UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Gilbert Martin Woodworking Co.	**)**	
d/b/a Martin Furniture	**)**	**Docket No. EPCRA 09-99-0016**
	)	
Respondent	**)**	
	)	

Initial Decision

In this proceeding under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 *et. seq.* (also known as the Emergency Planning and Community Right-to-Know Act of 1986) ("EPCRA"), EPA has alleged, in eight counts, that the Respondent, Gilbert Martin Woodworking Company, d/b/a Martin Furniture,[1/] failed to file Toxic Chemical Release Inventory Reporting Forms, better known as "Form R's," for 1994, 1995 and 1996.[2/] EPCRA § 313 requires facilities to submit annually, and no later than July 1st of each year, a Form R for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds. On November 24, 1999, the Respondent and EPA stipulated as to liability for the counts.[3/] EPA seeks a civil penalty of $119,946 for these violations.

The Post Hearing Briefs

A. EPA's Arguments

EPA argues that it established a prima facie case in support of the penalty it proposes and that the Respondent failed to rebut that case. It notes that the failure to file Form R's goes to the heart of EPCRA's purpose: "the community's right to know about releases of toxic chemicals." EPA Brief at 16. As to the particular penalty calculation performed in this instance, EPA first

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[1/]EPA filed a motion seeking dismissal of the Complaint as to Gilbert Martin individually. The Court granted the motion on June 20, 2000.

[2/]Two toxic chemicals are involved: 1, 1, 1 -Trichlorethane ("TCA") and Methyl isobutyl ketone ("MIBK").

[3/]The stipulation also sets forth the number of pounds involved for each chemical in each calendar year at the facilities involved (the El Cajon and the Kearny Mesa facilities**)**, that the threshold amount was exceeded in each instance, and that no Form R was submitted.

maintains that Section 16(a)(2)(B) of the Toxic Substances Control Act ("TSCA") is the appropriate source to consult for EPCRA violations. This source examines the nature, circumstances, extent and gravity of the violation and then considers the violator itself.

Evaluating the violation, it notes that Respondent's required Form R's were not timely filed and were not submitted until after EPA began its March 1998 investigation. By failing to make timely submissions, it argues that the Respondent "deprived both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could have resulted in increased risk to the community." *Id*. at 23. Noting that the "circumstances" of the violation takes into account its seriousness, EPA asserts that the failure to report in a timely manner is "the most significant of the violations of Section 313." *Id*. This assessment stems from the public's deprivation of information on "chemical releases which may have a significant affect [*sic*] on public health and the environment." *Id*. at 24. Under the Enforcement Response Policy's ("ERP") "penalty matrix," extent levels and circumstance levels are determined and from these a penalty is derived. In terms of the "extent" factor, EPA considers the quantity of the toxic chemical. This is important because facilities which far exceed the reporting threshold "create a greater potential of exposure to the employees at the facility, the public and the environment." *Id*. Here, EPA observes that in 1994 and 1995, Respondent's usage of 1,1,1-trichloroethane at its El Cajon and Kearny Mesa facilities was more than ten times above the threshold quantity.

In considering the factors involving the nature of the violator, EPA considers a respondent's ability to pay, the penalty's effect on its ability to continue in business, prior history of violations, the degree of culpability and such other factors as justice may require. *Id*. at 25-26. The Respondent has conceded it has the ability to pay the proposed penalty and that a fine of that size would not damage its ability to continue in business. As EPA sees it, the other factors do not impact the penalty calculation either. A prior history of violations, for example, can enhance the penalty, but the absence of any history does not work to reduce a penalty. Similarly, while a knowing violation affords reason to increase the penalty, the absence of a knowing or willful violation does not work to reduce a penalty, as knowledge of the requirements is presumed. EPA made no upward adjustments to the penalty for any of these considerations because it considered each inapplicable to the Respondent. Regarding the last factor, the "as justice may require" consideration, EPA notes that its ERP lists new ownership when considering one's violation history, significant-minor borderline violations and lack of control over the violation, as grounds for reducing a penalty, but it observes that none of these situations are applicable under these facts.

EPA also states that, under the ERP, it also weighs voluntary disclosure, attitude and supplemental environmental projects. In its view none of these apply either. Responding to the assertion that Daren Jorgensen discovered the Form R violations, EPA notes that Jorgensen did not disclose "specifically which chemicals or whether reporting obligations were required" when he spoke with Bill Kerstan on March 11, 1998. *Id*. at 29 (quoting Transcript at 174). Addressing Respondent's suggestion that the disclosure of the existence of its Kearny Mesa Facility to Bill

Kerstan affords a basis to reduce the penalty, EPA argues that it should not be considered because EPCRA § 313 reporting is on a facility basis and in the normal course of events, such information ultimately would be discovered during the investigation of the corporation.

