UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
COAST WOOD PRESERVING, INC.,	)	**DOCKET NO. EPCRA-9-2000-0021**
	)	
RESPONDENT	)	
	)	
	)	

INITIAL DECISION

Emergency Planning and Community Right-To-Know Act of 1986: Pursuant to Section 325 of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045, also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045, Respondent Coast Wood Preserving, Inc. is assessed a civil administrative penalty of $23,375 for violating the reporting requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, and its implementing regulations set forth in the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372.

Issued: February 20, 2002

Barbara A. Gunning
Administrative Law Judge

Appearances:

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San Francisco, CA 94104-2878

For Complainant: David M. Jones, Esq.
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INTRODUCTION

This civil administrative proceeding arises under the Emergency Planning and Community Right-to-Know Act ("EPCRA"). The EPCRA statute was enacted in 1986 pursuant to Title III of the Superfund Amendments and Reauthorization Act for the purpose of "provid[ing] the public with important information on the hazardous chemicals in their communities and ... establish[ing] emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281, *reprinted in* 1986 U.S.C.A.A.N. 3374.

The instant proceeding was initiated by the filing of a Complaint by the United States Environmental Protection Agency ("EPA" or "Complainant") against Respondent on September 28, 2000. The Complaint alleges that the respondent in this proceeding, Coast Wood Preserving, Inc. ("Respondent" or "Coast Wood Preserving"), violated the reporting requirements of Section 313 of EPCRA and its implementing regulations at 40 C.F.R. Part 372. Section 313(a) of EPCRA requires the owners or operators of facilities who satisfy specific criteria set forth at Section 313(b) of EPCRA to submit a toxic chemical release form (hereinafter referred to as "Form R") to the Administrator of the EPA as well as "to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year." EPCRA Section 313(a), 42 U.S.C. 11023(a).

In the Complaint, Complainant sets forth six counts against Respondent and proposes that a penalty of $32,500 be imposed against Respondent for these alleged violations. Specifically, Complainant alleges that Respondent failed to submit a Form R for calendar years 1995, 1996, and 1997 for certain named chemicals used at its facility. Count I alleges that Respondent failed to submit a Form R for approximately 64,550 pounds of chromium compounds that were processed at Respondent's facility in 1995. Count II alleges that Respondent failed to submit a Form R for approximately 133,131 pounds of chromium compounds that were

processed at Respondent's facility in 1996. Count III alleges that Respondent failed to submit a Form R for approximately 210,387 pounds of chromium compounds that were processed at Respondent's facility in 1997. Count IV alleges that Respondent failed to submit a Form R for approximately 31,300 pounds of arsenic compounds that were processed at Respondent's facility in 1996. Count V alleges that Respondent failed to submit a Form R for approximately 53,201 pounds of arsenic compounds that were processed at Respondent's facility in 1997. Count VI alleges that Respondent failed to submit a Form R for approximately 26,955 pounds of copper compounds that were processed at Respondent's facility in 1997.

Respondent filed an Answer to the Complaint on October 27, 2000. In its Answer, Respondent admits that it did not file Form Rs for the chemical compounds enumerated in the Complaint for the calendar years specified. Respondent also sets forth six affirmative defenses in its Answer. The first of these defenses consists of Respondent's assertion that Complainant failed to state a claim upon which relief may be granted. As its Second Affirmative Defense, Respondent asserts that some or all of Complainant's claims are "uncertain." Respondent then contends in its Third Affirmative Defense that the Complainant's claims are barred by the applicable statute of limitations. The Fourth Affirmative Defense is Respondent's assertion that Complainant failed to join indispensable parties to this action. In its Fifth Affirmative Defense, Respondent contends that the regulations under which the Complaint was filed are invalid because they violate federal law. Respondent's sixth and final affirmative defense consists of a reservation of rights in which Respondent claims that the Complaint does not describe its claims or events with sufficient particularity to permit Respondent to ascertain what other affirmative defenses may exist and thus, Respondent reserves its right to assert all affirmative defenses which may pertain to the Complaint once the precise nature of the claims is ascertained.

After setting forth its list of defenses, Respondent then requests that the Complainant's proposed civil penalty be denied and that the Complaint be dismissed with prejudice. In addition, Respondent requests that Respondent be reimbursed for any costs of the suit which Respondent incurs, including attorney fees and expenses as well as any other relief that the Court may deem just and proper.

On March 12, 2001, Complainant filed a Motion for Accelerated Decision on the issue of Respondent's liability and on April 2, 2001, Respondent filed a Cross-Motion for Accelerated

Decision. The undersigned Administrative Law Judge denied both Motions in an Order issued June 28, 2001.

The EPA's Motion for Accelerated Decision as to liability was based on its assertion that Respondent's Answer was defective under Section 22.15 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (2001)("Rules of Practice"), 40 C.F.R. § 22.15, and thus the material factual allegations contained in the Complaint should be deemed admitted. The EPA's Motion essentially was a motion to strike Respondent's Answer. In the June 28, 2001, Order it was determined that Respondent's Answer was adequate to meet the requirements of 40 C.F.R. §22.15(b) and, as such, the EPA's Motion for Accelerated Decision was denied.

The June 28, 2001, Order also addressed Respondent's Cross-Motion for Accelerated Decision. Respondent's Cross-Motion for Accelerated Decision was based on its assertion that the EPA regulation at 40 C.F.R. § 372.22 (b), which was promulgated pursuant to Section 313 of EPCRA, is invalid as a matter of law. Specifically, Respondent argued that 40 C.F.R. § 372.22 (b) creates a new standard, inapposite to federal law, for piercing the corporate veil. In the June 28, 2001, Order it was found that Respondent had failed to demonstrate sufficient compelling circumstances to warrant a review of the regulation in question, and Respondent's Cross-Motion for Accelerated Decision was denied.

The EPA responded to the Order denying the parties' respective motions on July 1, 2001, with the filing of a motion to forward the Order to the Environmental Appeals Board ("EAB") on the ground that the Order "involve[d] important questions of law or policy concerning which there is substantial grounds for difference of opinion." EPA Motion to Forward at 1. The EPA's Motion was denied by an order issued on July 31, 2001, by the undersigned. The EPA subsequently sought interlocutory appeal from the EAB. According to the record before me, the EAB has not taken any action on this appeal.

The EPA filed a Rebuttal Prehearing Information Exchange on May 8, 2001, in which Complainant sought to expunge portions of Respondent's Prehearing Exchange Information and to exclude certain pieces of evidence that Respondent intended to present at hearing. In turn, Respondent filed a Motion to Strike the EPA's Rebuttal Prehearing Information Exchange. Respondent's Motion was denied by the undersigned in an Order issued August 24, 2001. This Order also denied the EPA's Motion to Expunge, and denied

the EPA's Motion in Limine in part and granted it in part.

An evidentiary hearing was held in this matter in San Francisco, California on September 5, 2001, for the purpose of the presentation of evidence on the issues of Respondent's liability and the appropriateness of the proposed penalty. There were two witnesses who testified during the hearing: Adam A. Browning, a toxics release inventory program coordinator with the Region 9 Office of the EPA, for the Complainant; and Tom Gatton, the controller at Coast Wood Preserving, for the Respondent. Mr. Gatton's responsibilities include overseeing the company's bookkeeping and presenting financial figures to the company's certified public accountant. Transcript ("Tr.") at 3.

Both parties have filed post-hearing briefs and post-hearing reply briefs in this matter.[1]

FINDINGS OF FACT

1. Coast Wood Preserving, Inc. was incorporated under California law on May 12, 1971. Coast Wood Preserving's address is 3150 Taylor Drive, Ukiah, California, which is located at the intersection of Taylor Drive and Plant Road. Cal Coast Wholesale Lumber, Inc.[2] ("Cal Coast Lumber") is located adjacent to Coast Wood Preserving and is within the same fenced-in area. At the time of the EPA inspection on May 26, 1998, only one sign was posted that identified the facility. This sign read "Coast Wood Preserving, Inc."

2. On May 26, 1998, Adam A. Browning and Greg Gholson, two employees of the Region 9 Office of the EPA, inspected the facility. During this inspection, Mr. Browning and Mr. Gholson toured the facility and observed its operations. The two observed the conditions existing at Coast Wood Preserving 's treatment operation, its storage area, and its wastewater treatment operation.

3. During the inspection of the facility, Mr. Browning and Mr.

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[1] In Complainant's Post-Hearing Brief ("Complainant's Brief"), Complainant renews its argument concerning the claimed deficiency of Respondent's Answer.

