UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
LOES ENTERPRISES, INC.	**)**	**DOCKET NO. EPCRA-05-2005-0018**
	)	
RESPONDENT	**)**	

ORDER DENYING RESPONDENT'S
MOTION FOR ACCELERATED DECISION

I. *PROCEDURAL HISTORY*

On June 17, 2005, the United States Environmental Protection Agency ("the EPA"), Region V ("Complainant"), filed a Complaint against Loes Enterprises, Inc. ("Respondent"), pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045. The Complainant alleges violations of EPCRA's Section 312, 42 U.S.C. § 11022, requirement that the owner or operator of a covered facility shall annually submit emergency and hazardous chemical inventory forms. The alleged facility at issue is located in St. Paul, Minnesota.

Three counts were alleged in the Complaint. In Count 1, the Complainant alleged that the Respondent did not submit to the State Emergency Response Commission ("SERC") and local fire department for calendar year 2002 the requisite emergency and hazardous chemical inventory form ("inventory form") for calendar year 2002 until August 24, 2004. Complaint ¶ 19. Count I further alleged that Respondent's failure to submit the inventory form by March 1, 2003, for calendar year 2002 violated Section 312(a) of EPCRA. *Id.* ¶ 20. In Count 2, the Complainant alleged that the Respondent did not submit to the SERC a completed inventory form for calendar year 2003 until August 24, 2004, and that Respondent's failure to submit to the SERC a completed inventory form by March 1, 2004, for calendar year 2003 violated Section 312(a) of EPCRA. *Id.* ¶¶ 23-24. In Count 3, the Complainant alleged that the Respondent did not submit to the fire department a completed inventory form for calendar year 2003 until August 27, 2004, and that Respondent's failure to submit to the fire department the inventory form by March 1, 2004 for calendar year 2003 violated Section 312(a) of EPCRA. *Id.* ¶¶ 28-29.

In the Complaint's penalty proposal, the Complainant stated, "Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), authorizes EPA to assess a civil penalty of up to $25,000 per day of violation for each Section 312 violation that occurred before January 31, 1997." Complaint at 6-7. It further stated, "The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to $27,500 per day of violation for EPCRA 312 violations that occur on or

after January 31, 1997, and to $32,500 per day for violations that occur after March 15, 2004." Complaint at 7. The proposed penalty in the Complaint was as follows: Count 1 – $1,275; Count 2 – $56,801, and Count 3 – $56,801, for a total proposed penalty of $114,877. *Id.*

In my August 29, 2005 Prehearing Order, I directed the Complainant to file its prehearing exchange, including a statement explaining in detail how the proposed penalty was determined. On October 18, 2005, the Respondent sent a letter to the Complainant, contending that the penalty proposal in the Complaint exceeded the maximum amount allowed under EPCRA.

On December 2, 2005, the Complainant submitted its initial prehearing exchange, which includes a penalty explanation, via a worksheet and narrative explanation. The cover letter to the latter prehearing exchange stated that the Complainant would move to amend its Complaint, which would, *inter alia,* increase the number of counts. Furthermore, the Complainant pointed out that its prehearing exchange "reflects these anticipated amendments." In its penalty calculation worksheet, the Complainant added many additional counts to represent each day Respondent was in violation beyond the first day of violation. For instance, with regards to the Complaint's Count 2, the penalty explanation proposes a $23,375 penalty for the first day of failing to file the inventory form, which is referred to as Count 2 in the penalty explanation. The penalty explanation adds Counts 3 through 144, "arising from the same set of facts as Count 2," for each day of violation beyond the first day, for a proposed penalty of $33,192. *See* Prehearing Exchange, Ex. 3, Bates Stamp Numbers 155-158, 173-196. Likewise, for the Complaint's Count 3, the penalty explanation proposes to assess $23,375 for the first day of violation, and adds Counts 146-287, proposing to assess $33,192 for the additional counts. *Id.*, Bates Stamp Numbers 159-162, 197-220. The penalty calculation adds even more complexity by providing a modest decrease in the penalty, by reducing the formerly proposed penalty amounts for Counts 2 and 3 from $56,801 to $56,567, for a total proposed penalty of $114,409 instead of the Complaint's $114,877.

In a letter dated December 21, 2005, the Complainant advised this Tribunal and the Respondent that it in fact would not be filing a motion to amend the Complaint, and that "The Complaint stands exactly as is." The Complainant further stated that the proposed civil penalty for the "violations cited in Count II of the Complaint remains articulated by" its prehearing exchange, Bates Stamp Numbers 155-158 and 173-196, and that the proposed civil penalty for the "violations cited in Count III of the Complaint remains articulated by" Bates Stamp Numbers 159-162 and 197-220. The Complainant closed its letter by stating, "The Prehearing Exchange stands exactly as is."

