UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	§	
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	§	
THOMAS PETROLEUM, LLC	§	
PILOT THOMAS LOGISTICS, LLC	§	DOCKET NO. EPCRA-06-2019-0501
	§	
	§	
RESPONDENT	§	

RESPONDENTS' PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"), and to Administrative Law Judge Christine Donelian Coughlin's November 8, 2019 Prehearing Order (the "Order"), Respondents Thomas Petroleum, LLC ("Thomas", the "Company" or "Respondent") and Pilot Thomas Logistics, LLC ("PTL") hereby submit their prehearing exchange in the above-captioned matter as follows:

PILOT THOMAS LOGISTICS, LLC

Relying on Complainant United States Environmental Protection Agency's ("EPA" or "Complainant") "Clarification of Respondents" and stated plan not to pursue this matter against PTL, Respondents' Prehearing Exchange will not address matters related to PTL. Should Complainant not amend its Complaint and Notice of Opportunity for Hearing ("Complaint") to remove PTL, Respondent reserves its right to supplement this Prehearing Exchange in regard to PTL.

A. WITNESS TESTIMONY AND TIME NEEDED TO PRESENT THOMAS' CASE

The names of all expert and other witnesses intended to be called at hearing are as follows:

1. Blaine Zwahlen – Mr. Zwahlen will testify as a fact witness and an expert witness. Mr. Zwahlen's resume is attached as Attachment A.

Mr. Zwahlen is an independent technical consultant who has assisted in preparation of Toxic Release Inventory ("TRI") filings for industrial clients. Mr. Zwahlen will testify that he made calculations for Thomas' TRI filings for the years 2012 and 2013 and that some of his calculations were based on conservative assumptions that overestimated actual amounts of those chemicals. Mr. Zwahlen will testify that recalculation of chemical content using actual product content or more realistic estimates results in amounts of ethylene glycol significantly lower than initially reported in some cases, and amounts of zinc below reporting thresholds in some cases. Mr. Zwahlen will testify that nearly 90% of Thomas' TRI filings were on Form A and no corrections to such filings involved filing a Form R where a Form A had previously been filed.

2. Megan Zettlemoyer – Ms. Zettlemoyer will testify as a fact witness. Ms. Zettlemoyer's prior resume is attached as Attachment B and will be supplemented by her current resume.

Ms. Zettlemoyer was a member of Thomas' Health, Safety and Environmental ("HSE") Department in 2014 when the TRI filings at issue were made. Ms. Zettlemoyer will testify regarding Company operations and TRI filings for 2012 and 2013 at the 12 Region 6 facilities that are subject to the Complaint (collectively, the "Facilities"), complexities related to initiating TRI filings for same, the Company's efforts and its dedication of resources to be environmentally compliant before and after its acquisition in 2014, its dedication of resources to respond promptly and accurately to EPA inquiries, and expenditures made to assure compliance.

3. Mendi Martino – Ms. Martino will testify as a fact witness and will authenticate Thomas' documents. Ms. Martino's resume is attached as Attachment C.

4. Bryan Christian – Mr. Christian will authenticate documents and testify regarding the Company's commitment to environmental compliance after the 2014 acquisition. Mr. Christian will also testify that, except for some additional corrections to pre-acquisition filings where needed, Thomas' new owner was not involved in, and had no control over, the alleged violations since the alleged violations occurred prior to the acquisition. Mr. Christian's resume is attached as Attachment D.

B. EXHIBITS

Per the Order, Respondent must submit copies of any documents: (A) in support of the denials made in Respondent's answer; (B) in support of Respondent's asserted affirmative defenses; (C) that Respondent considers relevant to penalty assessment; and (D) that Respondent relies upon in support of penalty reduction or elimination. Thomas' denials in its Answer relate to two issues, neither of which Complainant, per its Initial Prehearing Exchange ("Prehearing Exchange"), intends to pursue: Complainant's allegations related to PTL, and certain 2013 naphthalene-related allegations involving EPA TRI guidance (**Prehearing Exchange pp. 5, 6 and 8**). Accordingly, Respondent is not submitting any documents in support of denials made in its answer. Documents related to the other three categories are listed below:

RX 1	EPA Press Release dated February 4, 2014
RX 2	Ragna Henrichs Letter to James Murdock, EPA, dated September 8, 2016
RX 3	Dr. Wakeland Emails with Megan Zettlemoyer dated September 16, 2014
RX 4	2012 and 2013 TRI Submissions Chart
Rx 5	Thomas Petroleum Headcount
RX 6	*In re: DIC Americas, Inc.*, 6 E.A.D. 184, 1995 Westlaw 646512 at *4-5 (EAB 1995)
RX 7	*In re: Employers Ins. of Wausau*, 6 E.A.D 735, 1997 Westlaw 94743 at *15-16
RX 8	*In re: Steeltech, Ltd.*, 8 E.A.D. 55, 1999 Westlaw 673227 at *6 (EAB, 1999)
RX 9	*In re: Gilbert Martin Woodworking Co.* 2001 Lexis 27, *1 (EPA 2001)
RX 10	EPA Audit Policy
RX 11	*In re: GCA Chemical Corp.* 2002 WL 1472043 (EPA 2002)
RX 12	Blaine Zwahlen Letter to Thomas Petroleum LLC dated March 9, 2020
RX 13	DOJ Criminal Division - Evaluation of Corporate Compliance Programs (April 2019)
RX 14	Thomas Petroleum Code of Ethics and Business Conduct
RX 15	Thomas Petroleum Haul Safety Handbook
RX 16	Thomas Petroleum Zero Spill Product Transfer Prevention Checklist SOP
RX 17	EHS Policy – Environmental Sustainability
RX 18	EHS Policy – Ammonia Awareness
RX 19	EHS Policy – Benzene Awareness
RX 20	EHS Policy – Emergency Action Plan
RX 21	EHS Policy – Gas Hazard Procedures
RX 22	EHS Policy – Gaseous Chlorine Awareness
RX 23	EHS Policy – Transportation of Hazardous Materials
RX 24	EHS Policy – Naturally Occurring Radioactive Material
RX 25	EHS Policy – Non Hazardous Industrial Waste Management
RX 26	EHS Policy – Silica Awareness

RX 27	EHS Policy – Spill Response Protocol - Procedure

C. APPROPRIATE PLACE OF HEARING; ESTIMATE OF TIME NEEDED TO PRESENT CASE; TRANSLATION SERVICES

As noted in its Preliminary Statement, Respondent wishes for the hearing to take place in Fort Worth, Texas. Alternatively, Respondent proposes to have the hearing in Houston, Texas.

Respondent expects to need up to two days to present its direct case. Respondent will not require the services of an interpreter.

D. EXPLANATION OF AFFIRMATIVE DEFENSES

Respondent's affirmative defenses are discussed in the sections below, except that Affirmative Defense No. 2 is no longer applicable given Complainant's stated decision not to pursue the 2013 naphthalene-related allegations involving EPA TRI guidance. However, Respondent reserves the right to pursue Affirmative Defense No. 2 should Complainant not amend the Complaint to remove these allegations.

FACTUAL INFORMATION RELEVANT TO PENALTY ASSESSMENT

Thomas is dedicated to environmental compliance and expends substantial resources to achieve and maintain compliance. For instance, Thomas currently employs, and at all times relevant to this proceeding has employed (including in 2012 and 2013), an HSE department. This department is responsible for, among other things, maintaining compliance with environmental laws, including the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Indeed, in 2012, 2013 and currently, Thomas has complied with non-TRI provisions of EPCRA, including completing Tier II reporting. The allegations in the Complaint generally involve small chemical quantities and small releases of air emissions.

Many years ago, Thomas analyzed whether TRI reporting was required for the Facilities and concluded that TRI reporting was not applicable. This singular determination affected all of the Facilities. When Thomas re-evaluated whether TRI filings should be made, it determined that TRI filings were appropriate for some of the Facilities, and timely filed for calendar year 2013 by the July 1, 2014 deadline. (**CX 5**). To achieve compliance, Thomas took what it logically believed was the proper course of action:

upon determining that filing was needed, Thomas focused its efforts on meeting the then-current filing deadline (July 1, 2014 for calendar year 2013). Thomas did not file for prior years, including 2012, because Thomas correctly understood EPA had already incorporated TRI data reports for 2012 and before into its annual TRI summaries published for those years and that filing late reports would serve no practical purpose. (**CX 5**; **RX 1**, press release documenting that the TRI report for 2012 was released on February 4, 2014; and **RX 2**). At that time, TRI reporting was being handled internally by Thomas' technical staff, who were unaware of the TRI Enforcement Response Policy ("ERP") regarding penalty assessment for prior years, or of the EPA Audit Policy.