[2] Cal Coast Lumber was incorporated under California law on October 17, 1986.

Gholson met with Gene Pietila, the Plant Manager at Coast Wood Preserving. Mr. Pietila also held the position of Plant Manager at Cal Coast Lumber. Mr. Pietila performed both of these functions out of the same office.

4. The observations that Mr. Browning and Mr. Gholson made during the inspection were later memorialized in an inspection report dated October 28, 1998.

5. The administrative operations for both Coast Wood Preserving and Cal Coast Lumber are performed out of the same office building.

6. Coast Wood Preserving and Cal Coast Lumber are separate establishments co-located on a single site.

7. Harold W. Logsdon is the President of Coast Wood Preserving and Cal Coast Lumber. Mr. Logsdon has been the President of Coast Wood Preserving since 1971. He and Cordes Langley (the Vice President of Coast Wood Preserving since 1971 and the Vice President of Cal Coast Lumber since 1986), are shareholders in Coast Wood Preserving and in Cal Coast Lumber. Brenda Schmidt[3] is the only other shareholder in Coast Wood Preserving aside from Mr. Langley and Mr. Logsdon. Ms. Schmidt also serves as the Secretary and the Treasurer of Coast Wood Preserving. Mr. Logsdon and Mr. Langley are the only shareholders in Cal Coast Lumber.[4]

8. At all times relevant to the Complaint, Coast Wood Preserving had about five to nine full-time employees and Cal Coast Lumber had approximately ten full-time employees.

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[3] According to an August 17, 2001, Dun and Bradstreet Report for Coast Wood Preserving, Ms. Schmidt is also actively involved in Fontana Wood Preserving, Inc. Fontana Wood Preserving is a manufacturer of pressure treated wood products and is described in the Dun and Bradstreet Report as an affiliate of Coast Wood Preserving.

[4] Mr. Logsdon and Mr. Langley are both involved in other lumber related operations. Mr. Langley is the President of Redwood Coast Lumber, Co., a wholesale lumber company affiliated with Coast Wood Preserving. Mr. Logsdon serves as the President of Fontana Wood Preserving, Inc. as well as Fontana Wholesale Lumber, Inc., a wholesale lumber company. Mr. Logsdon is also the Vice President of United Equipment Company, a company that engages in wholesales and rents heavy construction equipment. United Equipment is an affiliate of Coast Wood Preserving.

9. Coast Wood Preserving's Standard Industrial Classification ("SIC") code is 2491, placing it in the SIC major group code 20, which is listed as a regulated code for toxic chemical release reporting purposes. Cal Coast Lumber's SIC code is 50, which is not a regulated code for toxic chemical release reporting purposes.

10. Coast Wood Preserving's tax returns reflect income losses during tax years 1995, 1996, and 1997 (tax year begins May 1, and ends April 30).

11. Coast Wood Preserving's sole client is Cal Coast Lumber. Cal Coast Lumber sends lumber to Coast Wood Preserving so that the wood can be treated with chemical compounds that serve as preservatives. After the wood is treated, it is then transferred back to Cal Coast Lumber. Coast Wood Preserving never takes ownership of the wood.

12. Coast Wood Preserving's preservation of the lumber is accomplished through the use of a single cylinder chromated copper arsenate ("CCA") pressure treating process. The preservation process typically begins with the conditioning of the wood via drying and incising which permits the preservative to penetrate and to be retained by the wood. The next step is the treatment of the wood by placement into the treatment tank of the CCA cylinder. The tank contains preservative solution which is replenished as needed until the desired level of retention is reached. Any unused preservative solution is drained off from the tank and any excess solution present on the wood is vacuumed away. The wood is then removed from the cylinder and placed on a drip pad where it remains until the dripping ceases.

13. Coast Wood Preserving stores chemicals at the facility in a chemical storage area. This area consists of several above-ground liquid storage tanks. These tanks are used to store sodium bichromate, copper sulfate, and arsenic acid.

14. Cal Coast Lumber bids on untreated wood, purchases lumber, maintains an inventory of lumber, incises the wood, and arranges for the transport of the lumber.

15. After their inspection, Mr. Browning and Mr. Gholson requested that Respondent submit its payroll records for all full-time, part-time, and contract workers; copies of its federal tax returns; and copies of any contracts between Respondent and any other individuals or firms working for

the facility.

16. In response to an EPA Section 313 Information Request, Respondent by letter dated July 13, 1998 asserted that neither Cal Coast Lumber nor Coast Wood Preserving is subject to the EPCRA Section 313 reporting requirements. Respondent asserted that Cal Coast Lumber does not have the requisite SIC code, that Coast Wood Preserving has less than ten employees, and that the value of services provided by Coast Wood Preserving are less than the value of services and products supplied by Cal Coast Lumber.

17. In 1996 Cal Coast Lumber purchased raw, untreated lumber for $4,391,339. Cal Coast Lumber contracted with Coast Wood Preserving to treat the lumber for a price of $755,877.

18. The value of the treated, unsold lumber in 1996 was $5,147,216.[5]

19. In 1996 Cal Coast Lumber sold the treated lumber for $5,511,644.

20. In 1996 the value of Cal Coast Lumber's services provided and products shipped was $364,428.[6]

21. The value of the services provided and products shipped by Coast Wood Preserving in 1996 ($755,877) is greater than 50% of $1,120,305[7], the total value of the services provided and products shipped for the facility which is $ 560,152.[8]

22. In 1997 Cal Coast Lumber purchased raw, untreated lumber for $5,601,381. Cal Coast Lumber contracted with Coast Wood Preserving to treat the lumber for a price of $924,589.

23. The value of Cal Coast's treated, unsold lumber in 1997 was $6,525,970.[9]

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[5] $4,391,339 + $755,877 = $5,147,216

[6] $5,511,644 - $5,147,216 = $364,428

[7] $364,428 + $755,877 = $1,120,305

[8] $1,120,305 x 50% = $ 560,152

[9] $5,601,381 + $924,589 = $6,525,970

24. In 1997 Cal Coast Lumber sold the treated lumber for $6,880,548.

25. In 1997 the value of Cal Coast Lumber's services provided and products shipped was $354,578.[10]

26. The value of the services provided and products shipped by Coast Wood Preserving in 1997 ($924,589) is greater than 50% of $1,279,167[11], the total value of the services provided and products shipped by the facility which is $639,583.[12]

27. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 64,550 pounds of chromium compounds that were processed at Coast Wood Preserving in calendar year 1995.

28. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 133,131 pounds of chromium compounds that were processed at Coast Wood Preserving in calendar year 1996.

29. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 210, 387 pounds of chromium compounds that were processed at Coast Wood Preserving in calendar year 1997.

30. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 31,300 pounds of arsenic compounds that were processed at Coast Wood Preserving in calendar year 1996.

31. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 53,201 pounds of arsenic compounds that were processed at Coast Wood Preserving in calendar year 1997.

32. Respondent did not submit a Form R to the EPA Administrator or the State designated official(s) for approximately 26,955 pounds of copper compounds that were processed at Coast Wood Preserving in calendar year 1997.

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[10] $6,880,548 - $6,525,970= $354,578

[11] $354,578 + $924,589 = $1,279,167

[12] $1,22279,167 x 50 % = $639,583

33. Under the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("Section 313 Penalty Policy") dated August 10, 1992, Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372 as described in Counts II through IV of the Complaint are Level 1 circumstance violations and Level C extent violations. Application of the Penalty Matrix in the Section 313 Penalty Policy to these violations results in a gravity-based penalty in the amount of $5,500 for each of the five counts and a total penalty of $27,500.

34. No adjustments of the gravity-based penalties for Counts II through VI are warranted on the basis of voluntary disclosure, history of prior violation(s), delisted chemicals, compliance, SEPs, ability to pay, or other matters as justice may require.

35. A downward adjustment of 15% for the cooperation component of the adjustment factor of attitude is warranted. As such, the gravity-based penalty for Counts II through VI is reduced from $27,500 to $23,375.

CONCLUSIONS OF LAW

1. Respondent is a "person" under Section 329(7) of EPCRA, 42 USC §11049(7).[13]

2. Respondent's facility, comprised of the establishments of Coast Wood Preserving and Cal Coast Lumber, is located on a single site and is owned and/or operated by the same person (or by any person which controls, is controlled by, or under common control with such person). 40 C.F.R. § 372.3.

3. Respondent is an owner and operator of a "facility" as defined by Section 329(4) of EPCRA,42 U.S.C. § 11049(4), and 40 C.F.R. § 372.3.

