UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	Docket Nos. IF&R-III-425-C;
	)	TSCA-III-651; and
Hanlin Chemicals - West Virginia, Inc.	)	EPCRA-III-091
	)	
	)	
Respondent	)	

INITIAL DECISIONS

In a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, Respondent has been found liable for two counts of the production and distribution of an unregistered pesticide in violation of Section 12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A). The proposed penalty of $10,000 is reduced to $8000 in view of circumstances surrounding the violations.

In a proceeding under the Toxic Substances Control Act, Respondent has been found liable for four violations of the Inventory Reporting Regulations, Section 15, 15 U.S.C. §2614, 40 C.F.R. §710, Subpart B. The proposed penalty of $74,000 is reduced to $40,000 to reflect the relative gravity of the four violations.

In a proceeding under the Emergency Planning and Community Right-to-Know Act, Respondent has been found liable for four counts of failing to file toxic chemical release reports in violation of Section 313, 42 U.S.C. §11023, and assessed a penalty of $32,000.

Appearances:

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By: Andrew S. Pearlstein
Administrative Law Judge

Dated: November 9, 1995
Washington, D.C.

Procedural History

These proceedings arise from three separate Complaints filed by Region III of the United States Environmental Protection Agency, Philadelphia (the "Complainant" or "EPA"), against Hanlin Chemicals - West Virginia, Inc. (the "Respondent" or "Hanlin"), for alleged violations at Hanlin's chemical manufacturing facility in Moundsville, West Virginia. The particulars of the charges will be described below in the respective sections of this Decision addressing each proceeding.

Complainant served its Complaint in Docket No. IF&R-III-425-C on January 4, 1991. Respondent filed its Answer on February 20, 1991. This proceeding was assigned to Administrative Law Judge Daniel M. Head. In Docket No. TSCA-III-651, assigned to Administrative Law Judge Frank W. Vanderheyden, the Complaint was served on April 2, 1992 and Answer on May 4, 1992. In Docket No. EPCRA-III-091, assigned to Administrative Law Judge Thomas B. Yost, the Complaint was served on April 15, 1992, and Answer on May 7, 1992. Respondent served a Motion for Accelerated Decision in all three cases on August 19, 1992. On or about September 21, 1992, Complainant filed Responses and cross-Motions for Partial Accelerated Decision in all three proceedings.

On October 27, 1992, Judge Head was redesignated the Presiding Officer in the EPCRA and TSCA proceedings (Docket Nos. EPCRA-III-091 and TSCA-III-651) pursuant to the EPA Rules of Practice, 40 C.F.R. §22.21(a). On January 14, 1993 Judge Head denied the parties' motions and cross-motions for accelerated decision in all three proceedings. In a Status Report submitted on February 11, 1993, Respondent requested that the three proceedings be consolidated and that the issue of the penalty amount be decided on the basis of the pleadings and supporting materials submitted by the parties, without an evidentiary hearing. Complainant concurred with those requests in a Status Report dated February 16, 1993.

Judge Head then issued an Order dated December 14, 1994 consolidating these three proceedings pursuant to 40 C.F.R. §22.12(a), and granting the request that the proceedings be decided on the basis of the pleadings, without a hearing. In that Order he also directed the parties to designate specifically those portions of the pleadings, prehearing exchanges, and motions that the parties intended to constitute the decisional record. Such designations of the record were submitted by both parties on or about January 31, 1995.

In an Order dated September 5, 1995, Chief Administrative Law Judge Jon G. Lotis redesignated the undersigned, Andrew S. Pearlstein, as the presiding Administrative Law Judge in these three consolidated proceedings.

Background

This proceeding arose from an administrative Complaint filed on January 4, 1991 by the United States Environmental Protection Agency, Region III, pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §136*l*(a). The Complaint originally named Hanlin's predecessor, LCP Chemicals - West Virginia as the Respondent. The Complaint charged Respondent with two counts of the sale or distribution of an unregistered pesticide, whose registration had been cancelled, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A). A third count alleging sale of an adulterated pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. §136j(a)(1)(E), was later withdrawn by Complainant.

The EPA alleges Respondent sold the pesticide product chlorine in 1988 and 1989 although the registration for chlorine was cancelled in July 1987 and remained cancelled during 1988 and 1989. Complainant seeks a proposed penalty of $5000 for each of the two counts, for a total of $10,000.

In its Answer and subsequent submissions, Respondent denied liability for these violations. Respondent asserts that the registration for its chlorine product was mistakenly cancelled, and that the EPA's contractor had led Respondent to believe that the cancellation was rescinded during 1988 and 1989. Respondent also claims that it has limited ability to pay any assessed penalty since Hanlin and its parent corporation, the Hanlin group, filed for protection of the Bankruptcy Court under Chapter 11 of the U.S. Bankruptcy Code, as of July 10, 1991.

The designated record for decision in this FIFRA enforcement proceeding consists of the Complaint and Answer; the parties' Prehearing Exchanges; Respondent's Motion for Accelerated Decision dated August 19, 1992 with supporting affidavit of Don P. DeNoon; and Complainant's Response to Respondent's Motion for Accelerated Decision, dated September 21, 1992.

Findings of Fact

Respondent, a Delaware corporation, formerly known as LCP Chemicals - West Virginia, owned and operated a pesticide and chemical manufacturing facility in Moundsville, West Virginia (the "Moundsville Plant") during the period relevant to this proceeding, 1987 to 1991. The Respondent, Hanlin, is a subsidiary of the Hanlin Group. The Hanlin Group also owned and operated a facility in Linden, New Jersey in 1987, known as LCP Chemicals - New Jersey.

In January 1987, the EPA initiated a Generic Data Exemption Call-In program for the re-registration of pesticides by all

registrants. The data call-in notice required registrants to determine whether their registered products qualified for the generic data exemption, and allowed registrants the option to voluntarily cancel product registrations. The EPA sent its data call-in notice for Respondent to its LCP - New Jersey facility. On March 18, 1987, the manager of that facility returned the form requesting voluntary cancellation of its product "chlorine" (Registration No. 021139-1). Although chlorine was no longer being produced at the Linden, New Jersey facility, it was still being produced at the Moundsville Plant and at several other Hanlin Group facilities.

When Don P. DeNoon, Facility Manager of the Respondent's Moundsville Plant, received a copy of LCP - New Jersey's response to the data call-in, he immediately realized that it would be interpreted by EPA as cancelling the chlorine registration for all Hanlin's divisions and subsidiaries. All those facilities shared the same registration number for the chlorine product. Mr. DeNoon then called the EPA's contractor running the data call-in, Keydata Systems, Inc., on March 30, 1987, to inform them of the erroneous voluntary cancellation. Mr. DeNoon understood from that conversation that the problem would be rectified. Mr. DeNoon wrote a confirming letter that same day to Keydata Systems in which he cited the Chlorine registration number and stated it was still being produced at Hanlin's other facilities.

On October 25, 1987 the Hanlin Group received the EPA's notice formally ordering cancellation of the Respondent's registration for chlorine in response to the voluntary cancellation request. The notice was dated July 31, 1987 and stated it cancelled the registration effective July 1, 1987. On November 2, 1987 Mr. DeNoon wrote to the EPA enclosing a copy of his March 30, 1987 letter to Keydata Systems. Mr. DeNoon stated that chlorine was still being produced at other Hanlin locations and that the purpose of his letter was to corroborate that EPA's order does not cancel the product at those other locations. EPA did not respond to that letter, and Respondent made no further effort to contact EPA about the matter until October 27, 1989.

Respondent continued to produce and distribute its chlorine product at its Moundsville Plant in 1988 and 1989. Respondent's annual production records for 1988 indicated it produced and sold chlorine under Registration No. 21139-1 that year. In 1989, the records showed chlorine was produced and distributed under Registration No. 21139-L, indicating registration pending.

