UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Spang and Company,	)	Docket Nos. EPCRA-III-037 & 048
	)	
	)	
Respondent	)	

Emergency Planning and Community Right-To-Know Act--Regulations - Penalties

Although EPCRA § 325 (42 U.S.C. § 11045) does not expressly authorize administrative assessment of penalties for violations of regulations promulgated under the Act, EPCRA § 328 authorizes the Administrator to prescribe such regulations as may be necessary to carry out this chapter (SARA Title III), and 40 CFR § 372.18 provides that violators of the requirements of this part [Part 372] shall be liable for a civil penalty in an amount not to exceed $25,000 each day for each violation as provided in section 325(c) of Title III. It is held that a person violating the recordkeeping requirements of 40 CFR § 372.10, is liable for a civil penalty in accordance with EPCRA § 325(c).

Emergency Planning and Community Right-To-Know Act--Regulations - Records - Availability For Inspection

Penalty for violation of recordkeeping requirements of 40 CFR § 372.10, which requires that specified records be "readily available for inspection by EPA," may not be assessed where the evidence failed to establish that a specific request to see the records at time of EPA inspection had been made.

Emergency Planning and Community Right-To-Know Act--Penalties - Supplemental Environmental Projects

Credit for supplemental environmental projects (SEPs) was allowed in determining penalties under EPCRA § 325(c) for violations of § 313 and of the recordkeeping requirements of 40 CFR § 372.10.

Appearance for Complainant:

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Appearances for Respondent:

William T. Marsh, Esq.
Vice President & General Counsel
Spang and Company
Butler, Pennsylvania

David G. Oberdick, Esq.
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INITIAL DECISION

These proceedings under Section 325 of the Emergency Planning and Community Right-to-Know Act (EPCRA), enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499, October 17, 1986), 42 U.S.C. § 11001 et seq., were commenced by the issuance on December 19, 1990, of separate complaints by the

Director of the Air, Toxics and Radiation Management Division, U.S. EPA Region III, charging Respondent, Spang and Company, with violations of the Act and applicable regulations at 40 CFR Part 372.

Specifically, the complaint in Docket No. EPCRA-III-037, concerning Spang's Power Control Division or facility in Sandy Lake, Pennsylvania, alleges in Count I, that Spang "otherwise used" more than 10,000 pounds of xylene in the calendar year 1987 and was thus required to file a Toxic Chemical Release Inventory Reporting Form ("Form R") with the Administrator of EPA and the Commonwealth of Pennsylvania on or before July 1, 1988. Spang allegedly failed to file "Form R" showing the quantity of xylene "otherwise used" in the calendar year 1987 as required by the mentioned date. Count II alleges that Spang failed to retain all supporting materials and documentation to determine the quantity of xylene "otherwise used" during 1987 as required by 40 CFR § 372.10. Count III alleged that Spang "otherwise used" more than 10,000 pounds of xylene for the calendar year 1988, and, consequently, was required, but failed, to file "Form R" showing such usage with the Administrator of EPA and the Commonwealth of Pennsylvania on or before July 1, 1989. For these alleged violations, it was proposed to assess Spang a penalty of $59,000, consisting of $17,000 each for failure to timely file "Form Rs" as alleged in Counts I and III and $25,000 for the failure to retain records as alleged in Count II.

Spang answered, admitting that "Form Rs" showing xylene usage for the calendar years 1987 and 1988 were filed subsequent to

July 1, 1988, and July 1, 1989, respectively. Spang denied the recordkeeping violation alleged in Count II, and contested the Administrator's authority to adopt a regulation imposing penalties not prescribed by statute. Spang requested a hearing.

The complaint in Docket No. EPCRA-III-048, concerning Spang's Magnetics Division and a Specialty Metals Division or facility located in East Butler, Pennsylvania, alleged, inter alia, Counts I through XII, that Spang "processed" or "otherwise used" quantities of nickel, aluminum oxide, manganese compounds, nitric acid, zinc compounds, and sodium hydroxide in excess of threshold quantities for the calendar years 1987 and 1988 and was thus required, but failed, to file Toxic Chemical Release Inventory Reporting Forms, "Form Rs," showing the quantities of the listed chemicals processed or otherwise used during the mentioned calendar years, with the Administrator of EPA and the Commonwealth of Pennsylvania on or before July 1, 1988, and July 1, 1989, respectively. Counts XIII through XXIV alleged that Spang violated the record retention requirements of 40 CFR § 372.10 by failing to retain all supporting materials and documentation required to determine the quantities of the listed chemicals "processed" or "otherwise used" during the calendar years 1987 and 1988. For these alleged violations, it was proposed to assess Spang a penalty totaling $520,000.

Spang answered, admitting that "Form Rs" showing quantities of the listed chemicals "processed" or "otherwise used" for the calendar years 1987 and 1988 were filed subsequent to July 1, 1988, and July 1, 1989, respectively. Spang denied violating the record retention requirements of 40 CFR § 372.10, contested the Administrator's authority to impose penalties not prescribed by statute, and requested a hearing.

Accompanying Spang's answers to the complaints were identical motions to dismiss upon the ground that under section 325 of the Act only the Administrator was authorized to issue complaints and compliance orders. Additionally, Spang contended that Count II, Docket No. III-037 and Counts XIII through XXIV, Docket No. III-048, failed to state a claim upon which relief could be granted, because the factual allegations were contradicted by Counts I and III, Docket No. III-037, and Counts I through XII, Docket No. III-048, which alleged that an inspection of invoices, records and documents revealed that Spang processed or otherwise used quantities of the mentioned chemicals in excess of threshold quantities for the calendar years in question and for the additional reason that the statute did not authorize the assessment of penalties for non-retention of records. These motions were denied by an order, dated June 3, 1991, upon the ground that it was reasonable to imply the Administrator's authority to delegate his or her functions under the Act, because it would be impracticable for the Administrator to personally issue complaints for every violation of the Act. The order also pointed out that EPCRA § 328 (42 U.S.C. § 11048) expressly authorized the Administrator to prescribe such regulations as may be necessary to carry out the Act and that there was no necessary contradiction between the counts alleging processing or use of materials in excess of threshold quantities and failure to retain records. The mentioned order consolidated these proceedings pursuant to 40 CFR § 22.12.

Over Spang's objection, Complainant's motion to amend the complaints, Count II (Docket No. III-037) and Counts XIII through XXIV (Docket No. III-048), so as to allege failure to maintain records in such a manner as to be readily available for inspection by EPA rather than failure to retain records was granted (Order Granting Motion to Amend Complaint, April 9, 1992).

A hearing on these matters was held in Pittsburgh, Pennsylvania, on June 30 and July 1, 1992.

Based on the entire record, including the proposed findings and conclusions and briefs of the parties,[1/] I make the following:

FINDINGS OF FACT

1. Respondent, Spang and Company, is a Pennsylvania corporation and is thus a person as defined in section 329(7) of the Act (42 U.S.C. § 11049(7)).
2. Spang owns and/or operates an electric power control equipment and dry type transformer division, known as Spang Power Control located in Sandy Lake, Pennsylvania. This division had ten or more full-time employees in 1987 and 1988 and had

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[1/] Findings 1 through 8 are based upon allegations in the complaints which Spang has admitted in its answers.

a SIC Code of 3677 (electronic coils, transformers, and other inductors) during the mentioned years.

3. Spang Power Control "otherwise used" more than 10,000 pounds of xylene during each of the calendar years 1987 and 1988.

4. Spang owns and/or operates a Magnetics Division and a Specialty Metals Division on contiguous property in Butler, sometimes referred to as East Butler, Pennsylvania. This facility had ten or more full-time employees in the calendar years 1987 and 1988 and had a primary SIC Code of 3679 (electronic components).

5. Spang "processed" more than 75,000 pounds of nickel at the facility referred to in finding 4 in 1987 and more than 50,000 pounds of nickel at said facility in 1988. Spang also "processed" more than 75,000 pounds of manganese compounds at this facility in 1987 and processed more than 50,000 pounds at this facility in 1988.

6. Spang "otherwise used" more than 10,000 pounds of aluminum oxide at its Butler facility during each of the calendar years 1987 and 1988. Spang also "otherwise used" more than 10,000 pounds of nitric acid at said facility during each of the calendar years 1987 and 1988.

