12/1/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ALL REGIONS CHEMICAL LABS, INC.,	)	Docket No. CERCLA-I-88-1089
	)	
	)	
Respondent	)	

1. Given the absence of a specific statutory provision or any relevant legislative history indicating the criteria which should be considered in assessing a Class II administrative penalty under Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), it is reasonable to conclude that the criteria which should be considered are those in 42 U.S.C. § 9609(a)(3).

2. Since no civil penalty guidelines have been issued under Section 109 of CERCLA, the Presiding Officer is under no obligation to consider any particular penalty guidelines pursuant to 40 C.F.R. § 22.27(b). However, consideration of the TSCA Guidelines and General Policy Framework may be helpful in defining and explaining the criteria in 42 U.S.C. § 9609(a)(3).

3. In assessing a Class II administrative penalty under Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), given the absence of any "issued" penalty guidelines, consideration of the TSCA Guidelines and the General Policy Framework is particularly appropriate in defining and explaining the criteria to be applied because of the requirement that a Class II penalty under Section 325(b)(2) be assessed in the same manner as a penalty under Section 2615 of TSCA.

4. Neither Section 103(a) of CERCLA nor the implementing regulation, 40 C.F.R. § 302.6, requires that notification of a release of a hazardous substance include any particular information, other than the fact of the release itself.

APPEARANCES:

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BEFORE: Henry B. Frazier, III
Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision:

On May 3, 1989, an Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency ("EPA," "Complainant" or the "Agency"), found that All Regions Chemical Labs, Inc., d/b/a Advanced Laboratory ("Respondent," "All Regions" or "Advanced Labs"), had violated Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. § 11004, as alleged in the complaint.

Section 103(a) of CERCLA requires a person in charge of a vessel or an onshore facility, as soon as he or she has knowledge of a release of a hazardous substance from such vessel or facility in an amount equal to or greater than the reportable quantity (RQ) of that substance, to notify immediately the National Response Center ("NRC").1/ During the time Respondent was in charge

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1/ Section 103(a), 42 U.S.C. § 9603(a), provides, in pertinent part:

"Any person in charge of...an onshore facility shall, as soon as he has knowledge of any release...of a hazardous substance from such...facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center...of such release."

of the facility, there was a release of chlorine, a hazardous substance, in a quantity equal to or greater than the RQ for chlorine and Respondent did not immediately notify the NRC of the release as soon as it had knowledge thereof.

Section 304(c)[2/] of EPCRA requires an owner or operator of a facility, as soon as practicable after a release that requires notice under Section 304(a),[3/] to provide written follow-up emergency notice (or notices, as more information becomes available)

2/ Section 304(c), 42 U.S.C. § 11004(c), provides:

"As soon as practicable after a release which requires notice under subsection (a) of this section, such owner or operator shall provide a written followup emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b) of this section, and including additional information with respect to--

(1) actions taken to respond to and contain the release,

(2) any known or anticipated acute or chronic health risks associated with the release, and

(3) where appropriate, advice regarding medical attention necessary for exposed individuals."

3/ Section 304(a)(1), 42 U.S.C. § 11004(a)(1), provides, in pertinent part:

"(a) Types of releases

(1) Section 11002(a) substance which requires CERCLA notice

If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980..., the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section."

to include information required under Section 304(b).4/ Respond-

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4/ Section 304(b), 42 U.S.C. § 11004(b) provides:

"(b) Notification

(1) Recipients of notice

Notice required under subsection (a) of this section shall be given immediately after the release by the owner or operator of a facility (by such means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees, if established pursuant to section 11001(c) of this title, for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release. With respect to transportation of a substance subject to the requirements of this section, or storage incident to such transportation, the notice requirements of this section with respect to a release shall be satisfied by dialing 911 or, in the absence of a 911 emergency telephone number, calling the operator.

(2) Contents

Notice required under subsection (a) of this section shall include each of the following (to the extent known at the time of the notice and so long as no delay in responding to the emergency results):

(A) The chemical name or identity of any substance involved in the release.

(B) An indication of whether the substance is on the list referred to in section 11002(a).

(C) An estimate of the quantity of any such substance that was released into the environment.

(D) The time and duration of the release.

(E) The medium or media into which the release occurred.

(F) Any known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals.

(G) Proper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordinator pursuant to the emergency plan).

(H) The name and telephone number of the person or persons to be contacted for further information.

ent did not provide written follow-up emergency notice (or notices, as more information became available) as soon as practicable after the release for, as of September 30, 1988, ninety-nine (99) days had elapsed since written follow-up emergency notice was practicable and none had been provided.

On May 30 and 31 and June 1, 1989, a hearing, which had been requested by All Regions, was held in Springfield, Massachusetts, for the purpose of deciding the sole remaining issue of the amount, if any, of civil penalties, which appropriately should be assessed for the violations found.

EPA proposed a Class II administrative penalty of $25,000.00 for the violation of Section 103 of CERCLA. For the violation of Section 304 of EPCRA, EPA proposed a Class II administrative penalty of $25,000.00 for the first day of noncompliance and $500.00 for each day of noncompliance thereafter. Since, as of September 30, 1988, ninety-nine (99) days had elapsed since a written follow-up report was practicable and, since EPA alleged that a complete report was not filed until November 15, 1988, a total penalty of $97,000.00 ($25,000.00 + $72,000.00) was proposed for the violation of Section 304 of EPCRA. Therefore, the total penalty proposed by EPA for the two violations was $122,000.00.

In Respondent's Post-Hearing Memorandum filed on July 31, 1989, All Regions contends that the proposed penalty is excessive and should be reduced for the following reasons:

(1) The proposed penalty is excessive when measured against the penalty criteria set forth in the respective statutes;

(2) The legislative history of both statutes shows that the fact of the notice rather than the source of the notice is most important and the notice requirements of the respective statutes were complied with when (a) a representative of the Massachusetts Department of Environmental Quality Engineering ("DEQE") reported the release to the NRC at approximately 12:50 a.m. on June 18 and provided information to EPA in a telephone discussion shortly thereafter; and (b) the local community emergency coordinator for the City of Springfield was on the scene within a few minutes of the second incident on the evening of June 17 and conceded that he would not have done anything differently if he had received immediately the full information required; and

(3) The assessment of civil penalties under the Toxic Substance Control Act ("TSCA") for violation of notice and reporting provisions indicates that the penalties assessed in this case under CERCLA and the Right-to-Know Act are excessive.

On the basis of these arguments, All Regions maintains that the penalty for violation of each of the two statutes should be $3,000.00 for a total penalty of $6,000.00.

II. Applicable Statutory Provisions:

1. CERCLA - Section 109 of CERCLA, 42 U.S.C. § 9609,5/

5/ Section 109, 42 U.S.C. § 9609 provides, in pertinent part:

"(a) Class I administrative penalty

(1) Violations

(Continued on page 8.)

establishes two types of administrative penalties which may be assessed for a violation of the notice requirements of Section 103, 42 U.S.C. § 9603: Class I administrative penalties and Class II administrative penalties. The proceeding under CERCLA in this matter is an administrative proceeding for the assessment of a Class II civil penalty.

5/ Continued from page 7.

A civil penalty of not more than $25,000 per violation may be assessed by the President in the case of any of the following--

(A) A violation of the requirements of section 9603 (a) or (b) of this title (relating to notice).