[13] The term "person" means "any individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political division of a State, or interstate body." Section 329 of EPCRA, 42 U.S.C. § 11049.

4. Respondent's facility had 10 or more full-time employees in 1995, 1996, and 1997 for toxic chemical release reporting purposes. 40 C.F.R. § 372.22(a).

5. Respondent's facility is a "multi-establishment" complex in which the value of services provided and products shipped by Coast Wood Preserving, which has a regulated primary SIC major group code, is greater than 50 percent of the total value of all services provided and products shipped by all establishments at the facility for the calendar years 1996 and 1997. 40 C.F.R. § 372.22(b)(3)(i).

6. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 64,550 pounds of chromium compounds in 1995. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

7. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 133,131 pounds of chromium compounds in 1996. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

8. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 210,387 pounds of chromium compounds in 1997. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

9. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 31,300 pounds of arsenic compounds in 1996. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

10. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 53,201 pounds of arsenic compounds in 1997. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

11. Respondent's facility processed, as that term is defined in 40 C.F.R. § 372.3, approximately 26,955 pounds of copper compounds in 1997. This quantity exceeded the threshold of 25,000 pounds established by Section 313(f) of EPCRA and 40 C.F.R. § 372.25. 40 C.F.R. § 372.22(c).

12. Respondent's facility is a "covered facility" as defined by 40 C.F.R. § 372.22 and as such, Respondent was subject to the reporting requirements set forth at 40 C.F.R. § 372.30.

13. Respondent's facility was required by 40 C.F.R. § 372.30(a) to submit to the EPA and to the State of California a completed Form R for 1996 and 1997 "[f]or each toxic chemical known by the owner or operator to be manufactured, processed, or otherwise used in excess of an application threshold quantity in § 372.25, § 372.27, or § 372.28 at its covered facility described in § 372.22 for a calendar year." 40 C.F.R. § 372.30(a).

14. The Complaint fails to allege that during calendar year 1995 the total value of products shipped and services provided by Coast Wood Preserving was greater than 50 percent of the total value of all services provided and products shipped and/or produced by all establishments at the facility. Complainant also failed to submit evidence concerning the value of the products and services provided by Cal Coast Lumber and Coast Wood Preserving in 1995. Thus, Complainant failed to sustain both its burden of persuasion and its burden of presentation as to Respondent's liability for the violation charged in Count I of the Complaint. 40 C.F.R. §§ 22.24, 372.22(b)(3)(i).

15. Respondent violated Section 313 of EPCRA and 40 C.F.R. Part 372 in the manner charged in Counts II through Count VI of the Complaint.

16. The Section 313 Penalty Policy is applicable to Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372 as described in Counts II through VI of the Complaint.

17. The total civil administrative penalty of $23,375 for Respondent's violations of Section 313 of EPCRA is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA and the applicable EPA penalty guidelines issued under EPCRA. *See* Section 313 Penalty Policy; 40 C.F.R. § 22.27(b).

18. The EPA has established that the penalty of $23,375 is appropriate under the particular facts and circumstances of this case. *See* 40 C.F.R. § 22.24. The total penalty of $23,375 ($4,675 for Count II, $4,675 for Count III, $4,675 for Count IV, $4,675 for Count V, and $4,675 for Count VI) is an appropriate and reasonable civil administrative

penalty for Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372.

DISCUSSION

Challenge to the validity of the toxic chemical release reporting requirements

As a preliminary matter, I again address some issues raised by Respondent in its prehearing filings that were renewed at the hearing. In its Memorandum in Support of its Cross-Motion for Accelerated Decision (" Respondent's Memorandum") and Motion to Strike the EPA's Rebuttal Prehearing Information Exchange ("Respondent's Motion"), Respondent controverts the validity of the regulations that the EPA seeks to enforce in this administrative proceeding. Respondent disputes the jurisdiction of the EPA with regard to its prosecution of this case under Section 313 of EPCRA and its implementing regulations.

Respondent does not dispute the facts asserted in the Complaint regarding its failure to file Form Rs for the years specified in the Complaint. Rather, Respondent argues that certain EPCRA regulations for toxic chemical release reporting at 40 C.F.R. Part 372 are invalid as a matter of law. Memorandum at 1. Specifically, Respondent argues that 40 C.F.R. § 372.22(b) impermissibly creates new standards, inapposite to federal law, for piercing the "corporate veil." Respondent's Memorandum at 2, 3-15. Respondent contends that the EPA cannot treat Coast Wood Preserving and Cal Coast Lumber as being under "common control" to establish EPA jurisdiction under 40 C.F.R. § 372.3 because this regulation piercing the separate corporate entities is invalid as a matter of law. Respondent asserts that Coast Wood Preserving and Cal Coast Lumber are separate corporate entities that do not collectively fall within the definition of "facility" under Section 313 of EPCRA, 42 U.S.C. Section 11023, and 40 C.F.R. §§ 372.3, 372.22, and 372.30.

Additionally, Respondent asserts that the EPA cannot conflate the assets and business operations of the two separate corporations in order to establish EPA jurisdiction over Respondent. Specifically, Respondent contends that the EPA has impermissibly included the workers at Cal Coast Lumber to establish that Coast Wood Preserving is a covered facility under 40 C.F.R. § 372.22(b), thereby subjecting Respondent to the reporting requirements of EPCRA. Respondent argues that the identities of these two separate companies should not be

conflated for the purposes of establishing EPA jurisdiction. As such, Respondent asserts that it is not obligated to file Form Rs for the chemicals cited in the Complaint.

The question of the validity of the EPA regulations at issue was addressed in the undersigned's June 28, 2001 Order Denying Respondent's Cross-Motion for Accelerated Decision and August 24, 2001 Order on Complainant's Motion in Limine. As previously discussed in those Orders and as stated again below, the validity of the regulations at issue and Respondent's related arguments concerning the piercing of the corporate veil are not properly before me for adjudication in this proceeding.

First, I note that 40 C.F.R. § 372.22 is a substantive regulation and the properly adopted product of the EPA's rule-making process. Respondent does not contest the procedural aspects of the rule-making in this matter. Second, the EPA's interpretation of the regulation is fair and reasonable and is consistent with the statutory intent of EPCRA and the implementing regulatory scheme. *See Mobil Oil Corporation*, EPCRA App. No. 94-2, 5 E.A.D. 490, 500-503 (EAB, Sept. 29, 1994). Thus, the substantive regulation at issue is a final Agency regulation that is in conformity with the enabling statute.

The general rule is that regulations defining review authority by an administrative body are to be construed narrowly. The Rules of Practice, under which this civil administrative enforcement action is conducted, are silent on the authority of an administrative law judge to rule a final EPA regulation invalid. 40 C.F.R. Part 22. The EAB has recognized certain exceptional circumstances in which an Agency regulation may be reviewed and ruled invalid in an administrative enforcement proceeding. *See e.g. Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services*, CAA Appeal No. 94-1, 5 E.A.D. 626, 635 n. 13 (EAB, Dec. 22, 1994); *see also B.J. Carney Industries*, *Inc.*, CWA App. No. 96-2, 7 E.A.D. 171, 194-5 (EAB, June 9, 1997). Nevertheless, the presumption is an exceptionally strong one of nonreviewability which may only be overcome by the most compelling circumstances. *Woodkiln, Inc.*, CAA Appeal No. 96-2, 7 E.A.D. 254,269 (EAB, July 17, 1997). An example of such a compelling circumstance includes a showing that the regulation has already been held invalid in an intervening court decision. *Echevarria*, *supra*, at 635 n.13.

In the instant matter, Respondent has not demonstrated sufficient compelling circumstances to warrant a review of the regulation at issue. As Respondent has failed to overcome the presumption against entertaining a challenge to the validity of

a regulation, and in the absence of an affirmative grant of authority to review the validity of final Agency regulations, I decline to assume such authority.[14] Therefore, Respondent's argument that the EPCRA toxic chemical release reporting regulations are invalid as a matter of law is not addressed further in this decision.[15]

EPA jurisdiction under the toxic chemical release reporting regulations

A. Whether Coast Wood Preserving and Cal Coast Lumber comprise a

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[14] Assuming that the issue were properly before me, Respondent has pinpointed a thorny question embedded in these regulations, namely whether the regulations create a new standard for piercing the corporate veil. Although the issue raised is somewhat problematic, Respondent's arguments ultimately should be rejected. Respondent correctly points out that EPCRA is silent on the issue of piercing the corporate veil. However, the statute, on its face, does not limit its application to non-corporate establishments. This is evident from its definition of the term "facility" which clearly contemplates the inclusion of "multi-establishment" facilities. Moreover, here the two companies involved are under common ownership and control and there is no derivative liability based on a parent-subsidiary relationship as found in the *United States v. Bestfoods*, 524 U.S. 51 (1998).

