

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>In the Matter of</b>	)	
	)	
<b>VALIMET, INC.,</b>	)	<b>Docket No. EPCRA-09-2007-0021</b>
	)	
<b>Respondent.</b>	)	

**ORDER ON COMPLAINANT’S MOTION TO STRIKE,  
MOTION *IN LIMINE*, AND MOTION FOR ACCELERATED DECISION  
AS TO LIABILITY, AND EXTENDING TIME FOR FILING PREHEARING BRIEFS**

**I. Procedural Background**

On September 24, 2007, the United States Environmental Protection Agency Region V (“Complainant”) filed a ten-count Complaint against Valimet, Inc. (“Respondent”) for violating Section 313 of the Emergency Response and Community Right-to-Know Act (“EPCRA” or “the Act”), 42 U.S.C. § 11023, and the implementing regulations at 40 C.F.R. Part 372. Specifically, the Complaint charges Respondent with failure to timely file with EPA toxic chemical release forms (“Form Rs”) reporting aluminum fume or dust and copper compounds that Respondent manufactured or processed for the years 2001 through 2005. Respondent filed an Answer on December 13, 2007, admitting that it manufactured or processed these substances in excess of the reporting threshold of 25,000 pounds and asserting several affirmative defenses. Thereafter, the parties filed their prehearing exchanges. Complainant in its Prehearing Exchange proposed to assess a penalty of \$249,186 for the ten counts of violation alleged in the Complaint. An Order was issued on September 15, 2008, setting the hearing in this matter to commence on December 9, 2008.

On September 16, 2008 the parties filed a Joint Set of Stipulated Facts, Exhibits, and Testimony in this matter. On September 26, 2008, Complainant filed a Prehearing Motion to Strike Affirmative Defenses 1, 2, and 11, a Prehearing Motion *in Limine*, and a Prehearing Motion for Accelerated Decision as to Liability (“Mot.” collectively). After filing for a one-day extension of time, Respondent submitted an Opposition to the Motion to Strike and Motion in *Limine* (“Opp.”) and a Non-Opposition to the Motion for Accelerated Decision, dated October 17, 2008. On October 30, Complainant submitted a Reply to the Opposition.

## **II. Statutory and Regulatory Background**

EPCRA Section 313(a) provides that:

(a) Basic requirement. The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) for each toxic chemical listed under subsection (c) that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

42 U.S.C. § 11023(a).

The correlating regulation provides that:

For each toxic chemical known by the owner or operator to be manufactured (including imported), processed, or otherwise used in excess of an applicable threshold quantity in § 372.25, § 372.27, or § 372.28 at its covered facility described in § 372.22 for a calendar year, the owner or operator must submit to EPA and to the State in which the facility is located a completed EPA Form R (EPA Form 9350-1) and, for the dioxin and dioxin-like compounds category, EPA Form R Schedule 1 (EPA Form 9350-3) in accordance with the instructions referred to in subpart E of this part.

40 C.F.R. § 372.30(a).

In order to fall under the purview of EPCRA Section 313 a facility must have ten or more full-time employees, fall within Standard Industrial Classification Codes 20 through 39, and have manufactured, processed or used more than the threshold amount of a toxic chemical listed in 40 C.F.R. § 371.65 during the relevant year. EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A); 40 C.F.R. § 372.30. If all of the above requirements are met, the facility must file a toxic chemical release form, or “Form R,” for each toxic chemical processed in excess of the threshold amount during the calendar year. EPCRA § 313(a)(42 U.S.C. § 11023(a)); 40 C.F.R. § 372.30.

### **III. Undisputed Facts**

Respondent is a Delaware corporation which does business in the State of California. Joint Set of Stipulated Facts, Exhibits and Testimony (“Stip.”) ¶ 1-2. Respondent owns and operates a facility located at 431 Sperry Road, Stockton, California, at which Respondent produced spherical metal powders, including aluminum, aluminum silicon, aluminum bronze and copper alloys during the time relevant to the Complaint. Stip. ¶¶ 3-5, 12. Aluminum powder and copper alloy manufactured by Respondent at its facility are encompassed by toxic chemical categories listed in 40 C.F.R. § 372.65 as aluminum (fume or dust), CAS No. 7429-90-5, and copper compounds, EPA chemical category code No. N100. Stip. ¶¶ 13-14.