II. *THE PARTIES' ARGUMENTS*

Through its "Motion for Accelerated Decision" (Jan. 5, 2006), the Respondent seeks dismissal of Counts 2 and 3 on ground that each count constitutes a 1-day violation, and that a penalty of $56,801 is in excess of EPCRA's $27,500 maximum penalty for a 1-day violation.[1] M. for Acc. Dec. at 1. The Respondent argues that, without seeking this Tribunal's permission to amend the Complaint, that the Complainant has allocated the excessive penalty portion to 284 additional daily violations. *Id.* at 1-2. Furthermore, the Respondent argues that even if granted leave to amend the Complaint, that the 284 additional daily violations would have to be dismissed as a matter of law because Respondent's alleged failure to submit the required inventory form by March 1, 2004 is a one-time, one-day violation that does not continue pursuant to Section 325(c)(3), 42 U.S.C. § 11045(c)(3), to subsequent days and therefore does not create 284 additional violations. *Id.*

The Respondent points out that in order for a complainant to establish a prima facie case, 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." *Id.* at 6 (quoting 40 C.F.R. § 22.24(a)). With regards to accelerated decision, the Respondent contends that there is no genuine issue as to any material fact related to Complainant's demand for penalties in excess of the amount authorized by Section 325(c)(1), 42 U.S.C. § 11045(c)(1). More specifically, Respondent contends that the Complainant has failed to establish a prima facie case that the requested penalty amounts for Counts 2 and 3 are authorized. For instance, as to Count 2, the Respondent contends that as a matter of law, no trier of fact could return a verdict of $56,801 for the single March 1 violation alleged and pled in Count 2 when the statutory maximum for a single violation is $27,500, and that the Complainant similarly fails with regards to Count 3.

The Respondent acknowledges Section 325(c)(1) and (3) of EPCRA, which provides: "Any person . . . who violates any requirement of [Sections 312 or 313 of EPCRA] shall be liable . . . for a civil penalty in an amount not to exceed [$27,500] for each such violation," and that "Each day a violation . . . continues shall . . . constitute a separate violation." However, the Respondent argues that if an EPCRA complaint does not specify and plead more than one violation of Section 312 for each count pursuant to Section 325(c)(3), the maximum penalty for the violation is $27,500 per count. M. for Acc. Dec. at 7 (citing *In re F.B. Haab Co.*, Docket No. EPCRA-III-154, 1998 EPA ALJ LEXIS 46 (ALJ, June 30, 1998)). The Respondent asserts that the Complainant, in Count 2 of the Complaint only alleged and pled one violation – failure to submit the inventory form by the March 1, 2004 deadline – and that there was no allegation in the Complaint that this violation continued to subsequent days and that there was a separate violation for each subsequent day. The Respondent makes the same argument with regards to Count 3. *Id.* at 8. Furthermore, the Respondent asserts that it is "too late" for the Complainant to amend its Complaint. *Id.* at 9.

[1] Respondent has indicated its intention to file an Equal Access to Justice Act ("EAJA") claim against the Complainant, but such a claim is not before me.

Alternatively, the Respondent argues that the March 1, 2004 violations in Counts 2 and 3 were not violations that "continued" pursuant Section 325(c)(3) of EPCRA. *Id.* at 10. The Respondent cites to rulings of other Administrative Law Judges ("ALJs") that violation of the annual EPCRA reporting requirements is not continuing. *Id.* at 10-11 (citing *In re Mafix, Inc.*, Docket No. EPCRA-III-113, 1998 EPA ALJ LEXIS 5 (ALJ, Feb. 12, 1998); *In re Rhone-Poulenc Basic Chems. Div.*, Docket No. 5-EPCRA-97-053, 1998 EPA ALJ LEXIS 95 (ALJ, Apr. 27, 1998)).