* * * * * * *

(3) Determining amount

In determining the amount of any penalty assessed pursuant to this subsection, the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

* * * * * * *

(b) 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 President in the case of any of the following--

(1) A violation of the notice requirements of section 9603(a) or (b) of this title.

* * * * * * *

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 after notice and opportunity for hearing on the record in accordance with section 554 of Title 5.

While Section 109(a)(3), 42 U.S.C. § 9609(a)(3), specifies the criteria to be considered in assessing a Class I penalty, the statute is silent as to the criteria to be considered in assessing a Class II penalty. An examination of the legislative history of Section 109 has failed to reveal any indication of congressional intent concerning the factors to be weighed in assessing a Class II penalty. Given the absence of a specific statutory provision or any relevant legislative history, it is reasonable to conclude that the criteria which must be considered in assessing a Class I penalty should also be considered in assessing a Class II penalty. It would be unreasonable to assume that Congress intended to leave the amount of Class II penalties to the unfettered discretion of those who preside over the administrative hearings required by the statute, which hearings are specified to be held in accordance with 5 U.S.C. § 554. It is unlikely that Congress would impose the strict procedural requirements of the Administrative Procedure Act upon the conduct of the proceeding and yet intend to leave the determination of the amount of the monetary penalty to the unrestricted judgment of the Presiding Officer. (Even though the statute continually refers to "the President," pursuant to Section 115 of CERCLA, 42 U.S.C. § 9615, the President has delegated the authority to assess penalties under the Act.) Moreover, since Class II penalties are potentially larger than Class I penalties, the criteria which should guide my judgment in determining the amount of the Class II penalty, if any, to be assessed herein, should be at least as comprehensive as those criteria which are

considered in assessing lesser Class I penalties. Therefore, in determining the amount of the penalty for the violation of Section 103, 42 U.S.C. § 9603, pursuant to 40 C.F.R. § 22.27(b),6/ herein, I will take into account "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

I note that no civil penalty guidelines have been issued by EPA under Section 109 of CERCLA for the assessment of penalties for violations of Section 103. Thus, I am under no obligation to consider any particular penalty guidelines pursuant to 40 C.F.R. § 22.27(b). However, as Respondent points out in its Post-Hearing Memorandum, the penalty criteria in the TSCA, 15 U.S.C. § 2615(a)(2)(B), are almost identical to those in 42 U.S.C. § 9609(a)(3),

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6/ 40 C.F.R. § 22.27(b) provides, in pertinent part:

"(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

and EPA has issued "Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA,"7/ ("TSCA Guidelines"), as well as "A Framework for Statute-Specific Approaches to Penalty Assessments; Implementing EPA's Policy in Civil Penalties"8/ ("General Policy Framework") wherein it has defined and explained many of the terms found in 42 U.S.C. § 9609(a)(3).

On August 28, 1989, Complainant filed a motion to strike pages 24 to 35 of Respondent's Post-Hearing Memorandum wherein Respondent explicates its argument that the penalties assessed in this case are excessive when compared with the assessment of civil penalties under TSCA. Respondent's explication includes citations, inter alia, to the TSCA Guidelines. Complainant moves to strike this material on the grounds that Respondent did not include the TSCA Guidelines in its prehearing exchange and did not introduce the TSCA Guidelines into evidence during the hearing. In response, All Regions filed, on September 6, 1989, a Memorandum in Opposition to Complainant's Motion to Strike, wherein it contends that EPA's arguments are without merit because the Presiding Officer may take official notice of the TSCA Guidelines. The Consolidated Rules governing this proceeding provide at 40 C.F.R. § 22.22(f):

7/ 45 F.R. 59770 (September 10, 1980).

8/ EPA General Enforcement Policy #GM-22 (February 16, 1984).

> Official notice may be taken of any matter judicially noticed in the Federal Courts and of other facts within the specialized knowledge and experience of the Agency.

Clearly, I may take official notice of the TSCA Guidelines which have been published in the Federal Register. I find no merit in Complainant's motion and it is hereby denied.

Since the TSCA Guidelines and the General Policy Framework were not issued to implement the penalty criteria of CERCLA, I am not required to consider them in determining the appropriate penalty under Section 109 of CERCLA. However, consideration of the TSCA Guidelines and the General Policy Framework may be helpful in defining and explaining the statutory penalty criteria which I will apply herein.

2. EPCRA - Section 325 of EPCRA, 42 U.S.C. § 11045,9/ establishes two types of administrative penalties which may be assessed for a violation of the emergency notification requirements of Section 304, 42 U.S.C. § 11004: Class I administrative penalties and Class II administrative penalties. Like the proceeding herein under CERCLA, the proceeding herein under EPCRA is an administrative proceeding for the assessment of a Class II civil penalty.

9/ Section 325, 42 U.S.C. § 11045, provides, in pertinent part:

> (b) Civil, administrative and criminal penalties for emergency notification
>
> (1) Class I administrative penalty

(Continued on page 13.)

Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), which provides for Class II administrative penalties, states that "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." As noted previously, Section 2615 of Title 15 governs the assessment of penalties under TSCA. 15 U.S.C. § 2615(a)(2)(B) provides that 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

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9/ (Continued from page 12.)

(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.

* * * * * * *

(C) In determining the amount of any penalty assessed pursuant to this subsection, 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, 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....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.

and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

Since no civil penalty guidelines have been issued by the Agency under Section 325 of EPCRA, I am not required by 40 C.F.R. § 22.27(b)10/ to consider any particular civil penalty guidelines in assessing a penalty for a violation of EPCRA. However, as noted above,11/ EPA has issued TSCA Guidelines and a General Policy Framework which may be helpful in defining and explaining the statutory penalty criteria to be applied under EPCRA. Reference to the TSCA Guidelines is particularly appropriate under Section 325 of EPCRA because of the explicit statutory requirement that a civil penalty under Section 325(b)(2) of EPCRA "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."

III. Findings of Fact

As noted previously, on May 30 and 31 and June 1, 1989, a hearing was held for the purpose of deciding the amount, if any, of civil penalties to be assessed herein. Thereafter, the

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10/ See supra note 6.

11/ See supra note 7.

Respondent and the Complainant filed post-hearing memoranda, proposed findings of fact, proposed conclusions of law and proposed orders on July 31, 1989 and August 1, 1989, respectively. On August 30, 1989 and August 31, 1989, the Respondent and Complainant, respectively, filed reply memoranda.

In addition to the findings of fact previously made in my Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. Two chemical incidents occurred in a building housing Advanced Labs at One Allen Street, Springfield, Massachusetts (the "Site") on Friday, June 17, 1988. Tr. 11-12, 288.
2. The first incident began shortly before 10:00 a.m. on Friday, June 17, 1988. Tr. 12, 24.

3. The Springfield Fire Chief, Raymond F. Sullivan, arrived at the Site at approximately 10:00 a.m. on June 17, 1988. Tr. 25-26.

4. Chief Sullivan came to the scene because a second alarm had been issued. Tr. 25-26.

5. The second alarm on a chemical incident initiated the implementation of the Hazardous Integrated Response Plan of the City of Springfield. Tr. 26-27, 73.

6. A chemical reaction was taking place. Although there were no visible flames, a cloud release of chlorine gas occurred as a result of the first incident and consequently the area within approximately one-half mile of the Site was evacuated. Tr. 25-26, 30.