In terms of the "attitude adjustment" factor, EPA maintains that Respondent was in fact given credit for this and awarded a reduction under the ERP of $16,000. *Id*. at 33. However, this consideration is viable only during settlement. During that phase EPA informed the Respondent of this reduction and the resulting penalty but, from its perspective, Respondent never offered any explanation, during settlement, to support its position that a further reduction was warranted, although subsequently it did present information along this line on two occasions during the prehearing exchange phase of the litigation. EPA views the Respondent's lack of a forthcoming attitude during settlement dimly and asks the Court to disapprove of such settlement tactics by not rewarding disclosures which arrive after settlement has failed. *Id*. at 33.

In sum, EPA argues that its adjustment of the gravity based attitude factor, resulting in a $23,990 reduction, and the adjustment for cooperation, resulting in an additional reduction of $15, 994, afford appropriate recognitions of the speed and cooperation Respondent demonstrated in filing its delinquent Form R's for 1993 through 1996. Thus, upon consideration of these deductions in the application of the ERP in this instance, it maintains that the proposed penalty of $119,946 is fully supported.

B. Martin Furniture's Arguments

Martin Furniture asserts that the ERP, and hence the penalty EPA derived by using it, should be disregarded in this case because "its use does not result in a penalty that is commensurate with the nature, circumstances, extent and gravity of the EPCRA reporting violations" in this case. Respondent's Reply at 1. Respondent, noting that the Environmental Appeals Board has stated that judges must be prepared to reexamine the basic propositions underlying such penalty policies, contends that the ERP rests upon ensuring that EPCRA § 313 violations are fair, uniform and consistent, that the response is appropriate to the violation committed, and that the action will deter future violations.

Generally, Martin asserts that EPA failed to demonstrate that the ERP produced an appropriate penalty under the particular facts and instead produced a penalty that was not commensurate with the nature, circumstances, extent or gravity of the reporting violations. In fact, Martin argues, the penalty sought by EPA is so disproportionate to the violations that it is manifestly unjust.

As a fundamental matter, Martin takes issue with EPA's use of TSCA statutory factors to derive an appropriate EPCRA § 313 reporting violation.[4/] Even accepting EPA's rationale that

[4/]In its Reply Brief, Martin also argues that EPA was misleading because its prehearing exchange materials indicated the proposed penalty was derived by use of the penalty policy

Congress intended the application of TSCA § 16(a)(2)(B) to be used for EPCRA § 304 does not, Martin maintains, translate into such use for Section 313, even when those factors are used as guidance.

Martin Furniture argues that the ERP should be completely disregarded on several grounds. It maintains first that EPA did not follow the ERP, as evidenced by its post-hearing brief admission that it looked primarily to the TSCA statutory penalty factors and only used the ERP after it had applied those factors. This contradicts EPA's pre-hearing exchange posture in which it maintained that it relied solely upon the ERP to arrive at the proposed penalty. Next, Martin contends that EPA's evaluation failed to consider the voluntary steps it had taken to come into compliance with EPCRA before EPA's investigation had commenced. Those steps involved Martin's voluntary cessation of the use of one of the toxic chemicals, its significant reduction of the use of another, and establishing, on its own, verifiable procedures to ensure future EPCRA compliance.

Martin also asserts that the ERP has a fundamental flaw by its consideration of supplemental environmental projects and engaging in settlement discussions as "adjustment factors," while foreclosing their consideration upon appeal. Despite this Agency posture, it observes that EPA went ahead and spoke to these settlement issues, and its assessment of them, in its post-hearing brief. Last, Martin argues that EPA simply failed to meet its burden of showing that an appropriate penalty was derived under the ERP.

Martin notes that EPCRA § 325(c) does not provide a list of factors to be considered in deriving a civil penalty and instead provides for a maximum penalty of $25,000 for each Section 313 violation with each day's failure to report constituting a separate violation. Martin is unaware of any cases which require EPA to evaluate TSCA penalty factors to arrive at an appropriate penalty for EPCRA § 313 reporting violations. It also takes issue with EPA's point that Congress designated TSCA § 16(a)(2)(B) as the source for penalty factors in EPCRA § 304 matters, because this case is an EPCRA § 313 matter. Martin asserts that the EAB has implicitly recognized this distinction by only upholding the use of TSCA penalty factors *as guidance* in EPCRA § 313 matters.