Complainant's Response, dated February 3, 2006, argues that the Respondent failed to demonstrate that no genuine issue of material fact exists, and is not entitled to judgment as a matter of law pursuant to 40 C.F.R. § 22.20. The Complainant points out the Environmental Appeals Board's ("EAB") position that the main purpose of a complaint is to put the respondent on notice of the basis of the complaint and the legal grounds for recovery, thus providing enough detail to fairly inform a respondent of the claims it must defend against. *In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218, 232 (EAB 1999). Moreover, in construing the use of particular words or phrases in a complaint, the complaint must be looked at as a whole. *Id.*

The Complainant argues that Counts 2 and 3 of the Complaint alleged 143 and 141 violations, respectively. Response at 6-7. In support, the Complainant points out that in Count 2, it alleged that the Respondent did not submit the inventory form to the SERC by calendar year 2003 until August 24, 2004, and that Respondent's failure to submit the inventory form to the SERC by March 1, 2004 for calendar year 2003 violated Section 312(a). Similarly, the Complainant points out that Count 3 alleged that the Respondent did not submit the inventory form to the fire department by calendar year 2003 until August 27, 2004, and that Respondent's failure to submit the inventory form by March 1, 2004 violated Section 312(a).

Furthermore, the Complainant points out the Complaint's allegation that Section 325(c)(1) of EPCRA authorizes the EPA to assess a civil penalty of up to $25,000 per day. Response at 7-9. It further alleged that the Debt Collection Act of 1996 increased these statutory maximum penalties to $27,500 per day for violations that occur on or after January 31, 1997, and to $32,500 per day for violations that occur after March 15, 2004. Moreover, the Complainant argues that the very fact that it proposed a penalty of $114,877 in the Complaint demonstrates that the Complainant alleged more than three violations of Section 312(a). As for the *F.C. Haab* case cited by Respondent, the Complainant states that, in contrast to the case at bar, the complainant in *F.B. Haab* expressly stated that only one violation was alleged in each count. 1998 EPA ALJ LEXIS 46, at *16.

The Complainant further argues that the alleged Count 2 and Count 3 violations of Section 312(a) began on March 1, 2004 and continued until August 24, 2004, and August 27, 2004, respectively. Response at 10-14. The Complainant points out that the specific language of a statutory requirement determines whether its requirements are continuing in nature. *Id.* at 11

(citing *In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 22 (EAB 1997), *rev'd on other grounds sub nom Harmon Indus. v. Browner,* 19 F. Supp. 2d 988 (W.D. Mo. 1988), *aff'd,* 191 F.3d 894 (8th Cir. 1999); *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997)). It further points out that words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. *Id.* (citing *Harmon*, 7 E.A.D. at 33). However, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame. *Id.* (citing *Harmon*, 7 E.A.D. at 28).

The Complainant asserts that the language of Section 312 imposes requirements that are of a continuing nature. *Id.* at 11-12. For instance, the Complainant points out that Section 312(e) requires that upon request, the owner or operator of a facility shall provide Tier II information to the State emergency planning commission, local emergency planning committee, or fire department with jurisdiction over the facility. Moreover, Complainant points out that upon request of an official, a State emergency planning commission or local emergency planning committee shall request that the facility owner or operator make the Tier II information available to the official.

The Complainant also argues that Respondent's reliance on certain ALJ rulings, namely in *Mafix* and *Rhone-Poulenc,* is misplaced being that the specific issue before the ALJs was whether the alleged Section 312(a) violations in those matters were barred by the five-year general federal statute of limitations, under 28 U.S.C. § 2462. Response at 12. Moreover, the Complainant points to other ALJ rulings, holding that whether a statutory obligation is complete for purposes of the statute of limitations is not determinative of the question of whether daily penalties may be assessed for the violation of that obligation. *Id.* (citing *In re Umetco Minerals Corp.*, Docket No. CAA-(133)-VIII-92-03, 1996 EPA ALJ LEXIS 203 (ALJ, Mar. 29, 1996); *In re Bethlehem Steel Corp.*, Docket No. TSCA-III-322, 1991 EPA ALJ LEXIS 11 (ALJ, Dec. 23, 1991)).[2]

Finally, the Complainant makes reference to the objectives of EPCRA, and points out the following legislative history, statutory provisions, and federal court case law, *id.* at 13: EPCRA's intent 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. 99-962, at

[2] The ALJ's decision in *Bethlehem Steel,* 1991 EPA ALJ LEXIS 11, was reversed by the EAB, 4 E.A.D. 29 (EAB 1992) (per curiam), on the ground that the general federal statute of limitations, at 28 U.S.C. § 2462, did not apply at all to an administrative enforcement action brought under the Toxic Substances Control Act. *Id.* at 30 (relying on *3M Co. (Minn. Mining and Mfg.),* 3 E.A.D. 816 (CJO 1992), *rev'd and remanded sub nom 3M v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994).