7. Mr. James Controvich, Emergency Response Coordinator for the City of Springfield, was called by the Police Department around 10:00 a.m. Friday, June 17, 1988, and informed of the first incident. Mr. Controvich responded by going to the command post to serve as a coordinator of the ambulance service, the police department and civil defense to insure that the evacuation process, shelter program and the emergency medical services were operating smoothly. Tr. 74, 341-342.

8. Mr. Controvich made certain that the State of Massachusetts DEQE had been notified. Tr. 343.

9. Mr. Controvich directed the evacuation of four or five elementary schools. Tr. 343.

10. About 5,000 people, most of whom were school children, were evacuated on Friday morning. Tr. 351.

11. Mr. Controvich testified that he thought he had all the information he needed to perform his duties at the Site on Friday morning. Tr. 344.

12. The incident was declared secured and under control about 1:00 p.m. on Friday, June 17, 1988. Tr. 345.

13. The foreman of All Regions was of great assistance to the Springfield Fire Department during the first incident. Tr. 79.

14. During the response to the first incident, firefighters broke the windows on the west, south and east sides of the building to permit it to ventilate so that they could determine what was required to deal with the incident. Tr. 78-79.

15. After the first incident, Chief Sullivan issued instructions to the foreman of the company that all the windows of the building at the Site should be boarded up because of a fear of more rain which could produce additional chemical reactions. Tr. 26, 79.

16. Mr. David Slowick of the State of Massachusetts DEQE arrived at the Site about 10:35 a.m. on Friday, June 17, 1988. Mr. Slowick toured the inside of the building after the first incident was under control. Mr. Slowick observed several hundred (approximately 500) barrels stored in the building. Tr. 436-438, 454.

17. At approximately 3:00 p.m. on Friday, June 17, 1988, EPA was informed by a "concerned citizen" of the incident which had occurred at the Site at approximately 10:00 a.m. that morning. Tr. 209-210.

18. On Friday, June 17, 1988, at approximately 3:00 p.m., Mr. Slowick received a telephone call from a representative of EPA who stated that EPA had received a complaint from a citizen concerning the facility at One Allen Street. Mr. Slowick described the first incident to the EPA representative thereby informing EPA of the time, location and suspected cause of the incident; the estimated amount of chemicals (100 to 200 lbs.) involved; the evacuation of citizens; the termination of the release; and DEQE's intention to perform a follow-up inspection on Monday, June 20, 1988. Tr. 439-441, 460-461.

19. A second incident at the Site began around 11:00 p.m. on Friday, June 17, 1988. Tr. 12, 30, 54.

20. Chief Sullivan arrived at the Site at approximately 11:10 p.m. on Friday, June 17, 1988. Tr. 12, 30, 54.

21. There was a fire on the second floor. A heavy cloud was coming from the building. The fire produced a chlorine release. Tr. 56-57, 292; Complainant's Exh. 39.

22. A disaster emergency was declared by the DEQE of the State of Massachusetts. Tr. 17.

23. Around 11:30 p.m. on Friday, June 17, 1988, two Springfield firemen entered the building and removed a label from a barrel. Tr. 37-38, 60.

24. The label identified the chemical in the barrel as trichloroisocyanurate acid or trichloro-s-triazinetrione ("TCT"). The material had approximately a 90 percent chlorine base. Chief Sullivan reviewed the nature of TCT in the CHRIS Manual which was available at the scene in the HAZMAT truck. Tr. 37-38, 43, 60-61, 181, 443; Respondent's Exhs. 6 and 7.

25. Chief Sullivan testified that he did not require any additional information concerning TCT for purposes of combating the fire beyond that information obtained from the CHRIS Manual. Tr. 42-43, 64-65, 69.

26. On Friday night, June 17, 1988, Chief Sullivan had no idea of the quantity of TCT present at the Site. Tr. 70.

27. Chief Sullivan did not know all the chemicals that were in the building at the time of the fires and consequently did not know what reactions might take place. Tr. 18, 68.

28. Chief Sullivan testified that based upon what he later learned about the other chemicals in the building, he would not have done anything differently on Friday evening, June 17, 1988, in his firefighting and combative efforts regardless of the presence of the other chemicals, except probably have the firefighters at a greater distance from the building, if possible. Tr. 68-69, 76-77.

29. Chief Sullivan sought the advice of chemists from Olin Chemical and Monsanto as to methods for treating the fire. Tr. 19.

30. Of the twenty (20) fire companies in the City of Springfield, eighteen (18) operated at the Site during the second fire. Tr. 19.

31. Fifty (50) to sixty (60) firemen received medical attention as a result of fighting the fire. One was held over in the hospital. Tr. 22.

32. The smoke cloud was probably a mile to a mile and a half wide and extended six (6) to eight (8) miles across the city. Tr. 16-17.

33. The cloud of chlorine was over the city until the early hours of Monday, June 20, 1988. Tr. 21.

34. By the evening of Saturday, June 18, 1988, Chief Sullivan decided to pour as much water as possible into the building in order to accelerate the reaction because dull explosions were taking place and fires were breaking out within the building. Tr. 32-33.

35. Water was poured continuously into the building from about 7:17 p.m., Saturday evening, June 18, 1988, until approximately 3:00 a.m., Monday, June 20, 1988. Tr. 33.

36. The Springfield Fire Department poured approximately six million gallons of water on the fire. Tr. 20.

37. Mr. Controvich, Emergency Coordinator for the City of Springfield, was notified by the Springfield Police Depart-

ment around 11:15 p.m. on Friday, June 17, 1988, of the second incident. Mr. Controvich responded by going to the command post. Tr. 346.

38. A representative of All Regions Laboratories was on the scene when Mr. Controvich arrived at the command post, but Mr. Controvich did not speak to him at that time. Tr. 347, 360-361.

39. Mr. Controvich learned almost immediately upon his arrival the identity of one of the chemicals involved from the label that had been removed from a drum. Tr. 347, 360.

40. Mr. Controvich requested a chemical inventory from All Regions Laboratories during the four (4) days of the fire, but All Regions was unable to provide the inventory until November of 1988. Tr. 348, 362-363.

41. Mr. Controvich testified that if he had received a specific list of chemicals and their quantities which were in the building, other than passing that information on to the other agencies involved in combating the incident, there is nothing else he personally would have done differently. Tr. 364.

42. On the night of Friday, June 17, 1988 and into Saturday, June 18, 1988, Mr. Controvich coordinated an evacuation of the immediate neighborhood around the Site. Tr. 349.

43. Two separate evacuations took place in response to the second incident. On Friday night, an area about a mile to a mile and a half from the Site in all directions was evacu-

ated thereby affecting about 30,000 people. On Saturday, many of these people were permitted to return to their homes. On Saturday night, an area approximately three (3) to five (5) miles downwind was evacuated affecting about 30,000 people, some of whom had been evacuated previously on Friday night. Tr. 351.

44. Most people were permitted to return to their homes by Sunday night and all had returned by Monday night. Tr. 351-352.

45. Mr. David Slowick of DEQE was contacted by the DEQE on-call person at approximately 11:45 p.m. on Friday, June 17, 1988, and informed of the second incident at the Site. Tr. 441-442.