7. Spang "processed" more than 75,000 pounds of zinc compounds at its Butler facility in 1987 and "processed" more than 50,000 pounds of zinc compounds at the mentioned facility in 1988.

8. Spang "otherwise used" more than 10,000 pounds of sodium hydroxide at its Butler facility in each of the calendar years 1987 and 1988.

9. Spang's facility in Sandy Lake, Pennsylvania was inspected on May 22, 1990, by Donald W. Stanton, an EPCRA inspector and technical advisor for EPA Region III (Tr. 10; Inspection Report, dated June 25, 1990, C's Exh 2). Spang was informed of the impending inspection by a letter from Mr. Stanton, dated May 2, 1990 (C's Exh 1), which stated that among documents he would be reviewing were 1987 and 1988 year-end chemical purchase summaries (printouts), 1986, 1987 and 1988 year-end chemical inventory summaries, year-end chemical production import summaries for 1987 and 1988 and invoice, sales, shipping records, and/or supplier notification of toxic chemicals listed under the SARA Title III, section 313 Rule. The letter indicated that a list of chemicals subject to the section 313 Rule was attached.

10. During the inspection referred to in finding 9, Mr. Stanton met with Mr. Kenneth Ricciardella, general foreman and Mr. Marvin T. Baker, manager of administration (Tr. 11; C's Exh 2). Mr. Stanton was informed that sales of the Power Control Division were $8,000,000 in 1987 and $8,250,000 in 1988. The Power Control Division had 105 employees in both of those years and was in SIC Code 3677. Corporate sales (apparently for Spang including all divisions) were

$73,000,000 in 1987, $96,000,000 in 1988 and $95,000,000 in 1989 (C's Exh 2).

11. Mr. Stanton testified that he asked Messrs. Baker and Ricciardella for chemical usage records and was told that the records were not readily available (Tr. 11, 15). They did, however, produce a "big box" [of records] and were able to prepare a summary showing xylene usage in 1988 as 11,662 pounds. Mr. Stanton's report states in pertinent part that "(a)n examination of the purchase records [1988] verified that Xylene (CAS Number 1330-20-7) mixed isomers exceeded the 10,000 lb., otherwise used threshold" (C's Exh 2 at 3). Xylene is purchased separately and is apparently also contained in paint purchased. Mr. Ricciardella confirmed this information in a letter to Mr. Stanton, dated May 22, 1990 (C's Exh 3). After confirming the 11,662 pounds of xylene used in 1988, the letter stated that "(w)e do not have records for 1987." The letter pointed out that Spang kept its inventory quantities at a relatively constant level and stated that "(w)e assume that usage to be approximately the same level in 1987." Mr. Stanton determined that Spang Power Control should have submitted a "Form R," for xylene used during each of the years 1987 and 1988.

12. Mr. Stanton inspected the Magnetics and Specialty Metals Divisions of Spang and Company in Butler, Pennsylvania on June 21, 1990 (Tr. 12, 13; Inspection Report, dated September 17, 1990, C's Exh 5). Mr. Stanton informed Spang of

the inspection by a letter, dated June 11, 1990 (C's Exh 4), which is identical, as to the documents he wished to review, to the letter sent to Spang prior to the inspection of the Power Control Division. Mr. Stanton met with William T. Marsh, Vice President and General Counsel, and John T. Lee, Chief Project Engineer. Mr. Stanton was informed that the Magnetics and Specialty Metals Divisions had combined sales of $44,000,000 in 1987 and $56,000,000 in 1988 (Tr. 14; C's Exh 5). The Divisions employed approximately 400 people in the years 1987 and 1988. The plant's SIC code is 3679.

13. Unlike the inspection of the Power Control Division, there is no evidence that Mr. Stanton specifically asked to see chemical usage records for 1987 and 1988. He recalled, however, that Messrs. Lee and Marsh, said the records for 1987 and 1988 were not available (Tr. 15). This testimony is supported by the inspection report he prepared (C's Exh 5 at 3). It is also inferentially supported by the statement on page 2 of the report to the effect that the remainder of the inspection involved determining if the plant manufactured, processed, or otherwise used toxic chemicals in excess of the thresholds for the calendar years 1987 and 1988. This, seemingly, would necessarily require reference to records. This report, however, is dated September 17, 1990, approximately three months after the inspection. Moreover, on redirect examination in response to a direct question as to whether Mr. Lee had offered to make underlying records

[concerning manganese usage] available, Mr. Stanton replied that he didn't remember discussing it at all (Tr. 38). He added that Mr. Lee was an honorable man and reported the truth as he saw [it].[2/]

14. The summary of chemical usage for 1989 given to Mr. Stanton by Mr. Lee is summarized in the inspection report and reflects, inter alia, that the Magnetics and Specialty Metals Divisions of Spang "otherwise used" 27,660 pounds of sodium hydroxide, 53,660 pounds of aluminum oxide and 10,171 pounds of nitric acid (C's Exh 5 at 3). The summary also reflects that Spang "processed" 119,295 pounds of manganese compounds, 1,118,922 pounds of nickel and 76,824 pounds of zinc compounds. Mr. Stanton concluded that Spang should have, but failed, to file "Form Rs" for the years 1987 and 1988 showing the quantities of nickel, aluminum oxide, manganese compounds, nitric acid, sodium hydroxide solution and zinc compounds "processed" or "otherwise used" (C's Exh 5 at 5).

15. Mr. Dean L. Craig, corporate accounting supervisor for Spang, described Spang's procedures in purchasing materials and paying bills (Tr. 100-02). He testified that someone in

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[2/] Tr. 38. This observation refers to a letter, dated August 29, 1990, written by Mr. Lee in response to Mr. Stanton's telephonic inquiry of August 28, 1990, concerning usage of manganese compounds in 1987 and 1988. Mr. Stanton did not recall why his inquiry was limited to manganese compounds (Tr. 30). This letter was Attachment 6 to the inspection report (C's Exh 5). Because counsel for Complainant chose to introduce the inspection reports without the attachments (Tr. 17), this letter is not in evidence.

manufacturing would turn in a requisition to order an item or multiple items, that the purchasing department would cut a purchase order to a particular vendor for the items, that multiple copies of the purchase order were distributed to the vendor, the requisitioner, to the receiving department and to the accounting department. After the items were received, the receiving department prepared a "receiving copy," annotating thereon a description of the item, the quantity received, etc. This copy was sent to the accounting department which, if the quantity and price agreed with the purchase order, would cut a check to the vendor (Tr. 102-03). These records, i.e., a copy of the original purchase order, a copy of the receiving slip and a copy of the invoice were retained in the record room on the second floor of the Spang and Company Building on Brugh Avenue in Butler, Pennsylvania.

16. Mr. Craig testified that, although materials were received at the Power Control Division in Sandy Lake, payments were made out of the Butler Office (Tr. 103). He stated that the same procedure was followed for Spang's operations in Booneville, Arkansas--Today's Kids, a toy manufacturer, and Booneville Magnetics. Mr. Craig further testified that the accounting department maintained usage records, classifying items as either "raw materials" or a "central stock." He indicated that nickel, manganese, and zinc were raw materials, while nitric acid, aluminum oxide and sodium hydroxide were examples of central stock items (Tr. 104-05). He described raw

materials as basic ingredients used to make components which Spang manufactured, while "central stock" items were not a part of such components and were not processed, but were "otherwise used." He stated that Spang maintained an inventory of raw materials, taking a physical inventory of such materials every month (Tr. 106).

17. Mr. Craig testified that the records referred to in findings 15 and 16 were available at Spang's Brugh Avenue building in June 1990 (Tr. 105). He indicated that retrieving the records was simply a matter of going downstairs and finding a box for the particular year for which you were looking (Tr. 105-06). Records were maintained on a fiscal year basis, however, and it would seem that at least two boxes of fiscal year records would need to be examined in order to obtain all records applicable to a particular calendar year.

18. Mr. Craig identified Spang's Exhibit E as a summary of manganese dioxide and of manganese manganel oxide purchased by the Magnetics Division in 1987 (Tr. 108-09). Included in the exhibit is supporting documentation for the purchases, i.e., copies of purchase orders, receiving reports and invoices. The exhibit also includes a summary of 1987 "usage" of manganese oxide and manganese manganel oxide[3/] and a copy of a "Form R," signed by R. A. Rath, Spang's Vice Chairman, on

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[3/] "Usage" in the summary is not to be interpreted in the EPCRA regulatory sense. Manganese dioxide and manganese oxide were regarded by Spang as raw materials and "processed" in the EPCRA sense in the manufacture of products.