In October 1989 Mr. DeNoon was reminded that EPA had never responded to the 1987 correspondence, and that the cancellation of the chlorine product registration remained in effect since that time. On October 27, 1989 he wrote to the EPA in an effort to have the registration reinstated without the necessity of reapplying for a new registration. On November 2, 1989 the EPA responded that its

cancellation for chlorine had not been in error, and that reapplication for a new registration would be necessary. Respondent did then reapply and EPA re-issued Hanlin's registration for its Chlorine product on February 26, 1990.

On May 7, 1990, Robert E. Adams, Jr., an inspector employed by the West Virginia Department of Agriculture, who was duly authorized to conduct FIFRA inspections, conducted an inspection of Respondent's Moundsville Plant. During that inspection, Mr. Adams obtained the annual production reports indicating Respondent had produced and distributed Chlorine in 1988 and 1989.

Respondent's Liability

As part of its comprehensive regulation of the manufacture and distribution of pesticides, FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A) prohibits the sale or distribution of any pesticide that is not registered pursuant to §136a of the act or whose registration has been cancelled or suspended. Respondent does not dispute that it was a producer of the pesticide chlorine who was subject to the registration and reporting requirements of FIFRA.

In its Motion for Accelerated Decision, Respondent argues that it had a reasonable basis to believe that its registration for chlorine remained in effect until October 1989 when it learned definitively from EPA that the registration had remained cancelled since 1987. Hanlin urges that this defense should bar any penalty for the alleged violations.

Perhaps aware of the extremely heavy burden needed to establish a claim of equitable estoppel against a government agency, Respondent does not couch its argument in those terms. In order to show equitable estoppel, Respondent would have to at least establish that the EPA engaged in "affirmative misconduct" that caused it to commit a violation. United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 452 (E.D. Ark., 1991). The facts here, however, fall far short of establishing equitable estoppel, or even a reasonable basis for Respondent to believe its registration for Chlorine remained in effect.

Respondent did make efforts in 1987 to have the registration for its chlorine product reinstated after the voluntary request for cancellation was made by the manager of the LCP - New Jersey facility. However, those efforts were ineffective and Respondent should reasonably have known they were ineffective. Mr. DeNoon received an official notice of EPA's cancellation of the registration in October 1987. Although he promptly wrote EPA to again try to reverse the cancellation, he did not receive any further response, oral or written, from the Agency. Most significantly, Respondent then failed to follow up or contact EPA about the problem for nearly two more years. Thus, the last communication Respondent received from EPA was the July 1987 notice

cancelling the registration for Chlorine. The pesticide registration program is carried out by means of written applications and notices. The only reasonable belief in the absence of a written notice from EPA confirming that the registration remained in effect, was that, in accord with the last notice, it was cancelled.

In these circumstances, the primary responsibility for these violations rests with Respondent. Ideally, Keydata should not have represented on March 30, 1987 that the registration would remain in effect, and, ideally, EPA should have responded to Mr. DeNoon's November 2, 1987 letter. However, such actions or inactions fall far short of affirmative misconduct that could support a claim of equitable estoppel. On the other hand, Respondent did voluntarily request the cancellation and was fully aware by October 25, 1987 that the registration had been cancelled. Yet Respondent continued to produce and distribute chlorine for two years without receiving any notice from EPA reinstating the product's registration. Therefore, Respondent is liable for two counts of production of an unregistered pesticide in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A).

Amount of Penalty

Assessment of civil penalties for violations of FIFRA is governed by Section 14(a), 7 U.S.C. §136*l*(a). Subdivision (1) of that section authorizes the Administrator to assess a civil penalty of not more than $5000 for each violation of FIFRA by pesticide registrants and distributors. Subdivision (4) states:

> "In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. §136*l*(a)(4).

The EPA Rules of Practice also require the Administrative Law Judge to consider any civil penalty guidelines issued under the relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the complaint. 40 C.F.R. §22.27(b). The Presiding Officer "may either approve or reject a penalty suggested by the guidelines," and "has *the discretion either to* adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." (emphasis in original). In re DIC Americas, Inc., TSCA Appeal No. 94-2, at 6 (EAB, September 27, 1992). In this FIFRA enforcement proceeding, both parties have framed their arguments in terms of the ERP, and it will be considered in this Decision as the basis for the penalty assessment.

The EPA's Office of Compliance Monitoring and Office of Pesticides and Toxic Substances has issued civil penalty guidelines

applicable to FIFRA, entitled Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), dated July 2, 1990 (the FIFRA "ERP"). EPA develops such penalty policies to help ensure that regional enforcement personnel calculate penalties appropriate to the violations, and that penalties are assessed fairly and consistently throughout the nation. In its Prehearing Exchange the Complainant has presented the ERP and its calculations worksheets using the ERP, resulting in a penalty of $10,000 for the two violations.

Respondent has presented its own recommendation of an appropriate penalty for the two violations (as an alternate position if liability is found), also following the ERP guidelines. Under its analysis, Respondent proposes reducing the penalty by 60% due to its voluntary disclosure of the cancellation and its good faith in acting to rectify the problem. Respondent further claims that it has limited ability to pay any penalty due to its bankrupt status, but suggests it could obtain approval of the Bankruptcy Court to lift the stay to pay a penalty of 10% of the amount sought, or $1000.

- FIFRA Enforcement Response Policy

Under the ERP, computation of the penalty amount is determined in a five-stage process taking into account the statutory criteria listed in FIFRA §14(a)(4). These steps include the following: (1) determination of the gravity or "level" of the violation; (2) determination of the size of the business category of the violator; (3) use of a civil penalty matrix to determine the dollar amount associated with the level of the violation and the size of the business of the violator; (4) gravity adjustments of the base penalty in consideration of the pesticide toxicity, actual or potential harm to human health or the environment, the compliance history of the violator, and culpability of the violator; and (5) consideration of the effect that payment of the penalty will have on the violator's ability to continue in business. (ERP at 18).

The ERP includes tables and appendices that list the appropriate values for insertion into the civil penalty calculation worksheet for these factors, other than the ability to continue in business. The ERP further contains special provisions allowing a 40% reduction in the penalty for the voluntary disclosure of a violation, and a 20% reduction for a respondent's good faith efforts to comply with FIFRA. (ERP at 26 and 27).

- Gravity of the Violation

The Complainant used Appendix A (p. A-1) in the ERP to determine that a violation of FIFRA §12(a)(1)(a) for the sale of an unregistered or cancelled pesticide is a level "2" violation. Complainant next determined that the size of Respondent's business merited classification in category "I" based on gross corporate

revenues of over $1,000,000 for the preceding calendar year. (Table 2, ERP at 20). Respondent has not disputed these determinations. They result in a base penalty of $5000 for each of the two violations under Table 1, Civil Penalty Matrix for FIFRA Section 14(a)(1). (ERP at 19).

Complainant then determined the values for the gravity adjustment criteria listed in Appendix B of ERP. Those are as follows for each of the two violations in this proceeding: pesticide toxicity - 2; human harm - 3; environmental harm - 3; compliance history - 0; and culpability - 2. The total gravity adjustment value is thus 10. Under Table 3 (ERP at C-1), a total gravity adjustment value from 8 to 12 requires assessment of the base penalty matrix value with no increase or reduction. Complainant inserted these values in its Civil Penalty Calculation Worksheet, using the form provided in ERP, Appendix D. This resulted in the proposed penalty of $10,000 for these two violations.

Respondent did not specifically dispute any of the gravity adjustment determinations made by Complainant, but did state in its motion that it was "informed" that the total adjustment value calculated by EPA was 6. This is obviously in error, as the worksheet showing the total of 10 was submitted with Complainant's Prehearing Exchange before Respondent filed its motion for accelerated decision. A value of 6 would require a 20% reduction in the amount of the penalty under Table 3. In any event, Respondent couches its argument for reduction of the penalty in terms of the narrative sections of the ERP providing for substantial reductions for a respondent's voluntary disclosure and good faith, rather than in the terms of the penalty calculation worksheet. Since the worksheet result was not disputed, its figure of $10,000 will be used as the starting point for considering Respondent's arguments for reduction based on voluntary disclosure and good faith.