46. Mr. Slowick arrived at the Site at approximately 12:20 a.m. on Saturday, June 18, 1988, and recognizing that a major incident was occurring, contacted the NRC at approximately 12:50 a.m. on Saturday, June 18, 1988. Tr. 445-447.

47. Mr. Slowick informed the NRC of the nature of the incident and requested air monitoring and technical assistance from EPA. Mr. Slowick informed the NRC of the location of the incident; the approximate time the incident had begun; an approximate number of containers (about 500) that were involved; the nature of the containers; that the chlorine fire was in a large warehouse; that TCT was the probable chemical involved; and that an evacuation of 30,000 people was taking place. Tr. 447-449; Respondent's Exh. 1.

48. During the second incident, Mr. Slowick did not know the number, names or quantities of other chemicals present at the Site. Tr. 457-458.

49. Mr. Slowick requested that someone from EPA contact him and, as a result, the NRC arranged a telephone call from a representative of EPA. During that conversation, Mr. Slowick provided EPA with the information which he had given the NRC. Tr. 449-452; Respondent's Exh. 1.

50. Mr. Paul Groulx, an environmental scientist with EPA, served as EPA duty officer from 6:00 p.m. Friday, June 17, 1988, until approximately 8:00 a.m. Saturday, June 18, 1988. Tr. 267.

51. At approximately 1:00 a.m. on Saturday, June 18, 1988, Mr. Groulx received a telephone call from the NRC informing him that a representative of the DEQE had telephoned the NRC to request EPA's assistance. NRC arranged a conference call among Mr. Groulx, the DEQE representative, Mr. Slowick, and the NRC representative. Tr. 267-269.

52. In this telephone conversation, Mr. Slowick, the DEQE representative, informed Mr. Groulx that a chlorine release and major evacuation had occurred at Advanced Laboratories at One Allen Street in Springfield and estimated that approximately 500 300-pound drums of a swimming pool chemical material were in the building. Tr. 270, 279, 287-288, 290-291. Respondent's Exh. 1.

53. Mr. Groulx attempted to telephone the "responsible party," i.e. Advanced Laboratories, but was unable to get an answer because, as Mr. Groulx concluded, the building was on fire and no one was inside. Tr. 280, 293.

54. No one from Advanced Labs called Mr. Groulx. Tr. 294.

55. At approximately 1:00 a.m. on Saturday, June 18, 1988, Mr. Thomas Condon, an On-Scene Coordinator with the U.S. Environmental Protection Agency, received a "beeper call" and as a result, contacted the EPA duty officer Mr. Groulx. Tr. 84-85.

56. Mr. Condon was informed by Mr. Groulx that EPA had received a request for assistance from the DEQE relayed to EPA through the NRC. The assistance was requested in connection with a release of chlorine gas in Springfield, Massachusetts. Tr. 85.

57. Mr. Condon drove to the scene of the incident in Springfield, arriving at the command post at approximately 3:30-4:00 a.m. on Saturday, June 18, 1988. Soon after his arrival, Mr. Condon learned that TCT was the principal chemical involved and how the containers were stacked in the building. Tr. 86, 88, 110, 113-115.

58. Soon after he arrived, Mr. Condon met with Mr. Slowick and Mr. Higgins of DEQE and Mr. Controvich of the City of Springfield. EPA's greatest immediate assistance to Mr. Controvich was the provision of air monitoring equipment. Tr. 88, 349-350.

59. Mr. Condon asked Steven Novick, the EPA employee on standby duty during the day on Saturday, June 18, 1988, to contact the NRC and request the names of experts who might be of assistance. As a result of that inquiry, NRC provided no additional information or names of individuals who might be of assistance, other than those whose names Mr. Condon and others at the Site already had. Tr. 117-118.

60. Personnel from the EPA Technical Assistance Team and contractor, Roy F. Weston, were present at the Site working with Mr. Condon in air monitoring work. Tr. 120.

61. Mr. Condon was the EPA individual-in-charge from his arrival at approximately 3:30 a.m. on Saturday, June 18, 1988 until approximately 1:00-2:00 a.m. on Sunday, June 19, 1988, at which time he was relieved by Mr. Rich Hayworth of EPA. Tr. 105-108.

62. Mr. Hayworth was the individual-in-charge on behalf of EPA from approximately 2:00 a.m. until 10:00 or 11:00 a.m. on Sunday, June 19, 1988, when Mr. Condon returned and resumed that responsibility for two to three hours after which Mr. Condon was relieved by Mr. David Firenz. Tr. 106.

63. Mr. Condon testified that, in dealing with the second incident, information, other than that contained in the CHRIS Manual, which was needed at the time of the incident included: (a) the amount of TCT present in the building; (b) the relative amounts of TCT which had and had not been exposed to water and whether there was a structural boundary between

the two; (c) an inventory of other chemical materials present in the building; and (d) the location of TCT and other chemicals in the building. Tr. 111.

64. Mr. Steven Novick served as the EPA standby person, or duty officer, from approximately 7:30 a.m. Saturday, June 18, 1988, until 7:30 a.m. Sunday, June 19, 1988. Tr. 179.

65. In that capacity, he assisted those on the scene by coordinating the flow of information from the Site to personnel within EPA, by attempting to contact all available experts to provide information as to how to best address the second incident and to minimize the release of chlorine gas and by passing that information on to the EPA on-scene coordinator and by obtaining additional resources including manpower and equipment. Tr. 180-183.

66. Mr. Novick never asked Mr. Condon, the EPA on-scene coordinator, to have the "responsible party" telephone him. Tr. 197.

67. Mr. Novick did not make any effort to contact anyone associated with the "responsible party" during the weekend of June 17-20, 1988. Tr. 220-221.

68. Mr. Novick testified that the procedure would have been to contact the "responsible party" after EPA received notification of the second incident from the NRC at 1:00 a.m. on Saturday, June 18, 1988. However, he testified that the need to make such contact had been obviated by 7:30 a.m. on Saturday because it was his understanding that a represen-

tative of the "responsible party" was already on the scene. Tr. 224-225.

69. Mr. Carolo Rovelli, an officer of All Regions and of Armory Distributors, came to the Site sometime in the early morning hours of Saturday, June 18, 1988, but was unable to provide the Springfield Fire Department an inventory of the chemicals in the building at the Site because Fire Chief Sullivan did not permit him to enter the building. Tr. 75-76.

70. Mr. Rovelli told Chief Sullivan and others, including representatives of DEQE, in attendance at a meeting in the Old Post Office Building sometime in July 1988, that there were about one thousand (1000) barrels of chemicals in the building, each weighing three hundred (300) pounds. Tr. 36, 76, 315-317.

71. Mr. Gary Ritter, Manager of the Environmental Services Department for Con-Test, Inc. of East Longmeadow, Massachusetts, was retained by All Regions on June 28, 1988, as a consultant to assist in post-incident cleanup activities. Tr. 395-399.

72. As of June 28, 1988, Mr. Ritter was aware that approximately 200,000 pounds of TCT had been involved in the release. Tr. 398.

73. Mr. Ritter met with representatives of EPA on two or three occasions in July 1988 after the second incident. Mr. Ritter also had telephone conversations with representa-

tives of EPA. At no time did EPA request a written follow-up notice from Mr. Ritter or from Con-Test in connection with the release. EPA did request, and Mr. Ritter provided, analytical information on the discharge which was entering the sewer system during cleanup and sampling data on soil samples and sludge samples. Tr. 400-401.