It is uncontroverted that Thomas' discovered its singular error—the determination that TRI reporting was not applicable to the Facilities—on its own, and that no EPA investigation, inspection or enforcement of Thomas had been commenced or noticed. **Joint Stipulations of Fact and Law filed February 14, 2020** ("Stipulations") **p. 2.** EPA Region 6 became aware of this issue only when it found Thomas' first-time reporter status. ***Id.*** Thomas was then contacted by Dr. Morton Wakeland of EPA Region 6 on approximately September 4, 2014. (**CX 1**) Thomas strongly disputes Complainant's assertion in its Prehearing Exchange that Thomas "was not initially well prepared when contacted about the Tyler facility". (**Prehearing Exchange, p. 25**) Between September 4 and 15, 2014, Dr. Wakeland and Megan Zettlemoyer, then an employee in Thomas' HSE department[1], exchanged emails regarding the location of the Tyler facility and why the Tyler facility did not previously report. (**CX 2, 3**). Ms. Zettlemoyer, who joined the HSE department in 2014 after previously working with the Company's retail operations and who resided in Corpus Christi, Texas, not Tyler, understandably was not aware of the Tyler facility's latitude and longitude coordinates and could not instantly respond to questions on matters regarding which she had no involvement, such as why the Company initially determined TRI reporting was not required for the Tyler facility. Despite these limitations, she promptly responded to Dr. Wakeland's questions, often within hours to one day. ***Id.*** Ms. Zettlemoyer was polite and helpful in their communications, promising she was responding to Dr. Wakeland's questions

[1] Ms. Zettlemoyer is no longer with the Company.

as quickly as she could (*e.g.*, "I am gathering the data and will send it to you as soon as quickly [sic] as I can gather it.") (**CX 3, p. 2**), and her prompt substantive responses were indicative of her efforts.

In light of documented efforts, Dr. Wakeland's email of September 17, 2014 is bewildering. In an earlier email dated September 16, 2014, Dr. Wakeland asked Ms. Zettlemoyer for the "specific reason why the [Tyler] facility did not have to report." (**RX 3**). Ms. Zettlemoyer reasonably and correctly responded the following morning that she needed to research the answer because she was not in the HSE department at the time of the determination. ***Id.*** Ms. Zettlemoyer was given no time to complete this research because roughly 40 minutes later, Ms. Zettlemoyer received another email from Dr. Wakeland, who threatened a potential fine or imprisonment for up to five years for any false statements made to the federal government. ***Id.*** This unprovoked threat of criminal liability was bizarre and wholly uncalled for, as Thomas' and Ms. Zettelmoyer's actions provided no basis to believe that Thomas or any employee thereof intended to knowingly or willfully make any false statements. To the contrary, Thomas had identified the issue and initiated reporting on its own, and Ms. Zettlemoyer had helpfully written just 40 minutes earlier that she would "hopefully have an answer soon". ***Id.*** It was at this point that Ms. Zettlemoyer and Thomas' technical staff escalated the matter for legal input and learned of EPA's Audit Policy.

One day later, on September 18, 2014, EPA noticed an inspection of the Thomas Tyler facility for October 29, 2014. (**CX 4**). On the same day, EPA sent a letter requesting TRI chemical usage and release calculations for all of Thomas' other Region 6 Facilities. (**CX 7**). Thomas expended considerable resources responding to EPA's requests: preparing TRI filings for reporting years 2009-2012 for the nine facilities for which filings for reporting year 2013 had already been made (Damascus, Hobbs, Bridgeport, Robstown, LaGrange, Laredo, Odessa, Tyler and Victoria), and re-evaluating its conclusion that TRI reports were not required for Thomas' other Region 6 Facilities. (**CX 8**). Thomas' applicability analysis, in particular its analysis related to employee headcounts, was complicated, and there was initially internal confusion about how to account for part-time employees, including truck drivers who may have worked out of multiple facilities and were sometimes paid by the load, not hours. When completing its filings for reporting year 2013, Thomas believed the number of full-time employees (as defined in EPCRA) at the Beaumont,

