7/16/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
GENICOM CORPORATION et al.,	)	Docket No. EPCRA-III-057, et al.
	)	
Respondent.	)	

CERCLA, section 103(a) - Releases in reportable quantities which were not reported until two hours after Respondent acquired knowledge of them were not reported "immediately" and were properly classified as Level 1 violations under the penalty policy.

EPCRA, section 304(a) and CERCLA, section 103(a) - Even though Respondent acquired knowledge simultaneously of two releases which had occured at different times, a separate penalty is still to be assessed for the failure to immediately report each release.

EPCRA, section 304(a) and CERCLA, section 103(a) - The trebling of penalties for failing to immediately report a second release disallowed where Respondent acquired knowledge of both releases simultaneously and there was no basis for ascribing any greater fault to the violations with respect to the second release than to the violations with respect to the first release.

EPCRA, section 304(a) and CERCLA, section 103(a) - Base penalty adjusted downwards 25% because of evidence of Respondent's good faith efforts to comply with the reporting requirements.

Appearances:

For Complainant:
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Philadelphia, PA 19107

For Respondent:
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One James Center
Richmond, VA 23219

INITIAL DECISION

This is a consolidated proceeding for the assessment of civil penalties against Genicom Corporation for alleged failure to report the release of a hazardous substance as required by the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), section 304(a), 42 U.S.C. 11004(a), and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, ("CERCLA"), section 103(a), 42 U.S.C. 9603(a). The hazardous substance released was spent cyanide plating bath solutions from electroplating operations, EPA Hazardous Waste No. F007. The proceedings are instituted pursuant EPCRA, section 325(b)(2), 42 U.S.C. 11045(b)(2), and CERCLA, section 109(b), 42 U.S.C. 9609(b).[1]

Summary of Pertinent Statutory and Regulatory Provisions

Spent cyanide plating bath solutions from electroplating operations (hereafter referred to as "F007 Waste") are listed as a hazardous waste under the Solid Waste Disposal Act, section 3001, 42 U.S.C. 6921.[2] As such, they are also a "hazardous substance" as

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[1] The proceedings under both EPCRA, section 325(b)(2) and CERCLA, section 109(b) are for "Class II" administrative penalties. Both provide for a civil penalty of not more than $25,000 for each day during which the reporting violation continues and of not more than $75,000, in the case of a second violation, for each day the violation continues. Both also provide for the assessment of a civil penalty after a hearing on the record in accordance with 5 U.S.C. 554 (EPCRA, section 305(b)(2) by reference to the Toxic Substances Control Act, 15 U.S.C. 2615). Enforcement of CERCLA, originally given to the President, has been delegated to the Administrator of the EPA. 54 Fed. Reg. 21174 (May 16, 1989).

[2] See 40 C.F.R. 261.31(a). F007 waste is listed because of both its reactive and toxic properties.

defined in CERCLA, section 101(14), 42 U.S.C. 9601(14).

Under CERCLA, section 102(a), 42 U.S.C. 9602(a), the Administrator of the EPA has promulgated regulations establishing the quantity of each hazardous substance the release of which shall be reported pursuant to CERCLA, section 103, 42 U.S.C. 9603. For F007 Waste the reportable quantity is 10 pounds.[3] As to reportable releases, CERCLA, section 103(a) provides in pertinent part as follows: "Any person in charge of an * * * onshore facility shall, as soon as he has knowledge of any release * * * of a hazardous substance from such * * * facility in quantities equal to or greater than [the reportable quantity] * * *, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. Section 1251 et seq.] of such release."

The reporting of releases is also required by EPCRA, section 304(a)(3), 42 U.S.C. 11004(a)(3), which provides in pertinent part: "If a release of a substance * * * occurs at a facility at which a hazardous chemical is produced, used or stored, and such release requires notification under section 103(a) of CERCLA * * * (A) If the substance is one for which a reportable quantity has been established under section 102(a) of CERCLA, the owner or operator shall provide notice as described in subsection (b) of this section." The term "hazardous chemical" under section 311(e), 42 U.S.C. 11021(e), has the meaning given in the Occupational Health and Safety Standards, 29 C.F.R. 1910.1200(c), which defines it as

[3] 40 C.F.R. 302.4.