The promulgating regulations set forth in Part 372 are clearly consistent with the plain meaning of EPCRA. The regulations make no mention of the concept of "piercing the corporate veil" and in major part the term "facility" as defined in the regulations echoes the definition in EPCRA. In addition, a regulatory scheme is created by the regulations that is clearly applicable to multi-establishment facilities like that of Respondent. Thus, Respondent's arguments, though well articulated, should be rejected in light of the plain meaning of EPCRA and its implementing regulations.

[15] In light of the Order Denying Respondent's Cross-Motion for Accelerated Decision, Respondent's proposed evidence concerning the alleged invalidity of the regulations at issue was excluded as irrelevant. *See* Order on Complainant's Motion in Limine. Respondent preserved its objection to this ruling at the hearing.

"facility"

Pursuant to Section 313 of EPCRA, the EPA Administrator has promulgated the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372. This rule provides that a multi-establishment complex comprising a covered "facility" is subject to the requirements for the submission of information relating to the release of toxic chemicals under Section 313 of EPCRA. A "facility" is defined by regulation as:

> [A]ll buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with such person). A facility may contain more than one establishment.

40 C.F.R. § 372.3.[16] In turn, the term "establishment" is defined by regulation as "an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed." *Id*. The definitions of the above terms clearly contemplate the inclusion of more than one "economic unit" in one facility.

When the above definitions are applied to the instant matter, Respondent's establishment along with Cal Coast Lumber comprise the same facility. In this regard, I note that the EPA presented evidence showing that Respondent and Cal Coast Lumber are located on the same enclosed property in Ukiah, California; Mr. Logsdon serves as the President of both establishments; Mr. Pietila serves as the Plant Manager of both establishments and performs these functions out of the same office; the management and administrative functions of both establishments occur at the same office building at the shared site; and the officers of both companies are the same (with the exception of Brenda Schmidt who

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[16] This definition essentially duplicates EPCRA's definition of the term "facility" with the exception of the regulation's last sentence. Section 329(4) of EPCRA defines facility as:

> [A]ll buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous adjacent sites and which are owned by the same person (or by any person which controls, is controlled by, or under common control of such person). For purposes of section 11004 of this title, the term control includes motor vehicles, rolling stock, and aircraft.

Section 329(4) of EPCRA, 42 U.S.C. §11049(4).

is the secretary of Coast Wood Preserving but is not an officer of Cal Coast Lumber)and one-hundred percent of the capital stock is owned by the officers. Complainant's Exs. 2, 4, 5.

In contrast, Respondent has not rebutted the EPA's prima facie showing that Coast Wood Preserving and Cal Coast Lumber comprise a "facility" as that term is defined by the toxic chemical release reporting regulations.[17] Other than its "piercing the corporate veil" argument, Respondent has neither argued nor presented any evidence indicating that the co-located establishments of Coast Wood Preserving and Cal Coast Lumber are not under common ownership or control. Accordingly, Respondent's facility is found to meet the definition of a "facility" under 40 C.F.R. § 372.3.

B. Whether Respondent's facility is a covered facility

The toxic chemical release reporting rule at 40 C.F.R. § 372.22 sets forth the jurisdictional requirements for the reporting regulation at 40 C.F.R. § 372.30 to apply to a particular facility, including a "multi-establishment complex." In order for the EPA to have jurisdiction and for the reporting requirements to apply, a facility must, among other things, have 10 or more full-time employees, have a designated Standard Industrial Classification ("SIC") major group or industry code, and use a toxic chemical in excess of an applicable threshold quantity. 40 C.F.R. § 372.22.

The SIC code criterion needed to qualify a facility as a "covered facility" for reporting purposes is multi-faceted, depending upon whether the facility is a single establishment or a multi-establishment complex and/or the establishment(s) has the

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[17] Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24, specifies the parties' burdens of proof in EPA administrative proceedings, stating as follows:

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following Complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

requisite primary SIC major group or industry code. Specifically, the regulation provides that a facility is covered if it meets one of the following criteria:

> (1) The facility is an establishment with a primary SIC major group or industry code in the above list.
> (2) The facility is a multi-establishment complex where all establishments have primary SIC major group or industry codes in the above list.
> (3) The facility is a multi-establishment complex in which one of the following is true:
> (i) The sum of the value of services provided and/or products shipped and/or produced from those establishments that have primary SIC major group or industry codes in the above list is greater than 50 percent of the total value of all services provided and/or products shipped from and/or produced by all establishments at the facility.
> (ii) One establishment having a primary SIC major group or industry code in the above list contributes more in terms of value of services provided and/or products shipped from and/or produced at the facility than any other establishment within the facility.

40 C.F.R. §372.22(b).

In the instant case, Respondent's facility is a multi-establishment complex where only one establishment of the facility, Coast Wood Preserving, has the requisite SIC code. Coast Wood Preserving's SIC Code of 2491 places it in the 20 major group code which is listed as a regulated SIC code. 40 C.F.R. § 372.22(b). Thus, to prevail on all six counts in the Complaint, the EPA must show for calendar years 1995, 1996, and 1997 that the value of services provided and/or products shipped and/or produced from Coast Wood Preserving exceeded the value of all services provided and/or products shipped and/or produced from Cal Coast Lumber. The EPA's showing must be made by a preponderance of the evidence. *See* 40 C.F.R. § 22.24.

At the hearing, the EPA presented the testimony of Mr. Browning concerning the comparable value of services provided and/or products shipped by Coast Wood Preserving and Cal Coast Lumber. Tr. at 49-55. Mr. Browning testified that his calculations were based on financial information requested of and provided by Respondent. Ex. 7. According to this evidence, Cal Coast Lumber in 1996 purchased raw untreated lumber for $4,391,339. Cal Coast Lumber contracted with Coast Wood Preserving to treat this wood for $755,877, and the EPA deemed this amount to be the value of Coast Wood Preserving's services.

By adding the cost of the lumber and contract price for the wood treatment, Mr. Browning determined that the total value of the treated but unsold lumber was $5,147,216. In 1996 Cal Coast Lumber sold the treated lumber for $5,511,644. Mr. Browning determined that the value of Cal Coast Lumber's lumber wholesale activity was $364,428 by subtracting the value of the treated wood ($5,147,216) from the sales price of $5,511,644. Upon comparison, Mr. Browning determined that the value of Coast Wood Preserving's services ($755,877) clearly exceeded that of Cal Coast Lumber ($364,428).

When the same method of comparison was undertaken by Mr. Browning for calendar year 1997, his conclusion was the same. In 1997 Cal Coast Lumber purchased raw untreated lumber for $5,601,381. Cal Coast Lumber contracted with Coast Wood Preserving to treat this wood for $924,589. The total value of the lumber prior to resale and after the treatment was $6,525,970. In 1997 Cal Coast Lumber sold the treated lumber for $6,880,548. The value of the wholesale lumber activity by Cal Coast Lumber in 1997 was determined to be $354,578. Once again, as in 1996, the value of Coast Wood Preserving's services ($924,589) clearly exceeded that of Cal Coast Lumber ($354,578).

As such, the EPA made its prima facie showing that the value of services provided and/or products shipped and/or produced by Coast Wood Preserving that has a designated primary SIC major group code was greater than 50 percent of the total value of all services provided and/or products shipped and/or produced by all establishments at the facility for calendar years 1996 and 1997. Thus, Respondent's facility meets the SIC code criterion to qualify as a covered facility for reporting purposes under 40 C.F.R. §372.22(b).

Respondent contests the EPA's methodology used in determining the value of products and services of the two respective establishments comprising Respondent's facility. Respondent asserts that the EPA mistakenly compares Coast Wood Preserving's gross revenue with Cal Coast Lumber's net revenue. Coast Wood Preserving, Inc.'s Post-Hearing Opening Brief ("Respondent's Brief") at 6. This approach, Respondent contends, is flawed because it is a comparison of "apples and oranges" and such a comparison is meaningless. *Id*. at 6-7. Respondent submits that a more reasonable approach would be to compare gross revenues to gross revenues or to compare net revenues to net revenues. In addition, Respondent suggests that the EPA should have subtracted expenses such as the cost of wood treatment chemicals and related items from Coast Wood Preserving's gross revenue. *Id.* at 8.

