

By reopening the hearing, Respondent seeks to correct what it believes is a misunderstanding in the Initial Decision with respect to whether Respondent "voluntarily disclosed" to EPA its failure to file the Form Rs for the years 1992 and 1993. Such voluntary disclosure is a factor to be considered in calculating a penalty, according to the Enforcement Response Policy for Section 313 of EPCRA (the "ERP").

Complainant opposes the Motion on the basis that Respondent has not demonstrated a misunderstanding on the record or an entitlement to reconsideration of the penalty, and that Respondent has not met the criteria set forth in 40 C.F.R. §22.28(a).

Discussion

Respondent asserts that there was no dispute with EPA as to the fact that Respondent made a "voluntary disclosure" of its failure to file the Form Rs for 1992 and 1993 without receiving any prior notice from EPA. More specifically, Respondent asserts that James Pews, an employee of Respondent, informed Bob Allen and Nina Zippay of EPA in a telephone conference that upon investigating Respondent's EPCRA 313 reporting history, he had determined that Form Rs for 1992 and 1993 had not been filed.

Respondent points out that written stipulations prepared by the parties prior to the hearing demonstrate that EPA and Respondent mutually agreed to the fact that the 1992 and 1993 violations had been "voluntarily disclosed" by Respondent. See, Joint Stipulated Facts, dated July 30, 1997. ⁽¹⁾ Respondent asserts that the evidence it seeks to present was not introduced at the hearing because all parties believed that the stipulated facts established as a fact that Respondent "voluntarily disclosed" the 1992 and 1993 violations.

Respondent cites to portions of the Initial Decision which Respondent believes indicate a misunderstanding of that fact, such as the following:

However, the testimony of Mr. Pews indicates that Steeltech's "voluntary disclosure" was not spontaneous; rather, it merely consisted of his confirmation to EPA of the accuracy of information concerning the existence of the additional violations, information which EPA had previously provided to him.

As a result, Respondent requests that the hearing be reopened to take further evidence to correct the apparent misunderstanding, and accordingly that the amount of the penalty be reconsidered. Respondent seeks to introduce as further evidence an Affidavit of James Pews, dated June 25, 1998, and if necessary, further testimony of Mr. Pews and EPA representatives.

In the Affidavit, dated June 25, 1998, Mr. Pews states:

On October 24, 1994, I participated in a telephone conference with Mr. Robert Allen and Ms. Nina Zippay of U.S. EPA This telephone conference was my first contact with any U.S. EPA representative as to Steeltech's Form R reporting requirements During the telephone conference, I told Mr. Allen and Ms. Zippay that I had discovered Steeltech had not filed Form Rs for 1992 and 1993. . . . Neither Mr. Allen nor Ms. Zippay had made any statement whatsoever as to whether Steeltech had filed form Rs for 1992 and 1993 at the time I made this disclosure to them. . . [and] neither indicated that they had been previously aware of such lack of filing for those years.

However, as indicated in the Initial Decision, the conclusion that Mr. Pews' disclosure of the violations was not spontaneous but had been prompted by prior communications between the parties was based in part on the following testimony, given by Mr. Pews, under oath, on direct examination, at the hearing:

Q. When did you first begin working with Steeltech?

A. September 26, 1994.

Q. . . . When did you first become aware of the Form R reporting requirements?

A. The first week of work when I became aware of the Complaint that had been filed by the EPA at the start of that month. . . .

* * *

Q. . . . Were you given some responsibilities with respect to that Complaint and the allegations in it?

A. Yes.

* * *

Q. What were those responsibilities?

A. First of all, to research exactly what had been filed And through research internally as well as phone conversations with Bob Allen of EPA, I was able to determine what had been filed and what hadn't been filed.

* * *

Q. [What did your research show?]

A. I found that for '92 and '93, I did not find any record of those [Form Rs] having been filed, so it was consistent with Bob Allen's assertion that we had not filed them.

Q. Do you remember approximately when you discovered that '92 and '93 forms had not been filed?

A. In October of 1994.

Q. Was there a disclosure to the EPA, specifically Bob Allen, of the lack of filings showing your records given to Bob Allen at that time?

A. The date of that telephone conversation with Bob Allen was October 24, 1994, and that is when we basically came to the conclusion that those forms needed to be filed

Tr. 73-77 (emphasis added).

The statements in Mr. Pews' Affidavit appear to be inconsistent with his testimony at the hearing and the finding in the Initial Decision that EPA had provided him information as to additional violations prior to the disclosure.