281 (Oct. 3, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3374. EPCRA requires industrial and commercial facilities to adhere to a system of notification requirements, and requires the creation of state emergency response commissions and local emergency planning committees. The local emergency planning committees are charged with developing emergency response plans based upon the information provided by the facilities. 42 U.S.C. §§ 11001-11003. The public has a right to know the information reported by the facilities and the contents of the emergency response plans. 42 U.S.C. § 11044; *Huls Am., Inc. v. Browner,* 83 F.3d 445 (D.C. Cir. 1996). "EPCRA establishes a framework of state, regional, and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening release." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 86 (1998).

The Complainant concludes by arguing that the Respondent failed to timely file its Tier II inventory forms, and that each and every day the Respondent withheld from its community its Tier II Emergency and Hazardous Chemical inventory, it needlessly and unlawfully exposed its community to potential harm.[3] Response at 14. Moreover, the Complainant argues, "Surely Respondent's subsequent decision to do nothing to comply with EPCRA, for months, did not place Respondent back into compliance with Section 312 of EPCRA. *Id.* Accordingly, the Complainant argues that each day after March 1, 2004, that Respondent's violations continued constituted separate violations of Section 312, pursuant to Section 325(c) of EPCRA.

In its Reply (Feb. 16, 2006), the Respondent contends that Complainant's argument with regards to violations of Section 312(e) being continuing is inapposite and unreasonable because Respondent did not violate Section 312(e), but rather this case involves violation of Section 312(a), which the Respondent contends is not a continuing violation. Respondent contends that a failure to comply with Section 312(a) of EPCRA is, as a matter of law, only one violation, because there is only one requirement – the requirement to send the inventory form in by March 1. Moreover, Respondent posits that an ALJ's Initial Decision in *In re Energy Gases, Inc.*, Docket No. EPCRA-02-2000-4002, 2003 EPA ALJ LEXIS 61 (ALJ, Aug. 13, 2003), further supports its position.

[3] As discussed in further detail, *infra,* the Complaint alleges that Respondent violated EPCRA Section 312(a), which requires that a covered facility annually report inventory information (i.e., "Tier I" information). However, in its Response to the Motion for Accelerated Decision, the Complainant – presumably by mistake – refers to EPCRA Section 312(*e*), which provides that certain authorities may request additional, so-called "Tier II" information, as opposed to Tier I information.

III. *DISCUSSION*

At the outset, I note that I am not bound by the rulings of other ALJs as precedent, although I may turn to the rulings of my esteemed colleagues as persuasive authority in making my independent ruling. *Accord In re General Motors Auto. – N. Am.*, Docket No. RCRA-5-2004-0001, 2005 EPA ALJ LEXIS 29 (ALJ, May 19, 2005). However, Environmental Appeals Board ("EAB") decisions carry far greater authority and can be precedential.

First, I address whether the Complaint alleged multiple violations within each count. As the Complainant correctly points out, in Count 2 of the Complaint it alleged that Respondent did not submit the inventory form for calendar year 2003 until August 24, 2004, and that Respondent's failure to timely submit the inventory form by March 1, 2004 violated Section 312(a). Similarly, for Count 3, the Complaint alleged that Respondent did not submit the inventory form for calendar year 2003 until August 27, 2004, and that its failure to timely submit by March 1, 2004 violated Section 312(a). Later, the Complaint alleges that Section 325(c) of EPCRA authorizes a maximum penalty of up to $25,000 per day, and as adjusted for inflation, it is authorized to assess a maximum penalty up to $27,500 per day for violations that occur on or after January 31, 1997, and up to $32,500 per day for violations that occur after March 15, 2004. Complaint at 6-7. The Complaint proposed a penalty of $56,801 for Count 2 and $56,801 for Count 3. *Id.* at 7.

In its totality, the Complaint put Respondent on notice that it intended to seek multi-day penalties rather than treating each count as a single violation. Significantly, for Count 2 and Count 3, the Complaint proposes a penalty for each that is higher than the maximum penalty for a single violation. Furthermore, the Complaint alleged that March 1, 2004 was the due date for the 2003 calendar year inventory form, and yet the Complaint points out that the penalty for violations that occur after March 15, 2004 is $32,500, as opposed to the $27,500 maximum in effect on March 1, 2004. If the Complaint had been alleging just a single, one-day violation, for failure to submit the inventory form by March 1, 2004, there would have been no need to mention the maximum penalty for violations occurring after March 15, 2004.