- Voluntary Disclosure and Good Faith

The ERP contains guidelines under the heading "Voluntary Disclosure" that state:

> "In order to encourage voluntary disclosure of FIFRA violations, the Agency will offer a 40% reduction of the civil penalty if the disclosure was made: (1) by the violator promptly to EPA, or States with cooperative agreements [within 30 to 60 days of discovery by the violator]; (2) before the violation was discovered by EPA or a State; (3) before an inspection was scheduled by EPA or a State; and, (4) the violator immediately takes all the steps necessary to come into compliance, and steps requested by the Agency to mitigate the violation." (ERP at 26).

Respondent contends it is entitled to such a 40% reduction in the civil penalty under these guidelines.

Respondent almost, but not quite, meets these guidelines for a civil penalty reduction under the facts of this case. Respondent's letters of March 30, 1987 and November 2, 1987 to, respectively, Keydata and EPA, could be construed as voluntary disclosures of violations, although they were not truly intended as such.

Particularly in the November 2, 1987 letter, sent immediately after Respondent received official notice of the cancellation, Mr. DeNoon did explicitly state that Hanlin was continuing to produce chlorine at several of its facilities under the same registration number that had been cancelled. This letter did not contain an express admission of a violation, since Mr. DeNoon was still trying to have the unintended voluntary cancellation rescinded. However, it clearly provides all the information the EPA would need to determine that Respondent was committing the violation of producing an unregistered pesticide. Since Respondent made this communication promptly, before the violation was discovered by EPA or West Virginia, and before a scheduled inspection, it satisfies the first three requirements for a voluntary disclosure penalty reduction under the ERP guidelines.

Respondent did not, however, satisfy the fourth requirement for a voluntary disclosure penalty reduction -- that it immediately take all steps necessary to come into compliance. As discussed above in the section on liability, Respondent did not have a reasonable basis to believe that the registration had been reinstated in the absence of written notice to that effect from EPA. In order to take immediate steps to come into compliance, Respondent would have had to stop its production of chlorine in November 1987 until its registration was reinstated. Respondent did not stop its chlorine production, and did not reapply to register its chlorine product until two years later. Respondent therefore does not qualify for the 40% reduction in the civil penalty for voluntary disclosure under the ERP guidelines.

Although Respondent did not meet the requirements for the full 40% penalty reduction, some reduction should by afforded in these circumstances. Respondent did voluntarily disclose the violation and did reapply for its chlorine registration to come into compliance before the May 7, 1990 inspection. Respondent basically acted in good faith by immediately informing EPA and its data call-in contractor of the company's error in requesting a voluntary cancellation for its chlorine product. Although Respondent unreasonably relied on verbal assurances that the registration would be reinstated, there is no basis to question its overall good faith in such reliance and in its ultimate resolution of this matter.

Another section of the ERP, entitled "Good Faith Adjustments," provides for up to a 20% reduction for a "respondent's attitude or good faith efforts to comply with FIFRA . . ." (ERP at 27). Due to Respondent's voluntary disclosure and overall good faith in seeking to rectify its chlorine registration problem, the penalty should be reduced by 20% to $8000. If not explicitly authorized by the letter of the ERP's guidelines for voluntary disclosure and good faith adjustments, such a reduction is consistent with their spirit.

- Ability to Continue in Business and Ability to Pay

Respondent also contends that, as a debtor under the protection of the Bankruptcy Court, it has a highly restricted cash flow that is under Court scrutiny and therefore has a limited ability to pay any penalty. The latest information on Hanlin's financial condition is found in statements of counsel accompanying Respondent's designation of the record on January 30, 1995. According to those statements, Hanlin has suffered serious business reversals and has not yet formulated a reorganization plan that would allow it to continue to conduct business. With the bankruptcy court's approval, Hanlin has sold its two remaining production facilities and now only operates its terminal and warehouse. All monies generated by Respondent's sales and operations are allegedly being applied to certain priority claims, loan repayments, and environmental obligations.

In its penalty calculations, Complainant did not make any reduction based on Respondent's ability to continue in business or ability to pay a penalty. Complainant asserts that the penalty should be determined in this proceeding without reference to Respondent's bankruptcy, as payment related issues will be dealt with in the Bankruptcy Court.

Both parties concur in the well established principle that this proceeding is in the exercise of the EPA's power to enforce environmental laws and is therefore not stayed by Respondent's filing of a petition under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §362(b)(4). The ultimate enforcement of the penalty assessment resulting from this proceeding is, however, a money judgment that is subject to the automatic stay provision. 11 U.S.C. §362(b)(5); Kovacs v. Ohio, 717 F.2d 984, 988 (6th Cir. 1983), aff'd, 469 U.S. 274 (1985). Both sides recognize that Complainant, upon reducing this administrative enforcement proceeding to a monetary judgement, must wait along with other unsecured creditors in the Bankruptcy Court before it can collect any money. It will then be up to the Bankruptcy Court to decide how to treat the claim under the Chapter 11 plan for reorganization or other resolution of Respondent's petition.

In determining the amount of the civil penalty, FIFRA §14(a)(4) requires the Administrator to consider "the effect on the

person's ability to continue in business." The ERP essentially equates this statutory requirement to the ability of the violator to pay a penalty. Under the heading "Ability to Continue in Business/Ability to Pay", the ERP states that: "EPA will generally not collect a total civil penalty which exceeds a violator's ability to pay." (ERP at 23). When a respondent's ability to pay a penalty under FIFRA is at issue, the ERP sets forth three methods for determining a respondent's ability to pay: (1) a detailed tax, accounting, and financial analysis; (2) a guideline of four percent of average gross annual income; or, (3) ABEL, a computer model based on estimating the strength of internally generated cash flows. (ERP at 23).

A respondent's ability to pay a penalty may be presumed until it is put at issue by the respondent in the proceeding. In re New Waterbury, Ltd., TSCA Appeal No. 93-2, at 15 (EAB, Oct. 20, 1994). The Complainant bears the burden of proving the appropriateness of the penalty, and can do so by initially presenting "some evidence of Respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." New Waterbury at 15 (italics in original). It is then incumbent on the respondent to come forward with specific evidence on its ability to pay, such as financial reports or tax returns. Such documents were in fact specifically required by Judge Head's Order Setting Prehearing Procedures in this case, dated March 28, 1991, pursuant to 40 C.F.R. §22.19(b).

The Complainant here has submitted some general financial information from which it may be inferred that Respondent is a large corporation that, at least at the time of the alleged violations, generated substantial cash flow indicative of its ability to pay the proposed penalty. Although specific sales figures are not given, a Dun & Bradstreet report (attached to a Status Report dated February 16, 1993 and designated part of the record) indicates that the Moundsville Plant employs over 200 workers. Other correspondence states that Respondent sold over 171,000 gallons of chlorine in 1988. Respondent's corporate parent owns and operates several other facilities as well. Moreover, Respondent did not dispute Complainant's classification of the size of Respondent's business in Category I on the penalty calculation worksheet, indicating gross annual revenues of over $1,000,000. Thus, apart from Respondent's bankrupt status, the record indicates it could pay the gravity-based penalty amount of $8000 recommended in this decision.

Respondent did not produce any evidentiary material concerning its ability to pay a penalty, such as financial reports or tax returns. It only provided representations by counsel that it filed a petition under Chapter 11 of the Bankruptcy Code on July 10, 1991. Hanlin has remained under the Bankruptcy Court's protection since that time, at least as of the date of counsel's designation of the record, January 30, 1995.

In the absence of any actual evidence on Respondent's ability to pay, the mere fact that Respondent is under the protection of the Bankruptcy Court is insufficient reason to reduce the amount of the gravity-based civil penalty. Based on the limited information available on the size of Respondent's business, the amount of the proposed penalty in this proceeding is already relatively quite small, and apparently well under the ERP guideline based on 4% of annual gross income. Whether the EPA will ever collect any civil penalty from Respondent is problematical, and in the hands of the Bankruptcy Court.