June 29, 1990, which shows, by reference to a code, manganese compounds processed in 1987.

19. Spang's Exhibits F through P are summaries, with supporting documentation, of manganese dioxide, manganese manganel oxide, zinc oxide and zinc stearate, nickel including nickel powder and nickel pellets, nitric acid, aluminum oxide and sodium hydroxide, purchased, processed or otherwise used by the Magnetics and Specialty Metals Divisions during the calendar years 1987 and 1988 (Tr. 111-19). Mr. Craig testified that records of the referenced purchases were available at Spang's offices in Butler, Pennsylvania at the time of Mr. Stanton's inspection in June of 1990 and could have been located in a very short time had Mr. Stanton asked to see the records (Tr. 111-12, 113, 115-16, 117-18, 119). As is the case with Exhibit E, Exhibits F through P contain copies of Form Rs, signed by Mr. Rath on June 29, 1990, which show, by reference to codes, quantities of the chemicals referred to in the exhibits processed or otherwise used during the years 1987 and 1988.

20. Exhibit Q is a summary, with supporting documentation, of purchases of xylene by the Power Control Division in 1987 and 1988, respectively (Tr. 119-20). This exhibit contains copies of Form Rs, signed by Lewis N. Martin, President of Spang's Power Control Division, on June 8, 1990, showing, by reference to a code, quantities of xylene otherwise used during 1987 and 1988. The summary at the front of this exhibit shows that

12,200 pounds of xylene were purchased in 1987 and that 14,661 pounds were purchased in 1988. As we have seen (finding 16), payment for materials received by the Power Control Division was made out of Spang's offices in Butler, Pennsylvania and records of such purchases were retained in those offices. Accordingly, Mr. Craig's affirmative answer to an ambiguous question as to whether the records of xylene purchases, if requested by Mr. Stanton, could have been located in a short period of time (Tr. 120), is construed as referring to the June 1990 inspection of Spang's Butler offices. Records of xylene usage in 1988 were, however, available at the Power Control Division at the time of the inspection on May 22, 1990 (finding 11).

21. As described by Mr. Craig, Spang's Exhibit R is basically the documentation used to record the usage of various raw materials and items on a monthly basis for the years 1987 and 1988 (Tr. 120). Raw materials covered are electrolytic nickel and nickel powder used by the Magnetics Division, East Butler, nickel powder pellets used by the Specialty Metals Division, and zinc oxide, zinc stearate, manganese dioxide and manganese manganic oxide used by the Magnetics Division, East Butler and Booneville. These are the usage reports summarized on the exhibits referred to in findings 18 and 19. According to Mr. Craig, these reports were readily available at the time of Mr. Stanton's inspection and all he would have had to do is ask to see them (Tr. 121). Under cross-examination, however,

he acknowledged that he hadn't told anyone about the records in the Spring of 1990 and that the only time the subject came up was when Mr. Marsh, identified in finding 12, asked for the records sometime in 1992 (Tr. 121-22).

22. Mr. Craig testified that in 1987 and 1988 the purchasing department would take a physical inventory of basically all of the products (raw materials) at issue herein, that a dollar amount would be applied to these items and that what he referred to as a "recap summary" showing the number of pounds used and the dollar cost would be distributed to various managers (Tr. 123). Other than the more valuable items like nickel powder, he wasn't aware that any of the managers maintained these summaries in any kind of a record system (Tr. 124). He maintained, however, that if anyone wanted to see any of these summaries, all they had to do was ask (Tr. 124-25).

23. Mr. John T. Lee, identified finding 12, testified that he was present with Mr. Stanton the entire course of the June 1990 inspection, except for the time he (Stanton) was in the reception area or in Mr. Marsh's office (Tr. 126). Mr. Lee stated that he had known Mr. Stanton for approximately 30 years and that they had a very cordial meeting. He (Lee) testified that they discussed Form Rs, whether Spang had filed Form Rs and the records for these forms (Tr. 127). He denied, however, ever being informed by Mr. Stanton that a purpose of the inspection was to examine chemical usage records for 1987

and 1988. He (Lee) asserted that when he inquired whether Mr. Stanton desired to know about those records or to have those records available to him, Stanton replied that based upon the information available, he didn't feel that it was necessary to take the time to "look up" the records. "Information available" refers to a computer printout prepared by personnel from the Magnetics and Specialty Metals Divisions showing materials used, which was necessary for completing the Form R for 1989 (Tr. 127-28). A copy of this printout was given to Mr. Stanton. This is apparently Attachment 2 to the report of the inspection conducted on June 21, 1990, which is summarized on page 3 of the inspection report, but is not in evidence for reasons previously stated (supra note 2). According to Mr. Lee, usage of nickel, manganese, zinc, nitric acid, aluminum oxide and sodium hydroxide was relatively consistent during the years 1987 to 1989, inclusive (Tr. 137). This is confirmed by a letter, dated June 21, 1990, from Mr. Marsh to Mr. Stanton, which states in part that "(w)ith the exception of copper which was not reportable in 1987 and 1988, the quantities [of chemicals] used for those years were approximately the same for those years as for 1989" (C's Exh 6).

24. Describing Spang's operations in Booneville, Arkansas, Mr. Lee testified that Spang had a ferrite manufacturing facility there, referred to as Magnetics Booneville, which was quite similar to the facility in East Butler (Tr. 138). He

acknowledged that Spang was late in filing Form Rs for the Booneville plant for the years 1987 and 1988. Exhibits S and T are copies of the Form Rs filed by Spang for the Booneville plant for the calendar years 1987 and 1988. Materials reported are zinc compounds, aluminum oxide, manganese compounds and hydrochloric acid. These forms were signed by Mr. Rath on June 29, 1990. Mr. Lee testified that the only action taken by EPA for this late reporting, of which he was aware, was the issuance of Notices of Non-compliance (NONs) (Tr. 139-40). A NON, which alleges submittal of a Form R after the July 1, 1989, deadline, addressed to Spang & Co. Ferrites Magnetics Division, Booneville, Arkansas, dated June 10, 1991, signed by Michael F. Wood, Director of the Compliance Division, Office of Compliance Monitoring, U.S. EPA, Washington, D.C., is in the record (Exh U). It is not clear what, if any, action was taken for the failure to submit Form R for the calendar year 1987 on or before July 1, 1988.

25. Mr. Kurt Elsner, presently Chemical Accident Prevention Coordinator for EPA, Region III, and formerly a program manager for EPCRA § 313, testified as to the calculation of the proposed penalties (Tr. 38, 39). For this purpose, he utilized the Enforcement Response Policy (ERP) For Section 313 Of The Emergency Planning And Community Right-To-Know Act, dated December 2, 1988 (C's Exh 7). He testified that the first step was to refer to the Penalty Matrix on page 9 of the ERP, which contains six circumstance levels (Tr. 42). The

circumstance levels of the matrix assertedly take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the states and to the [federal] government. Adjustment levels are based on the quantity of section 313 chemicals for which the violation is being issued, i.e., the quantity manufactured, processed or used by the facility and the size of the corporate entity involved in the violation (ERP at 7). Mr. Elsner testified that, because Spang did not meet the definition of a "late reporter" in the ERP for either its Sandy Lake or Butler facilities, it was a "non-reporter" and thus placed in Circumstance Level 1 of the Penalty Matrix.[4/]

26. The next step in the penalty calculation is to apply the adjustment levels, which take into account total corporate sales and whether the company has 50 or more employees at a particular site (Tr. 43). Because Spang's total corporate sales exceeded ten million dollars and because it had more than 50 employees at both its Sandy Lake and Butler

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[4/] Tr. 42, 43. A "late report" is defined on page 8 of the ERP as follows:

> To be considered a late report instead of a failure to report for those reports submitted after the deadline of July 1, the report must be submitted prior to the facility being contacted by EPA or an EPA representative in preparation for a pending inspection or for purposes of determining compliance or in the absence of such contact, prior to the date of the inspection. Any report which is submitted after such contact/inspection is to be treated the same as a nonreport in assessing the penalty. Regions are encouraged to keep written records which document any such contact with the facility.

facilities, Spang was considered a large facility. The final step was to consider the amount of chemical used in relation to the threshold quantity, that is, if usage were more than ten times the threshold, the violation would be placed in Adjustment Level A (Tr. 44). Because xylene usage at the Power Control Division was determined to be 11,662 pounds for each of the years 1987 and 1988--the threshold for a chemical "otherwise used" being 10,000 pounds--Spang's failure to report for those years placed it in Circumstance Level 1, Adjustment Level B, resulting in a proposed penalty of $17,000 for each of the mentioned years. Because of ALJ decisions to the effect that the ERP was arbitrary, insofar as it equated reporting after being contacted by EPA or after an EPA inspection as a "failure to report,"[5/] Mr. Elsner recalculated the penalties for Spang Power Control Division on the theory that Spang qualified as a "late reporter after 180 days." Thus the violations for Counts I and III were determined to be in Level 2, Adjustment Level B or $13,000 each (Tr. 57).