Broussard and San Benito facilities was below the TRI reporting threshold, but in re-evaluating the issue Thomas determined reporting was needed for these facilities. Thomas promptly commenced preparing TRI filings for reporting years 2009-2013. (***Id.* at, p. 2**). Thomas' significant efforts resulted in completion of the Tyler filings for reporting years 2009-2012 just two weeks later, on October 3, 2014. **(CX 5, CX 39, CX 40)**. All other filings for the Facilities were completed between October 22, 2014 and October 28, 2014. **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)**. In Thomas' rush to make the TRI filings, some mistakes were made but once identified, Thomas promptly corrected them. (*see, e.g.,* **CX 14, CX 15, CX 16,** and **CX 17**). The products Thomas processed had a relatively small percentage by weight of each subject TRI chemical and involved very small releases of air emissions. Indeed, approximately 90%[2] of the subject 2012 and 2013 filings were on Form A, which is indicative of the low levels of air emissions involved. **(RX 4)**. Particularly given the number of Facilities (12) and the number of chemicals at each Facility (up to 10) in generally small amounts, Thomas' significant efforts to initiate compliance voluntarily and to promptly correct non-compliance, as well as to cooperate and quickly respond to EPA's requests, were commendable. EPA has recognized that Thomas assisted EPA in its investigation and audit and that Thomas promptly filed TRI reports for prior years. **(Stipulations, p. 2)**.

In sum, it was Thomas, not EPA, that discovered the applicability of TRI filing requirements to the Facilities, and commenced TRI filings on its own initiative and not pursuant to any investigation or enforcement by EPA. When EPA made follow-up inquiries, Thomas promptly cooperated and undertook considerable efforts to quickly get into compliance, submitting all requested filings within just 34-40 days. **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)** Additionally, the allegations against Thomas are historical and are unlikely to recur. All of the allegations in the Complaint relate to alleged violations that occurred before Thomas was acquired in December 2014. Thomas has timely filed TRI reports since the acquisition, as well as promptly fixing any 2012 or 2013 TRI issues discovered following the acquisition. Further, the Hobbs and San Benito facilities closed in 2015 and 2016, respectively,

[2] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

and as of the date hereof, only four of the Facilities meet the TRI reporting threshold of 10 full-time employees. **(RX 5)**.

ARGUMENTS IN SUPPORT OF DOWNWARD PENALTY ADJUSTMENT

EPA has not yet identified a penalty amount. However, any proposed penalty based on rote application of the ERP would be excessive for a number of reasons, including (i) Thomas' voluntary initiation of TRI reporting, (ii) that a single analytical error (the determination TRI reporting was not required) impacted 12 Facilities, most for more than one year, (iii) the generally low releases of air emissions involved, (iv) that each facility had multiple chemicals, (v) the historical nature of the alleged violations, which all occurred under prior ownership, and (vi) TRI compliance since 2014 as well as historical and current environmental compliance programs. Though discussed below for completeness, application of the ERP adjustment factors would not result in a fair and just penalty in this case.

A. Application of the ERP Would Cause Manifest Injustice

1. The Environmental Appeals Board Has Authorized Deviation From the ERP

The Environmental Appeals Board has recognized that penalty policies such as the ERP are not rules subject to notice and comment. While a presiding officer must consider an applicable penalty policy **(40 CFR § 22.27(b))**, rigid application of such policies is not required, and the presiding officer is free to "deviate from it where circumstances warrant". ***In re: DIC Americas, Inc.*, 6 E.A.D. 184, 1995 WL 646512 at *4-5 (EAB 1995) (RX 6)**; *see also*, ***In re: Employers Ins. of Wausau*, 6 E.A.D 735, 1997 WL 94743 at *15-16 (EAB 1997) (RX 7)**. Moreover, extraordinary circumstances need not be present to warrant deviation from a penalty policy. ***In re: Steeltech, Ltd.*, 8 E.A.D. 55, 1999 WL 673227 at *6 (EAB 1999) (RX 8)**. In this case, deviation from the penalty policy is not only warranted, but necessary to avoid a manifest injustice.

Other presiding officers have accepted the Environmental Appeals' Board invitation to deviate from an applicable penalty policy in appropriate circumstances. For instance, in ***In re: Gilbert Martin Woodworking Co.***, Gilbert Martin Woodworking Company d/b/a Martin Furniture failed to file TRI reports for two facilities for three years. **2001 EPA ALJ Lexis 27, *1 (EPA 2001) (RX 9)**. The complaint against Gilbert Martin alleged eight violations, significantly fewer than the 135 allegations against Thomas. ***Id.*** Yet,