Martin also separately maintains that the Court should depart from the ERP because EPA incorrectly concluded that the violations were not discovered in advance of the EPA investigation but were detected by EPA before any disclosure by Martin. In fact, Martin argues, it had

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whereas the Agency's post-hearing brief shows that the calculation was derived primarily through the TSCA Section 16 penalty factors. The Court agrees that EPA's post-hearing brief places more emphasis on the TSCA factors than the ERP. However, EPA Counsel's characterization of the penalty analysis does not usurp the evidence that, as reflected by Monahan's affidavit, EPA applied the ERP in calculating the penalty. *See* Complainant's Exhibit 1. In addition, while not identical, the ERP factors and the TSCA Section 16 penalty factors have much in common.

detected the problem prior to EPA's involvement by virtue of its retaining Jorgensen Environmental on or about February 20, 1998. Further, while EPA asserts that it accounted for Martin's prompt compliance as part of the "attitude adjustment," Martin counters that this consideration was flawed because the "attitude adjustment" implicitly assumes that the violation was first discovered during an EPA inspection. In addition, Martin asserts that the compliance reduction does not afford appropriate credit in those situations where a Respondent has taken steps to achieve compliance prior to the EPA inspection. It suggests that EPA's approach, by ignoring Martin's voluntary compliance efforts, conflicts with ensuring that the proposed penalty is fair, uniform and consistent.

Martin also submits that EPA's proposed penalty is flawed because it considered settlement discussions as an "adjustment factor." It contends that EPA's factoring of settlement discussions in proposing the penalty amount, including Martin's cooperation during such discussions, was inappropriate and inconsistent with arriving at a penalty in a fair, uniform and consistent manner.

While conceding that some penalty is due, Martin maintains that the penalty imposed should take into consideration that:

1. It discovered the violations on its own, promptly, voluntarily and through its exercise of due diligence.

2. The violations were discovered voluntarily, prior to any investigation or information request. Consequently, they were not detected in reaction to any known pending enforcement action or complaint and they were reported promptly. Martin highlights that in this regard, upon their detection by Jorgensen Environmental, the violations were corrected within three days and steps were taken to prevent any recurrences. The violations were not part of any repeat pattern of noncompliance.

3. It cooperated fully with EPA and it eliminated the use of one toxic chemical, TCA, and significantly reduced its use of another, MIBK.

Upon consideration of these factors, Martin believes that the penalty imposed should be $11,991.

Discussion

A departure from the Penalty Policy is appropriate in this instance.

The Court takes note of the Board's decision *In re Steeltech, Ltd.*, 1999 WL 673227 (EAB, Aug. 26, 1999) ("Steeltech"), upholding a penalty of $61,736 for nine violations, occurring over a four year period, of the EPCRA Section 313 reporting requirements. In that case, after noting the judge's obligation to consider the ERP's guidance, the Board pointedly observed that the ERP "does not have the force of law." The Board advised that judges "must refrain from treating the [penalty policy] as a rule, and must be prepared 'to re-examine the basic propositions' on which the policy is based ..." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 761 (EAB, Feb. 11, 1997). It also reminded litigants that it has "repeatedly stated" that as long the applicable penalty policy has been considered, the judge is "free to not apply them to the case at hand" where circumstances warrant. This authority to depart from the ERP, because it is not a rule, means that a finding of "extraordinary circumstances" is *not* required to deviate from the policy's guidance.

For the reasons that follow, the Court, having considered the penalty policy, departs from its application in this instance because EPA's evaluation did not consider that the Respondent was already well under way in the process of completing the Form R's at the time EPA began its investigation. Additionally, as independent bases for departure from the ERP, the Court believes that the policy, under the particular facts and circumstances, did not yield a penalty that is appropriate for the violations committed and did not weigh the deterrence achieved as to this Respondent. Further, the Court views EPA's inclusion of its assessment of the Respondent's conduct during settlement negotiations as an inappropriate consideration within the penalty computation.

The events which led to the filing of the Complaint in this matter began with the actions of EPA's Bill Kerstan, who, at the time in issue, was employed with EPA's Toxic Waste Inventory Program in their targeting and enforcement section. Kerstan was examining furniture companies located in south coastal California. His procedure was to determine if the companies were reporters to the program and if not, he would telephone a representative of the company and ask them if they had ever heard of EPCRA, whether they had ever done an inventory of their chemical use and if they had not, request that they examine such use to determine if they met the threshold for reporting. Tr. 39.

Kerstan's first telephone call to the Respondent was on March 10, 1998. At that time he left a message asking to speak with the company representative who handled environmental reporting. Tr. 42, EPA Ex. 3. The following day Kerstan received a call from Daren Jorgensen, the environmental consultant retained by Respondent. Kerstan asked Jorgensen to check to determine whether the Respondent had chemical use which would trigger reporting. Kerstan's notes indicate Jorgensen informed him he would make such a check. EPA Ex. 3. During this first call Jorgensen did not state that he was preparing a Form R for Respondent, rather his March 11th call was to determine the purpose of EPA's contact with the Respondent. Tr. 43. Kerstan's notes do not reveal when the Respondent first contacted Jorgensen nor do they assert that

Jorgensen was contacted only after his March 10th call to the Respondent. Kerstan agreed that it was likely that Jorgensen had some sort of agreement with Respondent prior to his March 10th call, but he added that it could have been for other environmental work, and not necessarily EPCRA work. Tr. 55. Following a March 19th conversation between Kerstan and the Respondent's representative, Richard Hartig, the Respondent sent EPA the Form R's the next day. Tr. 59. Kerstan conceded that he "would be surprised" if Jorgensen would have been able to prepare the Form R's and submit them only one day after the March 19th conversation unless the work had already been in progress. Tr. 67.