[5/] Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-4066 (Initial Decision, September 28, 1989) and Pease and Curren, Inc., Docket No. EPCRA-I-90-1008 (Initial Decision, March 13, 1991). The revised ERP, dated August 10, 1992, adopts the rationale of these decisions in part by providing for administrative complaints for, inter alia, failure to report in a timely manner, and by providing for a reduction of the penalty for voluntary disclosure, provided disclosure was made prior to an EPA contact.

27. Placing Spang's Magnetics and Specialty Metals Divisions in the "late reporting" rather than the "non-reporting category" reduces the proposed penalty for Counts I and II, nickel, to Circumstance Level 2, Adjustment Level A or from $25,000 to $20,000 per count (Tr. 57). The penalty for Counts III and IV, aluminum oxide, was determined to be Level 2, Adjustment Level B, or $13,000 per count, which would be reduced by an additional 25 percent to $9,750, because aluminum oxide has been delisted (Tr. 58). Counts V, VI, manganese compounds for 1987 and 1988, Counts VII and VIII, nitric acid for 1987 and 1988 and Count IX and X, zinc compounds for 1987 and 1988, were reduced to Circumstance Level 2, Adjustment Level B, or $13,000 per count. Counts XI and XII, sodium hydroxide for 1987 and 1988, were determined to be Level 2, Adjustment Level B, or $13,000 per count, and reduced by an additional 25 percent, because sodium hydroxide has been delisted. Mr. Elsner testified that EPA was prepared to reduce the 13 counts for recordkeeping violations in both dockets to one recordkeeping violation at $25,000, making the total penalty $208,000 (Tr. 58). He indicated that because of Spang's cooperation, EPA proposed to reduce that figure by ten percent or $20,800, making EPA's bottom line $187,200 (Tr. 59).

28. As indicated at the outset of this decision, Spang has contended from the inception of these proceedings that Complainant lacked the authority to issue these complaints. The ERP (December 2, 1988) provides that ". . Regional

enforcement personnel must obtain written concurrence from the Office of Compliance Monitoring of the Office of Pesticides and Toxic Substances prior to initiating an administrative civil penalty for section 313 violations" (Id. at 6). Complainant has stipulated that written headquarters' concurrence was not obtained (Tr. 7). The ERP further provides, however, that a region may request the relaxation of the concurrence requirements once three civil administrative actions have been successfully issued and closed out. Spang's Exhibit A is a copy of a memorandum, dated June 9, 1989, from Michael Wood, Director Compliance Division, to Steven R. Wasserburg, Hazardous Waste Management Division, EPA, Region III, Subject: "Relaxation of Concurrence to Issue and Settle Civil Administrative Actions for Violations of Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA)," which provides in pertinent part that ". . the requirement for obtaining headquarters' concurrence prior to issuance and settlement of civil administrative complaints for violations of the Section 313 EPCRA reporting requirement is relaxed." (emphasis added). A memorandum, dated December 7, 1990 (C's Exh 11), only the first paragraph of which is in evidence, reflects that the Office of Enforcement did not agree with the recordkeeping counts in the Spang case, because a violation of the recordkeeping requirements of 40 CFR § 372.10 is not a violation of EPCRA § 313, and, therefore, is not subject to penalties pursuant to § 325(c). Mr. Elsner testified, however, that he was subsequently informed by Mr. D'Alessandro, Complainant's counsel, that headquarters had changed its position and that the Region could proceed with the counts claiming monetary penalties for recordkeeping violations (Tr. 46-48).

29. The ERP summarizes the circumstances under which issuance of a notice of non-compliance (NON), rather than the administrative assessment of civil penalties, is appropriate (Id. 2-5). These include reports containing readily-detectable errors; errors which would warrant a NON, if found by EPA during data entry, or which were found during an inspection and fully corrected within 30 days of their discovery and within 180 days after the reporting date; late reports submitted within 31-to-90 days after the due date of July 1, 1988, 1-to-60 days after the due date of July 1, 1989, and 1-to-30 days after the due date of July 1, 1990, or subsequent years; and recordkeeping violations. Examples of recordkeeping violations include "(r)ecords available but not at facility or submitter's headquarters. If records cannot be presented within 14 days from the date of inspection, the violation is failure to keep records in accordance with the regulations." (Id. at 3). The ERP provides that a civil complaint is warranted for violations in subsequent years.

30. A memorandum from the Office of Compliance Monitoring, dated June 1991, entitled "EPCRA § 313 Late Reporter Initiative" (Spang's Exh C), reflects that, as a matter of prosecutorial

discretion, the Agency had decided to issue NONs to facilities reporting 45 or more days after the due dates of July 1, 1989, or July 1, 1990. In order to avoid interference with ongoing enforcement actions, facilities which were inspected since July 1, 1988, were deleted from the NON policy. As indicated (finding 24), Spang's Booneville facility was issued a NON for late reporting. Mr. Elsner testified that Spang's facilities herein were not eligible for issuance of NONs, because the complaints were issued prior to this initiative (Tr. 79). The "Initiative" on its face does not apply to late reporting for the calendar year 1987.

31. The ERP provides at 16 that in determining penalties "environmentally beneficial expenditures" (EBEs) may appropriately be considered under the statutory rubric "other factors as justice may require." The ERP further provides in part that "(t)his adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations." (Id.). It is made clear that [in order to be eligible for the credit] the alleged EBEs must not be required by other laws or regulations and that a firm, claiming the credit, must not have received credit for the same EBEs in another enforcement action. A memorandum from the Assistant Administrator for Enforcement, dated February 12, 1991, sometimes referred to as the "Strock memo," clarified the terms under which EBEs, now referred to as Supplemental Environmental Projects (SEPs), were to be

considered (C's Exh 12). The memorandum enclosed a SEP policy statement which specified the five categories of environmental projects which could be considered in settlement, i.e., pollution prevention, pollution reduction, environmental restoration, environmental auditing and public awareness. Under the policy, supplemental projects may be considered if: (1) violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a substantial monetary penalty; and (3) there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the supplemental project (Policy at 1, 2).

32. The SEP Policy provides that a vertical nexus exists when the supplemental project operates to reduce pollutant loadings to a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question (Id. at 6). As related to EPCRA § 313, Mr. Elsner explained that a vertical nexus would be a project which would reduce the use or emission of chemicals involved in the violation (Tr. 164). A horizontal nexus exists when the supplemental project involves either: (a) relief for different media at a given facility or (b) relief for the same medium at different facilities (SEP Policy at 7). The Policy implies, but does not expressly provide, that a vertical nexus is more desirable than a horizontal nexus. Mr. Elsner testified, however, in a vertical nexus, the

respondent would receive a better or greater credit, because the project directly relates to improving the violation (Tr. 164).