even with a small number of counts, the presiding officer concluded application of the ERP would result in an unfair penalty amount. ***Id.* at *13-14.** The presiding officer largely relied on Gilbert Martin's apparent independent discovery of the need for TRI reporting before EPA commenced an investigation, though none of the Form R's were submitted until *after* the company was contacted by EPA. ***Id.* at **13-14, 31.** That is, though Gilbert Martin may have discovered the issue, there was no voluntary initiation of reporting. Indeed, during EPA's initial telephone conference with the company's consultant, the consultant failed to disclose his knowledge that TRI reporting was required, despite apparently already knowing that it was. ***Id.* at *14.** The presiding officer cited Gilbert Martin's disclosure that another company facility that was not completing TRI reporting, the company's prompt submission of the TRI reports once contacted by EPA, and the company's steps to ensure future compliance, including no longer meeting the TRI thresholds that trigger a reporting requirement, as further support for deviating from the ERP. ***Id.* at **31-35.** The presiding officer ultimately decreased EPA's ERP-derived proposed penalty by nearly 75%. ***Id.* at **1, 35.**

The Thomas facts are far more compelling. First, Thomas also independently discovered the need to file TRI reports, but unlike in *Gilbert Martin*, Thomas initiated reporting *prior* to being contacted by EPA. Indeed, Thomas' actions fulfilled the spirit and most of the provisions of the EPA Audit Policy despite Thomas not being aware of the Audit Policy. For instance, the Audit Policy allows 60 calendar days to complete corrective action, and more if an extension is sought. **(RX 10)**. Thomas completed its corrective measures well within the 60-day period, with all filings completed within 34-40 days, and the Tyler filings completed within just two weeks. **(CX 5, CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41; RX 10)**. Further, after re-evaluating its other Region 6 facilities, Thomas did not just disclose one additional facility, but three (Broussard, Beaumont and San Benito). **(CX 8, p. 2)**. Moreover, as in *Gilbert Martin*, Thomas has taken steps to ensure environmental compliance, including employing a dedicated HSE department, engaging a consultant to complete its annual TRI reports and drastically decreasing the number of the Facilities subject to TRI reporting, from 12 to just four **(RX 5)**. If application of the ERP in *Gilbert Martin* would have created a manifest injustice related to just eight counts, then application of the ERP certainly creates a manifest injustice related to the 135 counts alleged in this case.

Another example of a presiding officer deviating from an applicable penalty policy is ***In re: GCA Chemical Corp.***, a case that examined the Toxic Control Substances Act's ("TSCA") penalty policy. **2002 WL 1472043 (EPA 2002) (RX 11).** In *GCA Chemical*, the company did not complete required reporting. ***Id.* at *2.** As in this case, the failure to report was a circumstance Level 1 violation under the penalty policy. ***Id.* at *3.** In contrast, however, GCA Chemical did not discover the violation on its own, rather, EPA identified the reporting issue during an inspection. ***Id.* at *3.** The presiding officer took issue with the penalty policy's formulaic restrictions, stating that "robotically fill[ing] in the blanks on the penalty calculation worksheet" created an inequitable result. ***Id.* at *8.** Further, while acknowledging that the goal of a penalty policy "is to provide consistent enforcement", the presiding officer recognized that "the uniform application of a single penalty assessment methodology, regardless of the facts and circumstances of each case, can produce results contrary to the statutory criteria in a given instance". ***Id.* at *8.** Accordingly, the presiding officer undertook its own analysis of criteria enumerated in TSCA. ***Id.* at *9-13.** Unlike TSCA, Section 313 of EPCRA has no statutory criteria for assessing penalties, but presiding officers have looked to the TSCA factors examined in *GCA Chemical* to evaluate the efficacy of proposed TRI penalties. ***See, e.g., Gilbert Martin,* 2001 EPA ALJ Lexis 27 at *30.** The *GCA Chemical* presiding officer emphasized many factors favoring downward penalty adjustment from the penalty proposed under the penalty policy, including the company's cooperation and responsiveness, its general compliance with other applicable sections of TSCA, the lack of harm resulting from the company's failure to report, and the general efforts GCA Chemical took to comply, even though those efforts did not result in compliance until after EPA discovered the violation. ***Id.*** The factors examined in *GCA Chemical* are also relevant to Thomas, and are not adequately accounted for under the ERP, even if all adjustment factors are considered:

i. Thomas not only fully cooperated, but in contrast to *GCA Chemical*, also discovered the issue and initiated reporting on its own **(CX 5)**;

ii. Lack of harm is demonstrated by the very low releases of air emissions involved **(CX 19-CX 42, RX 4)** and Thomas' correct determination that since EPA published TRI data for 2012 before the

applicability of the TRI reporting requirement was discovered (**RX 1**), reporting for 2012 would serve no practical purpose;

iii. Thomas has a long history of considerable efforts to comply with environmental laws, including employing an HSE department, developing and implementing numerous compliance-related policies and procedures, and hiring a consultant to assist with its TRI reporting obligations; and

iv. Similar to *GCA Chemical*, at the time of the alleged violations and currently, the Facilities have complied with other environmental laws, including other provisions of the relevant statute, EPCRA (i.e., completion of Tier II reporting).