Complainant's conduct in proposing to amend the Complaint and withdrawing that proposal was rather awkward. Nevertheless, as noted, the Complaint sufficiently put the Respondent on notice that Count 2 and Count 3 alleged more than a single violation for each count. There was no need to amend. In contrast, in the *F.C. Haab* Initial Decision cited by the Respondent, the complainant in that matter expressly stated that only one violation was alleged for each count. 1998 EPA ALJ LEXIS 46, at *15-17. Furthermore, contrary to Respondent's assertions, even if the Complaint had not put the Respondent on notice of Complainant's intentions regarding the penalty, it would not be "too late" for the Complainant to amend the Complaint. As a general principle, "administrative pleadings are liberally construed and easily amended." *Lazarus,* 7 E.A.D. at 334. Even if amendment of the Complaint had been necessary, no undue prejudice would have resulted from such amendment. Even now, this proceeding is not yet at the evidentiary hearing stage.

With regards to continuing violations, the EAB has not specifically ruled on whether violation of EPCRA's Section 312 is continuing in nature. Within the context of determining whether a violation is "continuing in nature" for purposes of the statute of limitations, the EAB has set forth a test which first requires "looking to the statutory language that serves as the basis for the specific violation at issue, including examination of legislative history as necessary," and second, "reviewing regulations and preambles in cases where the substance of a requirement is found in a regulation rather than the statute." *In re Mayes,* RCRA (9006) Appeal No. 04-01, slip op. at 16, 2005 EPA App. LEXIS 5 (Mar. 3, 2005), 12 E.A.D. ___, *appeal docketed,* No. 3:05-CV-00478 (E.D. Tenn.) (citing *In re Newell Recycling Co.*, 8 E.A.D. 598, 615-19 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000); *Lazarus,* 7 E.A.D. at 366; *Harmon*, 7 E.A.D. at 22-23). "This analysis focuses on discerning the intent and purpose of the particular legal requirements in question." *Id.* "In that regard, '[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.'" *Id.* at 16-17 (quoting *Lazarus*, 7 E.A.D. at 366-67 (footnotes omitted)).

Significantly, it is well established that "[w]hether an obligation is complete for the purpose of the statute of limitations is not determinative of the question of whether daily penalties may be assessed for the violation of that obligation." *See, e.g., Umetco,* 1996 EPA ALJ LEXIS 203, at *18. In the case of *Umetco,* the allegations entailed failure to comply with a Clean Air Act regulation requiring the annual reporting of radon emissions. The radon emission reports are due on March 31, for the preceding calendar year. Upon reviewing the statutory language and an intensive analysis of federal caselaw, the ALJ held that violation of the reporting requirement was complete for purposes of the statute of limitation upon failure to meet the March 31 deadline, but was continuing until the next annual report was due for purposes of assessing a multi-day penalty. *Id.* at *18-19.

At issue in the case at bar is whether the EPA has statutory authority to assess multi-day penalties for violating Section 312(a) of EPCRA. I look first to the statutory language. The Complaint was filed pursuant to Section 325(c) of EPCRA, " Civil and administrative penalties for reporting requirements," 42 U.S.C. § 11045(c). Paragraph 1 of Section 325(c), which concerns Section 312, provides:

> (1) Any person (other than a governmental entity) who violates any requirement of section [312] or [313] of [EPCRA] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

Pursuant to laws that adjust statutory penalties for inflation, the new penalty amount is $27,500 for violations that occur "between January 30, 1997 and March 15, 2004," and is set at $32,500 for violations that occur "after March 15, 2004."[4] In paragraph 2, Section 325(c) provides for

[4] *See* 40 C.F.R. part 19 (promulgated pursuant to the Federal Civil Penalties Inflation

the lesser amount of $10,000 (also adjusted for inflation) for violating Section 311, Section 323(b), or Section 322(a)(2):

> (2) Any person (other than a governmental entity) who violates any requirement of section [311] or [323(b)] of [EPCRA], and any person who fails to furnish to the Administrator information required under section [322(a)(2)] of [EPCRA] shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

Paragraph 3 of Section 325(c) discusses continuing violations:

> (3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.

Accordingly, by the language of Section 325(c), especially Paragraph 3, Congress explicitly provides for continuing violations of EPCRA. Moreover, the specific language used by Congress is that each day a violation *described in paragraph (1) of (2)* continues shall constitute a separate violation. The language of both Paragraphs (1) and (2) states that any person who violates *"any requirement"* of Section 312 (emergency and hazardous chemical inventory forms), 313 (toxic chemical release forms), 311 (material safety data sheets), 323(b) (provision of information to health professionals, doctors and nurses; medical emergency), or 322(a)(2) (trade secrets), is liable for a penalty for each violation.

Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701).