Although EPA's second witness, Patricia Monahan,[5/] acknowledged that she was aware that the facility filed the Form R's on or about March 20, 1998, which was about ten days after Kerstan first contacted Martin Furniture, in her view the only measure of Respondent's conduct was whether the facility had contacted EPA in writing prior to the call from EPA. Tr. 80. Thus, she rejected the notion that the Respondent discovered the violations as a result of its own due diligence in the evaluation of its compliance and concluded there was no voluntary compliance. Tr. 88.

When Gilbert Martin, President of Martin Furniture, took the witness stand, he testified that his company hired Jorgensen Environmental ("Jorgensen" or "firm") in July 1997. Tr. 107. The firm's precise duties when first hired were to obtain the permits to allow it to use sprays at their new facility. Tr. 129. Martin stated that the firm was hired specifically to deal with EPCRA compliance issues in February 1998. This assertion is supported by Respondent's Exhibit 5, a letter dated February 16, 1998 from Jorgensen to Hartig, the production manager for the Respondent. The letter reflects a contract offer between Respondent and the firm to review its Form R reporting obligations. Shortly thereafter Respondent accepted the proposal contained in that letter, as evidenced by Respondent's signature, dated February 20, 1998. Tr. 108. Thus, Martin contends that the firm's investigation of its EPCRA compliance was ongoing at the time of EPA's first contact with Martin Furniture and that Jorgensen, not EPA, discovered the problem. Tr. 109 - 110.

Daren Jorgensen, President of Jorgensen Environmental testified that his firm was first hired

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[5/]Respondent's counsel initially objected to Monahan's testimony on the grounds that she lacked personal knowledge of the facts and did not perform the penalty calculation but rather reviewed the work performed by another EPA employee. Monahan was not called as an expert nor as a fact witness, but rather as one who reviewed the calculation with the penalty policy to determine whether the factors were applied in making the proposed penalty. Tr. 70. Her affidavit was admitted, as was the penalty calculation worksheet. Complainant's Exhibits 1 and 2. Consequently, with the affidavit deemed her direct testimony, her live testimony began with cross-examination. Monahan stated that she reviewed the complaint and the penalty calculation that another employee, no longer employed with EPA, had performed.

by the Respondent in June or July of 1997 and that their first job was to evaluate the air quality permitting issues for Martin's two facilities, in dealing with the San Diego Air Pollution Control District. Tr. 133. He confirmed that in mid-February 1998, while dealing with those air quality issues, they were also hired to evaluate Form R applicability to Respondent's business. Discussions on this issue began in January 1998. Tr. 133, 134. This resulted in Respondent's request for the submission of a proposal and the firm presented one on February 16, 1998. Respondent's Exhibit 5. Respondent accepted the proposal (i.e. the offer) on February 20th.

Jorgensen stated that on March 11, 1998 he received a call from Hartig, relating that EPA's Kerstan had called regarding Form R reporting duties for Martin Furniture. Tr. 146. Jorgensen then called Kerstan the next day, March 12th, at which time Kerstan asked whether he knew if Respondent had a Form R reporting obligation. Jorgensen told him then they were in the process of preparing the reports. A second conversation with Kerstan occurred on March 19th during which he gave Kerstan a summary of the Form R reports that he had determined Respondent needed to file. He also told him when the Form R's would actually be filed and agreed to send him an additional copy for his records.[6/] Tr. 148.

Jorgensen described the evaluation and preparation of a Form R as a detailed, time-consuming process and supported that assertion with a description of the work involved. Tr. 137 -139. He stated that it took from February 21st to March 18th to complete the work. Although the Form R's themselves were actually completed on March 20th, the firm's letter to the Respondent, signed by one of Jorgensen's supervising associates, was prepared March 26, 1998. It summarizes the work performed regarding the Form R reporting, and reflects that only two substances required Form R reporting. Tr. 143.

The Court questioned Jorgensen, inquiring whether, given that his firm has been in business since 1988 and that he has been very familiar with the Form R requirements from their inception, it would have been natural for him to immediately connect in his mind Form R requirements with furniture manufacturers. Jorgensen conceded that while it would be on his list of things to address with the furniture manufacturer, it takes time to build up trust with a new client, and consequently dealing with other issues, beyond the initial reason for hiring, cannot be raised immediately. Tr. 169- 171.

As Jorgensen represented that the proposal to perform the Form R work was at least the second proposal the firm had made to the Respondent, with the earlier proposal being related to the aforementioned air quality permitting, the Court required that those records be provided within seven days for inclusion in the record. These records were provided and fully support Jorgensen's testimony.