Most of Respondent's arguments are specious. Respondent bases much of its argument on its interpretation of the term value which it equates to income, losses, and profits as reported for corporate income tax purposes. For example, Respondent points out that Coast Wood Preserving showed zero income or significant losses on its corporate income tax returns for its tax years 1995, 1996, and 1997 while Cal Coast Lumber showed income (nontaxable) on its S corporation tax returns for the corresponding years. Tr. at 146-50; Respondent's Exs. 26, 27. The amount of income or loss declared for income tax purposes is not determinative of the value of services provided and/or products shipped and/or produced by an establishment at a facility under 40 C.F.R. §372.22(b). First, the regulation does not refer to value in terms of income or loss. Second, income or loss for income tax purposes encompasses many factors that are not at all relevant to the "value" of services or products by an establishment.

Respondent's approach attempts to compare the revenues of the two operations. This approach is not supported by the terms of the regulations which state that covered establishments include ones in which:

> The sum of the *value* of services provided and/or products shipped and/or produced is greater than 50 percent of the *total value* of all services provided and/or produced by all establishments at the facility.

40 C.F.R. §372.22(b)(3)(i)(emphasis added).

In contrast, the EPA sought to determine "which of these two operations added the most value to the facility's operations as a whole." Tr. at 84. Noting that the establishments were "dealing with a sequential process and that is value added to the same product," the EPA envisioned its task as trying "to separate what was the value added by the different activities performed by the different establishments at the facility." *Id*. Mr. Browning pointed out that his determination of value centered on his evaluation of Coast Wood Preserving's services which he described as the "laborious process of taking raw untreated wood, sizing it, drying, putting it in the chemical solution and sometimes fully impregnating, letting it dry" while Cal Coast Lumber's services consisted of the "act of wholesaling, buying and selling." Tr. at 84, 86. On the other hand, Respondent described Cal Coast Lumber's services as including "bidding for and purchasing untreated lumber, arranging for its transportation to the facility, maintaining a lumber inventory, marketing, and incising untreated lumber." Respondent's Ex. 13.

Mr. Browning persuasively testified that in light of the regulatory language of "value of services" he looks at the "amount of value added to a particular product through a service" or "value added to that particular operation, to that particular product through that operation" rather than to the profitability of the different operations or the amount spent to add that value to a product. Tr. at 91. Based on his calculations outlined above, Mr. Browning determined that "the operations at Coast Wood Preserving in fact added more value to the operations as a whole than the wholesale lumber business of Cal Coast Company." Tr. at 49.

Respondent's argument that the EPA should not have deducted the cost of purchasing the raw lumber in calculating the amount of value of services provided and or products shipped by Cal Coast Lumber is rejected. Mr. Browning persuasively testified that the cost of the lumber was the "beginning of the value added process" and that it was the "baseline from which operations would then go about adding value to that particular product." Tr. at 89. I observe that by analogy, the cost of the lumber can be treated as the basis of the property which must be deducted when determining the appreciation or depreciation of that property. On the other hand, Respondent's assertion that the EPA could have considered the expenses of the cost of the chemicals used to treat the wood when calculating the value attributable to Coast Wood Preserving's services may have some merit. However, Respondent presented no evidence concerning the cost of the chemicals used to treat the wood or to otherwise support its assertion. In the absence of such evidence, I cannot speculate as to the costs of such expenses. I also note that the calculated differences in the amounts of the "value added" for the two establishments are significant and that minor or moderate expenses would not alter the outcome.

Thus, I find that although the EPA's methodology in calculating the amount of added value attributable to each establishment of Respondent's facility is not be applied unquestioningly, it is a fair and reasonable approach and clearly is the more compelling. Moreover, such approach readily suffices to meet the EPA's burden of establishing its prima facie case by a preponderance of the evidence. *See* 40 C.F.R. § 22.24. The regulations seek to parse the *value* of the output of the entire facility by comparing the *value* added to the final product from each establishment. Respondent's approach is contrary to the regulation and will not be adopted.

I now turn to the question of whether Respondent's facility meets the remaining jurisdictional criteria of having 10 or more

full-time employees[18] and the threshold quantities of toxic chemicals necessary to invoke the reporting requirements pursuant to 40 C.F.R. § 372.22(a),(c). At the hearing, the EPA presented evidence showing that during the relevant years Coast Wood Preserving employed at least five and as many as 10 full-time employees during the relevant years and that Cal Coast Lumber had 10 full-time employees during the same time period. Complainant's Exs. 2, 4, 5; Tr. at 41-42. Respondent disputed that Coast Wood Preserving had 10 or more full-time employees and presented documentary evidence in support of this position. Tr. at 141; Respondent's Ex. 25. I find that the probative evidence of record shows that Coast Wood Preserving alone did not have the requisite 10 full-time employees. Moreover, the EPA's Complaint charges only that the facility, comprised of the establishments of Coast Wood Preserving and Cal Coast Lumber, had 10 full-time employees.

Respondent acknowledges that when the full-time employees of Cal Coast Lumber and Coast Wood Preserving are combined there is a total of at least 17 employees which exceeds the regulatory threshold of 10 full-time employees. Tr. at 171; Respondent's Brief 1-2. However, Respondent contends, pursuant to its piercing the corporate veil argument, that the conflation of the operations of the two corporations is improper and, thus, only the Coast Wood Preserving employees should be considered for the purposes of establishing jurisdiction. As discussed earlier, Respondent's arguments concerning the issue of piercing of the corporate veil will not be adjudicated in this proceeding. Thus, the undisputed evidence establishes that Respondent's facility had 10 or more full-time employees at all times relevant to the Complaint. Consequently, the regulatory criterion concerning the ten employee minimum under 40 C.F.R. § 372.22(a) is satisfied.

At the hearing, the EPA presented evidence showing that Coast Wood Preserving processed or otherwise used in excess of the applicable threshold quantities the toxic chemicals chromium compounds in 1995, 1996, and 1997, arsenic compounds in 1996 and 1997, and copper compounds in 1997. Tr. at 56-59; Complainant's Ex. 10. Respondent did not dispute the EPA's evidence but it did point out that it minimally exceeded the threshold quantities of the cited toxic chemicals. I point out that EPCRA is a strict

[18] The term "[f]ull-time employee means 2,000 hours per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totaling the hours worked during the calendar year by all employees, including contract employees, and dividing that total by 2,000 hours." 40 C.F.R. § 372.3.

liability statute and the fact that Respondent minimally met the criterion does not alter the determination of whether the facility is a covered facility for reporting purposes. Consequently, I find that the regulatory criterion concerning the threshold quantities of toxic chemicals under 40 C.F.R. § 372.22(c) is satisfied.

Having found that Coast Wood Preserving and Cal Coast Lumber comprise a "facility" as defined by 40 C.F.R. § 372.3, I further find that the evidence establishes that this facility, which is owned and operated by Respondent, is a covered facility for toxic chemical release reporting purposes for the calendar years 1996 and 1997. The facility is a multi-establishment complex that meets all the jurisdictional requirements for a covered facility set forth in 40 C.F.R. § 372.22; the facility has 10 or more full-time employees, has the requisite SIC major group code, and meets the applicable threshold quantities of cited toxic chemicals. 40 C.F.R. § 372.22. Thus, Respondent as the owner and operator of the facility was required to file Form Rs for the chemical compounds cited in the Complaint for calendar years 1996 and 1997.

Respondent's due process argument

Finally, Respondent argues that the regulations at issue are vague and do not provide companies with sufficient notice that they are subject to the toxic chemical release reporting requirements. Respondent's Motion at 6; Respondent's Brief at 2-3.[19] In particular, Respondent contends that the EPA's interpretation of the regulatory phrase "value of services" is unreasonable and could not have been "reasonably anticipated" by Respondent. Respondent's Brief at 5. In addition, Respondent contends that the EPA failed to inform Respondent of the EPA's interpretation of the regulatory term in a timely fashion. *Id*. at 3-4. Respondent relies on *the case of General Electric Company v. United States Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995) as support for its argument. *Id.* at 2-3.