74. During the period Con-Test was retained by All Regions to assist in the cleanup following the second incident, Mr. Ritter met daily with representatives of DEQE to discuss his efforts. DEQE did not request more information about the chemical involved in the release or the amount of chemical involved in the release. Tr. 398-400.

75. Mr. Ritter submitted material safety data sheets for the chemicals which had been present in the building to DEQE in late June. These sheets provided the name of each chemical present at the Site during the incident. Tr. 403, 430; Respondent's Exh. 8.

76. A member of Mr. Ritter's staff informed All Regions of their responsibilities under Title III of SARA after September 30, 1988, i.e., after the complaint was filed in this matter. Tr. 402, 425-429.

77. Mr. James Controvich, Emergency Response Coordinator for the City of Springfield, sent a letter, dated October 14, 1987, to the Plant Manager of Armory Distributors, Inc. at One Allen Street, Springfield, Massachusetts, to outline certain requirements which establishments covered by the

reporting requirement provisions of SARA must meet and to invite those so covered to participate in the work of the City's Emergency Planning Committee. No response was received to this letter. Tr. 332-335; Complainant's Exh. 34.

78. Mr. Controvich sent a second letter dated February 8, 1988, to the Plant Manager at Armory Distributors, One Allen Street, Springfield, Massachusetts, requesting that the company contact his office or DEQE to determine whether it was covered by Title III of SARA. Included as an attachment was a Title III fact sheet on Emergency Planning and Community Right-to-Know. Tr. 335-337; Complainant's Exh. 35.

79. In March of 1988, Mr. Controvich had a telephone conversation with Roger Curran who said that he was with Advanced Labs and was responding to the February 8 letter which Mr. Controvich had sent to Armory Distributors. Messrs. Curran and Controvich discussed the various aspects of SARA. Tr. 337-339.

80. Mr. Curran described his operation as a warehouse operation and concluded that it was not covered by the requirements of Title III of SARA and the Right-to-Know program. Tr. 338, 359-360.

81. Roger Curran was the Production Supervisor for All Regions Chemical Labs, Inc. having served in that capacity since November 1987. Tr. 102.

82. Mr. Controvich received a letter, dated October 7, 1988,

from Mr. David Martel, Esquire, of Doherty, Wallace, Pillsbury and Murphy, P.C., in which notice was given, pursuant to 42 U.S.C. § 11004, of a chemical release at One Allen Street on June 17, 1988. Transmitted with the letter was a report prepared by Con-Test, Inc., environmental consultant to All Regions Chemical Labs, Inc. Tr. 353; Complainant's Exh. 39.

83. Upon review of the Con-Test report, Mr. Controvich found that it was incomplete and wrote Mr. David Martel a letter, dated October 27, 1988, to request additional information. By letter, dated November 15, 1988, Mr. Martel replied and submitted a supplemental report, prepared by Con-Test, which provided the additional information requested by Mr. Controvich. Tr. 354-356; Complainant's Exhs. 40 and 41.

84. Mr. Joseph Marotta, permanent duty officer at the EPA Emergency Response Section in Lexington, Massachusetts, received a telephone call from the NRC on October 5, 1988, to report a release that had occurred in June 1988. Tr. 295-302; Complainant's Exh. 38.

85. The report of the discharge had been submitted by a representative of Con-Test on behalf of Advanced Labs, One Allen Street, Springfield, Massachusetts. The discharge was reported to have occurred on June 17 and 18, 1988, as a result of a fire involving 180,000 pounds of chlorine material. The name of the contact person for Advanced Labs which was given to Mr. Marotta was Mr. David Martel. Tr.

301, Complainant's Exh. 38.

86. The total cost, directly and indirectly related to cleanup, after the second incident was approximately $1,205,000.00. Tr. 465-472.

87. All Regions' operations at One Allen Street were terminated as a result of the second incident and a place to which operations might be relocated had not been found as of June 1, 1989. Tr. 472.

IV. Calculation of Civil Penalty

1. Calculation of Civil Penalty for Count I:

As noted above,12/ in calculating the civil penalty for the violation of Section 103(a) of CERCLA, I will consider first, with respect to the violation itself, the nature, circumstances, extent and gravity of the violation 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.

(a) Nature of the Violation: The nature of the violation may be considered to be the essential character of the violation as defined by the requirement which has been violated.13/

The requirement which was violated is the require-

12/ See supra p. 10.

13/ TSCA Guidelines, 45 F.R. 59771 (September 10, 1980).

ment of Section 103(a) of CERCLA that the person in charge of a facility notify the NRC immediately when there is a release of a designated hazardous substance in an amount equal to or greater than the RQ for that substance. A major purpose of this notification requirement is to alert government officials to releases of hazardous substances that may require rapid response to protect public health and welfare and the environment. Under Section 104 of CERCLA, the federal government may respond whenever there is a release into the environment of a hazardous substance which may present an imminent and substantial danger to public health or welfare. Such notification, based upon an RQ of the hazardous substance, constitutes a trigger for informing the government of a release so that the need for response can be evaluated and any necessary response undertaken in a timely fashion.14/

As previously found, there was a release into the environment at the Site of an RQ of chlorine, which is a hazardous substance, during the period June 17-20, 1988. However, the report required by Section 103(a) was not made to the NRC until October 6, 1988. Respondent totally failed to meet its legal obligation to notify the NRC immediately so that EPA could evaluate the need for a response. Clearly, the second incident which took place at the Site on June 17 required a rapid and

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14/ 48 F.R. 23552-23553 (May 25, 1983).

extensive response to protect public health and welfare and the environment. Respondent's failure to promptly notify the NRC of the release was in complete derogation of its statutory responsibilities.

(b) Circumstances of the Violation: Circumstances may be described as the probability of harm based upon the risk inherent in the violation even though, through some fortuity, no actual harm resulted.15/ Where, as here, the violation is a failure to notify or report, the risk inherent in the violation is a measure of the effect of such failure on the Agency's ability to implement the other provisions of the act, even though through some fortuity, the full potential harm may not have resulted.

CERCLA establishes broad federal authority to deal with releases or threats of releases of hazardous substances from facilities and vessels. As noted above, a major purpose of the notification requirement in Section 103(a) is to alert EPA immediately to the release of an RQ of a hazardous substance so that EPA may make a prompt decision as to whether the release requires a rapid response to protect public health and welfare and the environment from an imminent and substantial danger. Given the findings of fact herein and the findings of fact and conclusions of law in the Order Granting Complainant's Motion for Partial

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15/ TSCA Guidelines, 45 F.R. 59772 (September 10, 1980).

Accelerated Decision, there can be no doubt that during the time Respondent was in charge of the facility there was a release of an RQ of chlorine which required a rapid response to protect the public health and welfare and the environment in Springfield from an imminent and substantial danger.

EPA learned of the first incident fortuitously as a result of a complaint from a "concerned citizen" some five (5) hours after the incident began. Although Mr. Slowick reported that 100 to 200 pounds of chemical were involved, he was unsure about the quantity.16/ EPA learned of the second incident some two (2) hours after the incident began when a representative of the Massachusetts DEQE called the NRC to request EPA's assistance. There can be no doubt that there was a release of an RQ in connection with the second incident. With significant delay in notification in connection with the second incident, EPA was prevented from making an immediate assessment of the incident in order to determine what, if any, responsive actions were required. The purposes of CERCLA, and more particularly, those of Sections 103 and 104, were thwarted thereby. One can only surmise what may have occurred if the NRC and, in turn, EPA had been notified immediately as required.