"any chemical which is a physical or health hazard." [4] Subsection (b)(1) provides as follows: "Notice required under subsection (a) shall be given immediately after the release by the owner or operator of a facility (by such means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees, if established pursuant to section 11001(c) of this title, for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release." Subsection (b)(2) describes the contents of the notice and subsection (b)(3) requires the owner or operator to provide a written followup emergency notice with additional information about the release.

The Pleadings and Issues

The complaints charge two releases of F007 Waste at Genicom's facility in Waynesboro, Virginia. The first release (Release I), it is alleged, was of about 136 pounds and occurred at or about 9:00 a.m. on October 11, 1990. The second release (Release II) was of 27.5 pounds and occurred at or about 6:00 a.m. on October 30, 1990. It is further alleged that Genicom had knowledge of these releases at or about midnight on October 30. The EPCRA violations charged are that Genicom did not report either release to the Virginia Emergency Response Committee until 4:00 p.m. on October 31, and did not give any notice of the releases to the Augusta County Joint Local Emergency Planning Committee, within whose jurisdiction the facility was located. The CERCLA violations alleged are that

[4] There are certain exclusions that are not relevant here.

Genicom did not notify the National Response Center of the releases until 6:00 p.m. on October 31. A penalty of $99,500 is requested for the EPCRA violations, and a penalty of $49,750 for the CERCLA violations, making a total penalty of $149,250.

Genicom in its answer and also by stipulation at the hearing has admitted the releases of cyanide in solution on October 11, and October 30, 1990, in the quantities alleged in the complaint.[5] Also not disputed is that Genicom did not know of these releases earlier than midnight of October 30, although there is some dispute as to whether Genicom first had knowledge of the releases at that time or not until the afternoon of October 31, 1990.[6] Finally, Genicom admits that the National Response Center was not notified of the releases until 6:00 p.m. on October 31, 1990, and that it did not notify either the Virginia Emergency Response Council or the Local Emergency planning Committee.[7] The issues raised by Genicom, thus, deal with whether the proposed penalty of $149,250 is excessive, given the nature of the releases, the circumstances surrounding them and Genicom's response upon determining that there had been releases.

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[5] Transcript of proceedings (hereafter "Tr.") 10. The "cyanide in solution" was untreated F007 Waste from Genicom's electroplating operations. See infra, p.6.

[6] See infra, pp. 8-9.

[7] The complaint alleged that Genicom did notify the Virginia Emergency Response Council at 4:00 p.m. on October 31, an allegation which Genicom admitted. In fact, however, the record shows that Genicom notified the State Water Control Board at that time and not the Virginia Emergency Response Council. Govt Ex. 3(Item 13(c)), 10.

The Facts

Wastewater containing cyanide (F007 Waste) is generated by Genicom in the course of its electroplating operations. Spent cyanide solution with a high concentration of cyanide is carried by pipe to a storage tank at Genicom's wastewater treatment plant and then treated to destroy the cyanide before being disposed of.[8] Effluent from the wastewater treatment plant is discharged to the South River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit.[9]

As part of its usual procedures, Genicom took a sample of the effluent from its wastewater treatment plant on October 11, and sent it to a laboratory for analysis. The analysis results were received by Genicom on October 30, 1990, and showed a high concentration of cyanide in the effluent. Genicom called the laboratory to verify the results and the laboratory called back on October 31, 1990, confirming the presence of cyanide.[10]

In the morning of October 31, 1990, Genicom personnel while preparing to start up the wastewater treatment plant noted a rusty red liquid coming from a covered trench which ended at a containment area for the storage tanks at its wastewater treatment plant. The pipe carrying wastewater from the plating room to the tanks at the wastewater treatment plant passed through this covered

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[8] Tr. 43-44.

[9] Tr. 39, 54, 65.

[10] Tr. 44-46.

trench. The liquid was analyzed and found to contain cyanide.[11] Genicom proceeded to investigate the source of the liquid. Late in the morning or early afternoon on October 31, it discovered from its records that concentrated cyanide solution had been pumped through the pipe on October 11 and October 30, and that out of 225 gallons of concentrated cyanide wastewater piped to the tank at the wastewater treatment plant on October 11, 195 gallons was not accounted for as having been received at the tank. The records for October 30, 1990, disclosed a similar loss of 40 gallons of concentrated cyanide liquid waste. From these and other records Genicom concluded that there was a break in the pipe carrying the cyanide waste from the plating room to the tank in the containment area and calculated the quantity of cyanide released.[12] The waste leaking into the containment area went into a drain in the floor and from there through the wastewater treatment plant in a waste stream that was not treated for cyanide destruction and was eventually discharged into the South River.[13]

Genicom notified the State Water Control Board ("SWCB"), which had jurisdiction over its NPDES permit, of the releases at 4:00

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[11] Tr. 41, 46,49.