The presiding officer in *GCA Chemical* ultimately reduced EPA's proposed penalty by over 80%. ***In re: GCA Chemical*, 2002 WL 1472043 at *1, 13.**

2. Use of the "Extent" Criterion Creates An Unreasonable Penalty Amount

Under the ERP, the gravity-based penalty is determined by the circumstances and extent of the violation. **(CX 46, p. 11)** Regarding extent, the ERP bases the penalty level on the chemical quantity and the size of the facility. ***Id.*** Primary emphasis is intended to be on the quantity. Indeed, the ERP states that "using the amount of the §313 chemical involved in the violation as the primary factor in determining the extent level underscore[s] the overall intent and goal of EPCRA §313...". ***Id.* at p. 12.** (emphasis added). In particular, under the ERP, EPA considers whether a facility manufactures, processes or otherwise uses 10 times or more of the threshold amount of a chemical. ***Id.*** Per the ERP, "[t]en times the threshold for distinguishing between extent levels was chosen because it represents a *significant* amount of chemical substance." ***Id. at* p. 13** (emphasis added).

Application of the penalty policy in this instance would result in a penalty far exceeding a reasonable or just penalty, because Thomas processed petroleum products with relatively small weight percentage amounts of each subject TRI chemical with very small releases of air emissions and no releases to other media. In fact, Thomas was eligible to file roughly 90% of the chemicals[3] as a Form A annual certification, rather than on Form R (**RX 4**). The Form A alternative to filing a Form R was developed specifically for

[3] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

facilities that EPA recognizes involve "a *low* annual reportable amount of a listed toxic chemical". **(CX 47, p. 1)** (emphasis added). Further, most of the counts involve far less than 10 times the threshold amount of the reportable chemical: approximately 44% of the counts involve chemicals where Thomas' reported amount was less than three times the applicable reporting threshold and nearly 70% were less than half the threshold that EPA considers significant under the ERP.[4] **(CX 19-42)**. Accordingly, application of the ERP in this case would place disproportionate emphasis on the Company's large size. Thomas' single error—wrongly determining TRI reporting was not needed—affected 12 facilities, each with a number of reportable chemicals, but typically involving small quantities and very small releases to air.

The *In re: Trinity Indus. Inc.* case is instructive. **2002 WL 826938 (EAB 2002)** In contrast to Thomas, the violations in *Trinity* were discovered only after EPA initiated an investigation—there was no discovery or disclosure by Trinity. ***Id.* at *6**. The presiding officer concluded application of the ERP would result in a penalty that was "arbitrary and capricious" and that deviation from the ERP was appropriate. ***Id.* at *16**. The presiding officer's analysis largely focused on the low quantities of chemicals involved and the unfairness that would result from applying the extent criterion when the chemical usage averaged approximately 3.3 times the reportable amount.[5] ***Id.* at *17-19.** Similarly, in this case, Thomas' reportable amounts were typically far below the 10 times threshold. **(CX 19-42).** In *Trinity*, the presiding officer ultimately decreased EPA's proposed ERP-generated penalty amount by approximately 60%. ***In re: Trinity Indus. Inc.* 2002 WL 826938 (EAB 2002) at *1.**

3. The ERP Adjustment Factors

As Complainant has not identified a proposed penalty in the Complaint or in its Initial Pre-Hearing Exchange, discussion of actual numbers by Respondent is not possible. However, given the volume of counts, it is clear that rote application of the ERP, including its adjustment factors, would result in a manifest injustice:

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[4] This number includes naphthalene, allegations regarding which are currently present in the Complaint.

[5] In *Trinity*, the reportable quantity was 10,000 lbs., and the chemical usage averaged 23,000 lbs. above that amount, or 33,000 lbs. The penalty ERP states, "[F]acilities which manufacture, process or otherwise use ten times or more than the threshold of the § 313 chemical involved...". **(CX 46 p. 12)**. Trinity's average 33,000 lb. chemical usage is 3.3 times the 10,000 lbs. reportable quantity in that case.

an excessive penalty grossly disproportionate to an equitable amount for Thomas' noncompliance. Nonetheless, preliminary discussion of the adjustment factors is appropriate.