The fact that local fire officials were on the scene almost immediately after the second incident began and the City

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16/ Tr. 438-441.

Emergency Response Coordinator and there a very short time thereafter, in no way diminishes the requirement that the person in charge at the Site notify the NRC. Nor does the fact that local officials subsequently notified the DEQE reduce the risk inherent in Respondent's failure to notify the NRC. Indeed, Section 304 of EPCRA establishes separate requirements for reporting certain releases of hazardous substances to state and local authorities similar to the release reporting provisions under section 103 of CERCLA. Under Section 304, the owner or operator of a facility must report, inter alia, releases which require notification under Section 103 of CERCLA to the community emergency coordinator for the local emergency planning committee and to the state emergency planning commission. Because state and local participation for effective and timely emergency response is central to Title III of SARA, Congress has concluded that the state and local organizations must be alerted to potentially dangerous chemical releases. The notification requirements of Sections 103 and 304, while similar in their purpose to protect the public and the environment in the event of hazardous chemical releases, are separate and independent requirements.17/ Each requirement must be met.

Finally, the call to the NRC on behalf of Respondent on October 6, 1988 constituted nothing more than an after-the-fact attempt at technical compliance with the notification requirement.

17/ See 52 F.R. 13386 (April 22, 1987).

I conclude that Respondent's failure to notify the NRC immediately, as required, seriously impaired EPA's ability to make the necessary assessment to meet its response obligations imposed by CERCLA.

(c) Extent of the Violation: The extent of the violation is often described as the degree, range or scope of the violation.18/ In notification violations, the quantity of the regulated substance is considered an indicator of the extent of the violation. Here, the discharge was reported to have occurred as a result of a fire involving 180,000 pounds of chlorine material which is 18,000 times the RQ of ten (10) pounds. The extent of the violation was substantial or major in degree.

(d) Gravity of the Violation: The gravity of the violation is a measure of the overall seriousness of the violation.19/ In determining the gravity or seriousness of the notification violation here, several factors should be considered. Among them are the harm resulting from the violation (including both actual harm and the risk of harm inherent in the violation at the time it was committed), the importance of the notification requirement to achieving the goal of the statute and the availa-

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18/ TSCA Guidelines, 45 F.R. 59771-59772 (September 10, 1980).

19/ TSCA Guidelines, 45 F.R. 59773 (September 10, 1980).

bility from alternate sources of the information required to be reported to EPA.20/

Both the harm resulting from the violation and the importance of the notification requirement in the overall statutory scheme were discussed under "circumstances."21/ As for the availability from alternate sources of the information required to be reported to EPA, Mr. Slowick of DEQE described the first incident to EPA after he received a call from EPA at 3:00 p.m. on Friday, June 17 and Mr. Slowick provided certain information pertaining to the second incident to EPA at 1:00 a.m. on Saturday, June 18. Specifically, Mr. Slowick informed the NRC of the location of the second incident; the approximate time the incident began; an estimate of the approximate number of containers involved; the nature of the incident (a chlorine fire in a large warehouse); the probable chemical (TCT) which was involved; and the evacuation taking place.

Complainant maintains that All Regions not only failed to notify NRC of the second incident, but that the efforts to combat the fire were hindered by the paucity of information resulting from that failure. Thus, Mr. Condon of the EPA testified that information, other than that which was available, which was needed to deal with the second incident included: (a) the

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20/ General Policy Framework, pp. 14-15 (February 16, 1984).

21/ See supra pp. 33-36.

amount of TCT present in the building; (b) the relative amounts of TCT which had and had not been exposed to water and whether there was a structural boundary between the two; (c) an inventory of other chemical materials present in the building; and (d) the location of TCT and other chemicals in the building. While it may have been helpful to local, state and federal authorities to have such information, I cannot penalize Respondent for a failure to have provided it.22/

First, Mr. Rovelli, an officer of All Regions and of Armory Distributors, came to the Site sometime in the early hours of Saturday, June 18, 1988, but was unable to provide the Springfield Fire Department an inventory of the chemicals in the building at the Site because Fire Chief Sullivan, understandably, would not permit him to enter the building. Second, I find no statutory requirement that the person in charge provide such specific information as Mr. Condon desired. Section 103(a) itself simply requires the person in charge of the facility to "notify" the NRC immediately when there is a release of an RQ of a designated hazardous substance. The implementing regulation, 40 C.F.R. § 302.6, repeats the statutory requirement by simply providing that:

22/ It should be noted that the complaint did not allege a violation of Section 304(a)(1) of CERCLA, 42 U.S.C. § 11004(a)(1), which requires the owner or operator to submit certain specific information (to the extent known and so long as no delay in responding to the emergency results) to state and local authorities. (See supra note 4.)

> (a) Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release or application of a pesticide) of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period, immediately notify the National Response Center ((800) 424-8802; in Washington, D.C. (202) 426-2675).

Thus, neither the statute nor the implementing regulation requires that the notification include any particular information, other than the fact of the release, especially that information which Mr. Condon would like to have had.

When EPA issued 40 C.F.R. § 302.6 in proposed form, it explained the mechanics of notification and, in doing so, outlined the nature of the questions the duty officer at the NRC would ask the caller: "When a call is received by the National Response Center, the duty officer will ask for information including the name, address, and telephone number of the reporting individual; the identity, location, and nature of the release (e.g., the source, cause, quantity, and duration of the release); the identity of the transporter or owner of the facility or vessel; the nature of injuries or property damage; any other relevant circumstances such as weather conditions; and any corrective actions taken." Even these basic questions do not include a request for the type of information which Mr. Condon was seeking. Admittedly, EPA received from DEQE a low estimate (up to 500 barrels) of the amount of TCT which was actually present in the facility. However, there is no evidence that the quantity of the

release which was likely to occur after Fire Chief Sullivan decided to accelerate the reaction by pouring as much water as possible into the building could have been estimated accurately by the Respondent or anyone else on the scene.

In summary, in assessing the gravity of the violation, I will not consider the failure to provide information for which there is no statutory or regulatory requirement. However, I will give full weight to the potential for harm resulting from the violation, the importance of the notification requirement and the extent of de facto notification from alternate sources, as well as the timeliness of that notification.

Considering the nature, circumstances, extent and gravity of the violation, and giving full weight to the availability of information from alternate sources after the incident occurred, I conclude that the initial penalty which is appropriate for the violation of Section 103 of CERCLA is $20,000.00.

(e) The remaining factors which I will consider are 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. It is possible that consideration of these factors may result in an upward or downward adjustment of the initial penalty calculation of $20,000.00.

As for ability to pay, Respondent "did not make

ability to pay an issue in these proceedings."23/ As for prior history of such violations, Complainant has conceded that "the penalty factor for prior history of violation does not apply as an aggravating factor...."24/

The degree of Respondent's culpability is measured by Respondent's knowledge and control with respect to the violation.25/ As for Respondent's knowledge, the test is whether the Respondent knew or should have known of the CERCLA requirement or of the general hazardousness of its failure to meet those requirements.26/ As for Respondent's control, factors such as how much control Respondent had over the events constituting the violation; the foreseeability of the events constituting the violation; and whether the Respondent took reasonable precautions against the events constituting the violation should be considered.27/

As for knowledge of the CERCLA notification requirement, Respondent, like everyone else, is charged with knowledge of the United States Code and rules and regulations duly promulgated thereunder.28/ The Supreme Court has said: "Just as everyone is

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23/ Respondent's Post-Hearing Memorandum at 13 (July 31, 1989).