[6/]Subsequently Kerstan needed additional records (specific chemical usage information) in order to validate the usage reports reflected in the forms. Jorgensen responded on July 1, 1998, submitting purchase records and MSDSs. Tr. 152. Respondent's Ex. 11.

Hartig, the operations manager for Gilbert Martin, also testified. His duties include responsibility for environmental compliance. It is sufficient to note that his testimony corroborated that of Martin and Jorgensen. Importantly, he related that after the voice mail contact from Kerstan, inquiring whether Gilbert Martin had a Form R reporting requirement, he telephoned Jorgensen to ask about the firm's status on the project and learned that it was underway. He then instructed Jorgensen to call Kerstan. Tr. 184. Hartig also confirmed that it takes a lot of time to dig up all the files to assess Form R obligations and offered that if it had not already been underway they could not have responded so promptly.

Based upon the Court's assessment of the testimony and credibility of the witnesses, it is concluded that in fact Respondent was well underway in the process of complying with its Form R reporting requirements. EPA's witnesses conceded that it would not have been likely that the Respondent could have provided the Form R's so rapidly had Martin not already started the process. Respondent's witnesses credibly testified that the process had begun by February 20th and Jorgensen's business records corroborate that this was the case. Yet EPA applied a rigid test to the facts by considering only whether the Respondent had contacted EPA prior to the initial call from Kerstan.

The policy does not anticipate a situation such as that presented here where a Respondent is in the process of complying when an EPA inquiry is initiated. While admittedly a rare occurrence, the evidence confirms that it happened in this instance. To apply such a rigid standard, examining only whether the Respondent made the first contact with the Agency, while ignoring that the Respondent had started the review of its Form R obligations, would produce an enforcement response that is not "appropriate for the violation committed" and thus inconsistent with the policy itself.

As noted, the Court has concluded that, under the facts and circumstances, the penalty derived by EPA under the ERP is excessive and therefore inappropriate. In addition to the finding of fact that the Respondent was already in the midst of complying before EPA's first contact, the proposed penalty did not consider that the Respondent has taken steps to ensure that future violations are not likely to occur by hiring Jorgensen Environmental to prophylactically monitor its chemical usage and to evaluate those chemicals it contemplates using. Given that one of the announced purposes of the ERP is to ensure "deterr[ence] from committing EPCRA § 313 violations," the Respondent's actions to prevent future violations should have been considered.[7/]

Further, the Court agrees with Martin Furniture's contention that EPA's assessment of the Respondent's cooperation and preparedness during the settlement process was an inappropriate consideration to include in proposing a penalty. This conclusion rests on two grounds. First, the Court questions the premise that "settlement cooperation" should ever be factored into a

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[7/]There is no suggestion in the ERP that deterrence is limited to other potential violators and does not extend to the respondent in the litigation.

proposed penalty,[8/] as opposed to a post-calculation consideration. "Attitude" is not factor listed under TSCA Section 16 nor is a Respondent's "conduct" during settlement. Further, as applied here, EPA's statements regarding the Respondent's settlement conduct was conclusory in nature. The agency provided no substance to back up its assertion, describing only in the most general of terms that "during the settlement talks, it was not clear what the basis was for the facility arguing for a lower penalty" and the claim that the Respondent displayed a "shifting sands" approach during settlement. Tr. 79-80, 82.

What criteria should be evaluated in determining an appropriate penalty?

Having concluded that EPA's application of the policy produced an inappropriate penalty in this instance, it must be determined what criteria should be evaluated in determining an appropriate penalty. Section 325(c) of EPCRA provides little guidance for the appropriate penalty where Section 313 violations are involved. Other than establishing the maximum penalty and providing that each day of noncompliance is a separate violation, the Section does not identify factors to be considered in arriving at the penalty. This was noted by the Board's decision *In re Steeltech Ltd*. There, in upholding a penalty of $61,736 for nine violations of the EPCRA Section 313 reporting requirements, occurring over a period of four years, it noted that, other than the parameters of the potential for a $25,000 civil penalty for each violation and that each day of failure to report is a separate violation, "the statute does not provide further guidance for the assessment of penalties for violation of [that section]," as it "does not provide a list of factors to be taken into account in assessing civil penalties."