[12] Tr. 52-54, 57; Govt Ex. 9(p.3). It was estimated that both releases took place between 9 a.m. and 11 p.m. on the days that they occurred. Tr. 57-58; Govt. Ex. 9. Genicom describes Release II (occurring on October 30) as amounting to 110 gallons, but the record indicates that it was 40 gallons, which at 11oz/gal of cyanide would amount to 25.7 pounds of cyanide. Govt Ex. 9(p.3). The break in the pipe was not actually located until November 1. Tr. 53.

[13] Tr. 64-65.

p.m. on October 31, and the National Response Center ("NRC") at 6:00 p.m. No notification was given to the Virginia Emergency Response Council ("SERC") or the Local Emergency Planning Committee ("LEPC").[14]

The EPA claims that Genicom had knowledge of Release I on 9:00 a.m. on October 31, the time when the discharge was discovered in the containment area, and knowledge of Release II on the early morning of October 31.[15] "Knowledge", however, under both CERCLA and EPCRA requires knowledge that there has been a release of a reportable quantity.[16] Genicom in the morning of October 31 did have information indicating a release somewhere in the system of untreated F007 Waste. Indeed, Genicom does not dispute this and admits to taking extra precautions to insure that all F007 Waste stored or generated was treated to neutralize the cyanide.[17] The record, however, does not show that the information that Genicom had as of 9:00 a.m. on October 31, was sufficient to charge it with knowledge that there had been a release of reportable quantities of cyanide either on October 11 or October 30. The quantities of cyanide released were not readily observable but had to be derived from calculations based upon the quantity of liquid released and

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[14] Govt. Exs. 3, 4, 5, 6, 10; Tr. 54.

[15] Findings of Fact 4, 9.

[16] CERCLA, Section 103(a), 42 U.S.C. 9603; EPCRA, Section 304(a)(3), 42 U.S.C. 11004(a)(3) (providing that notice must be given of releases which require notification under CERCLA, Section 103(a)); Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA III-90-04 (Initial Decision, May 19, 1992) at 17-18.

[17] Tr. 50-51.

the concentration of cyanide in the liquid.[18]

This does not mean, however, that Genicom was entitled to wait until it had conclusive knowledge of the exact quantities of F007 Waste released before it had to report the releases, nor does Genicom so contend. What is at issue is when did Genicom have enough information that it could reasonably be said that it knew that the releases were at or above reportable quantities even though it did not know the exact quantities released. A company should be given some latitude about how it interprets the information it has. At some point, however, the nature of the information can be such that the failure to give notice is indicative of the company not knowing the requirements or being hostile or indifferent to them, rather than of any uncertainty that a release in reportable quantities had taken place. Here, both Genicom's conduct and the evidence about what it did know enable the determination that Genicom did have sufficient knowledge about the releases at 4:00 p.m. on October 31, when it notified the SWCB about the discharges of the untreated F007 Waste into the South River, to impose upon it the obligation to also give the notices required under CERCLA and EPCRA. At that point, Genicom knew about

[18] Tr. 56-57. There is no evidence that the quantity of liquid observed in the containment area on October 30, would in itself indicate how much F007 waste had been released. See Tr. 60. There is also no evidence that the data Genicom possessed at the time about the concentration of cyanide found in the effluent for October 11, was sufficient to enable Genicom to make an informed judgement about the quantity of cyanide released on that date. Genicom contends that the leakage into the containment area on October 11, was not observed because of rainwater in the containment area. Brief at 4.

the loss in gallons of the untreated F007 Waste on record as having been piped to the tanks in the wastewater treatment plant on October 11 and October 30, it knew about liquid cyanide solution being present on the floor of the containment area which drained into the wastewater stream that discharged into the South River, and it knew about a high concentration of cyanide having been found in the wastewater effluent on October 11, 1990.[19]