In these circumstances the issue of Respondent's ability to pay merges into the question before the Bankruptcy Court of how the claim is ultimately to be treated under Respondent's reorganization plan. See Order on Default, In the Matter of Watervliet Paper Company, Inc., Docket No. TSCA-V-C-098-88 (J. Harwood, August 21, 1989). In this proceeding, there is no reason to reduce the civil penalty due to Respondent's ability or inability to pay. Therefore, the penalty assessed for Respondent's two violations of FIFRA §12(a)(1)(A) is $4000 each, for a total of $8000.

It is ORDERED that:

A civil penalty in the amount of $8000 be assessed against the Respondent, Hanlin Chemicals - West Virginia, Inc..

See the Consolidated Order at the end of these Initial Decisions for particulars on payment of the penalty.

Docket No. TSCA-III-651

Background

This proceeding arose from an administrative Complaint filed on April 2, 1992 by the United States Environmental Protection Agency, Region III (the "Complainant") pursuant to Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2615, alleging violations of TSCA §15, 15 U.S.C. §2614. The Complaint charged Respondent with four counts of violating the Inventory Reporting Regulations, 40 C.F.R. Part 710, promulgated under the authority of TSCA §8(a). Specifically, Respondent is charged with two counts of failing to accurately report the volume of two chemical substances it manufactured in fiscal year 1989, and two counts of failing to report at all the volume it manufactured of two other chemical substances, as required by 40 C.F.R. §§710.28 and 710.32.

These constitute four alleged violations of TSCA §15(3)(B), 15 U.S.C. §2614(3)(B). Complainant seeks assessment of a total civil penalty of $74,000, apportioned at $20,000 each for counts 1 and 2

charging inaccurate reporting, and $17,000 each for the counts 3 and 4 charging failure to report.

In its Answer and subsequent submissions, Respondent admitted it committed these violations, but raised several factors in mitigation of the penalty. Respondent alleged the reporting errors were inadvertent, one-time errors, indicative of a lack of culpability. Respondent also claims that it has limited ability to pay any penalty since Hanlin and its parent corporation, the Hanlin group, filed for protection of the Bankruptcy Court under Chapter 11 of the U.S. Bankruptcy Code, as of July 10, 1991.

The designated record for decision in this TSCA enforcement proceeding consists of the Complaint and Answer; Hanlin's letter and Motion for Accelerated Decision dated August 19, 1992 (with attached affidavit of Don P. DeNoon); EPA's Cross-Motion for Accelerated Decision dated September 21, 1992; and the attachments submitted with EPA's Status Report dated February 16, 1993.

The Violations

Section 8(b)(1) of TSCA, 15 U.S.C. §2607(b)(1) requires EPA to maintain a current list of each chemical substance manufactured or processed in the United States. Under the authority of TSCA §8(a), 15 U.S.C. §2607(a), EPA has promulgated 40 C.F.R. §710, Subpart B, the Partial Updating of the Inventory Data Base. This regulation requires persons manufacturing, importing, or processing listed chemical substances in amounts that exceed specified regulatory thresholds, to submit "Form U" reports containing current information for the specified reporting periods.

In the period relevant to this proceeding, 1988 to 1991, Respondent owned and operated a chemical manufacturing facility in Moundsville, West Virginia (the "Moundsville Plant"). Pursuant to 40 C.F.R. §710.28(b), in 1990 Respondent was required to report the information specified in §710.32 for all listed chemical substances it manufactured whose volume exceeded 10,000 pounds, for fiscal year 1989. On June 18, 1991 a duly authorized representative of the EPA conducted a TSCA compliance inspection of Respondent's chemical manufacturing facility in Moundsville, West Virginia. The inspector compared Respondent's Form Us with its manufacturing records.

At its Moundsville Plant, Hanlin manufactured more than the threshold volume of 10,000 pounds of four listed chloromethane chemicals in fiscal year 1989: methyl chloride, methylene chloride, chloroform, and carbon tetrachloride. Respondent's 1990 Form U was dated October 19, 1990. It reported the information for fiscal year 1989, and listed two chemicals -- methyl chloride and methylene chloride. The Form U listed the volume of methyl chloride produced as 2,629,140 pounds. The actual volume of methyl chloride produced was 3,178,000 pounds. The Form U listed the

volume of methylene chloride produced as 25,135,562 pounds, while the actual volume of methylene chloride produced was 29,546,000 pounds. Respondent had inadvertently omitted one month's production of these two chemicals from its annual report figures which were the source for the Form U volume listings.

Respondent's 1990 Form U did not report production of chloroform or carbon tetrachloride at all, although those two chemicals were listed in EPA's Master Inventory File for the 1989-90 reporting period pursuant to 40 C.F.R. §710.25. Hanlin produced 18,500,000 pounds of chloroform and 3,120,000 pounds of carbon tetrachloride at its Moundsville Plant in fiscal year 1989. Respondent had failed to include these two chemicals because they did not appear on a 1990 appendix to EPA's instructions. Hanlin had misunderstood that appendix to be a complete list of chemicals to be reported, rather than additions to the existing list.

Respondent submitted to EPA a revised Form U that corrected the production volumes for methyl chloride and methylene chloride on the same day as the inspection, June 18, 1991. Respondent submitted a fully corrected Form U, that also listed the production volumes of chloroform and carbon tetrachloride, on January 8, 1992.

In its Motion for Accelerated Decision, Respondent stated that "it does not appear that Hanlin has any fact-based defenses to present." Respondent admitted the above facts that constitute the four violations of the TSCA Inventory Update reporting rules, as alleged in the Complaint. Respondent is therefore found liable for four violations of TSCA §15(3)(B), 15 U.S.C. §2614(3)(B). The factors cited by Respondent as mitigating its culpability, as well as its claim of inability to pay a penalty, will be discussed below in the section on Amount of Penalty.

Amount of Penalty

Assessment of penalties for violations of TSCA are governed by TSCA §16, 15 U.S.C. §2615. TSCA §16(a)(1), 15 U.S.C. §2615(a)(1), provides that any person who violates §2614 of TSCA shall be liable for a civil penalty not to exceed $25,000 per violation. Section 2615(a)(2)(B) states:

> "In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any histroy of prior such violations, the degree of culpability, and such other matters as justice may require."

The EPA Rules of Practice also require the Administrative Law Judge to consider any civil penalty guidelines issued under the

relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the complaint. 40 C.F.R. §22.27(b). The Presiding Officer "may either approve or reject a penalty suggested by the guidelines," and "has *the discretion either* to adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." (emphasis in original). In re DIC Americas, Inc., TSCA Appeal No. 94-2, at 6 (EAB, September 27, 1992).

The EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances has issued civil penalty guidelines applicable to violations of TSCA's recordkeeping and reporting rules, entitled Recordkeeping and Reporting Rules - TSCA Sections 8, 12 and 13 - Enforcement Response Policy, dated May 15, 1987 (the TSCA "ERP"). Penalty polcies such as the ERP are intended to ensure that regional enforcement personnel calculate civil penalties that are appropriate for the violations, and that penalties are assessed fairly and consistently throughout the nation. Complainant supports its calculation of its proposed penalty of $74,000 for these four violations with reference to the ERP guidelines.

Respondent asserts the penalty should be reduced because it had a low level of culpability due to the inadvertent nature of these violations and its prompt correction of the reporting errors. Respondent also claims it has limited ability to pay any penalty due to its bankrupt status.