Respondent employed 10 or more full time employees during the time relevant to the Complaint, thus establishing it as a “covered facility” for the purposes of toxic chemical release reporting pursuant to 40 C.F.R. § 372.22(a). Stip. ¶¶ 6-7. Respondent’s facility is classified in Standard Industrial Classification (“SIC”) code 3399, and its North American Industry Classification System (“NAICS”) code is 331 for the primary metals industry. Stip. ¶¶ 8-11. The facility meets the requirement of being in one of the SIC or NAICS codes specified in 40 C.F.R. § 372.23 since it falls under both SIC codes 20 through 39 and NAICS code 331, and accordingly, under 40 C.F.R. § 372.22(b) the facility was at relevant times a “covered facility” for toxic chemical release reporting purposes.

In 2001 Respondent manufactured 4,316,000 pounds of aluminum dust and 52,583 pounds of copper compounds at its facility; in 2002 Respondent manufactured 4,125,000 pounds of aluminum dust and 60,000 pounds of copper compound; in 2003 Respondent manufactured 3,910,000 pounds of aluminum dust and 60,000 pounds of copper compound; in 2004 Respondent manufactured 4,884,000 lbs of aluminum dust and 52,700 lbs of copper compound at its facility; and in 2005 Respondent manufactured 2,985,000 pounds of aluminum dust and 62,400 pounds of copper compound at its facility. Stip. ¶¶ 15-24.

The Respondent’s manufacturing of aluminum powder and copper alloys meets the definition of “manufacturing” or “processing” set forth at 40 C.F.R. § 372.3. Stip. ¶ 25. Respondent exceeded the 25,000 pounds threshold set forth at 40 C.F.R. § 372.25(a) of toxic chemicals “manufactured” or “processed” in years 2001 through 2005 for aluminum (fume or dust) and copper compounds, triggering the reporting requirements under EPCRA § 313. Stip. ¶ 15-24, 26.

Therefore, pursuant to EPCRA Section 313(a), 42 U.S.C. § 11023(a), Respondent was required to submit Form Rs for the toxic chemicals it “manufactured” or “processed” in an amount over 25,000 pounds, which were aluminum (fume or dust), CAS No., 7429-90-5, and copper compounds, EPA chemical category code No. N100, for calendar years 2001 through 2005 by July 1 of the subsequent year. Stip. ¶ 41. For aluminum (fume or dust) and copper compounds manufactured or processed during the calendar year 2001, Respondent filed its Form R on or after April 26, 2007; for those substances manufactured or processed during the calendar years 2002 through 2004 Respondent filed its Form Rs on April 27, 2007; and for those

substances manufactured or processed during calendar year 2005 Respondent filed its Form R on April 25, 2007. Therefore, Respondent failed to timely submit Form Rs for the aluminum dust and copper manufactured at its facility during the calendar years 2001 through 2005 and so violated EPCRA Section 313(a), 42 U.S.C. § 11023(a). Stip. ¶¶ 27-41.

#### **IV. Motion for Accelerated Decision**

Section 22.20(a) of the applicable Rules states that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

For EPA to prevail on a motion for accelerated decision where there is an affirmative defense as to which the respondent ultimately bears the burden of proof, EPA must initially show that there is an absence of evidence in the record in support of the affirmative defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If the EPA makes this showing, then the Respondent, “as the non-movant bearing the ultimate burden of persuasion on its affirmative defenses, must meet its countervailing burden of production by identifying ‘specific facts’ from which a reasonable fact finder could find in its favor by a preponderance of evidence.” *Id.*

Respondent’s Non-Opposition to the Motion for Accelerated Decision states - “Respondent agrees that there are no genuine issues of material fact related to the elements of violation as set forth in Complainant’s memorandum.” While this statement leaves open the possibility that an affirmative defense may preclude a finding of liability, the Stipulations state that “the parties hereby stipulate to Respondent’s liability for the violations, and agree that the hearing held in this matter will pertain only to the proper amount of the penalty to be assessed against Respondent.” Stip. Section II. Respondent has thereby made clear that it is not asserting any of its Affirmative Defenses as a defense to liability in this matter. Therefore, it is found that Complainant need not make any showing with regard to any of Respondent’s Affirmative Defenses in order to obtain accelerated decision as to liability.