24/ Complainant's Post-Hearing Memorandum at 33 (August 1, 1989).

25/ TSCA Guidelines, 45 F.R. 59773 (September 10, 1980).

26/ Id.

27/ General Policy Framework, p. 18 (February 16, 1984).

28/ 44 U.S.C. § 1507.

charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."29/ The CERCLA notification requirement which Respondent violated is spelled out in 42 U.S.C. § 9603 and is repeated again in 40 C.F.R. § 302.6. Therefore, Respondent is charged with knowledge of the CERCLA notification requirement which it violated.

As for the factor of control, whether Respondent notified the NRC or not was entirely within its control. The action required was simply a telephone call to an 800 number. Respondent did not make that call until several months after the release. There can be no question as to foreseeability of the violation. Failure to notify the NRC in these circumstances present here was clearly a violation of CERCLA. There is no evidence that Respondent took reasonable precautions against the event constituting the violation. Thus, for example, no evidence was introduced to show that Respondent attempted to make the call or that Respondent had developed a contingency plan in the event of a release which required such a call. Indeed, it appears from Respondent's reaction to the notices which Mr. Controvich had sent Respondent in late 1987 and again in early 1988 that Respondent decided that it was not covered by Title III of SARA. Since Respondent is charged with knowledge of the legal requirement here

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29/ Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

violated and with sufficient control over the situation to avoid committing the violation, I conclude that there should be no adjustment, upward or downward, for culpability.

There is no evidence that Respondent's "attitude" justifies a penalty adjustment. The good faith effort to comply with Section 103 did not occur until October 6, 1988 about a week after the filing of the complaint. The expiration of more than three months between the release and the notification to the NRC could hardly warrant classifying the notification as prompt.

There is no evidence that Respondent derived any economic benefit or savings from its failure to comply with Section 103. As Complainant itself conceded, "in this case, the economic benefit derived from failure to provide emergency notification (the cost of a phone call) is considered negligible."30/

Respondent points out that "All Regions was put out of business by the fire and has not resumed operations in Springfield or anywhere else."31/ Moreover, although All Regions did not make ability to pay an issue in these proceedings, Respondent urges me to "keep in mind the expenses which All Regions incurred as a direct consequence of the fire."32/ While it is indeed unfortunate to the company, to its employees and to the community

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30/ Complainant's Post-Hearing Memorandum, p. 34 (August 1, 1989).

31/ Respondent's Post-Hearing Memorandum, p. 14 (July 31, 1989).

32/ Id. at 13.

that All Regions is no longer in operation, I find no basis to take that fact into consideration in setting the penalty for the violation found. The threat of a civil penalty did not force All Regions out of operation; the inability to find another suitable location did. Moreover, as for Respondent's cleanup costs, while there is some question as to who ultimately may bear the expense,33/ the general civil penalty policy is that normally there should be no reduction for these costs, since it is part of the cost of the violation.34/ Therefore, I conclude that these factors provide no just basis to reduce the penalty.

In conclusion, the appropriate penalty for Count I of the complaint is $20,000.00.

33/ Tr. 465-472; 475-478. Respondent objected to any consideration of evidence pertaining to its insurance coverage for cleanup expenses on the ground that a jury in a personal injury case would not be permitted to hear such evidence under the "collateral source" rule. First, the rules of evidence upon which the Respondent relied, whether those of Massachusetts or any other jurisdiction, do not apply. Part 22 of Title 40 of the Code of Federal Regulations governs this proceeding. Second, this proceeding is an administrative proceeding under the Administrative Procedure Act, before an Administrative Law Judge, not a civil trial before a jury. Finally, and most important, this proceeding is a federal administrative proceeding designed to protect the public interest, namely the public health and welfare and the environment, not a civil suit brought for the purpose of securing monetary damages for a private party.

34/ TSCA Guidelines, 45 F.R. 59775 (September 10, 1980).

2. Calculation of Civil Penalty for Count II:

As noted above,35/ in calculating the civil penalty for the violation of Section 304 of EPCRA, I will consider, first, with respect to the violation, the nature, circumstances, extent and gravity of the violation and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

(a) Nature of the Violation: As explained above,36/ the nature of the violation is the essential character of the violation as defined by the requirement which has been violated.

The requirement which was violated is the requirement of Section 304(c) of EPCRA that requires an owner or operator of a facility, as soon as practicable after a release that requires notice under Section 304(a), to provide written follow-up emergency notice (or notices, as more information becomes available) to include information required under Section 304(b).

EPCRA is intended to encourage and support emergency planning efforts at the state and local levels and provide the public and local governments with information concerning potential chemical hazards present in their communities. The emergency

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35/ See supra pp. 13-14.

36/ See supra p. 31.

planning requirements of the Act recognize the need to establish and maintain contingency plans for responding to chemical accidents which can inflict health and environmental damage as well as cause significant disruption within a community. Section 304 establishes requirements for immediate reporting of certain releases of hazardous substances to the local planning committees and the state emergency response commissions, similar to the release reporting provisions under Section 103 of CERCLA. Section 304 also requires follow-up written emergency notice to the state emergency response commission and the local emergency planning committee on the release, its effects and response actions taken.

These follow-up notices are required as soon as practicable after the release and must include updated information concerning:

(1) The chemical name or identity of any substance involved in the release;

(2) An indication of whether the substance is an extremely hazardous substance;

(3) An estimate of the quantity of any such substance that was released into the environment;

(4) The time and duration of the release;

(5) The medium or media into which the release occurred;

(6) Any known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals;

(7) Proper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordination pursuant to the emergency plan); and

(8) The name(s) and telephone number(s) of the person or persons to be contacted for further information.

The follow-up reports must include additional information with respect to:

(1) Actions taken to respond to and contain the release;

(2) Any known or anticipated acute or chronic health risks associated with the release; and

(3) Where appropriate, advice regarding medical attention necessary for exposed individuals.

This information is intended to assist state and local authorities in their efforts to respond to the release and thereby protect the public health and welfare and the environment from any dangers resulting therefrom.

Respondent did not submit the required follow-up report until October 7, 1988, and that report proved to be incomplete. Respondent submitted a supplemental report on November 15, 1988, which provided the information which had been missing from the initial submission. One hundred and forty-four (144) days had elapsed between the date on which the follow-up report was practicable and the date on which it was submitted. With such a

significant delay, Respondent, in effect, made a nullity of the requirement under Section 304 of EPCRA to provide a written follow-up notice as soon as practicable to the appropriate authorities to assist them in their efforts to respond to the release and thereby protect the public health and welfare and the environment from any continuing dangers resulting from release. Respondent's failure was in complete derogation of its statutory responsibilities.

(b) Circumstances of the Violation: As explained previously,37/ circumstances may be described as the probability of harm based upon the risk inherent in the violation even though, through some fortuity, no actual harm resulted. Where, as here, the violation is a failure to notify or report, the risk inherent in the violation is a measure of the effect of such failure on the governmental agency's ability to implement the other provisions of the Act, even though through some fortuity, the full potential harm may not have resulted.