-TSCA Enforcement Response Policy

Under the ERP, the EPA determines the penalty in two stages: (1) determination of a gravity based penalty, and (2) adjustments to the gravity based penalty (ERP at 7). The gravity based penalty is determined by first assigning the particular violation a circumstance level based on the probability that harm will result from the particular violation. Circumstance levels range from Level 1 (high range) to Level 6 (low range). Next, the violation is assigned to one of three extent categories -- major, significant, or minor. The extent axis is intended to reflect the extent of potential harm caused by the violation. The matrix assigns a particular dollar amount for each combination of circumstances and extent, reproduced as follows (ERP at 8):

Circumstances Range	Levels	Extent (A) Major	(B) Significant	(C) Minor
High	1	$25,000	$17,000	$5,000
	2	20,000	13,000	3,000
Medium	3	15,000	10,000	1,500
	4	10,000	6,000	1,000
Low	5	5,000	3,000	500
	6	2,000	1,300	200

Violations are assigned circumstance levels and extent categories based on lists and descriptions of types of violations given on pages 9-11 of the ERP. The matrix then indicates the base penalty amount. The TSCA Recordkeeping ERP does also contain a quite lengthy explanation of the gravity components of the penalty policy (ERP at 16-23).

After the gravity based penalty is determined, it can be adjusted if any of the following adjustment factors listed in the ERP are found applicable: voluntary disclosure; economic benefits; chemical exposure reduction; attitude of respondent; and history of prior violations (ERP at 14-15). The TSCA Recordkeeping ERP does not specifically discuss the statutory penalty factors of ability to pay and ability to continue in business. However, a discussion of those and other penalty considerations applicable to all TSCA violations is found in the Environmental Protection Agency Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 FR 59770, effective March 10, 1980 (the TSCA "Guidelines").

- Gravity of the Violations

Complainant assigned the violations in Counts 1 and 2 -- the inaccurate reporting of production volumes of methyl chloride and methylene chloride -- to circumstance level 2. The table at ERP page 9 lists "failure to maintain records/reports in a manner that meets the standard required in the rule" as a Level 2 violation. In the table on Extent categories, all Circumstance Level 2 violations are assigned to the Major Extent category (ERP at 11). In the explanation section, this is confirmed by the statement that "[a]ll level 2 and level 6 violations are placed in the major extent category." (ERP at 21). Thus, the Complainant proposes a gravity based civil penalty of $20,000 for each of the two violations for the inaccurate reporting of production volumes for two chemicals, with no adjustment for culpability, ability to pay, or any other factors.

Before considering the appropriateness of this penalty, it will be helpful to outline the Complainant's determination of the penalty sought for the violations in Counts 3 and 4. In these two violations, the Respondent completely failed to report its production of two chemicals listed in the Inventory Update -- carbon tetrachloride and chloroform. Under the ERP, the violation of "Nonreporting for Inventory Update" is assigned a circumstance level of 1 (ERP at 9). The ERP then assigns this violation an extent category of "significant" ("Violations of . . . Inventory Update Rule except Level 2 or Level 6 violations." ERP at 11). It can be seen on the matrix that the nonreporting violations in counts 3 and 4 are thus assessed penalties of $17,000 each.

In accord with the above calculations, the Complainant seeks a total civil penalty of $74,000 for Respondent's four violations.

Counts 1 and 2 for inaccurate reporting of two chemicals' production volumes on the Inventory Update are assessed at $20,000 each. Counts 3 and 4 for nonreporting of two other chemicals are assessed at $17,000 each.

There is nothing in the designated record of this proceeding that sets forth a rational basis to explain why the violation of inaccurate reporting on the Inventory Update should be assessed a higher penalty than the violation of nonreporting. To the contrary, the explanation of the penalty policy contained in the ERP itself logically supports the common sense opposite conclusion -- that nonreporting is a more serious violation than inaccurate reporting. As stated in the ERP, the information gathered under TSCA §8, including the Inventory Reporting rules, is used by the EPA to evaluate the potential risks associated with the manufacture and use of particular chemicals, and has a direct impact on the EPA's toxic chemical regulatory program (ERP at 16).

Nonreporting is appropriately assigned the highest circumstance level of Level 1. "Nonreporting/failure to report or to keep records is an extremely serious violation of these rules." (ERP at 17). The Respondent here did not report any production of carbon tetrachloride or chloroform for fiscal year 1989, although it produced 18,500,000 pounds of the former and 3,120,000 pounds of the latter chemical that year.

Also appropriately, the "failure to maintain records or to report in a manner that meets the standard required by the rule" is also deemed a high range violation, but at Level 2 is not as serious as nonreporting. The ERP gives as an example "a small error in reporting production volume, i.e., less than an order of magnitude." (ERP at 18). The violations in counts 1 and 2 of the complaint involved reporting errors of far less than an order of magnitude. The Respondent under-reported its production of methyl chloride by about 18% for fiscal year 1989, and under-reported its production of methylene chloride by about 15%.

The incongruity arises in the next step in the ERP base penalty calculation, when the positions for these violations on the extent axis of the matrix are determined. The two violations for inaccurate reporting, because they are circumstance Level 2, are automatically assigned to extent category "major." (ERP at 11, 21). The two nonreporting violations of the Inventory Update rule are assigned to extent category "significant." This difference in the extent axis positions leads to the assessment of a higher penalty ($20,000) for slightly inaccurate reporting than the penalty ($17,000) for complete nonreporting of millions of pounds of production.

The ERP simply states, with no explanation, that "[a]ll level 2 and level 6 violations are placed in the major extent category." (ERP at 21). If that is truly the intent of the guidelines, then

the matrix values listed on the level 2 and level 6 lines corresponding with the "significant" and "minor" columns would be moot and, for clarity, should be omitted. Yet, as seen above, the matrix does give progressively lower base penalty amounts in those positions.

Specifically with regard to the violations of the Inventory Update Rule, the ERP states as follows:

> "TSCA §8(a) Inventory and Inventory Update Rules are also designated as significant. Although information under these rules is not required as a result of the Agency identifying a specific need for information on specific chemicals, this information provides exposure related information which is important to the overall decision making of the Agency in terms of setting its priorities and deciding what rulemaking to pursue." (ERP at 22).

This indicates that violations of the Inventory Update rules are generally considered as of "significant" extent. However, as we have seen, in the listing of extent category violations, the ERP explicitly lists level 2 and level 6 violations of the Inventory Update Rule as of "major" extent. (ERP at 11).

The automatic assignment of the level 2 violation of inaccurate reporting to the major extent category, resulting in a higher penalty than the level 1 violation for nonreporting under the Inventory Update Rule, is not explained in the ERP. The extent axis of the matrix is intended to reflect the extent of potential harm caused by the violation. "In the case of recordkeeping / reporting rules, harm is defined as the inability of the Agency to carry out its risk assessment responsibilities under TSCA." (ERP at 10). The ERP does not explain how inaccurate reporting of production volumes on the order of 20% or less could possibly adversely affect the EPA's ability to carry out its risk assessment responsiblities more than the total failure to report production of similar volumes of chemicals. The ERP makes no distinction, for example, with respect to the relative toxicity or exposure risks of the specific chemicals involved. Other factors being equal, there is no logical reason why inaccurate reporting should be considered a more serious violation than nonreporting.

In this case, the Complainant was slightly misled by the under-reporting of the production of two chemicals by Respondent. But it was misled far more by the nonreporting of similar production volumes of two other chemicals. Based on the original erroneous Form R, EPA at least knew that Respondent produced on the order of 3 million pounds of methyl chloride and over 25 million pounds of methylene chloride in 1989. But at that time EPA had no knowledge whatsoever of Respondent's production of over 18 million pounds of chloroform and over 3 million pounds of carbon

tetrachloride. In compiling its inventory and undertaking risk assessments for regulatory purposes, the nonreporting of the two latter chemicals' production represented a far more important information gap. The gravity based penalty for this nonreporting should therefore be correspondingly greater than the penalty for the inaccurate reporting, despite the ERP matrix.