33. The SEP Policy states that it is applicable to judicial as well as administrative settlements and provides, inter alia, that each administrative settlement in which a horizontal SEP is proposed must be approved by the Assistant Administrator for Enforcement, and where required by the Agency's delegations policy, the media Assistant Administrator (Id. at 1). Judicial settlements, including any of the projects described in the Policy, require the approval of the Assistant Administrator for Enforcement and also of the Assistant Attorney General of the Environment and Natural Resources Division. Respecting the timing of SEPs, the Policy provides that any defendant/respondent against whom the Agency has taken an enforcement action may propose to undertake a SEP at any time prior to resolution of the action (Id. at 8), thus implying that any SEP undertaken prior to issuance of a complaint would not be considered. Mr. Elsner testified, however, that the Region, prior to the "Walker Memorandum," sometimes considered for credit projects undertaken after the date of inspection.[6]

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[6] Tr. 165, 170-71. The "Walker Memorandum" is a memorandum from enforcement counsel Michael J. Walker, dated March 26, 1992, subject: "Draft Checklist on EPCRA § 313 Horizontal Nexus Projects" (C's proposed Exh 13). The enclosed checklist makes it clear that only projects proposed after the initiation of an enforcement action will be considered for credit. Because this memorandum was (continued...)

34. A schedule of alleged environmentally beneficial projects, now referred to as supplemental environmental projects (SEPs), for which Spang claims credit against any penalties is in the record (Exh D). The first of these is the design and installation of a wastewater pre-treatment plant at East Butler, Pennsylvania. This plant cost Spang approximately $203,400 and, according to Mr. Lee, was not required by any law or regulation and had no non-environmental benefits for the company (Tr. 141-42). He testified that this project was completed in July or August 1989, but was not placed in operation until July or August 1990 (Tr. 149). This project eliminated the discharge of wastewater to surface pond settling impoundments or lagoons. Although the wastewater contained various contaminants and metals, Spang asserts that the lagoons were not hazardous waste facilities, because the pre-treatment plant reduced the concentrations to below the levels authorized by the permit issued by the POTW.[7/] The next project is the closure of three surface pond settling impoundments or lagoons at East Butler. This project cost Spang $148,800. Work on this project started in August of

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[6/] (...continued)
issued long after the complaints herein were issued and presumably after any settlement discussions were concluded, the memorandum was not admitted into evidence.

[7/] This, of course, says nothing about the status of the discharges to the lagoons or of the lagoons as hazardous waste facilities prior to completion of the pre-treatment plant.

1990 and was completed in December of 1990 (Tr. 149, 185). These ponds were used for waste disposal prior to installation of the pre-treatment plant. According to Mr. Lee, closure of the impoundments was not required by any environmental law or regulation and Spang could have continued to use the ponds, provided it met certain requirements of EPA and PADER.[8] He pointed out that the pre-treatment plant would not have been necessary, if Spang had continued to use the ponds. He acknowledged, however, that PADER wanted the ponds closed (Tr. 149-50).

35. Project Nos. 4 and 5 consist of the design and installation of curbing and a sump around a shed in East Butler used for the storage of paint and the design and construction of a building for the storage of fuel oil containers in East Butler with curbing and sump, respectively (Tr. 142-43; Exh D). Both of these projects were to protect against spills or accidental releases to the environment and were completed in 1991. Project No. 4 cost $1,500 and No. 5 cost $7,400. Neither were

[8] Tr. 141, 155. Complainant's Exhibit 14 is an affidavit by Mr. Marsh, dated June 3, 1992, in a proceeding against Spang initiated by EPA, Docket No. RCRA-III-169. The affidavit denies that Spang or any official thereof has ever admitted that the lagoons were hazardous waste facilities, details Spang's efforts in contesting EPA and PADER claims that the lagoons contained hazardous waste, PADER's disapproval of a closure plan submitted by Spang, Spang's appeal to the EHB, which upheld PADER and the reversal and remand of the EHB decision by the Commonwealth Court. The record does not disclose the final outcome of the EPA proceeding. Complainant has, however, attached to its Reply Brief a copy of an EHB order, dated September 3, 1992, which reflects that Spang withdrew its appeal to that body.

required by environmental law or regulation and, according to Spang, neither provided any economic or non-economic benefit to the company. Project No. 6 is the design and construction of piping, pumps, trenches and water cooling towers so as to eliminate the discharge of cooling water to the environment from the Magnetics Division (Tr. 143-44, 150). The discharge of heated water is allowed by Spang's NPDES permit and this project is not required by any environmental law or regulation. This project will eliminate discharges from EPA Outfalls 001 and 002 (PADER Outfalls 001, 010 and 011), has an estimated cost of $360,000 and was scheduled for completion by September 30, 1992. Mr. Lee indicated that the only economic benefit to Spang would be the reduced consumption of water from the public water supply, which would probably be offset by the cost of operating the towers.

36. Project No. 7 is a project, similar to No. 6, for the design and construction of piping, pumps, trenches and a water cooling tower at Spang's Specialty Metals Division, East Butler. This project will eliminate discharges from Outfall 004 and has an estimated cost of $635,000 and a scheduled completion date of March 31, 1993 (Exh D). According to Spang, discharges of heated water are authorized under Spang's current NPDES permit and this project is not required by any law or regulation. Some doubt is thrown on this contention by Mr. Lee's testimony to the effect that "we have a schedule to meet the requirements of NPDES, which requires the elimination

of cooling water" (Tr. 153). Moreover, he testified that although preliminary drawings were completed, actual construction had been held up for economic reasons (Tr. 152). The only economic benefit to Spang is a possible reduction in water use, which would be offset by operation and maintenance costs of running the system.

37. Project No. 9 is the design and construction of piping and manholes to connect all water discharge outfalls (except stormwater) from Spang's facilities at Booneville, Arkansas, to the POTW which is being extended to service Spang's facilities. Even though this project will eliminate an existing sanitary sewage impoundment, it allegedly is not required by any existing law or regulation (Tr. 144-45). Mr. Lee testified that delays in this project were attributable to delays by the City in upgrading the POTW and extending its lines (Tr. 154). The estimated cost is $250,000, which includes a contribution to the Booneville Sewer Authority to upgrade its facilities. The project was scheduled for completion in September 1993.

38. Mr. Elsner testified that he first saw the list of projects for which Spang claims credit against any penalties (Exh D) some time in early January 1992 (Tr. 89, 173). Other than Mr. D'Allesandro, he didn't discuss the list with anyone and did not allow any credit therefor. Regarding the first two items on Exhibit D, the design and installation of a wastewater treatment plant and the closure of the surface

settling ponds at East Butler (finding 34), Mr. Elsner stated that it was unclear whether these projects were required by PADER and thus by environmental law or regulation (Tr. 166-67). He also pointed out that the first project was completed in 1989, which was well before the complaint was issued. Regarding Projects 4 and 5, the design and installation of a curbing and sump around a shed used for paint storage at the East Butler facility and the design and construction of a building with curbing and sump for the storage of used fuel oil containers, Mr. Elsner testified that these did not appear to be required by any regulation and would be considered horizontal projects (Tr. 168).

39. Although Mr. Elsner testified that on the surface there appeared to be no problem with Project Nos. 6 and 7, which involve the installation of water cooling towers and the closure of certain outfalls for NPDES discharges (findings 35 and 36), he, nevertheless, indicated that these projects could not be approved without investigation as to whether they were required or encouraged by PADER (Tr. 168). He acknowledged, however, that no effort to ascertain this information had been made (Tr. 174-75). As to Project No. 9, involving the connection of Spang's facilities in Booneville, Arkansas to the POTW and the elimination of a sanitary sewage impoundment, Mr. Elsner stated that on the surface there appeared to be no problem [with allowing credit for this project]. He pointed out that this was a horizontal project involving a facility

other than the one in violation, which would reduce any credit allowed. He explained, however, that an investigation would be required as to whether the project was required by the Arkansas Water Control Board or other pollution control authority (Tr. 168-69). He acknowledged that no one in Region III had attempted to determine if the project were required by Arkansas pollution control authorities (Tr. 175).

40. Mr. Lewis M. Martin, President of Spang's Power Control Division, testified as to the elimination of the painting and cleaning line, which used the great majority of xylene at the Division (Tr. 181-82). He stated that this project was started and completed subsequent to the middle of 1990 and estimated Spang's out-of-pocket costs on an annual basis at $150,000. Mr. Lee referred to the elimination of the paint line at Sandy Lake, indicating that filing of Form Rs by the Power Control Division was no longer required (Tr. 146-47).

C O N C L U S I O N S

1. Spang was required by EPCRA § 313 (42 U.S.C. § 11023), but failed, to file Toxic Chemical Release Inventory Reporting Forms, Form Rs, with the Administrator of EPA and the Commonwealth of Pennsylvania on or before July 1, 1988, and on or before July 1, 1989, showing the quantities of xylene "otherwise used" at its Power Control Division, Sandy Lake, Pennsylvania, during the calendar years 1987 and 1988, respectively.