The Respondent correctly points out that the Complaint alleged violations of Section 312(a) rather than Section 312(e).[5] Section 312(a) imposes an annual reporting requirement. The differences are that Section 312(a)'s annual reporting requirement calls for the submission of "toxic chemical inventory forms" (as opposed to toxic chemical release forms), those inventory forms must be submitted annually on March 1 (instead of July 1), and they must be submitted to the (a) local emergency planning committee, the (b) State emergency response commission, and (c) the fire department with jurisdiction over the facility (as opposed to EPA and State officials).

[5] For instance, Count 2 of the Complaint alleged that Section 312(a), and its implementing regulations at 40 C.F.R. part 370, require the owner or operator of a facility, which is required by OSHA to prepare or have available a material data safety sheet ("MSDS") for a hazardous chemical, to submit to the SERC annually a completed Emergency and Hazardous Chemical Inventory Form (Tier I or Tier II). Count 2 further alleged that the inventory form must contain the information required by Section 312(d) of EPCRA, covering all hazardous chemicals present at the facility at any one time during the preceding year. Count 2 concluded by alleging that the Respondent did not submit to the SERC a completed inventory form for calendar year 2003 until August 24, 2004, and that Respondent's failure to submit it by March 1, 2004, for calendar year 2003 violated Section 312(a) of EPCRA. In Count 3, the Complainant alleged a similar violation, but the difference was that the Respondent did not submit the inventory form (for calendar year 2003) to the fire department until August 27, 2004.

As for the content of the Section 312 inventory form, at a minimum it must contain so-called "Tier I" information, which includes (i) an estimate of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year, (ii) an estimate of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year, and (iii) the general location of hazardous chemicals in each category.[6] EPCRA § 312(d)(1), 42 U.S.C. § 11022(d)(1). Pursuant to Section 312(e), upon request by a State emergency planning commission, a local emergency planning committee, or a fire department with jurisdiction over the facility, the owner or operator can be called upon to provide additional, "Tier II" information.[7] As noted, the Complaint does not allege that any such request pursuant to Section 312(e) was made. Rather, the only allegations in Counts 2 and 3 are that the Respondent failed to comply with the annual inventory form reporting requirement of Section 312(a).

One might argue that Congress only intended some of the requirements in Section 312 to be continuing violations. For instance, one might argue that the local authorities' request for Tier II information under Section 312(e), or a fire department's request for access to a facility under Section 312(f) are continuing violations,[8] but that

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[6] Alternatively, the owner or operator of a covered facility may submit a Tier II inventory form in lieu of a Tier I inventory form, for its annual reporting obligation under Section 312(a). 40 C.F.R. § 370.25(b); *see also* EPCRA § 312(a)(2), 42 U.S.C. § 11022(a)(2).

[7] EPCRA does not specify when the facility owner or operator must comply with a Section 312(e) request for Tier II information. By regulation, the EPA directs that the facility owner or operator shall be submitted within 30 days of such a request. 40 C.F.R. § 370.25(c).

[8] Section 312(f) of EPCRA mandates that upon request of the fire department with jurisdiction over the facility, the owner or operator of the facility shall allow the fire department to conduct an on-site inspection of the facility and shall provide to the fire department specific

the annual reporting requirement in Section 312(a) is not. To the contrary, Congress unequivocally provides that the violation of "any requirement" of Section 312 is a continuing violation. Specifically, in Section 325(c), Congress commands that "Each day a violation described in paragraph (1) . . . continues shall . . . constitute a separate violation," and Paragraph 1 provides, "Any person . . . who violates *any requirement* of section 312 or 313 . . . shall be liable for a civil penalty . . . for each such violation." 42 U.S.C. § 11045(c) (emphasis added).

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location information on hazardous chemicals at the facility. 42 U.S.C. § 11022(f). Neither the statute nor EPA regulations expressly specify when the facility owner or operator must comply with the fire department's request. *See id.;* 40 C.F.R. § 370.25(d). Presumably, compliance must be immediate, in order to allow for unannounced inspections.

In an analogous situation, I have determined that EPCRA's statutory language authorizes multi-day penalties for violating annual reporting requirements. Specifically, in the case of *Coast Wood Preserving, Inc.,* I dealt with the EPCRA Section 313(a), 42 U.S.C. § 11023(a), annual reporting requirement, which requires the owner or operator of a facility to complete certain "toxic chemical release forms" for each listed toxic chemical that was manufactured, processed, or otherwise used in quantities exceeding the threshold quantity during the preceding year at the facility. Docket No. EPCRA-9-2000-0021, 2002 EPA ALJ LEXIS 9, at *65-66 (ALJ, Feb. 20, 2002), *rev'd on other grounds,* 11 E.A.D. 59 (EAB 2003). Under Section 313(a), such forms must be submitted to EPA and State officials annually on July 1. In *Coast Wood*, I observed that Section 325(c)(1) and (3) of EPCRA authorizes the assessment of a penalty for each Section 313 violation for each day the violation continues.[9] *Id.* at *65-66.