Section 325, entitled "Enforcement," presents a curious situation as to penalties because some of its subsections provide specific factors to be considered, either explicitly or through incorporation by reference, while other subsections only articulate the maximum penalty per violation. Subsection (a), entitled "Civil penalties for emergency planning," states only that a civil penalty of not more than $25,000 may be imposed for each day in which such violation occurs or such failure to comply continues. Subsection (b), addressing penalties for emergency notification violations, is divided into Class I and II administrative penalties. While the Class I penalty provision sets a per violation limit of $25,000, it also spells out the specific criteria to be

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[8/]There are indications in support of the impropriety of including "settlement cooperation" in the penalty calculation. By implication, Section 22.19(e)(2) of the Consolidated Rules of Practice with its reference to "penalty calculations for purposes of settlement" implies that a settlement calculation should be apart from that derived under the policy itself. The Environmental Appeals Board seems to agree with this proposition as well. In *City of Kalamazoo Water Reclamation Plant, 3 E.A.D. 109 (EAB, Mar. 2, 1990).* Chief Judicial Officer McCallum in noting that the City was entitled to know precisely how the penalty was calculated for the violation of the Clean Water Act, observed that the "BEN model *and the amount EPA would accept in settlement did not enter into EPA's penalty calculation."* (emphasis added).

considered in arriving at the penalty to be assessed,[9/] while Class II administrative penalties, although utilizing the $25,000 per day limit, incorporates the penalty factors of TSCA Section 16. 15 U.S.C. § 2615.[10/] Subsection (d)(1)(B), addressing trade secret claims that are frivolous, provides for a flat $25,000 penalty per claim, while subsection (d)(2), pertaining to disclosure of trade secret information, reverts to a fine with an upper limit of $20,000. Last, the subsection involved in this litigation, violations of Subsection (c) reporting requirements, provides the same $25,000 upper limit for a penalty, for violations involving Sections 11022 or 11023, while applying a $10,000 cap for violations of Sections 11021, 11043(b) or 11042(a)(2), but offers no elaboration as to any criteria to be considered.

The fact that Congress spoke with specificity as to the penalty criteria to be applied for some subsections while providing only broad directions as to others, may be construed as an intention to afford broader discretion where Section 313 reporting requirements are involved.

Faced with this lack of specificity for Section 313 violations, both EPA, through its penalty policy and administrative tribunals have relied upon and applied the statutory factors set forth in Section 16 of TSCA, as referenced in EPCRA Section 325(b)(2).[11/] Implicitly, the Board has approved the use of these factors for calculating EPCRA Section 313 violations. *In re Catalina Yachts, Inc*., 1999 WL 198912 (EAB, Mar. 24, 1999), ("Catalina"). These factors are the nature, circumstances, extent and gravity of the violation, and the violator's ability to pay, the penalty's effect on its ability to continue to do business, any history of violations, the degree of culpability, and such other matters as justice may require.[12/]

In addition, the federal district courts have noted and not taken issue with EPA's adoption of the TSCA Section 16 factors for Form R violations. *See Catalina*,112 F. Supp. 2d 965 (C.D.Cal.2000); *Steeltech, Ltd. v. United States EPA*, 105 F. Supp. 2d 760 (W.D. Mich. 2000).

[9/]These are "the nature, circumstances, extent and gravity of the violation ... [and the violator's] ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings ... and such other matters as justice may require." 42 U.S.C. § 11045 (b)(1)(C).

[10/]As contrasted with 42 U.S.C. §11045(b)(1)(C), TSCA Section 16 looks to the same penalty criteria except that, in place of "economic benefit or savings," it lists the penalty's "effect on ability to continue to do business." 15 U.S.C. § 2615(a)(2)(B)

[11/]*See also* the initial decision issued by Judge Barbara Gunning *In the Matter of Bituma-Stor, Inc*., 2001 WL 66547 (ALJ, Mar. 24, 1999).

[12/]On appeal the Federal District Court took no issue with the Agency's adoption, as guidance, of the TSCA penalty factors found at 15 U.S.C. § 2615(a)(2)(B), for application to EPCRA Form R violations. *Catalina Yachts, Inc. v. United States EPA*, 112 F.Supp. 2d 965, (C.D. Cal. 2000).

Following this guidance, this Court also looks to the TSCA Section 16 factors and notes that, even without expressly referring to that section and absent express Congressional direction, a Court would naturally consider the broad factors listed there as inherently relevant to the determination of a civil penalty.[13/]

Assessment of a Civil Penalty upon consideration of the factors listed in TSCA Section 16.

Several of the factors may be addressed summarily. The "nature" of the violation, the failure to file Form R's for 1994 through 1996, is not in dispute. Similarly, the ability to pay, and the penalty's effect on the Respondent's ability to continue to do business are not issues in this instance, with the Respondent having conceded that EPA's proposed penalty does not call those considerations into play. Remaining for the Court to consider are the circumstances, extent and gravity of the violation, the Respondent's degree of culpability, its history of violations, and such other matters as justice may require. The Board has pointed out that the TSCA Section 16 penalty adjustment factors "*may not be compartmentalized* and that the absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty calculation."[14/] *Catalina,* 1999 WL at *7 (emphasis added).