2. Spang was required by EPCRA § 313 (42 U.S.C. § 11023), but failed, to file Form Rs with the Administrator of EPA and the Commonwealth of Pennsylvania on or before July 1, 1988, and on or before July 1, 1989, showing the quantities of nickel, aluminum oxide, manganese compounds, nitric acid, zinc compounds, and sodium hydroxide "processed" or "otherwise used" at its Magnetics and Specialty Metals Divisions in East Butler, Pennsylvania, during the calendar years 1987 and 1988, respectively.
3. Although Complainant has stipulated that written concurrence from EPA headquarters to issue the complaints in these proceedings was not obtained, the requirement for such concurrence has been relaxed and no such concurrence was required insofar as the complaints allege violations of the reporting requirements of EPCRA § 313. Headquarters' approval to issue the complaints insofar as they allege violations of the recordkeeping requirements of 40 CFR § 372.10 may be inferred.
4. A person violating the recordkeeping requirements of the regulation, 40 CFR § 372.10, is liable for a civil penalty in accordance with EPCRA § 325(c).
5. The complaints as amended (Count III, Docket No. III-037 and Counts XIII through XXIV, Docket No. III-048) allege failure to maintain records in such a manner as to be readily available for inspection in violation of 40 CFR § 372.10. Records verifying xylene usage during the calendar year 1987

were not readily available within the meaning of 40 CFR § 372.10 at the time of the inspection on May 22, 1990.

6. It is unnecessary to decide whether records verifying the quantities of nickel aluminum oxide, manganese compounds, nitric acid, zinc compounds and sodium hydroxide "processed" or otherwise used at Spang's Magnetics and Specialty Metals Divisions in East Butler, Pennsylvania, were readily available within the meaning of 40 CFR § 372.10 at the time of the inspection on June 21, 1990, because there is no evidence that the EPA inspector, Mr. Stanton, asked to see these records at the time of the mentioned inspection. In the absence of such a request, a penalty therefor may not be assessed and Counts XIII through XXIV, Docket No. III-048, will be dismissed.

7. An appropriate penalty for the violations found above is $50,000.

D I S C U S S I O N

A. Failure To Submit Form Rs In A Timely Manner

EPCRA § 313(a) (42 U.S.C. § 11023(a)) provides that the owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility.[9] The form is to be submitted to the Administrator and to an official or officials designated by the Governor on or before July 1, 1988, and annually thereafter on July 1. Chemicals subject to the reporting requirements are listed in 40 CFR § 372.65 and include aluminum

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[9] EPCRA §§ 313(a) and (c) provides:

> (a) Basic requirement
>
> The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.
>
> (c) Toxic chemicals covered
>
> The toxic chemicals subject to the requirements of this section are those chemicals on the list in Committee Print Number 99-169 of the Senate Committee on Environment and Public Works, titled "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986" [42 U.S.C.A. § 11023] (including any revised version of the list as may be made pursuant to subsection (d) or (e) of this section).

oxide,[10/] manganese, nickel, nitric acid, sodium hydroxide,[11/] xylene (mixed isomers) and zinc (fume or dust).

The reporting requirements of EPCRA § 313(a) apply to owners and operators of facilities that have ten or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed or otherwise used a toxic chemical listed under subsection (c) in excess of the quantity of that toxic chemical established under subsection (f) during the calendar year for which a release form is required.[12/] EPCRA § 313(f) provides that the threshold for reporting toxic chemicals used at a facility is 10,000 pounds per year and that the threshold with respect to a toxic chemical manufactured or processed at the facility is 75,000

[10/] Aluminum oxide has been delisted (55 Fed. Reg. 5220, February 14, 1990).

[11/] Sodium hydroxide has been delisted (54 Fed. Reg. 51298, December 14, 1989).

[12/] EPCRA § 313(b)(1)(A) provides:

> (b) Covered owners and operators of facilities
>
> (1) In general
>
> (A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

pounds on or before July 1, 1988, 50,000 pounds on or before July 1, 1989, and 25,000 pounds for each form required to be submitted on July 1, 1990, and thereafter.[13]

In its answers (findings 2 through 8) and on brief, Spang has acknowledged its obligation to file Toxic Chemical Release Inventory Reporting Forms (Form Rs) for each of the chemicals at issue herein with the Administrator and the Commonwealth of Pennsylvania on or before July 1, 1988, and July 1, 1989. The

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[13] EPCRA § 313(f)(1) provides:

(f) Threshold for reporting

(1) Toxic chemical threshold amount

The threshold amounts for purposes of reporting toxic chemicals under this section are as follows:

(A) With respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year.

(B) With respect to a toxic chemical manufactured or processed at a facility--

(i) For the toxic chemical release form required to be submitted under this section on or before July 1, 1988, 75,000 pounds of the toxic chemical per year.

(ii) For the form required to be submitted on or before July 1, 1989, 50,000 pounds of the toxic chemical per year.

(iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of the toxic chemical per year.

record shows that Spang submitted (mailed) these forms on June 8 and June 29, 1990 (findings 18, 19 and 20).

B. Complainant's Authority To Issue The Complaints

As indicated (finding 28), Spang has contended from the inception of these proceedings that Complainant lacked the authority to issue these complaints. This is based on the ERP which requires written concurrence from the Office of Compliance Monitoring, EPA Headquarters, prior to issuing a complaint assessing a civil penalty for EPCRA § 313 violations. Spang's own evidence, however (Exh A), an EPA memorandum, dated June 9, 1989, establishes that this requirement was relaxed insofar as it applied to complaints alleging violations of EPCRA § 313 reporting requirements (finding 28).

Accordingly, the only question is whether the complaints were authorized insofar as they alleged violations of the recordkeeping requirements of 40 CFR § 372.10. Complainant has stipulated that written headquarters concurrence was not obtained and only the first paragraph of a memorandum discussing the question of whether EPA may assess penalties for violations of the recordkeeping requirements of 40 CFR § 372.10 under EPCRA § 325(c) is in evidence (C's Exh 11). The cited paragraph indicates that neither the Office of Enforcement or OGC accepted the validity of such a cause of action, because a violation of § 372.10 is not a violation of EPCRA § 313 and, therefore, is not subject to civil penalties under section 325(c). Mr. Elsner testified, however, that he was informed by Mr. D'Alessandro that headquarters had changed its position and that the Region could proceed with the counts claiming monetary penalties for violations of the recordkeeping requirements of 40 CFR § 372.10 (finding 28). Although this testimony is hearsay, the fact that the complaints were issued tends to corroborate this testimony and supports the conclusion that headquarters' approval to bring the actions may be inferred. The fact that this approval was not in writing is not controlling.

C. Penalties

1. Late Reporting

EPCRA §§ 325(b)(1) and (b)(2) authorize the assessment of Class I and Class II administrative penalties for violations of section 304 of the Act, which requires emergency notification of certain releases of extremely hazardous substances.[14/] The

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[14/] EPCRA § 325(b) provides in pertinent part:

(b) Civil, administrative, and criminal penalties for emergency notification

(1) Class I administrative penalty

(A) A civil penalty of not more than $25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title.

(B) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation.

(C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent

(continued...)

complaints do not allege any such releases and Complainant does not rely on the cited sections for any part of the penalties claimed. Section 325(c) of the Act is entitled "(c)ivil and administrative penalties for reporting requirements" and provides in subsection (c)(1) for penalties of up to $25,000 per violation for violations of sections 312 or 313 and in subsection (c)(2) for penalties of up to $10,000 per violation for violations of sections 311 or 323 or

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[14/] (...continued)
and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) Class II Administrative penalty

A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title. In the case of a second or subsequent violation the amount of such penalty may be not more than $75,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15. In any proceeding for the assessment of a civil penalty under this subsection the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures.

* * * *

322.[15] Each day a violation continues constitutes a separate violation.