The Appropriate Penalty

The EPA justifies its proposed penalty of $149,250, by reference to its penalty policy for assessing penalties for EPCRA and CERCLA violations (hereafter "Penalty Policy").[20] The policy contains penalty matrices from which is calculated a "base" penalty, which is the penalty before any adjustments are made because of factors personal to the violator. This base penalty takes into account the extent to which the violation deviated from regulatory requirements and the gravity of the violation as measured by the quantity released.[21]

According to the EPA, there were three separate violations in

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[19] Tr. 49-55. The notice given to the NRC at 6:00 p.m. does not show that Genicom had any greater knowledge of the releases at that time then it did at 4:00 p.m. See Govt. Ex. 2.

[20] See Govt. Ex. 1 (Final Penalty Policy for Sections 302, 303, 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, dated June 13, 1990). I must consider this policy in assessing the appropriate penalty but I am not required to follow it. See 40 C.F.R. 22.27(b).

[21] Penalty Policy, p. 20.

the case of each release, one under CERCLA and two under EPECRA. All are classified under the penalty matrices as Level 1 violations in extent of deviation from regulatory requirements, with the penalty assessed at the larger of the two penalties at that level, thus treating them as violations in which there was a total disregard of the notification requirements. The CERCLA violation is so classified because it is asserted that the NRC was not notified within two hours after Genicom had knowledge of the releases and the EPCRA violations because no notice was given at all.[22]

Genicom argues with respect to the CERCLA violations that it notified the NRC as soon as it had sufficient data to determine whether the releases were in reportable quantities and that this should be considered immediate notification under the statute. According to the record, however, Genicom had enough information at 4:00 p.m. to report the releases and there is nothing in the record to show that a delay after that time was justified by the need for additional information.[23] Nor is the fact that Mr. Batey was engaged in notifying the SWCB at 4:00 p.m. any justification for not giving notice. All that was required was a simple telephone call giving the information about the releases that Genicom then had, such as the substance, date, place and probable quantities, with further details to be supplied as soon as they became known. This is permitted by the regulation and, in fact, is essentially

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[22] So far as the gravity of the violation is concerned, the level assigned to each violation because of the quantity released is not disputed.

[23] Supra, pp. 9-10.

the information that was provided to the NRC at 6:00 p.m.[24]

Genicom argues that under the circumstances of this case it would be arbitrary to follow the penalty policy and assess the highest penalty simply because notice was not given within two hours. This argument is rejected. The two hour notification limit is fully consistent with the ordinary meaning of "immediate" found in any dictionary, namely, at once and without delay.[25]

Genicom also argues that the penalty is too severe, since by the time Genicom acquired knowledge of the release, any substantial response by the public authorities would have been impossible because the releases had been diluted to below hazardous levels upon release to the South River and had been transported far down the river. Notification under the statute, however, is not made dependent upon a person's view of the possible lack of harm from a release in a particular case, which may subsequently be confirmed by the facts, but on the person's knowledge of the release. Weighing the seriousness of the violation by the delay in

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[24] See Govt. Ex. 2; 40 C.F.R. 355.40(b). The telephone conversation lasted about 10 minutes. Tr. 70-71.

[25] The policy does permit extenuating circumstances which prevent notification to be taken into account in assessing the penalty. No extenuating circumstances have been shown which would have prevented Genicom from notifying the NRC and the other public authorities at 4:00 p.m. Notice was apparently given at precisely two hours after Genicom had knowledge of the releases in reportable quantities, thus making this a borderline case between level 1 and level 2 which carries a somewhat lower penalty. Presumably,a notice given two hours after the person knows about the release is "within" the two hour period specified in the Penalty Policy , but since the time is precisely on the borderline between a level 1 and a level 2 classification, the EPA's level 1 classification will not be changed.

notification, rather than by the harm actually caused by the release in a particular case, ensures that notification will serve its purpose of providing a mechanism whereby the public authorities are notified of every potentially hazardous release as soon as possible, leaving to them the decision of what response is necessary or feasible.