In this context the Court makes the following observations of the particular facts in this case. As noted earlier, it has been found that the Respondent was in fact in the process of complying with its Form R obligations at the time EPA made its first inquiry.[15/] It is also clear that EPA had no inkling that there was a second facility when Kerstan made the original call to the Respondent. Kerstan's notes indicate that he first learned on March 19, 1998, by virtue of the Respondent's disclosure, that Martin had another facility in Kearny Mesa. Tr. 46; EPA Ex. 3. Kerstan admitted, after some jousting during cross-examination, that when he contacted the Respondent he did not know there was a Kearny Mesa facility and that his initial contact was

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[13/]This view is consistent with the observations made by the United States Court of International Trade in *United States v. Complex Machine Works Co.* 83 F. Supp. 1307 (Ct. Int'l Trade 1999). While that case dealt with violations of customs law, the Court was also faced with a statute which failed to list factors to be applied in determining a civil penalty. The decision, after noting the civil penalty provisions for a host of other federal statutes, including the Clean Water Act, the Resource Conservation and Recovery Act and EPCRA., identified fourteen factors, which in large part reflect the factors enumerated in TSCA Section 16. *Id.* at 1315.

[14/]In *Catalina* the Board noted with approval that the judge "clearly was considering the statutory penalty factors in making adjustments not specifically contemplated by the ERP." 1999 WL at *7.

[15/]EPA Witness Monahan conceded that she was aware that the Respondent had hired Jorgensen Environmental approximately two to three weeks prior to the telephone call from the EPA inspector. Tr. 87.

only with the El Cajon facility. Tr. 51-52, 65. Jorgensen testified that he told Kerstan that Respondent also had a facility at Kearny Mesa and confirmed that Kerstan was only aware of a El Cajon facility. Tr. 147. Significantly, Kerstan agreed that EPCRA violations are facility specific.[16/]

> Q. Violations under E.P.C.R.A. are facility specific, are they not?
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> A. Yes, they are.

Tr. 51.

Kerstan admitted that he first determined there had been a reporting violation on March 20, 1998 when the company submitted the Form R's and informed EPA that it had a reporting obligation.

> Q Mr. Kerstan, [referring to the date it was determined there was a violation] wasn't this really determined on or about March 20, 1998, when the company submitted the Form R's to you and disclosed that they had an E.P.C.R.A. reporting obligation?
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> A That would have been true, yes.

Tr. 48.

Further, while the violations have been conceded, consideration of the TSCA § 16 factors cannot overlook that neither Kerstan nor any representative of EPA ever visited either of Respondent's facilities in connection with the EPCRA matter. Tr. 57. In fact, Kerstan never expressed any interest in visiting Respondent's El Cajon facility, admitting that he felt there was no need to do so. He also conceded that a company that is cooperative and supplies the information requested, saves EPA the effort of an inspection visit. Tr. 63.

[16/]Half of the Counts (Counts V-VIII) are derived from the Kearny Mesa facility. As noted, EPA, through Kerstan, did not learn of Kearny Mesa's existence until March 19th and this knowledge came about only through Respondent's disclosure. Given that violations are facility specific, Respondent could have opted to not disclose the Kearny Mesa facility at that time and instead simply submit the Form R's for that facility (as it did) on March 20th. The ERP does not foreclose the eligibility for voluntary disclosure in such a circumstance, as it precludes such eligibility only "if the company has been notified of a scheduled inspection or the inspection has begun, or *the facility* has otherwise been contacted by U.S. EPA for the purpose of determining compliance with EPCRA § 313." ERP at 14 (emphasis added). Thus, within the terms of the ERP, there could have been self-disclosure (i.e. voluntary disclosure) of the Form R's for that facility. Instead, Respondent acted as a good corporate citizen and disclosed the presence of a separate facility. The Court views this as an additional consideration to be weighed under either the circumstances of the violation or the "as justice may require" factor.

EPA witness Monahan was also aware that the Agency was relying upon Jorgensen's evaluation of the chemical use data at Respondent's facility. EPA's Kerstan had not requested chemical use data from Respondent until March 19, 1998, which was one day before the Respondent made the Form R reports. Tr. 81. Monahan also admitted that, looking at the single factor of speed in submitting the Form R's, the Respondent used the "utmost speed." Tr. 83.

Given that the Enforcement Response Policy itself identifies "deter[rence] from committing EPCRA § 313 violations" as one of its purposes, the Court also considers it appropriate to consider the Respondent's actions taken in the wake of the violations[17/] under the "other factors as justice may require" factor. To preclude future reporting requirement failures, Jorgensen's firm has been hired to provide regulatory consulting services to Respondent and evaluate all chemicals it may use, even before they purchase them. Tr. 155. Hartig confirmed that Jorgensen Environmental has been retained on an annual basis to be sure they remain in compliance. Tr. 187.

It also seems appropriate to consider under the "other factors" element that, subsequent to the events forming the basis for the complaint, the Respondent has had no Form R reporting duties. Respondent's Ex. 9 (a April 14, 1998 letter from Jorgensen to Hartig reflecting that Martin Furniture had no Form R reporting duties at either plant in 1997); Respondent's Ex. 10 (a June 3, 1999, letter to Hartig with the same conclusion for calendar year 1998: Respondent had no Form R reporting requirements); Tr. 160.