In contrast, the EPA maintains that the regulations at issue

[19] In Complainant's Response to Respondent's Post-Hearing Brief ("Complainant's Reply Brief"), the EPA posits that Respondent's due process argument is extremely tardy and therefore was waived by Respondent. There is no merit to the EPA's argument which is contradicted by the record. *See* Respondent's Motion at 6.

are rather straightforward and that Respondent anticipated or should have anticipated the EPA's interpretations of those regulations.[20] In this regard, the EPA contends that the regulatory language concerning a facility which is comprised of a multi-establishment complex and the determination of the "value added" by these establishments is rather clear and is informed by the Department of Labor's SIC Code Manual and the Form R (Toxics Release Inventory Reporting) instructions. Complainant's Reply Brief at 7-9. At the hearing, Mr. Browning testified as follows:

> When looking at a facility with more than one establishment, the regulation is quite prescriptive in its methodology. This methodology is derived from the Department of Labor, the one that puts out the standard SIC manual, the standard industrial classification.
>
> It's also reiterated in the reporting form, the Form R, which is the submission required under the toxic release inventory. This methodology requires one to look at the value added to the total services or products produced by the facility and to determine which establishment adds the most value.

Tr. at 49.

The *General Electric, supra,* case cited by Respondent in support of its position involved the EPA's interpretation of the Toxic Substances Control Act ("TSCA") regulations governing the manufacture, use, and disposal of polychlorinated biphenyls which are set forth at 40 C.F.R. Part 761. The Court of Appeals for the D.C. Circuit found that while General Electric's interpretation of the regulations at issue was reasonable, the EPA's interpretation was "permissible" and that deference must be given to an agency interpretation which is logically consistent and serves a 'permissible regulatory function.' *Id.* at 1327 (citation omitted). However, the court also found that the EPA had not provided fair notice of its interpretation to the regulated community and thus, General Electric should not be punished. *Id*. at 1334. This conclusion was based on the court's

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[20] The EPA's argument that its interpretations of the regulations should be accorded administrative deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is misplaced. *See* Complainant's Reply Brief at 7-9. The EPA's interpretations as argued before me have not yet become the final Agency interpretations. *See* 40 C.F.R. § 22.27(c),(d).

finding that a regulated party is not 'on notice' of the agency's interpretation when the regulations and other agency policy statements are unclear, the regulated party's interpretation is reasonable, and the agency struggled to provide a definitive reading of the regulatory requirements. *Id.*

The facts of the instant case are readily distinguishable from those in *General Electric*. The instant case, which arises within the jurisdiction of the Ninth Circuit, involves EPA interpretations that are "ascertainably certain" from the EPCRA regulations and regulations that are sufficiently clear to provide fair notice of the EPA's interpretation to the regulated community. *See Diamond Roofing Co. V. OSHRC,* 528 F.2d 645, 649 (5th Cir. 1976); *General Electric, supra*. This does not mean, however, that the toxic chemical release reporting regulations are not subject to interpretation, but rather that the EPA's interpretation is reasonable and is not far afield from a reasonable person's understanding of the regulations. Unlike the TSCA regulations in the *General Electric* case, the instant regulatory language has not been the subject of varying interpretations by the EPA. Additionally, the EPA's witness, Mr. Browning, testified during the hearing that the EPA's interpretation was based in part on the SIC Code Manual and the Form R (Toxics Release Inventory Reporting) instructions. Tr. at 135; Complainant's Exs. 8, 9. Although these documents are only guidance materials, they function to support the EPA's interpretation of the regulations as well as the argument that the regulated community had fair notice of the Agency's interpretation.

Furthermore, although Respondent asserts that the EPA's interpretation of the regulations is unreasonable, Respondent has not set forth an alternative reading of the regulations which is reasonable or ascertainably certain from the regulations. Although Respondent may be accurate in asserting that the EPA should have responded more promptly to Respondent's inquiry regarding the Agency's interpretation, the fact remains that Respondent's inquiry and the EPA's delayed response occurred after Respondent's EPCRA violations had transpired. I note that Respondent has remained non-compliant with the reporting requirements even after being informed of the EPA's interpretation of the regulations.

Respondent's liability

Count I of the Complaint charges Respondent for failing to submit a timely Form R for chromium compounds for 1995 to the EPA Administrator and to the State of California in violation of Section 313 of EPCRA and 40 C.F.R. Part 372 . In support of this charge, Complainant alleges that Respondent's facility processed approximately 64,550 pounds of chromium compounds in 1995.

Nevertheless, Complainant failed to make sufficient jurisdictional allegations to support the charge contained in Count I.[21] Specifically, Complainant failed to cite the calendar year 1995 in its recitation of the years in which the total value of products produced or shipped or services provided by Coast Wood Preserving exceeded the total value of products produced or shipped exceeded or services provided by Cal Coast Lumber. Moreover, at the hearing the EPA failed to proffer any documentary evidence or testimony to show that in 1995 the value of products shipped or services provided by Coast Wood Preserving was greater than 50 percent of the total value of all products shipped or services provided by both Coast Wood Preserving and Cal Coast Lumber as required under 40 C.F.R. § 372.22(b).[22] *See* Respondent's Brief. As such, Complainant failed to establish its prima facie case with regard to Count I and Respondent cannot be held liable for the violation charged in Count I. [23]

With regard to the remaining five counts contained in the Complaint, the record establishes Respondent's liability for the

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[21] Respondent raised the issue of Count I's sufficiency in its Motion to Strike the EPA's Rebuttal Prehearing Information Exchange. *See* Respondent's Motion at 6. The Order on Respondent's Motion noted this omission but the EPA took no action to amend the pleadings. See Order on Respondent's Motion at 5 n. 6.

[22] When questioned about the omission at the hearing, Complainant's counsel responded that: "With respect to 1995, I think the only explanation that can be offered is that in this regard, we requested information, we received no information with respect to 1995. And in making our calculations we used the information that was made available to us." Tr. 185-186.

[23] With respect to this issue in its post-hearing brief, Complainant argues that "a Respondent charged with the violation of EPCRA had a duty to bring the omission in paragraph 12 [of the Complaint] to the attention of Complainant and supply the product value information." Complainant's Reply Brief at 12. This argument has no merit. *See* 40 C.F.R. § 22.24.

violations of Section 313 of EPCRA and the toxic chemical release reporting regulations at 40 C.F.R. Part 372 as charged. Respondent failed to submit timely Form Rs to the EPA and State of California for chromium compounds for the calendar years 1996 and 1997, for arsenic compounds in calendar years 1996 and 1997, and for copper compounds in calendar year 1997.

The affirmative defenses identified by Respondent in its Answer were not supported by the presentation of evidence at the hearing and have not been argued in its briefing. Therefore, Respondent is deemed to have waived its claimed affirmative defenses. *See* 40 C.F.R. § 22.24.

PENALTY

Applicable criteria and policy

The assessment of administrative and civil penalties for violations of the reporting requirements of Section 313 of EPCRA is governed by Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), which provides that any person who violates Section 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation" and that "[e]ach day a violation...continues shall...constitute a separate violation."[24] Section 325(c)(4) further provides that the penalty may be assessed by administrative order or a civil action in federal district court. Section 325(c)(1), however, does not specify any factors for consideration by the Administrator or court in determining an appropriate civil penalty for violations of the Section 313 reporting requirements.

In the absence of prescribed statutory factors to be considered in the assessment of penalties for reporting violations under Section 313 of EPCRA, I note that prior EPA administrative decisions have looked to the immediately preceding

[24] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA, as well as other federal agencies, to periodically adjust maximum civil penalties to account for inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996). Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, the maximum civil penalty under Section 325(c)(1) of EPCRA for violations that occur on or after January 31, 1997, is $27,500 per violation per day. *See* 40 C.F.R. Part 19.

enforcement sections at Sections 325(b)(1)(C) and 325(b)(2) for guidance. Sections 325(b)(1)(C) and 325(b)(2) govern the assessment of civil penalties for Class I and Class II violations of EPCRA's emergency notification requirements, respectively.[25]

In determining the amount of a penalty, Section 325(b)(1)(C) requires the Administrator to consider "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Section 325(b)(2) incorporates by reference the penalty assessment procedures and provisions of Section 16 of the TSCA, 15 U.S.C. § 2615. Penalty factors listed at Section 16 of TSCA are nearly identical to those in Section 325(b)(1)(C) of EPCRA, except that the factor of "effect on ability to continue to do business" is substituted for "economic benefit or savings."