Genicom also argues that it is inappropriate to consider the second release as a second offense, since knowledge of both releases was obtained simultaneously and reported simultaneously to the NRC. CERCLA imposes an obligation to report "any release" of a hazardous substance and EPCRA also refers to notification of "a release" of a hazardous substance.[26] Speaking in the singular, as they do, the requirements are properly construed as placing a separate obligation, subject to its own penalty, to report each release, since each release will have its own data with respect to time, place, quantities, circumstances etc.[27]

While the violations with respect to Release II are properly considered as separate violations, the EPA's position that the penalties should be trebled is rejected. There is no basis for

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[26] CERCLA, section 103(a), 42 U.S.C. 9603(a), EPCRA, section 304(a)(3), 42 U.S.C. 11004(a)(3).

[27] The reason why a separate penalty should be levied for each release can be shown in the case of a company which discovers two releases simultaneously, each of which is of a quantity large enough to justify the maximum penalty of $25,000, and reports only one release. Even though the company did report one release, it should still be penalized the maximum penalty for the release it did not report, if the circumstances justify it. According to Genicom's argument, however, the company would occur no additional penalty if both releases were not reported.

ascribing any greater fault to the violations with respect to Release II than to the violations with respect to Release I. Knowledge of both releases was acquired at the same time, and to the extent the releases were reported, both were reported at the same time. To treble the penalties for Release II under these circumstances would simply be punitive. Triple penalties for a second violation make sense when a person after having failed to report a release it knew about repeats the same violation. In that case, they serve as an added deterrent against repeated violations. It would not be reasonable to interpret the statute as authorizing punitive penalties for a second release simply because two releases occurred [28]

Disallowing treble penalties for the violations in the case of the second release results in a base penalty of $25,000 for each violation with respect to Release I, namely, the failure to report immediately to the NRC under CERCLA, and the failure to report to the LEPC and the SERC under EPCRA, and in a base penalty of $8,250 for each of those violations under Release II. The Penalty Policy does recognize that the base penalty can be adjusted downwards where justified by evidence of a respondent's good faith effort in complying with the requirements [29] Here, a downward adjustment is merited for the following reasons:

First, Genicom did notify the NRC on its own, before the

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[28] This interpretation also accords with the fact that the violation consists not in the releases themselves, but in the failure to report them.

[29] Govt. Ex. 1, pp. 25-27.

violation had been detected by the EPA.

Second, Genicom has complied with other EPCRA requirements.[30]

Third, while Genicom failed to notify the LEPC and the SERC, it did immediately notify the SWCB, which was directly concerned with the discharge of F007 Waste into the river.[31]

It is found that the above factors merit a downward adjustment of 25% in the base penalty. Thus, a penalty of $18,750 is assessed for each of the Release I violations and a penalty of $6,187.50 is assessed for each of the Release II violations.

Accordingly, the following penalties are assessed for the violations herein found:

Violation	Penalty
Failure to immediately notify the NRC of Releases I and II.	$24,937.50
Failure to immediately notify the SERC of Releases I and II.	$24,937.50
Failure to immediately notify the LEPC of Releases I and II.	$24,937.50
Total penalty	$74,812.50

[30] Govt. Ex. 6. The EPA apparently considers Genicom's compliance with other EPCRA reporting requirements as support for its action in trebling the penalties for the Release II violations. Tr. 23-24. The reasoning appears to be that compliance with the other notification requirements demonstrates that Genicom should have known about the reporting of emergency releases. To use evidence of partial compliance as additional evidence of culpability in the case of noncompliance would seem to encourage noncompliance and not discourage it.

[31] It is to be noted that the SWCB is a member of the Virginia Emergency Response Council. Govt. Ex. 10

ORDER[32]

Pursuant to CERCLA, section 109(b), 42 U.S.C. 9609(b), and EPCRA, section 325(b)(2), 42 U.S.C. 11045(b)(2), a civil penalty of $74,812.50, is assessed against Respondent Genicom Corporation for the violations found herein.

Respondent shall pay the full amount of the penalty within thirty (30) days of the effective date of the final order. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 3
(Regional Hearing Clerk)
P.O. Box 360515M
Pittsburgh, PA 15251

Gerald Harwood
Senior Administrative Law Judge

Dated: July 16, 1992

[32] Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Environmental Appeals Board on its own motion elects to review this decision, this decision shall become the final order of the Environmental Appeals Board. See 40 C.F.R. 22.27(c), as amended by 57 Fed. Reg. 5325 (Feb. 13, 1992).