Although the ERP matrix was shown to lack a rational basis for the relatively high assessment of a penalty for inaccurate reporting, it was not challenged by the parties to this proceeding. The gravity based penalty of $17,000 on the matrix for the two nonreporting violations is reasonably explained in the ERP and will be used as the starting point for the penalty analysis. Compared to total nonreporting, the violation of slightly inaccurate reporting of production volumes is relatively minor in the extent of harm it could cause to the EPA's ability to carry out its risk assessment responsiblities. Applying the ERP matrix guideline rationally, the inaccurate reporting here constituted level 2 violations of minor extent, which are assessed at $3000. This figure represents an appropriate amount for the violations in counts 1 and 2 of the Complaint, compared to the $17,000 penalty for nonreporting in counts 3 and 4. Accordingly, the total gravity based civil penalty in this proceeding is reduced to $40,000, on the basis of $3000 each for counts 1 and 2, and $17,000 each for counts 3 and 4.

- Culpability

Respondent argues that its oversight and misunderstanding of the Inventory Appendix, and its prompt correction of the violations, are factors that reduce its culpability and should therefore reduce the penalty. Complainant cites the TSCA Penalty Guidelines in support of its contention that no adjustment for culpability is warranted in the circumstances of this case.

The Respondent's conduct in this case falls within the Guidelines' Level II initial culpability determination (45 FR 59773). Respondent should have known of the correct production volumes and the complete list of chemicals subject to reporting. Respondent had full control over its own recordkeeping and reporting practices so as to have prevented the violations. According to the Guidelines, there is no adjustment to the base penalty for culpability in these circumstances.

The Guidelines also allow for up to a 15% adjustment in the amount of the penalty based on the violator's "attitude" where culpability is at Level II. In assessing a violator's attitude, the factors to be considered include a respondent's good faith efforts to comply, promptness of corrective actions, and minimizing harm to the environment.

In this case, Respondent did act in good faith to correct the violations, but not promptly enough to merit a reduction in the penalty. As seen in Mr. DeNoon's affidavit and attachments, Respondent did immediately correct the inaccurate reporting errors for methyl chloride and methylene chloride. However, Respondent waited some 6 months after the inspection to submit a fully corrected Form U that included the two chemicals it had failed to report, chloroform and carbon tetrachloride. The reason for this delay is not explained. Accordingly, Respondent is not entitled to any adjustment in the amount of the penalty based on its attitude.

- Ability to Continue in Business and Ability to Pay

Respondent also contends that, as a debtor under the protection of the Bankruptcy Court, it has a highly restricted cash flow that is under Court scrutiny and therefore has a limited ability to pay any penalty. The latest information on Hanlin's financial condition is found in statements of counsel accompanying Respondent's designation of the record on January 30, 1995. According to those statements, Hanlin has suffered serious business reversals and has not yet formulated a reorganization plan that would allow it to continue to conduct business. With the bankruptcy court's approval, Hanlin has sold its two remaining production facilities and now only operates its terminal and warehouse. All monies generated by Respondent's sales and operations are allegedly being applied to certain priority claims, loan repayments, and environmental obligations.

In its penalty calculations, Complainant did not make any reduction based on Respondent's ability to continue in business or ability to pay a penalty. Complainant asserts that the penalty should be determined in this proceeding without reference to Respondent's bankruptcy, as payment related issues will be dealt with in the Bankruptcy Court.

Both parties concur in the well established principle that this proceeding seeking entry of a judgment is in the exercise of the EPA's power to enforce environmental laws and is therefore not stayed by Respondent's filing of a petition under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §362(b)(4). The ultimate enforcement of the penalty assessment resulting from this proceeding is, however, a money judgment that is subject to the automatic stay provision. 11 U.S.C. §362(b)(5); Kovacs v. Ohio, 717 F.2d 984, 988 (6th Cir. 1983), aff'd, 469 U.S. 274 (1985). Both sides recognize that Complainant, upon reducing this administrative enforcement proceeding to a monetary judgement, must wait along with other unsecured creditors in the Bankruptcy Court before it can collect any money. It will then be up to the Bankruptcy Court to decide how to treat the claim under the Chapter 11 plan for reorganization or other resolution of Respondent's petition.

In determining the amount of the civil penalty, TSCA §16(a)(2)(B) requires the Administrator to consider, "with respect to the violator, ability to pay, [and] effect on ability to continue to do business. . ." The Guidelines combine these into a single adjustment factor for practical purposes. (45 FR 59774). The Guidelines state generally that the inclusion of this factor by Congress evinced an intent that TSCA civil penalties not present such a burden that would seriously impair a firm's ability to continue in business. It is recognized, however, that firms in bankruptcy can still pay penalties upon continuing in business after reorganization (45 FR 59774). The Guidelines follow the ability to pay guideline of four percent of average gross annual sales. (45 FR 59775).

A respondent's ability to pay a penalty may be presumed until it is put at issue by the respondent in the proceeding. In re New Waterbury, Ltd., TSCA Appeal No. 93-2, at 15 (EAB, Oct. 20, 1994). The Complainant bears the burden of proving the appropriateness of the penalty, and can do so by initially presenting "some evidence of Respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." New Waterbury at 15 (italics in original). It is then incumbent on the respondent to come forward with specific evidence on its ability to pay, such as financial reports or tax returns. Such documents were in fact specifically required by Judge Vanderheyden's Notice and Order in this case, dated June 9, 1992, pursuant to 40 C.F.R. §22.19(b).

The Complainant here has submitted some general financial information from which it may be inferred that Respondent is a large corporation that, at least at the time of the alleged violations, generated substantial cash flow indicative of its ability to pay the proposed penalty. Although specific sales figures are not given, a Dun & Bradstreet report (attached to Complainant's Status Report dated February 12, 1993 and designated part of the record) indicates that the Moundsville Plant employs over 200 workers. The Form U submitted by Respondent shows it produced millions of pounds of listed chemical substances at Moundsville. Respondent's corporate parent owns and operates several other facilities as well. Thus, apart from Respondent's bankrupt status, the record indicates Respondent could pay the gravity-based penalty amount of $40,000 for TSCA violations recommended in this decision.

Respondent did not produce any evidentiary material concerning its ability to pay a penalty, such as financial reports or tax returns. It only provided representations by counsel that it filed a petition under Chapter 11 of the Bankruptcy Code on July 10, 1991. Hanlin has remained under the Bankruptcy Court's protection since that time, at least as of the date of counsel's designation of the record, January 30, 1995.

In the absence of any actual evidence on Respondent's ability to pay, the mere fact that Respondent is under the protection of the Bankruptcy Court is insufficient reason to reduce the amount of the gravity-based civil penalty. Based on the limited information available on the size of Respondent's business, the amount of the proposed penalty in this proceeding is apparently commensurate with the guideline based on 4% of gross annual sales. Whether the EPA will ever collect any civil penalty from Respondent is of course problematical in any event, and in the control of the Bankruptcy Court.

In these circumstances the issue of Respondent's ability to pay merges into the question before the Bankruptcy Court of how the claim is ultimately to be treated under Respondent's reorganization plan. See Order on Default, In the Matter of Watervliet Paper Company, Inc., Docket No. TSCA-V-C-098-88 (J. Harwood, August 21, 1989). In this proceeding, there is no reason to reduce the civil penalty due to Respondent's ability or inability to pay. Therefore, the total penalty assessed for Respondent's four violations of TSCA §8(a) is $40,000: $3000 each for counts 1 and 2, and $17,000 each for counts 3 and 4.

It is ORDERED that:

A civil penalty in the amount of $40,000 be assessed against the Respondent, Hanlin Chemicals - West Virginia, Inc..

See the Consolidated Order at the end of these Initial Decisions for particulars on payment of the penalty.

Docket No. EPCRA-III-091

Background

This proceeding arose from an administrative Complaint filed on April 15, 1992 by the United States Environmental Protection Agency, Region III, Philadelphia (the "Complainant"), pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §11045, and the implementing regulations at 40 C.F.R. Part 372. The Complaint charges Hanlin Chemicals - West Virginia, Inc. (the "Respondent" or "Hanlin") with failing to submit the required "Form R" reporting its use of zinc compounds, a toxic chemical, for two reporting years, 1987 and 1988; and failing to sumbit Form R's reporting its processing of another toxic chemical, propylene oxide, also for those two years. These constitute violations of EPCRA §313, 42 U.S.C. §11023, and of 40 C.F.R. §372.22 and §372.30.