Voluntary Disclosure

The ERP establishes two penalty reductions for voluntary disclosure, a fixed 25% reduction and a second reduction of up to 25% for meeting certain enumerated criteria **(CX 46, p. 17)**. Strict adherence to the ERP voluntary disclosure criteria has not been required by the Environmental Appeals Board. In *In re: Steeltech, Ltd.*, the company received a 42% reduction for voluntary disclosure even though *none* of the violations was voluntarily disclosed, and the TRI reporting violations were not discovered by the Company at all, but during an EPA inspection. ***1999 WL 673227 at *10***. Indeed, the violations deemed "voluntarily disclosed" were not disclosed by Steeltech until after the initial complaint was filed. ***Id.*** EPA, in its enforcement discretion, still allowed a 35% reduction for voluntary disclosure, which the presiding officer increased to 42% based on Steeltech's meeting several of the enumerated criteria for the second 25% reduction. ***Id.* at *10-11**. The Environmental Appeals Board subsequently upheld the presiding officer's penalty assessment. ***Id.* at *15**. Accordingly, Thomas' actions need not strictly conform to the ERP to qualify for the full 50% voluntary disclosure reduction, and Thomas should be granted the entire reduction.

The purpose of the ERP is "to distinguish between those facilities which make an immediate attempt to comply with §313 as soon as noncompliance with §313 is discovered and those which do not." **(CX 46, p. 18)**. Thomas timely filed 2013 TRI reports after discovering its mistake **(CX 8)**. Indeed, not only did Thomas discover its error and initiate reporting **(Stipulations)**, but Thomas completed reporting of four additional years (2009-2012) for 12 Facilities and numerous chemicals within just 34-40 days **(CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX 37, CX 38, CX 41)**, and the Tyler reports for all years were submitted even sooner, within just two weeks. **(CX 5)**. Comparison to the EPA Audit Policy for voluntary disclosure is appropriate, and this time frame is well within the 60 days for corrective action allowed under that policy, which authorizes up to a 100% reduction off the gravity-based penalty. Completing these filings was challenging, and Thomas dedicated significant efforts to this task. Thomas has also undertaken concrete actions to ensure future compliance at the Facilities, including engaging an environmental consultant

to complete TRI reporting, which is one of the examples in the ERP **(CX 46, p. 18)**, and lowering the number of employees at two-thirds of the Facilities to below the 10 employee reporting threshold **(RX 5)**. As further evidence of the actions taken to achieve compliance, there have been no alleged TRI violations at the Facilities since Thomas was acquired in December 2014. Lastly, as recognized by EPA, Thomas has no history of prior violations. **(Prehearing Exchange, p. 25)**. Thomas' compliance efforts merit the full amount of the 50% voluntary disclosure reduction.

Attitude

Under the ERP, the downward penalty adjustment for attitude has two components, cooperation and compliance, and an adjustment of up to 15% can be made for each component, for a total of 30%. The first component, cooperation, relates to the "cooperation extended to EPA throughout the compliance evaluation/enforcement process or the lack thereof". **(CX 46 at p. 21)** Factors include cooperation during the inspection and preparedness for it, allowing EPA access to records, the facility's responsiveness and speed of providing documents requested by EPA during or after the inspection, and the company's cooperation and preparedness during the settlement process. ***Id.*** Thomas deserves the full 15% available under the cooperation component. It is uncontroverted that Thomas was prepared for the Tyler facility inspection, that Thomas fully cooperated with the inspection and EPA's desk audit of the other facilities, that Thomas has allowed access to its records, and that Thomas has expeditiously responded to all of EPA document requests and questions. **(Stipulations, p. 2; Pre-Hearing Exchange at p. 25-26)**. Further, Thomas refutes any assertion of ill-preparedness related to EPA's initial inquiries regarding the Tyler facility. As discussed in the factual section above, Ms. Zettlemoyer responded to Dr. Wakeland within hours or days. **(CX 6, p. 6)**.