Because state and local participation for continuing effective and timely emergency response is central to Title III of SARA, Congress has concluded that the state and local organizations must be alerted and kept informed through follow-up reports as to potentially dangerous chemical releases. The failure to provide such follow-up reports as soon as practicable after the release completely undermined the congressionally mandated

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37/ See supra p. 33.

scheme of Title III of SARA.

(c) Extent of the Violation: In notification violations, as pointed out above,38/ the quantity of the regulated substance is considered an indicator of the extent of the violation. Since the amount of chlorine material involved was 180,000 pounds or 18,000 times the RQ, the extent of the violation was clearly substantial, or major in degree.

(d) Gravity of the Violation: The risk of harm inherent in the violation at the time it was committed and the importance of the notification requirement to achieving the goal of the statute have already been described in (b) above.39/ The availability from alternate sources of the information required to be reported to state and local authorities should also be considered in assessing the gravity of the violation.

At a meeting at the Old Post Office Building in July 1988, Mr. Carolo Rovelli, an officer of All Regions, informed those in attendance, including representatives of DEQE and Fire Chief Sullivan, that there were about one thousand (1000) barrels of chemicals in the building, each weighing three hundred (300) pounds.

Mr. Gary Ritter, Manager of the Environmental Services Department of Con-Test, Inc., was retained by All Regions on June 28, 1988, to assist in post-incident cleanup activities.

38/ See supra p. 36.

39/ See supra p. 48.

He met daily with representatives of DEQE to discuss his efforts. Mr. Ritter submitted material safety data sheets for the chemicals which had been present in the building to DEQE in late June. The sheets provided the name of each chemical present at the Site during the incident. DEQE did not request more information about the chemical involved in the release or the amount involved.

Mr. Ritter also met with representatives of EPA on two or three occasions in July 1988. In addition, he had telephone conversations with representatives of EPA. EPA requested, and Mr. Ritter provided, analytical information on the discharge which was entering the sewer system during cleanup and sampling data on soil samples and sludge samples. At no time did EPA request a written follow-up notice from Mr. Ritter or from Con-Test in connection with the release. After the notice of violation was filed in this matter, a member of Mr. Ritter's staff informed All Regions of their responsibilities under Title III of SARA.

While the nature of the communications between Mr. Rovelli and state and local authorities and between Mr. Ritter and representatives of DEQE and EPA did not meet the specific requirements of Section 304(c) of EPCRA, it is clear that Respondent's representatives were in communication with local, state and federal authorities some days after the release and continued to communicate with them during the cleanup period. Moreover, the evidence shows that these representatives provided whatever information the government authorities requested.

Additionally, during the period of the release itself (June 17-20, 1988), some of the information required to be reported under Section 304 became known to local, state and federal authorities. See Findings of Fact 23, 24, 25, 29, 39, 42, 43, 44, 47, 49, 52, 60, 64 and 65.

Considering the nature, circumstances, extent and gravity of the violation, and giving full weight to the availability of information from alternate sources, I conclude that the Class II civil penalty which is appropriate for the violation of Section 304 of EPCRA is $20,000.00 for the first day of noncompliance and $400.00 a day thereafter for each of the remaining one hundred and forty-four (144) days of noncompliance.

Turning to the remaining factors pertaining to the Respondent itself, neither "ability to pay" nor "prior history of such violations" warrant consideration in this proceeding.40/ As for "effect on ability to continue to do business," this factor is clearly related to the "ability to pay." No evidence was introduced to show that the amount of the penalty would affect the ability of Respondent to continue to do business. Indeed, the Respondent has discontinued operations because it has been unable to find a suitable location where operations might be resumed. For the reasons previously cited,41/ no adjustment is warranted

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40/ See supra pp. 40-41.

41/ See supra pp. 43-44.

because of cleanup costs incurred by Respondent.

The degree of Respondent's culpability is measured by Respondent's knowledge and control with respect to the violation. The EPCRA notification requirement which Respondent violated is spelled out in 42 U.S.C. § 11004 and is repeated again in 40 C.F.R. § 355.40. Therefore, Respondent is charged under law with knowledge of EPCRA requirements which it violated.

Whether Respondent filed the required follow-up reports or not was entirely within its control. The required report was not filed until one hundred and forty-four (144) additional days had elapsed after the date on which such filing was practicable. This failure to file a timely follow-up report was clearly a foreseeable violation of EPCRA.

While Respondent is charged with knowledge of the legal requirement here violated and with sufficient control over the situation to avoid committing the violation, I nevertheless conclude that a downward adjustment should be made in light of Respondent's attitude during the cleanup period following the release. Even though the full report was not filed until November 15, 1988, Respondent did work closely with local, state and federal officials during the period immediately following the release to insure that cleanup was accomplished promptly and properly. During that time, any information requested by governmental authorities was provided promptly.42/ In recognition of this

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42/ See supra pp. 49-51.

cooperative attitude, I conclude that the initial penalty for the violation of Section 304 of EPCRA should be reduced by ten (10) percent. Justice does not require that any other matters be considered. Therefore, the final penalty assessed for the violation of Section 304 of EPCRA shall be calculated as follows:

$20,000.00	-	initial penalty for first day of noncompliance
+ 57,600.00	-	initial penalty for each of 144 days of noncompliance ($400.00 X 144)
$77,600.00		
- 7,760.00	-	10 percent reduction
$69,840.00	-	final penalty

3. Conclusion

Accordingly, I find that the appropriate penalty is as follows:

Count I	-	$20,000.00
Count II	-	69,840.00
Total	-	$89,840.00

ORDER 43/

Pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, a civil penalty in the amount of $20,000.00 is hereby assessed against Respondent, All Regions Chemical Labs., Inc., for the violation of Section 103(a) of CERCLA. Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $69,840.00 is assessed against Respondent, All Regions Chemical Labs., Inc., for the violation of Section 304 of EPCRA.

IT IS ORDERED that Respondent, All Regions Chemical Labs., Inc. pay a civil penalty to the United States in the sum of $20,000.00. Payment shall be made by cashier's or certified check payable to the "Hazardous Substance Superfund." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 371003 M
Pittsburgh, PA 15251

43/ Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

IT IS ORDERED that Respondent, All Regions Chemical Labs., Inc. pay a civil penalty to the United States in the sum of $69,840.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 360197 M
Pittsburgh, PA 15251

Respondent shall note on these checks the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the checks to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region I
John F. Kennedy Federal Building
Room 2003
Boston, MA 02203

Attention: Marianna B. Dickinson

Henry B. Frazier, III
Administrative Law Judge

DATED: December 1, 1989
Washington, D.C.

IN THE MATTER OF ALL REGIONS CHEMICAL LABS, INC., Respondent
Docket No. CERCLA-I-88-1089

CERTIFICATE OF SERVICE

I do hereby certify that the original and three (3) copies of the INITIAL DECISION in this proceeding was mailed CERTIFIED MAIL, RETURN RECEIPT REQUESTED to the Regional Hearing Clerk, United States Environmental Protection Agency, Region I.

Gladys A. Bryant
Gladys A. Bryant
Secretary

DATED: December 1, 1989
Washington, D.C.