Accordingly, it is concluded that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law with respect to Respondent’s liability for all the violations alleged in the Complaint.

#### **V. Motion to Strike**

In its Motion, Complainant seeks to strike Respondent's First, Second and Eleventh Affirmative Defenses, arguing that even if the defenses are true, they do not "raise a genuine issue of material fact that is relevant, material or probative to Respondent's liability . . . [and] are likewise not relevant or material to the calculation of an appropriate penalty under EPCRA § 313." Mot. at 6. Respondent in its Opposition states that the defenses "are generally partial defenses and not complete defenses" which may reduce the penalty amount, and should not be stricken. Opp. at 1.

Because motions to strike are not addressed in the applicable procedural rules, 40 C.F.R. Part 22, Federal court practice with respect to the Federal Rules of Civil Procedure (FRCP) may be looked to for guidance. FRCP 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." However, such motions are "generally viewed with disfavor 'because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.'" *Waste Management Holding, Inc. v. Gilmore*, 252 F.3d 316, 347 (4<sup>th</sup> Cir. 2001) (quoting 5A Wright & Miller, Federal Practice & Procedure § 1380, at 647).

#### **A. First Affirmative Defense: Intent to Violate EPCRA**

As its First Affirmative Defense, Respondent asserts that it "lacked intent to violate the referenced statute and regulations." Answer at 5.

##### 1. Arguments of the Parties

Complainant argues that even if Respondent did lack intent, it is not relevant to the assessment of a penalty under EPCRA § 313, pointing out that the Enforcement Response Policy for Section 313, issued on August 10, 1992, ("ERP") provides that "the Agency intends to pursue a policy of strict liability in penalizing a violation, therefore, no reduction [to the penalty] is allowed for culpability." ERP at 14. The ERP further states that "the Agency has no intention of encouraging ignorance of EPCRA and its requirements," and that "if a violation is knowing or willful, the Agency reserves the right to assess per day penalties, or take other enforcement action as appropriate," including criminal enforcement. *Id.* The Environmental Appeals Board ("EAB") reasoned that this statement in the ERP indicates that "penalty assessments under the ERP are based on an assumption that a respondent may not have had actual knowledge of the requirements of section 313 of EPCRA." *Catalina Yachts, Inc.*, 8 E.A.D. 199, 211, 1999 EPA LEXIS 7, \*30-31 (EAB 1999).

Respondent argues that the criteria set forth in Section 325(b)(1)(C) of EPCRA, which include "the degree of culpability," are useful as guidance in assessing penalties for EPCRA § 313 violations, citing *Clarksburg Casket Co.*, 1998 EPA ALJ LEXIS 39 \*7 (ALJ, July 10, 1998), *aff'd*, 8 E.A.D. 496 (EAB 1999). Respondent asserts that "the degree of culpability is a factor in setting a penalty, both under the ERP and under other applicable criteria." Opp. at 3.

Complainant in its Reply points out that lack of intention is not the same as lack of culpability. Reply at 3. Complainant further points out that Respondent had filed Form Rs for aluminum (fume or dust) from 1990 through 2000, so it knew or should have known about the requirement.

## 2. Discussion and Conclusion

The ERP allows consideration of “motivati[on] to comply” or “negligence” to *increase* a gravity-based penalty under the rubric of “history of violations,” where the violator previously violated EPCRA. ERP at 16; *see*, Mot. n. 1. The ERP states that the gravity based penalty (from the penalty matrix) is intended to apply to “first offenders.” ERP at 16. The EAB has rejected arguments for reducing a penalty under EPCRA § 313 based on lack of culpability or intent. *Steeltech, Ltd.*, 8 E.A.D. 577, 586-587 (EAB 1999)(rejecting argument that ignorance of the EPCRA § 313 reporting requirements warrants a departure from the ERP’s guidelines, because the ERP expressly takes into account such circumstances); *Catalina Yachts, supra*. Respondent has not pointed to any case decision reducing a penalty under EPCRA § 313 for lack of intent, nor has any been otherwise found.

Respondent’s Prehearing Exchange (at p. 10) states that “lack of culpability will be addressed through testimony.” The summary of testimony in the Prehearing Exchange does not specify any particular circumstances regarding lack of intent or culpability that would suggest any deviation from the ERP or prior case law. If Respondent intends to present any testimony regarding “Other Factors as Justice May Require” under the ERP and/or any *special* circumstances in support of a deviation from the ERP, Respondent may present it at a hearing on the penalty. A mere lack of intent to violate EPCRA, however, is not material to a penalty assessment under the ERP and applicable case law.