However, even if Mr. Pews' current recollection of events is accepted as true and deemed to be unequivocal factual support for the conclusion that, within the parameters the ERP, Respondent "voluntarily disclosed" its 1992 and 1993 violations, it would not effect the outcome of this case.⁽²⁾ The Initial Decision indicates that, in determining the appropriate penalty to be imposed upon Respondent, the issue of voluntary disclosure of the 1992 and 1993 violations was considered at some length. See, Initial Decision pages 16-18. In its enforcement discretion,

prior to the hearing, Complainant had determined that Respondent did "voluntarily disclose" its 1992 and 1993 violations under the ERP and, as a result, proposed a 35% reduction in the penalties for those counts. While the Initial Decision questioned the propriety of the Complainant's determination that "voluntary disclosure," *as that term is defined in the ERP, that conclusion was not disturbed*, and to its benefit, Respondent was found to be entitled to a reduction in the penalty for voluntary disclosure of the 1992 and 1993 violations. Moreover, in calculating the penalty reduction for voluntary disclosure under the ERP, to the benefit of the Respondent, the undersigned *increased the reduction* from the 35% proposed by Complainant to 42% (out of a maximum of 50%). The maximum potential reduction of 50% was not applied because one criterion was not met, namely that the Respondent had had no prior history of violations.⁽³⁾ Respondent does not claim that this criterion was met, and thus there are no grounds upon which relief can be granted in terms of further reducing the penalty.⁽⁴⁾

Where there is no relief to be granted, there is no purpose served by reopening a hearing, and therefore the Respondent's Motion to Reopen Hearing will be denied.

Accordingly, **IT IS ORDERED THAT:**

1. Respondent's Motion to Reopen Hearing is **DENIED**.
2. Respondent shall pay the full amount of the \$61,736 penalty assessed in the Initial Decision within 60 days of the date that the Initial Decision becomes final. Pursuant to 40 C.F.R. § 22.27(c) and 22.28(b), the Initial Decision shall become the Final Order of the Agency forty-five days after service upon the parties of this Order Denying Motion to Reopen the Hearing, unless an appeal is taken pursuant to 40 C.F.R. § 22.30 or the Environmental Appeals Board elects *sua sponte* to review the Initial Decision. An appeal must be filed within twenty (20) days after service of this Order upon the parties. 40 C.F.R. § 22.30(a).

Susan L. Biro
Chief Administrative Law Judge

Dated: August 14, 1998
Washington D.C.

1. One of the stipulations states as follows, in part: "On October 26, 1994, a representative of Respondent voluntarily disclosed to Robert J. Allen, of the U.S. EPA, via a telephone conference, that it had not filed a Form R for nickel for calendar year 1992" Joint Stipulations, ¶ 40. The other stipulations cited by Respondent are identical except for the particular chemical or year referenced. An inconsistency in the record is noted as to the date of the telephone conference in which the "voluntary disclosure" occurred. According to the stipulations, the date was October 26th, but according to Mr. Pews' testimony and Affidavit the date was October 24th. See, Tr. 76-77; Affidavit of James Pews, dated June 25, 1998; *infra*, pps. 3, 4.
2. It should be noted that the statements in Mr. Pews' Affidavit do not rule out the possibility that Steeltech, although not necessarily Mr. Pews himself, had been put on notice by EPA about the 1992 and 1993 Form Rs prior to the October 1994 telephone conversation. Mr. Pews did not begin employment with Steeltech until September 26, 1994, after the 1992 and 1993 forms were required to be filed. Tr. 73.

In any event, at the time of the October 1994 telephone conference, Respondent was on notice of noncompliance with EPCRA § 313 by virtue of the Complaint, filed September 2, 1994, alleging failure to file Form Rs for 1988, 1989, and 1990. The ERP does not define "voluntary disclosure" in terms of whether a facility had notice from EPA of the *particular* violations prior to

disclosure, but rather in terms of whether a facility had notice of noncompliance

continued . . .

. . . continued

with EPCRA § 313 *in general*. The ERP provides as follows:

The Agency will not consider a facility to be eligible for any voluntary disclosure reductions 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

continued . . .

determining compliance with EPCRA § 313.

Thus, the ERP contemplates a facility which has not been contacted by EPA regarding compliance, disclosing violations which EPA had no reason to know about. At the time of the October 1994 telephone conference, EPA had reason to suspect that Respondent had additional violations for 1992 and 1993, since EPA already had investigated and found violations in regard to Respondent's compliance with EPCRA § 313 as to the 1988-1991 calendar years. Prior to the October 1994 telephone conference, Respondent had been contacted by EPA through EPA's inspection of Respondent's facility for compliance with EPCRA on February 12, 1992 and the filing of the Complaint on September 2, 1994. Tr. 54, 75. Thus, even without Mr. Pews' testimony regarding his conversations with Mr. Allen, there is a basis for arguing, that Respondent was not eligible for a "voluntary disclosure" reduction under the terms of the ERP.

3. The ERP provides for an initial 25% reduction for voluntary disclosure, and an additional 25% which can be applied to the extent to which a facility meets four criteria, one of which only applies to supplier notification violations. Because Respondent did not meet one of the three applicable criteria, the penalty was adjusted downward by 25% plus two thirds of 25%, or 42%.

4. The Initial Decision (in footnote 25) also questions the appropriateness of the ERP's direction that reductions for "voluntary disclosure" and "attitude" are always "mutually exclusive." However, then as now, it is within the discretion of the Presiding Officer to apply the ERP or deviate from it as appropriate under the circumstances of the case. The Initial Decision evidences a decision not to exercise the discretion to deviate from the ERP in that regard, a decision that will not be altered now.



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