Moreover, I recognize that a Federal district court has similarly construed EPCRA's statutory language as authorizing multi-day penalties for failure to comply with an annual reporting requirement. *Woodcrest Manufacturing, Inc. v. EPA*, 114 F. Supp. 2d 775, 779 (N.D. Ind. 1999), *denying petition for review from*, 7 E.A.D. 757 (EAB 1998). Within the context of explaining to a Section 313(a) reporting violator that the EPA-assessed penalty could have been more severe, the district court construed EPCRA's Section 325(c) as providing for penalties for each day it was in violation:

> Congress set out severe penalties in EPCRA for a company required to report under the reporting provisions that fails to do so, as much as $25,000 for each violation. 42 U.S.C. § 11045(c)(1). The statute goes on to say that each day the company fails to file the required reports is an additional violation. 42 U.S.C. § 11045(c)(3). Obviously, an unsuspecting company can accumulate enormous fines in a relatively short period of time. Woodcrest does not seem to understand that in 1992, when it discovered that it was required to report under EPCRA, it was already subject to civil penalties for each day that it had failed to file the required forms.

Id.

Furthermore, it would be irrational for Congress to treat the Section 313 annual reporting requirement as a continuing violation but not the Section 312 annual reporting requirement. Given the strong similarities between the annual reporting requirement

[9] Nevertheless, in *Coast Wood* I assessed a penalty of $4,675 for each enumerated count alleged in the Complaint – far less than the maximum penalty for a one-day violation. On appeal, the EAB did not address the issue of the maximum statutory penalty allowable.

under Section 312(a) and the annual reporting requirement under Section 313(a), reason stands that such provisions should be interpreted in a similar fashion for sake of consistency.

In addition to the clear statutory language, the legislative history further shows that a violation of the Section 312(a) reporting requirement is continuing in nature, due to Section 325(c).[10] The Conference Report for EPCRA states: "Section 325(c) provides for administrative and judicial civil penalties of up to $25,000 for each day a violation of the reporting requirements of sections 312 or 313 continues and up to $10,000 for each day a violation of sections 311, 322(a) and (f), and 323(b) continues." H.R. Conf. Rep. 99-962, at 309 (Oct. 3, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3402.

The U.S. Supreme Court explained that "EPCRA establishes a framework of state, regional, and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening release." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 86 (1998). In other words, EPCRA arms governmental authorities and the public with the information they need to plan for emergencies. For instance, Section 312(a) mandates the annual reporting of information such as the amounts and locations of hazardous chemicals at a facility, which is submitted to authorities that plan and/or respond to emergencies, including the State emergency planning commission, the local emergency planning committee, and the local fire department. Without that information, emergency response is impeded. Moreover, the risk to the public does not subside after the March 1 reporting deadline is missed. The risk continues, to the detriment of public safety. Accordingly, given Congress's express intent, and taking into consideration the purposes of the annual reporting requirement, I construe EPCRA as follows: Failure to comply with the reporting requirement of Section 312(a) is deemed a continuing violation for each day beyond the reporting deadline, and thus such failure allows for the assessment of multi-day penalties.

Finally, although I am not bound to follow EPA policy documents,[11] it is noteworthy that official EPA policy agrees that multi-day penalties are authorized for violating Section 312 of EPCRA. *See* Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and

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[10] Even assuming *arguendo* that the EPCRA Section 312(a) violation alleged here is not continuing in nature for statute of limitations purposes, such does not preclude the assessment of multi-day penalties pursuant to Section 325(c) of EPCRA. As the issue is not presented in this case, I need not reach the question of whether the alleged Section 312(a) violation is complete for purposes of the statute of limitations. *See Umetco,* 1996 EPA ALJ LEXIS, at *18-19.

[11] *In re Steeltech Ltd.,* 8 E.A.D. 577, 585 (EAB 1999), *aff'd,* 105 F. Supp. 2d 760 (W.D. Mich. 2000), *aff'd,* 273 F.3d 652 (6th Cir. 2001).

Liability Act (Sept. 30, 1999) ("Enforcement Response Policy").[12] Specifically, EPA's Enforcement Response Policy for Section 312 of EPCRA states that the EPA is authorized to assess penalties for violations on a per day basis. *Id.* at 23. The rationale that the EPA provides in the Enforcement Response Policy is that:

> Per day penalties serve to promote an expeditious return to compliance by creating disincentives for continued noncompliance and to level the playing field for those who complied in a timely manner. Facilities that delay in notifying the appropriate entities and submitting required information deny citizens their "right to know" of the existence of chemical hazards in their community.