As we have seen (findings 26 and 27), Complainant has accepted the view that Spang may appropriately be regarded as a "late reporter" for purposes of the penalty matrix and has recomputed the penalties for failure to timely file Form Rs. Additionally, Complainant has elected to follow the revised ERP, dated August 10, 1992, and allowed a reduction of 25 percent from penalties otherwise determined for the late reporting of aluminum oxide and sodium hydroxide to account for the delisting of these chemicals. The late reporting penalty thus calculated before a ten percent adjustment for good faith totals $183,000. Although Spang contends that no penalty is, or should be, applicable because of the Late

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[15] EPCRA § 325(c) provides in pertinent part:

(c) Civil and administrative penalties for reporting requirements

(1) Any person (other than a governmental entity) who violates any requirement of section 11022 or 11023 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.

(2) Any person (other than a governmental entity) who violates any requirement of section 11021 or 11043(b) of this title, and any person who fails to furnish to the Administrator information required under section 11042(a)(2) of this title shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

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

* * * *

Reporter Enforcement Initiative under which NONs were issued to firms in Spang's position (Brief at 36-41; Reply Brief at 11-12), the "Initiative" was not by its terms applicable to reporting required for the calendar year 1987 (finding 30). In any event, the "Initiative" was adopted as a matter of prosecutorial discretion. Accordingly, Spang's contention that it is entitled to a NON for the violations shown here and that the penalty should be zero is rejected.

2. Recordkeeping

Section 325(c) does not expressly authorize the assessment of penalties for violation of recordkeeping requirements of the regulation, 40 CFR § 372.10. Moreover, there is no indication in the legislative history, House Report No. 99-255 at 291 et seq., reprinted U.S. Code Cong. & Administrative News (1986) at 2966-2978, that Congress intended that civil penalties be assessed for violations of regulations promulgated under the Act. Indeed, the cited report does not mention section 328, which authorizes the Administrator to prescribe such regulations as may be necessary to carry out this chapter (SARA Title III).[16] The title of section 325(c) refers to "penalties for reporting requirements" and it can be argued that recordkeeping is essential for accurate reporting and effective enforcement, thereby authorizing by necessary

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[16] EPCRA § 328 provides:

> The Administrator may prescribe such regulations as may be necessary to carry out this chapter.

implication the assessment of penalties for violation of recordkeeping requirements of the regulation.

Be the foregoing as it may, the Administrator has by regulation provided for the assessment of civil penalties for violations of 40 CFR Part 372.[17] While this may be analogous to hoisting yourself by your own bootstraps, there would seem to be little point in authorizing the promulgation of regulations, if the regulations cannot be enforced.[18] It is concluded that a person violating the recordkeeping requirements of 40 CFR § 372.10 is liable for a civil penalty in accordance with EPCRA § 325(c).

The regulation, 40 CFR § 372.10, requires each person subject to the reporting requirements of EPCRA § 313 and 40 CFR Part 372 to retain, for a period of three years from the date of the submission of a report (Form R) under § 372.30, among others, the following records: a copy of each report (Form R) submitted and all supporting materials and documentation used to make the compliance

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[17] The regulation 40 CFR § 372.18, provides:

§ 372.18 Compliance and enforcement.

> Violators of the requirements of this part shall be liable for a civil penalty in an amount not to exceed $15,000 each day for each violation as provided in section 325(c) of Title III.

[18] The ERP, however, suggests a possible method of enforcement short of the assessment of penalties, i.e., the issuance of NONs which are considered in any subsequent proceedings for which the assessment of penalties is expressly authorized by EPCRA. Both the 1988 and 1990 ERPs, however, contemplate that administrative penalties may be assessed for violations of 40 CFR § 372.10.

determination that the facility or establishment is a covered facility under §§ 372.22 or 372.45.[19] Records retained in

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[19] Section 372.10 provides in pertinent part:

§ 372.10 Recordkeeping.

(a) Each person subject to the reporting requirements of this part must retain the following records for a period of 3 years from the date of the submission of a report under § 372.30:

(1) A copy of each report submitted by the person under § 372.30.

(2) All supporting materials and documentation used by the person to make the compliance determination that the facility or establishments is a covered facility under § 372.22 or § 372.45.

(3) Documentation supporting the report submitted under § 372.30 including:

* * *

(ii) Data supporting the determination of whether a threshold under § 372.25 applies for each toxic chemical.

* * *

(iv) Documentation supporting the use indications and quantity on site reporting for each toxic chemical, including dates of manufacturing, processing, or use.

* * *

(b) Each person subject to the notification requirements of this part must retain the following records for a period of 3 years from the date of the submission of a notification under § 372.45.

(1) All supporting materials and documentation used by the person to determine whether a notice is required under § 372.45.

(2) All supporting materials and documentation used in developing each required notice under § 372.45 and a copy of each notice.

(continued...)

accordance with the cited section are to be maintained at the facility to which the report applies or from which a notification was provided and are to be readily available for EPA inspection.

"Readily available" is not defined in the regulation or in the preamble (53 Fed. Reg. 4500 et seq., February 16, 1988). Some indication of the Agency's understanding of this term is provided by the ERP, which provides with respect to circumstances warranting the issuance of a NON, if records cannot be presented within 14 calendar days from the date of inspection, the violation is failure to keep records in accordance with the regulations (finding 29). Although Spang subsequently produced records of xylene purchased in 1987 and equates the quantity purchased with the quantity "otherwise used," there is no sound reason for not holding Spang to its written and oral statements at the time that records for 1987 were not available (finding 11). Accordingly, the charge that records, showing the amount of xylene used in 1987, were not readily available for purposes of EPA inspection at the Power Control Division within the meaning of 40 CFR § 372.10 is sustained by the evidence.

The record shows that prior to the inspection of the Magnetics and Specialty Metals Divisions on June 21, 1990, Mr. Stanton wrote

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[19/] (...continued)

(c) Records retained under this section must be maintained at the facility to which the report applies or from which a notification was provided. Such records must be readily available for purposes of inspection by EPA.

a letter to Mr. Marsh, which confirmed the date of inspection and listed the documents, including chemical purchase and year-end chemical inventory summaries, he wished to review (finding 12). The record also shows that Spang, in preparation for filing Form Rs due to be submitted by July 1, 1990, for the calendar year 1989, had prepared a summary of chemicals otherwise used and processed in 1989 and that a copy of this summary was given to Mr. Stanton (finding 14). The record further shows that Spang officials believed that the quantities of these chemicals processed and otherwise used in 1987 and 1988 closely approximated the quantities for 1989 (finding 23). Although there is no doubt that chemical usage records were discussed during the inspection, and there is evidence that Mr. Stanton was informed the records for 1987 and 1988 were "no longer available," there is no evidence that he specifically asked to examine such records. Indeed, Mr. Lee's testimony is to the contrary (finding 23).

While it is recognized that Mr. Lee's testimony in above respect is self-serving and that it is futile to ask for something one has been told is "no longer available," these apparent difficulties are easily resolved, if, for example, Mr. Stanton were told or understood that the records were "no longer readily available." The letter to Mr. Stanton, signed by Mr. Ricciardella (finding 11), states "(w)e do not have records for 1987." Therefore, Mr. Stanton's testimony that he was informed that the records were "no longer readily available" is more consistent with events during the inspection of the Magnetics and Specialty Metals Division than of the Power Control Division.

The evidence establishes that whatever Mr. Stanton may have been told as to availability of the records, the records were in storage at Spang's Brugh Avenue facility. Mr. Stanton considered Mr. Lee to be an honorable man (finding 13) and I find him to be a credible witness. In any event, there is no evidence that Mr. Stanton specifically asked for the records during the inspection of the Magnetics and Specialty Metals Divisions and, in the absence of such a request, it is concluded that Spang may not be assessed a penalty for failing to have records readily available for EPA inspection. The circumstances under which the issuance of a NON is appropriate (ante at 45) include "if records cannot be made available within 14 calendar days from the date of inspection." A fortiori, should this rule be applicable to the assessment of a penalty. Accordingly, the counts of the complaint (Docket No. III-048), alleging such failure will be dismissed.

At the hearing, Complainant indicated that it was prepared to reduce the 13 counts for recordkeeping violations to one count for which a penalty of $25,000 was claimed (finding 27). Notwithstanding this concession, Complainant asserts on brief that a penalty of $10,000 for each of the 13 counts of recordkeeping violations in the two dockets for a total of $130,000 is appropriate (Brief at 13). As indicated, supra, Complainant has failed to sustain the 12 counts (Docket-III-048) of failing to have records readily available for EPA inspection at Spang's facilities in Butler, Pennsylvania.