Generally, Section 325(b)(2)of EPCRA, which governs Class II administrative penalties under EPCRA's emergency notification provisions, has been cited in administrative decisions for statutory guidance on the issue of penalty assessment for EPCRA reporting violations under Section 325(c)(1). *See e.g.*, *Apex Microtechnology, Inc*., EPCRA-09-92-00-07 (Initial Decision May 7, 1993) (discussing elements of Section 325(b)(1)(C) of EPCRA and Section 16 of TSCA and using Section 16 factors); *TRA Industries, Inc*., EPCRA 1093-11-05-325 (Initial Decision, Oct. 11, 1996) (using Section 16 of TSCA criteria as directed by Section 325(b)(2) of EPCRA in assessing penalty under Section 313 of EPCRA); *GEC Precision Corp*., EPCRA 7-94-T-381-E (Initial Decision, Aug. 28, 1996). Compare *Clarksburg Casket Co.*, EPCRA III-165 (Initial Decision, July 10, 1998) (using elements of Section 325(b)(1)(C) of EPCRA in discussing penalty factors under Section 325(c)(1)of EPCRA). In assessing a penalty for a violation of the EPCRA reporting requirements, I find that the TSCA factor of "effect on ability to continue to do business" is more relevant to that assessment than the factor of "economic benefit or savings." Rarely would there be a demonstrable or significant "economic benefit or savings" resulting from a failure to timely file a Form R.

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[25] Class I administrative penalties are imposed for violations of Section 304 of EPCRA, 42 U.S.C. § 11004. Class II administrative penalties are imposed for continuing violations or second or subsequent violations of Section 304 of EPCRA.

Additionally, the legislative intent of EPCRA and the stated reasons for the implementing regulations provide helpful insight into interpreting the statutory provisions concerning the assessment of penalties for violations of Sections 312 and 313 of EPCRA in the absence of express statutory language concerning such penalties. The purpose of EPCRA is "to provide the public with important information on the hazardous chemicals in their communities and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281, reprinted in U.S.C.A.A.N. 3374. This stated purpose for the enactment of EPCRA is echoed in the implementing regulations set forth at 40 C.F.R. Part 372. Section 372.1 describes the purpose of the Part 372 regulation as "to inform the general public and the communities surrounding covered facilities about releases of toxic chemicals, to assist research, to aid in the development of regulations, guidelines, and standards . . . ." 40 C.F.R. § 372.1.

To ensure compliance with EPCRA's goals, Section 313 of EPCRA imposes requirements on owners and operators of facilities with hazardous chemicals at specified threshold levels to notify the EPA and the state in which the facility is located. The information collected is used to "inform the general public and the communities surrounding covered facilities about releases of toxic chemicals, to assist research, to aid in the development of regulations, guidelines, and standards, and for other purposes." 40 C.F.R. § 372.1. Thus, these notification requirements serve an important public safety and health purpose in addition to meeting the public's right and need to know the reported information.

In assessing the proposed penalty in the instant matter, the EPA relies extensively upon its penalty policy issued under EPCRA which incorporates the above-cited statutory penalty factors into the penalty guidelines. Specifically, the EPA has calculated its proposed penalty by following the guidelines set forth in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) ("Section 313 Penalty Policy"), dated August 10, 1992.

The Section 313 Penalty Policy is applicable to Respondent's five reporting violations of Section 313 of EPCRA and 40 C.F.R. Part 372 set forth in Counts II through VI of the Complaint. The Section 313 Penalty Policy was promulgated by the EPA's Office of Compliance Monitoring of the Office of Prevention, Pesticides and Toxic Substances. The stated purpose of the Policy "is to ensure that enforcement actions for violations of EPCRA § 313 and the P[ollution] P[revention] A[ct] are arrived 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 and the PPA." Penalty Policy at 1. The EPA considers many of the penalty factors in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA through its application of the Section 313 Penalty Policy.

At this juncture, it is emphasized that under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, which governs these proceedings, a penalty policy, such as the Section 313 Penalty Policy, is not unquestioningly applied as if the policy were a rule with "binding effect" because such policy has not been issued in accordance with the APA procedures for rulemaking. See *In re Employers Insurance of Wausau and Group Eight Technology, Inc*., TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997); *see also In re Steeltech, Limited*, EPCRA Appeal No. 98-6, at 10-16 (EAB, Aug. 26, 1999), *affirmed, Steeltech Limited v. United States Environmental Protection Agency*, 105 F.Supp.2d 760 (W.D. Mich. 2000). Nevertheless, pursuant to Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), which also governs these proceedings, the Administrative Law Judge is required to consider civil penalty guidelines issued under the Act and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the Complaint.

This regulatory language, however, must be read in light of the EAB's holding that the ALJ has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." In re DIC Americas, Inc., 6 E.A.D. 184, 189 (EAB, Sep. 27, 1995). Although the EAB in Wausau ultimately upheld the use of the PCB Penalty Policy in assessing a civil administrative penalty in that case, the EAB readily recognized the limitations of the role and application of the various EPA Penalty Policies. In discussing these limitations, the EAB noted that the relevant penalty Policy must not be treated as a rule and that in any case where the basic propositions on which the Policy is based are genuinely placed at issue, adjudicative officers "must be prepared 'to re-examine [those] basic propositions.'" Wausau, at 761, quoting, McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

The Rules of Practice, at 40 C.F.R. § 22.24, further provide that the EPA has the burden of showing that the proposed penalty is appropriate and such showing must be made by a preponderance of the evidence. The EAB has consistently held that the complainant, pursuant to 40 C.F.R. § 22.24, bears the burden of proving that the proposed penalty is appropriate after

considering all the applicable statutory penalty factors. *See, e.g., In re B.J. Carney Industries, Inc.*, CWA Appeal No. 96-2, 7 E.A.D. 171, 217 (EAB, June 9, 1997); *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 756 (EAB, Feb. 11, 1997); *In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595, 599 (EAB, Dec. 6, 1994); *In re New Waterbury, Ltd.,* TSCA Appeal No. 93-2, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994).

However, as previously discussed, the instant matter arises under the authority of Section 325(c) of EPCRA, and this statutory provision does not specify any penalty factors to be considered in assessing a civil administrative penalty. Under such circumstances, the EAB has found that the complainant must nevertheless prove that the proposed "penalty is appropriate in light of the particular facts and circumstances of the case." *In re Woodcrest Manufacturing, Inc.*, EPCRA Appeal No. 97-2, 7 E.A.D. 757, 773-774 (EAB, July 23, 1998) (emphasis removed) (citation omitted).[26] Thus, under the EAB's holding in *Woodcrest Manufacturing, supra*, Complainant, to prevail in the instant matter, must establish that the proposed penalty of $27,500 is appropriate given the particular facts and circumstances of this case.

Gravity-based penalties for Counts II through VI

The EPA has proposed in its Complaint that a penalty of $32,500 be imposed against the Respondent for its EPCRA violations. Based on the finding of non-liability for Count I, discussed above, the amount of the proposed penalty is reduced $5,000, the amount of the proposed penalty for this Count.

I now turn to the determination of the gravity-based penalties for Respondent's five violations of Section 313 of EPCRA (Counts II through VI). As outlined above, the Section 313

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[26] In cases where the governing statute specifies penalty factors to be considered in assessing the penalty, the EAB has found that the required consideration of the statutory factors "does not mean that there is any specific burden of proof with respect to any individual factor." *New Waterbury, supra*, at 539. Rather, the "complainant's burden focuses on the overall appropriateness of the proposed penalty in light of all the statutory factors, rather than any particular quantum of proof for individual statutory factors." *Woodcrest Manufacturing, supra,* at 773 (emphasis removed) (citation omitted).

Penalty Policy provides guidance for the determination of penalties for violations of the requirements of Section 313 of EPCRA and will be applied to each of Respondent's five violations of the reporting requirements delineated in Section 313 of EPCRA and 40 C.F.R. Part 372. The Section 313 Penalty Policy establishes a two-step determination process for the assessment of a penalty: 1) determination of a gravity-based penalty and, 2) adjustments to the gravity-based penalty. Section 313 Penalty Policy at 7.

The gravity-based penalty is determined on the basis of the "circumstances" of the violation and the "extent" of the violation. *Id.* at 8. The circumstances of a particular violation take into account the "seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government." *Id*. The "extent" of a violation is determined by "the quantity of each EPCRA § 313 chemical manufactured, processed, or otherwise used by the facility; the size of the facility based on a combination of the number of employees at the violating facility; and the gross sales of the violating facility's total corporate entity." *Id*.

Under the Section 313 Penalty Policy, there are three different extent levels: A, B, and C. Each extent level corresponds to a particular combination of the amount of Section 313 chemical(s) involved in the violation, the facility's corporate sales, and the number of employees at the facility. *Id*. at 9. For example, categorization to the A extent level is appropriate for facilities that manufacture, process, or otherwise use 10 times or more than the threshold amount of the Section 313 chemical, have $10 million or more in total corporate entity sales, and have 50 or more employees. *Id.* Circumstance levels range from 1 to 6 and each number corresponds to a different degree or category of the reporting violation. For example, Level 1 violations are violations that involve a facility's failure to file reports in a timely manner and Level 4 violations involve failure to maintain complete records as prescribed at 40 C.F.R. § 372.10(a) or (b). *Id*. at 12. The extent and circumstance levels are represented in tabular form and when combined form a "Penalty Matrix." *Id*. at 11. The final dollar amount of the gravity-based penalty is obtained from this Penalty Matrix. *Id*.