Id. I find this reasoning to be persuasive.

[12] http://www.epa.gov/compliance/resources/policies/civil/epcra/epcra304.pdf.

Accordingly, based on my review of the statutory language, which is bolstered by the Congressional history and well-established EPA policy, I hold that the EPA has the statutory authority to assess multi-day penalties for violating the annual reporting requirement of EPCRA's Section 312(a).[13] One caveat I would make is that violation of

[13] In a matter with statutory language materially identical to that in the case at bar, the EAB acknowledged EPA's authority to assess multi-day penalties. *Lazarus,* 7 E.A.D. at 372 n.94, 376 n.98. Specifically, the *Lazarus* case was filed pursuant to Section 16(a)(1) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a)(1), which provides:

> Any person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title.

In comparison, Section 325(c)(3) of EPCRA reads, "Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation." In *Lazarus* the EAB stated, "The $6,000 penalty assessed for this count reflects a single day penalty. The Region did not seek to assess multiple day penalties despite the authority to do so pursuant to TSCA section 16(a)(1)." *Lazarus,* 7 E.A.D. at 372 n.94; *see also id.* at 376 n.98. Although the EAB's analysis on this point is dicta, nonetheless I find it to be very persuasive.

the annual reporting requirement of Section 312(a) likely continues at most for one year after the reporting deadline. *Accord Umetco,* 1996 EPA ALJ LEXIS 203, at *18-19. Being that the Section 312(a) requirement is an annual obligation, arguably the information to be reported becomes stale after one year. For instance, calendar year 2003 information was due by March 1, 2004, but that information would arguably lose much, if not all, of its value by 2005, because the owner or operator of a covered facility would have the more up-to-date information from calendar year 2004. Nevertheless, resolution of this issue is likely not to be decided in the case at bar, as the alleged Counts 2 and 3 violations reportedly lasted no more than six months according to the Complaint. Therefore, I leave that particular issue for future debate.

As for the rulings of other ALJs, in *Mafix* and *Rhone-Poulenc,* that there were no continuing violations, they were made within the context of determining whether the statute of limitations barred the enforcement actions. Thus, they are distinguishable from the case at bar because "whether an obligation is complete for purposes of the statute of limitations is not determinative of the question of whether daily penalties may be assessed for the violation of that obligation." *Rhone-Poulenc,* 1998 EPA ALJ LEXIS 95, at *15-16 (citing *Umetco, supra,* and *Bethlehem Steel, supra*). As for the *Energy Gases* Initial Decision cited by the Respondent, it contains no analysis of whether the violation(s) were continuing in nature.

Under my reading of EPCRA, the statute does not preclude the proposal and assessment of multi-day penalties for the alleged Counts 2 and 3 violations of Section 312(a). Nevertheless, although authority generally exists under the statute to assess a multi-day penalty for violating Section 312(a), it remains to be seen whether Respondent is to be adjudged liable, and if so, the appropriate penalty amount for the given violation, taking into account the particular facts and circumstances of this case. In other words, this order does not address the appropriateness of the specific amount in Complainant's proposed penalty, but only addresses whether the EPA has the statutory authority to assess a multi-day penalty.

The EAB in *Lazarus* did not discuss whether the EPA may assess multi-day penalties for violating the annual reporting obligation in that matter. *See id.* at 377-79. With regards to the latter annual reporting count, the ALJ had dismissed that count in the Initial Decision without assessing a penalty.

Even if Respondent had been correct, and the Complainant had proposed a penalty beyond its statutory authority, the undersigned is not bound by Complainant's proposal, but rather must assess the penalty in accordance with the law and the facts. Dismissal is among the most draconian of sanctions, and would not be in order. Therefore, the Respondent has not shown that it is entitled to judgment as a matter of law, and it has not proven that the Complainant failed to establish a prima facie case or that there are other grounds which would show no right to relief on the part of the Complainant. *See* 40 C.F.R. § 22.20 (standard for ruling on motions for accelerated decision and for dismissal). Respondent's Motion is **DENIED**.[14]

So ordered.[15]

Dated: June 9, 2006
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

[14] I deem oral argument unnecessary to resolve the motion, and therefore Respondent's request for oral argument is denied.

[15] I remind counsel for both parties that mutual cooperation and respect towards each other is to be encouraged, and is not inconsistent with zealous representation.