This leaves only the single count of failure to have records involving xylene usage for the calendar year 1987 readily available for EPA inspection at the Sandy Lake facility at the time of the inspection in May of 1990. Complainant having stated on brief that a penalty of $10,000 for each recordkeeping count is appropriate, this figure is adopted as the maximum for such violations. Adding $10,000 to the total of $183,000 calculated for late filing of Form Rs (ante at 41), results in a total penalty, before considering other adjustment factors, of $193,000. This sum will be reduced by ten percent or $19,300 to a total of $173,700, because of Spang's cooperation, as Complainant recognized was appropriate at the hearing (finding 27).

EPCRA § 325(c)(1) does not set forth factors required to be considered in determining penalties for violations of section 313.[20] Nevertheless, the ERP, under the rubric of "other factors as justice may require" provides that crediting environmentally beneficial expenditures, now referred to as "supplemental environmental projects" (SEPs), is consistent with penalty assessment (Id. at 16). Although the ERP provides that SEPs are normally discussed only in settlement negotiations, it does not

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[20] The factors listed in EPCRA § 325(b)(1)(C) which includes the phrase "other factors as justice may require," and § 325(b)(2), which incorporates the penalty provision of section 16 of the Toxic Substances Control Act and which also includes the mentioned phrase, expressly apply only to the determination of Class I and Class II penalties for violations of section 304 (supra note 14).

preclude the consideration of SEPs in determining litigated penalties.[21] Moreover, I am required by Rule 22.27(b) (40 CFR Part 22) to consider any penalty guidelines issued under the Act. It is therefore concluded that I may properly consider SEPs in determining an appropriate penalty herein. Complainant does not argue to the contrary, but only that Spang has not met its burden of showing eligibility for such credit.[22]

Turning to specific projects, Project Nos. 1 and 2, involving the installation of a wastewater pre-treatment plant and the closure of three surface settling ponds at Spang's facilities in East Butler, appear to be closely related, because the ponds were used for waste disposal prior to installation of the pre-treatment

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[21] Spang argues persuasively that it is unjust for Complainant to contend that SEPs can only be considered in settlement negotiations, when it made no attempt to address Spang's claims for credit in that context (Reply Brief at 14). While this contention is not fully supported by the record, it is clear that Spang's claims for SEP credit were treated in a summary manner and that no attempt was made to ascertain whether any of the projects were required by PADER or Arkansas pollution control authorities (findings 38 and 39).

[22] Reply Brief at 5-11. Complainant has, however, attached a copy of a decision of the Comptroller General (B-247155, July 7, 1992) addressed to Congressman John Dingell, wherein it is concluded that despite the authority conferred upon the Administrator by CAA § 205 to "compromise or remit, with or without conditions" civil penalties, the Administrator lacked the authority to implement an "alternative payment policy," under which alleged violators could obtain reductions in proposed penalties for funding public awareness projects or other environmental activities deemed to further goals of the Act. While the rule against augmenting appropriations is well established, the Comptroller General's opinion is a crabbed interpretation of the Administrator's broad authority and is unpersuasive. In any event, EPA policy continues to favor SEPs.

plant (finding 34). The pre-treatment plant seemingly is a requirement of the Clean Water Act. See the General Pre-treatment Regulations for New and Existing Sources of Pollution, 40 CFR Part 403. In any event, installation of the pre-treatment plant was completed in 1989, before the inspection or issuance of the complaints herein. Although the Agency's policy as to whether a project or activity had to be undertaken after issuance of the complaint was unclear (finding 33), allowing credit for projects which would be accomplished for business reasons in any event or which were previously completed does not appear to serve any purpose of the Act.

As to the ponds, Mr. Lee testified that closure was not required by any environmental law or regulation (finding 34). He acknowledged, however, that PADER wanted the ponds closed. Even if Mr. Lee's testimony in this respect were technically correct, closure of the ponds would be within the spirit of the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616, Nov. 8, 1984), which prohibited the land disposal of specified wastes. See 42 U.S.C. § 6924 and 40 CFR Part 268. It is concluded that Spang hasn't shown entitlement to credit against the penalty for Project Nos. 1 and 2 and no credit therefor will be allowed.

Complainant hasn't objected to Project Nos. 4 and 5 and these projects qualify for credit. Project Nos. 6 and 7, involving the installation of cooling towers and the closure of certain outfalls in East Butler involve pollution prevention and appear to be precisely the type of project the SEP policy is intended to encourage.[23] Mr. Elsner testified that on the surface there did not appear to be any problems [with allowing Spang credit] for these projects (finding 38). He indicated, however, that these projects could not be approved for credit without determining whether the projects were required or encouraged by PADER. The notion that mere encouragement by PADER would or should disqualify an otherwise eligible project is rejected, because the very purpose of the SEP program is to encourage activities deemed beneficial to the environment. Notwithstanding the similarities between Project Nos. 6 and 7, it is not clear whether Project No. 7 is required by environmental law or regulation (finding 36). Moreover this project was put on hold for economic reasons. Although the SEP Policy indicates that a commitment to undertake a SEP may be sufficient to allow a credit therefor, provided respondent remains liable for the full amount of the penalty if the commitment is not fulfilled (Id. at 11), no such commitment has been demonstrated here.

Mr. Elsner testified that on the surface there appeared to be no problem with allowing credit for Project No. 9, involving the connection of Spang's facilities in Booneville, Arkansas, to the

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[23] See SEP Policy at 9 which reflects that pollution prevention is an exception to the rule disallowing credit for projects representing sound business practice.

POTW (finding 38). While he indicated that an investigation would be required as to whether this project was required by Arkansas pollution control authorities, the real problem with allowing credit for this project is not lack of a commitment by Spang as Complainant argues, but that there were delays by the City in upgrading its POTW and extending its sewer lines (finding 37). This is, of course, a horizontal project involving a facility in a different Region than the facilities in violation, which increases the difficulty of monitoring progress of the project, and which would reduce any allowable credit.

Because the violations at the Power Control Division involved reporting of xylene usage and recordkeeping therefor, removing the paint and cleaning line and eliminating the use of xylene is a SEP having a vertical nexus. It is concluded that, subject to verification of the $150,000 costs of implementing this SEP, the penalty for these violations, $32,400 after a ten percent reduction for good faith, will be reduced to $7,000. While this project appears to have been initiated after the date of inspection, rather than after issuance of the complaint (finding 40), the Region, as we have seen (finding 33), sometimes considered such projects as eligible for credit. Project Nos. 4, 5, and 6 at the Magnetics and Specialty Metals Divisions are projects having a horizontal nexus with the violations and subject to verification of the $368,900 expended on these projects, the penalty for the violations, $141,300 after a ten percent reduction for good faith, will be reduced to $43,000.

The "Strock memo" makes it clear that, notwithstanding credits against penalties for SEPs, substantial penalties must be assessed to recapture savings from non-compliance and an applicable portion of the gravity portion of the penalty (Id. at 9, 10). This is to assure that penalties serve their primary purpose, which is deterrence of future violations. The penalty for the violations herein of $50,000 after considering SEPs is substantial by any reasonable definition of the term.

O R D E R

Having determined that Spang and Company violated EPCRA § 313 (42 U.S.C. § 11023) in the particulars recited above, a penalty of $50,000 is assessed against it in accordance with section 325(c) of the Act (42 U.S.C. § 11045(c)). The penalty as determined above reflects recognition of expenditures by Spang for Supplemental Environmental Projects (SEPs) totaling $518,900 and a reduction from the full penalty ($173,700) in excess of 71 percent. This penalty reduction is subject to Spang's presentation to Complainant of verification of sums expended for the SEPs recognized herein.

In the absence of such verification, the full penalty of $173,700 is assessed. Payment of the penalty shall be made by mailing or presenting to the address set forth below a cashier's or certified check payable to the Treasurer of the United States within 60 days of the date of this order:[24]

Regional Hearing Clerk
U.S. EPA, Region III
P.O. Box 360515M
Pittsburgh, PA 15251

Dated this 10th day of March 1994.

Spencer T. Nissen
Spencer T. Nissen
Administrative Law Judge

[24] Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 CFR Part 22) or unless the EAB elects sua sponte to review the same as therein provided, the decision will become the final order of the EAB in accordance with Rule 22.27(c).