Complainant seeks a total civil penalty of $32,000 for these four violations. The penalty is apportioned on the basis of $13,000 each for the two failures to report use of zinc compounds

(counts 1 and 2), and $3000 each for the two failures to report processing of propylene oxide (counts 3 and 4).

In its Answer and subsequent submittals, Respondent admitted that it failed to file the Form Rs as alleged. Respondent maintained, however, that the penalty should be reduced due to its low degree of culpability, and its prompt correction of the oversight that led to the violations. Respondent also claims that it has limited ability to pay any penalty since Hanlin and its parent corporation, the Hanlin Group, filed for protection of the Bankruptcy Court under Chapter 11 of the U.S. Bankruptcy Code, as of July 10, 1991.

The designated record for decision in this EPCRA enforcement action consists of the Complaint and Answer; Respondent's Motion for Accelerated Decision (with attached affidavit of Don P. DeNoon), dated August 19, 1992; Complainant's Response to Respondent's Motion for Accelerated Decision, dated September 3, 1992; and the Status Report with attachments submitted by EPA dated February 16, 1993.

The Violations

EPCRA §313, 42 U.S.C. §11023, requires certain facilities to submit annually (beginning in 1987), to EPA and the State, a toxic chemical release form, known as "Form R," for each toxic chemical listed in 40 C.F.R. §372.65 that was manufactured, processed, or otherwise used during the preceding calendar year in quantities exceeding established statutory thresholds. The Form Rs report information on the facility's use of the chemical, the maximum amount present at the facility during the year, and the methods used for its disposal. EPCRA §313(a,g), 42 U.S.C. §11023(a,g).

On June 18, 1991 a duly authorized representative of EPA conducted an inspection of Respondent's chemical manufacturing facility in Moundsville, West Virginia (the "Moundsville Plant"). Complainant confirmed that Respondent was subject to the reporting requirements of EPCRA §313 in that it employed more than 10 persons in 1987 and 1988, and has a Standard Industrial Code ("SIC") number of 2812. EPCRA §313(b)(1)(A), 42 U.S.C. §11023(b)(1)(A).

Zinc and propylene oxide are toxic chemicals as defined by 40 C.F.R. §372.3 and specifically listed in 40 C.F.R. §372.65. In 1987 Respondent used 102,008 pounds of zinc compounds in its Moundsville Plant. In 1988 it used 109,754 pounds of zinc compounds. The annual threshold amount requiring reporting of toxic chemicals "used" at a facility is over 10,000 pounds pursuant to EPCRA §313(f)(1)(A). Respondent processed 89,979 pounds of propylene oxide in 1987, and 83,304 pounds of that chemical in 1988. The annual threshold reporting amounts for toxic chemicals "processed" at a facility were 75,000 pounds for 1987 and 50,000 pounds for 1988. EPCRA §313(f)(B)(i,ii). Respondent was thus

required to file Form Rs for those two toxic chemicals for the years 1987 and 1988 under EPCRA §313(a,f).

The EPA inspection disclosed that Respondent failed to file the forms for those two chemicals for those two years as required. The person responsible for filing the Form Rs at that time is no longer employed by Respondent. The reason for this apparently inadvertent failure to file the Form Rs in 1987 and 1988 for zinc and propylene oxide remains unknown.

In 1987 Respondent did file Form Rs for eleven other toxic chemicals as required by EPCRA, and in 1988 it did so for ten other chemicals. Respondent also did file Form Rs for zinc and propylene oxide for the calendar years 1989 and 1990, preceding the EPA's June 18, 1991 inspection. After being apprised of the missing forms for the two chemicals for 1987 and 1988, Respondent filed the appropriate Form Rs on June 27, 1991, nine days after the inspection.

The Respondent does not dispute the above facts that establish it committed the four violations of EPCRA §313 as alleged. Respondent's arguments that the amount of the penalty should be reduced are addressed below.

Amount of Penalty

The sole issue to be determined in this proceeding is the appropriateness of the Complainant's proposed penalty. EPCRA §325(c)(1) provides for the assessment of a civil penalty "in an amount not to exceed $25,000" for each violation of EPCRA §313. 42 U.S.C. §11045(c)(1).

The EPA Rules of Practice require the Administrative Law Judge to consider any civil penalty guidelines issued under the relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the complaint. 40 C.F.R. §22.27(b). The Presiding Officer "may either approve or reject a penalty suggested by the guidelines," and "has *the discretion either* to adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." (emphasis in original). In re DIC Americas, Inc., TSCA Appeal No. 94-2, at 6 (EAB, September 27, 1992).

- EPCRA Enforcement Response Policy

The EPA submitted for the record in this proceeding the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act, dated December 2, 1988 (the EPCRA "ERP"). EPA has developed penalty policies such as the EPCRA ERP to help ensure that regional enforcement personnel calculate penalties appropriate to the violations, and that penalties are assessed fairly and consistently throughout the

nation. Complainant submitted for the record its penalty calculation worksheet in support of its proposed penalty of $32,000.

The EPCRA ERP utilizes a matrix to determine a base penalty dependent on the circumstance level and adjustment level for each violation. Once this gravity-based penalty is determined, upward or downward adjustments may be made in consideration of other factors such as culpability, history of prior violations, and ability to pay (ERP at 6-7). The EPCRA statute itself does not list specifically list the penalty factors to guide the Agency's discretion in determining an appropriate penalty amount for violations of reporting requirements. In the preceding enforcement subsection, however, EPCRA does list the penalty factors applicable to Class I administrative penalties for violating EPCRA's emergency notification provisions. EPCRA §325(b)(1)(C), 42 U.S.C. §11045(b)(1)(C). The ERP applies essentially the same penalty factors, cited above, that are listed in that subsection of EPCRA as well as in FIFRA and TSCA (and in other statutes administered by EPA)[1], and incorporates them into a matrix similar to those used in the FIFRA and TSCA ERPS.

- Gravity of Violations and Culpability

In this proceeding, while the Complainant submitted its penalty calculation worksheet, it did not provide any explanation of how it selected its values for insertion into the matrix. Actually, according to the undersigned's reading of the ERP, Respondent's violations could technically have been assigned both higher penalty levels and extent levels, which would have resulted in a total penalty of $84,000 for these four violations. On the worksheet, the extent levels were visibly crossed out and lowered, which resulted in a reduction from the crossed out figure of $66,000 to $32,000.

All four violations here entailed the failure to submit Form Rs for two chemicals in two years. The ERP defines this as a "nonreporting" violation and assigns it to circumstance level 1 (ERP at 5, 8, and 10). Respondent's filing of the forms shortly after the inspection does not transform the violation to one of late reporting, which is assigned circumstance level 2 (ERP at 8). Yet in Complainant's worksheet, all four violations are assigned as circumstance level 2 violations.

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[1] See FIFRA §12(a)(4), 7 U.S.C. §136l(a)(4), quoted on p. 6 of these Initial Decisions; TSCA §16(a)(2)(B), 15 U.S.C. §2615(a)(2)(B), quoted on p. 14 of these Initial Decisions. See also, e.g., Clean Air Act §113(e)(1), 42 U.S.C. §7413(e)(1); and the Clean Water Act §309(g)(3), 33 U.S.C. §1319(g)(3)

The extent level in the matrix is determined by the size of Respondent's business and the quantity used or processed of the chemical that is the subject of the violation. The penalty worksheet indicates Respondent had 212 employees in both 1987 and 1988. Respondent processed slightly more than 100,000 pounds of zinc compounds in both years, which is over ten times the threshold reporting quantity of 10,000 pounds. According to the ERP guidelines, a violation by a company with over 50 employees, involving more than 10 times the threshold reporting quantity of a chemical, is assigned penalty adjustment level A (ERP at 11). On Complainant's worksheet, the adjustment level A was crossed out and B inserted.