The second attitude component, compliance, relates to a facility's good faith efforts to comply with EPCRA and the speed and completeness with which it comes into compliance. Thomas' timely initiation of TRI reporting for calendar year 2013 **(CX 8)** evidences its good faith effort to comply, and the fact that Thomas completed all filings for all chemicals and all facilities for reporting years 2009-2012 within just 34-40 days (and for the Tyler facility, within just two weeks) shows that Thomas came into compliance with both speed and completeness. **(CX 5, CX 19, CX 21-23, CX 25, CX 27, CX 29, CX 31, CX 33, CX 35, CX**

37, CX 38, CX 41) (**RX 10**). Further, any reporting errors—some of which were internally discovered by Thomas—were promptly corrected by Thomas. **(CX 8, pp. 2, CX 15, CX 17).** Accordingly, Thomas deserves the full 15% available under the compliance component, and a total attitude downward adjustment of 30%.

Other Factors As Justice May Require

Under the ERP, an additional reduction is allowed for "other factors as justice may require". For the reasons previously discussed herein and additional reasons discussed below, penalty policy deviation is needed in the interests of justice.

First, the amounts of chemicals subject to reporting were even smaller than initially reported. In furtherance of making filings as promptly as possible, Thomas' consultant conservatively estimated product content in several cases. (**RX 12**). Chemical content for ethylene glycol and for zinc compounds has been recalculated based on the actual chemical reported concentrations from respective Safety Data Sheets ("SDS"), in products or more realistic content estimates. ***Id.*** Based on these recalculations, in addition to the information previously provided to EPA regarding reporting ethylene glycol for the Robstown and Broussard facilities (see **RX 2**), ethylene glycol which was reported on Form R at Hobbs (2013), Laredo (2013) and Victoria (2013) was actually present in volumes that qualified for reporting on Form A. In addition, reports for zinc compounds were not required at all for Victoria (2012), LaGrange (2012), Laredo (2012), Odessa (2012), Hobbs (2012), Tyler (2012), Damascus (2012), Bridgeport (2012), Broussard (2012 and 2013), Beaumont (2012 and 2013) and San Benito (2012 and 2013) because zinc compound volumes were actually below the reporting threshold (**RX 12**).

Further, the focus of the ERP and its language concentrates on violations related to Form R filings. Perhaps due to the very small air emissions involved in Form A reports, the ERP does not mention Form A except to address instances where a Form A filing should have been on Form R **(CX 46, p. 26)**, a circumstance not at issue in this proceeding. Accordingly, in the interest of justice, the ERP is an inadequate guide for analyzing Thomas' alleged violations.

Also noteworthy, Thomas was acquired in December 2014. None of the allegations in the Complaint relate to Thomas' actions under its current ownership.

Lastly, the U.S. Department of Justice ("DOJ") Criminal Division has formulated guidance for the evaluation of an entity's corporate compliance program in determining an appropriate monetary penalty, "if any". **(RX 13)**. Though not directly applicable to civil matters, if consideration of a corporate compliance program is appropriate to achieve justice in penalty determinations in criminal cases, then it certainly should be an appropriate consideration in administrative enforcement actions. If such consideration can result in no penalty in a criminal case, this factor should bear no less weight in an administrative or civil enforcement case. Thomas operates under an extensive and effective corporate compliance program that includes numerous policies and practices that are circulated to Thomas facilities to foster environmental compliance and enhancement. Respondent's exhibits **RX 14-27,** are a sampling of the over 80 such protocols developed both prior to and after Thomas was acquired in 2014. These procedures often include a call for training on the subject matter. The Company's attention to compliance based on these programs is effective, resulting in consistent compliance since Thomas' acquisition.

CONCLUSION AND RESERVATION OF RIGHTS

In sum, environmental compliance is of utmost importance to Thomas, and Thomas dedicates significant resources to this effort. Thomas initiated an evaluation and determined on its own that TRI reporting is required for the Facilities, and Thomas promptly commenced reporting once that determination was made. There was no EPA inspection, investigation or enforcement ongoing or noticed at that time. The vast majority of chemical releases to air involved are low, and Thomas was eligible to file them on Form A. Moreover, most of the chemical quantities are less than half the 10 times reporting threshold that EPA has identified as indicative of a significant chemical amount. For these reasons and the others discussed herein, Thomas urges that no penalty be assessed, or alternatively a substantial penalty reduction and deviation from the ERP.

Respondent respectfully reserves the right to call all witnesses called by Complainant, to recall any of its witnesses in rebuttal, and to modify or supplement this Prehearing Exchange, the exhibits and the names

of witnesses prior to the Adjudicatory Hearing pursuant to 40 C.F.R. Part 22, and upon adequate notice to Complainant and the Presiding Officer.

DATED: March 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, the Respondent's Prehearing Exchange was filed with the OALJ E-Filing System.

Ragna Henrichs

Ragna Henrichs