Other aspects of this case merit discussion in the penalty determination context. Although the Board has noted that the penalty derived under the ERP assumes that a respondent may not have

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[17/]However, one of the mitigating factors advanced by the Respondent is rejected by the Court. Respondent asserted that the elimination of 111 trichloroethane from their facility was prompted by awareness that EPA was working to eliminate it and that the supply would be dwindling. Tr. 188. In dealing with the assertion that Respondent was a "good actor," as reflected by the steps it took to reduce use of M.I.B.K. and to eliminate the use of TCA, EPA noted that there must be an in depth investigation to determine whether the motivation stems from the goodness of the corporation's heart and not actually from some other motivation such as local or state laws or economic considerations prompting the action. Tr. 90. If applicable, such an act would be considered under the "other factors" element. Tr. 92. EPA made no such investigation in this case. However, no investigation was necessary because the Respondent conceded it was aware that 111 Trichloroethane manufacture had been banned on December 31, 1995, and consequently that the cost for the product would go up. Respondent's witness essentially conceded that costs were a consideration and that they anticipated increases coming for the use of the chemical. Tr. 121-125. Accordingly, it is clear that the Respondent's decision regarding use of those chemicals was not totally altruistic.

actual knowledge of the Section 313 requirements and affirmed a judge's decision not to reduce the penalty further for a respondent's lack of culpability as not "error," it also stated that "[w]e do not disagree that in some situations, a person's lack of actual knowledge of a regulatory requirement might appropriately be considered in mitigation of a penalty." *Catalina*, 1999 WL at *9. Here, the Respondent, initially a small firm, started literally out of Mr. Martin's garage making unfinished furniture. Given this context, and the Court's acceptance of Martin's contention that it was unaware of the requirement, Respondent's assertion that it did not know of the Form R requirement is credible. In recognition of the regulated community's lack of awareness of these requirements, EPA has conducted outreach programs. *See Pease and Curren, Inc.*, 1991 WL 310035 (ALJ, Mar. 13, 1991). No evidence of such an outreach effort applicable to this area or class of manufacturers was offered by EPA. In fact, Kerstan explained that part of his duties was to "do inspections of facilities to make sure that they comply *and also to find facilities who may have not been aware of the regulation and not filed Form R*." Tr. 38. (emphasis added).

A further comparison with *Catalina* is appropriate, as the judge in that case found that the Respondent's immediate retention of an individual to assist in preparing the Form R's demonstrated good faith efforts to come into compliance and that the Respondent's speed, taking six months, to submit the forms demonstrated prompt compliance, given that an earthquake disrupted the Respondent's business activities.[18/] *Catalina*, 1999 WL at *12. Both of these findings were upheld by the Board on the basis that it found no abuse of discretion on the judge's part. Obviously such considerations are more favorable in this litigation, as demonstrated by the finding that the Respondent had *already* retained Jorgensen to assess its potential Form R reporting responsibilities in advance of EPA's first contact and the fact that it provided the Forms the day after they were requested and within ten days of the Agency's first contact with the Respondent.

Upon consideration of each of the TSCA Section 16 factors, as reflected in the foregoing discussion, it is the Court's determination that, regarding the El Cajon facility, a penalty in the amount of $10,000 each is imposed for Counts I and III, $5,000 for Count II, and $1,300 for Count IV and, regarding the Kearny Mesa facility, a penalty of $2,000 each for Counts V and VII, $1,300 for Count VI, and $200 for Count VIII, for a total penalty amount of $31,800. These amounts take into account the Agency's own differentiation of penalties among the Counts and the Court's distinction between penalties at the Kearny Mesa and El Cajon facilities. Under the particular facts and circumstances present, the Court considers the penalty imposed to be appropriate for the violations committed.

ORDER

[18/]This finding was undisturbed, even though the event caused the Respondent's office to close for only a few days.

A civil penalty in the amount of $31,800 is assessed against the Respondent, Gilbert Martin Woodworking Company, Inc. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

Mellon Bank
EPA Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

William B. Moran
United States Administrative Law Judge

Dated: June 18, 2001

In the Matter of Gilbert Martin & Gilbert Martin Woodworking Company
d/b/a Martin Furniture Respondent
Docket No. EPCRA-09-99-0016

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated June 13, 2001, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA - Region
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Attorney for Complainant:

David Jones, Esq.,
Assistant Regional Counsel
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

Attorney for Respondent

Chris Amantea, Esq.,
McDermott, Will & Emery
2049 Century Park East, 34th Floor
Los Angeles, CA 90067

_____
Rachele D. Jackson
Legal Staff Assistant

Dated: June 18, 2001