Respondent's two violations for failure to report use of zinc, would, strictly following the ERP, be assigned on the matrix to circumstance level 1 and adjustment level A, resulting in the maximum penalty of $25,000 each. Complainant's assignments of these violations on the worksheet to circumstance level 2 and extent level B result in a penalty of $13,000 each on the matrix.

The violations of failure to report processing of propylene oxide would, strictly following the ERP, be assigned circumstance level 1 and adjustment level B. The quantity of that chemical processed is less than 10 times the threshold reporting quantity for each year (See ERP at 12). This would result in a penalty of $17,000 for each violation according to the matrix. Complainant assigned these violations as circumstance level 2 and extent level C, which results in a penalty of $3000 each.

Thus, Complainant's generous designations on the worksheet result in a total penalty of $32,000 compared to one of $84,000 if the ERP were strictly followed. Perhaps this is in recognition of the seemingly excessive amount that the ERP would direct for these violations. Although it failed to submit four reports, Respondent did file reports for ten or eleven other chemicals those reporting years. This indicates the inadvertence of its failure to report its use and processing of zinc and propylene oxide for two years. Respondent also demonstrated its compliant attitude and good faith by promptly filing the missing Form Rs after the inspection.

The proposed amount of $32,000 is still substantial, and is commensurate with the gravity of these violations, as well as Respondent's culpability. The Complaint placed Respondent on notice of a proposed penalty of only $32,000. It would be a denial of due process of law to penalize Respondent a greater amount without prior notice. For these reasons, the proposed penalty of $32,000 will be the recommended gravity based penalty for these four violations, apportioned as in the Complaint: $13,000 each for counts 1 and 2, and $3000 each for counts 3 and 4.

- Ability to Continue in Business and Ability to Pay

Respondent also contends that, as a debtor under the protection of the Bankruptcy Court, it has a highly restricted cash flow that is under Court scrutiny and therefore has a limited ability to pay any penalty. The latest information on Hanlin's financial condition is found in statements of counsel accompanying Respondent's designation of the record on January 30, 1995. According to those statements, Hanlin has suffered serious business reversals and has not yet formulated a reorganization plan that would allow it to continue to conduct business. With the bankruptcy court's approval, Hanlin has sold its two remaining production facilities and now only operates its terminal and warehouse. All monies generated by Respondent's sales and operations are allegedly being applied to certain priority claims, loan repayments, and environmental obligations.

In its penalty calculations, Complainant did not make any reduction based on Respondent's ability to continue in business or ability to pay a penalty. Complainant asserts that the penalty should be determined in this proceeding without reference to Respondent's bankruptcy, as payment related issues will be dealt with in the Bankruptcy Court.

Both parties concur in the well established principle that this proceeding seeking entry of a judgment is in the exercise of the EPA's power to enforce environmental laws and is therefore not stayed by Respondent's filing of a petition under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §362(b)(4). The ultimate enforcement of the penalty assessment resulting from this proceeding is, however, a money judgment that is subject to the automatic stay provision. 11 U.S.C. §362(b)(5); Kovacs v. Ohio, 717 F.2d 984, 988 (6th Cir. 1983), aff'd, 469 U.S. 274 (1985). Both sides recognize that Complainant, upon reducing this administrative enforcement proceeding to a monetary judgement, must wait along with other unsecured creditors in the Bankruptcy Court before it can collect any money. It will then be up to the Bankruptcy Court to decide how to treat the claim under the Chapter 11 plan for reorganization or other resolution of Respondent's petition.

EPCRA itself is silent on the factors to be considered in determining the amount of civil penalties to be imposed for violations of reporting requirements, citing only the maximum of $25,000 per violation. EPCRA §325(c)(1). However the EPCRA ERP does address the Respondent's ability to pay by incorporating the size of Respondent's business into the penalty matrix, on the axis for penalty adjustment level. Other than that, the ERP notes that a firm should be required to document its claimed inability to pay a penalty (ERP at 16).

A respondent's ability to pay a penalty may be presumed until it is put at issue by the respondent in the proceeding. In re New

Waterbury, Ltd., TSCA Appeal No. 93-2, at 15 (EAB, Oct. 20, 1994). The Complainant bears the burden of proving the appropriateness of the penalty, and can do so by initially presenting "some evidence of Respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." New Waterbury at 15 (italics in original). It is then incumbent on the respondent to come forward with specific evidence on its ability to pay, such as financial reports or tax returns. Such documents were in fact requested by Judge Yost's prehearing letter of May 29, 1992, pursuant to the prehearing exchange provisions of 40 C.F.R. §22.19(b).

The Complainant here has submitted some general financial information from which it may be inferred that Respondent is a large corporation that, at least at the time of the alleged violations, generated substantial cash flow indicative of its ability to pay the proposed penalty. Although specific sales figures are not given, a Dun & Bradstreet report (attached to Complainant's Status Report dated February 12, 1993 and designated part of the record) indicates that the Moundsville Plant employs over 200 workers. The Form Rs submitted by Respondent show it produced substantial quanitities of chemical substances at Moundsville. Respondent's corporate parent owns and operates several other facilities as well. Thus, apart from Respondent's bankrupt status, the record indicates Respondent could pay the gravity-based penalty amount of $32,000 for the EPCRA violations recommended in this decision.

Respondent did not produce any evidentiary material concerning its ability to pay a penalty, such as financial reports or tax returns. It only provided representations by counsel that it filed a petition under Chapter 11 of the Bankruptcy Code on July 10, 1991. Hanlin has remained under the Bankruptcy Court's protection since that time, at least as of the date of counsel's designation of the record, January 30, 1995.

In the absence of any actual evidence on Respondent's ability to pay, the mere fact that Respondent is under the protection of the Bankruptcy Court is insufficient reason to reduce the amount of the gravity-based civil penalty. Based on the limited information available on the size of Respondent's business, the amount of the proposed penalty in this proceeding is apparently commensurate with Respondent's ability to pay. Whether the EPA will ever collect any civil penalty from Respondent is of course problematical in any event, and in the control of the Bankruptcy Court.

In these circumstances the issue of Respondent's ability to pay merges into the question before the Bankruptcy Court of how the claim is ultimately to be treated under Respondent's reorganization plan. See Order on Default, In the Matter of Watervliet Paper Company, Inc., Docket No. TSCA-V-C-098-88 (J. Harwood, August 21, 1989). In this proceeding, there is no reason to reduce the civil

penalty due to Respondent's ability or inability to pay. Therefore, the total penalty assessed for Respondent's four violations of EPCRA §313 is $32,000: $13,000 each for counts 1 and 2, and $3,000 each for counts 3 and 4.

It is ORDERED that:

A civil penalty in the amount of $32,000 be assessed against the Respondent, Hanlin Chemicals - West Virginia, Inc..

See the Consolidated Order below for particulars on the payment of the penalty.

CONSOLIDATED ORDER

It is ORDERED that:

1. Respondent is assessed a total civil penalty of $80,000 for the violations in these three proceedings, apportioned as follows: Docket No. IF&R-III-425-C, $8000; Docket No. TSCA-III-651, $40,000; and Docket No. EPCRA-III-091, $32,000.

2. Subject to any proceedings pertaining to Respondent in the Bankruptcy Court, payment of the full amount of the civil penalties assessed shall be made within sixty (60) days of the service date of the final order by submitting three separate certified or cashier's checks in the above amounts, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 3
P.O. Box 360515
Pittsburgh, PA 15251-6515

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

4. If Respondent fails to pay the penalties within the prescribed statutory time period, after entry of the final order, then interest on the civil penalties may be assessed. 31 U.S.C. §3717, 4 C.F.R. §102.13.

5. Pursuant to 40 C.F.R. §22.27(c) these initial decisions shall become the final order of the Agency, unless an appeal is taken pursuant to 40 C.F.R. §22.30 or the Environmental Appeals Board elects, sua sponte, to review these decisions.

Andrew S. Pearlstein

Dated: November 9, 1995
Washington, D.C.

Andrew S. Pearlstein
Administrative Law Judge