Respondent committed five reporting violations of Section 313 of EPCRA and its implementing regulations set forth at 40 C.F.R. Part 372 by failing to submit Form Rs to the EPA and to the State of California as required by Section 313. As pointed out by the EPA, "failure to report is classified as the most serious violation because such failure deprives the public of information of chemical releases which may affect health and the

environment." Affidavit from Adam A. Browning, Toxic Release Inventory Program Coordinator for Region 9 of the EPA, dated August 28, 2001 ("Browning Aff."); Complainant's Ex. 1.

Sections 325(c)(1) and (3) of EPCRA authorize the assessment of a penalty of not more than $25,000 for each Section 313 violation each day the violation continues. The Section 313 Penalty Policy, consistent with Sections 325(c)(1) and (3) of EPCRA, directs that a separate penalty should be calculated for each reporting violation on a per-chemical and per-year basis. *Id*. at 11, 13. The Section 313 Penalty Policy, however, provides that "[a]ll violations are 'one day' violations unless otherwise noted." *Id*. at 11. Generally, penalty assessments are made on a "per day" basis only in two circumstances: 1) when a facility has received a complaint that has been resolved for failing to report under Section 313 for any two previous reporting periods or; 2) when a facility refuses to submit reports or corrected information within thirty (30) days after a complaint is resolved. *See* Section 313 Penalty Policy at 13.

Complainant proposes that Respondent be assessed penalties of $5,500 for Respondent's violations for failing to submit to the EPA and to the State of California Form Rs for calendar years 1996 and 1997 for chromium compounds by September 8, 1997, and July 1, 1998, respectively; for calendar years 1996 and 1997 for arsenic compounds by September 8, 1997, and July 1, 1998, respectively; and for calendar year 1997 for copper compounds by July 1, 1998 (Counts II through VI). Complainant properly categorizes these violations as having Level 1 circumstance levels because the Form Rs were not submitted within one year. Id. at 12. The extent levels are properly characterized as Level B extent levels because the amount of chromium compounds, arsenic compounds, and copper compounds used was less than 10 times the reporting threshold, Respondent's annual sales were less than $10 million, and Respondent had less than 50 employees. Id. at 9. The applicable Penalty Matrices yield gravity-based penalties of $5,500 for each of the Counts II through VI.[27]

Moreover, the EPA's proposed penalty amount is appropriate under the particular facts and circumstances of this case. Respondent's violations were all "reporting" violations. These kind of violations are fundamental violations of the EPCRA requirements. As mentioned earlier, EPCRA was implemented to ensure that the public has sufficient information about the kinds of chemicals being used in their communities. Thus, the timely filing of Form Rs is a key element in the EPCRA regulatory scheme. Respondent failed to file Form Rs for hazardous chemicals that it processed at its facility. Accordingly, no

[27] *See* footnote 20.

change in the amount of the gravity-based penalty is warranted.

Adjustments to the Gravity-based Penalties for Counts II through VI

In the EPA's determination of the proposed penalties for Counts II through VI, the EPA found that no adjustments to the penalties were warranted under the Section 313 Penalty Policy. Adjustments factors that relate to the violator include the following: voluntary disclosure; history of prior violation(s); delisted chemicals; attitude; other factors as justice may require; Supplemental Environmental Projects ("SEPs"); and ability to pay.

Specifically, in making the determination that no adjustments to the gravity-based penalties were warranted, the EPA made the following considerations. The Section 313 Penalty Policy does not provide reductions in penalties for voluntary disclosure if such disclosure occurs after the facility has been contacted by the EPA to determine compliance with Section 313 of EPCRA. Section 313 Penalty Policy at 14-16. Here, the violations were identified during the EPA inspection and, thus, no reduction is applicable. Browning Aff. at 5. The Section 313 Penalty Policy provides for an upward adjustment where a violator has demonstrated a history of violating EPCRA. Section 313 Penalty Policy at 16-17. As Respondent has no history of prior violations, no upward adjustment to the penalties was made. Browning Aff. at 5. No adjustment was made based on the factor of delisted chemicals because none of the chemicals involved in the violations has been delisted. Id. at 6. No adjustment was made based on the basis of inability to pay or SEPs because such issues were not raised by Respondent. *Id*. at 6,7.

Under the Section 313 Penalty Policy, the adjustment for attitude has the two components of cooperation and compliance and can be made up to 15% for each component. Section 313 Penalty Policy at 18. The EPA noted that no adjustment for the factor of attitude was made as to the proposed penalty but a reduction was offered in the course of settlement discussions. Browning Aff. at 6. The EPA pointed out at the hearing that Respondent was not in compliance with EPCRA at that time. Tr. at 107.

In response, Respondent argues that the proposed penalty should be reduced by 30% on the basis of "attitude" because Respondent fulfills both elements of "attitude", namely, cooperation and compliance. Respondent submits that a 15% reduction on the basis of cooperation is warranted because it has been cooperative with the EPA during the inspection of the facility, in providing access to records and documents, in its responsiveness to EPA requests, and in its attendance at

settlement conferences. Respondent's Brief at 10. The record, including the testimony of the EPA's witness, supports Respondent's claim that it has been cooperative throughout the compliance evaluation and enforcement process. Tr. at 105-06. Therefore, the amount of the penalty for Counts II through VI will be reduced 15% for the cooperation component of the adjustment factor for attitude. Such downward adjustment results in the reduction of the total penalty amount from $27,500 to $23,375.

Respondent additionally contends that a 15% reduction is warranted on the basis of its compliance because of its "at all times [Respondent] has striven to stay in compliance with EPCRA, reasonably believing in good faith that its attempts at compliance were sufficient." *Id*. at 11. I disagree. As of the hearing date, Respondent had not met the reporting requirements of Section 313 of EPCRA and 40 C.F.R. Part 372.

With regard to the final adjustment for other factors as justice may require, the EPA noted that use of this reduction is expected to be rare pursuant to the Section 313 Penalty Policy. Section 313 Penalty Policy at 18. The EPA determined that no adjustment for this factor as outlined in the Section 313 Penalty Policy was warranted. Browning Aff. at 6-7.

In contrast, Respondent argues that the proposed penalty should be reduced by 25% on the basis of other factors as justice may require. Specifically, Respondent asserts that such reduction is merited because: 1)the violations described in Counts IV and VI involve levels of chemicals that are very close to the regulatory threshold; 2) the total number of employees at Cal Coast Lumber and Coast Wood Preserving is very small when compared to many of the facilities that come under the scrutiny of the EPA; and 3) Respondent had a good faith belief that the regulations were not applicable to its facility. Respondent's Brief 11-14. Respondent's assertions are not persuasive. The amounts of chemicals and the number of employees involved already have been considered within the context of the extent level for the gravity-based penalty determination. Additionally, I reiterate my earlier finding that there is no basis for Respondent's claim that it is not subject to the toxic chemical release reporting requirements.

In conclusion, I find that the EPA has established that the penalty of $23,375 is appropriate under the particular facts and circumstances of this case. *See* 40 C.F.R. § 22.24. The total penalty of $23,375 ($4,675 for Count II, $4,675 for Count III, $4,675 for Count IV, $4,675 for Count V, and $4,675 for Count VI) is an appropriate and reasonable civil administrative penalty for

Respondent's violations of Section 313 of EPCRA and 40 C.F.R. Part 372. Further, such penalty is authorized and is in accordance with the statutory penalty criteria in Sections 325(b)(1)(C) and 325(b)(2) of EPCRA and the applicable EPA penalty guidelines issued under EPCRA. *See* Section 313 Penalty Policy; 40 C.F.R. § 22.27(b).

ORDER

10. Respondent Coast Wood Preserving, Inc. is assessed a civil administrative penalty in the amount of $23,375.

11. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the final order by submitting a cashier's check or certified check in the amount of $23,375, payable to the "Treasurer, United States of America," and mailed to:

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

12. A transmittal letter identifying the subject case title and EPA docket number (EPCRA 9-2000-0001), as well as Respondent's name and address, must accompany the check.

13. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

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Barbara A. Gunning
Administrative Law Judge

Dated: February 20, 2002
Washington, DC