Therefore, Respondent’s Affirmative Defense of lack of intent to violate the applicable requirements is immaterial to a penalty assessment under EPCRA § 313. Accordingly, the Motion to Strike is granted with respect to Respondent’s First Affirmative Defense.

## **B. Second Affirmative Defense: Unlawful Listing of Aluminum (fume or dust)**

Respondent’s Second Affirmative Defense is that “[l]istings of aluminum as toxic in 40 C.F.R. § 372.65 are arbitrary and capricious or otherwise not in accordance with the law.” Respondent’s basis for this Defense is that “the initial Section 313 list was adopted without independent evaluation of the toxic properties of each of the listed chemicals.” Respondent’s Prehearing Exchange (“R’s PHE”) at 7-8.

### 1. Arguments of the Parties

Complainant contends that Respondent’s attempt to facially challenge EPA’s 1988 rule-making is in the wrong forum, as Respondent should have challenged the rule through the rule-

making process and cannot raise the challenge in the instant proceeding. Mot. at 9. Even if Respondent could challenge the regulation in this proceeding, it has not demonstrated that the rulemaking was arbitrary or capricious, since the initial list of toxic chemicals adopted by EPA originated from the statute itself, Complainant argues. Mot. at 10. In addition, Complainant points out the hazards of aluminum dust or fume, including its high flammability and ignitability, citing to several documents in its Prehearing Exchange. Mot. at 11. The question of whether a chemical should be listed involves a complex analysis of the full record of scientific data and studies, which is beyond the scope of an enforcement proceeding, Complainant adds.

Respondent asserts that aluminum dust does not meet the criteria set forth in Section 313(d)(2) of EPCRA, 42 U.S.C. § 11023(d)(2). Respondent cites to a government (Department of Health and Human Services) Fact Sheet for aluminum indicating that aluminum is the most abundant metal in the Earth's crust, is found in several consumer products, and is contained in virtually all food, water, air and soil. Opp. at 4. Respondent asserts that permissible exposure limits to aluminum is for irritation, not toxicity. Respondent asserts further that there is "no differentiation between aluminum dust and nuisance dust," and that many fine particulates, including flour and sawdust, are prone to explosion when suspended in air. Opp. at 5.

## 2. Discussion and Conclusion

As observed by the EAB, the general rule is that "challenges to rulemaking are rarely entertained in an administrative enforcement proceeding." *Norma J. Echevarria*, 5 E.A.D. 626, 1994 EPA App. LEXIS 61 \*21 (EAB 1994)(quoting *American Ecological Recycle Research Corp.*, RCRA (3008) Appeal No. 83-3, at 5-6 (CJO, July 18, 1985)). "The decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances." 1994 EPA App. LEXIS 61 \*22. Moreover, there is a presumption against addressing legal challenges to a rule-making through enforcement proceedings due to practicality. *Id.* (citing *RSR Corp. v. Donovan*, 747 F.2d 294, 301 (5th Cir. 1994)("An agency has an interest in finality and conservation of its resources. It should not be compelled to defend the same regulation against identical attacks in successive enforcement actions, when those challenges could and should have been asserted in the period before pre-enforcement review.")).

Because Respondent's liability has been conceded, Respondent appears to argue that the penalty should be reduced on the basis that aluminum (fume or dust) should not have been listed as toxic in 40 C.F.R. § 372.65, or that it should have been delisted. The ERP (at 17) allows for a reduction in the penalty only if a chemical has *in fact* been delisted by EPA during the pendency of the enforcement proceeding. To the extent that Respondent argues that aluminum fume or dust is not harmful or is less toxic than other listed chemicals, that argument may be considered under Respondent's Eleventh Affirmative Defense.

Considering the arguments of both parties, Respondent has not shown any compelling reason for a challenge to the validity of the relevant regulation to be addressed in this proceeding for reasons of reducing a penalty assessment. Accordingly, the Motion to Strike is granted with

respect to the Second Affirmative Defense.

### **C. Eleventh Affirmative Defense: De Minimis Harm**

Respondent's Eleventh Affirmative Defense states "If any hazardous substances from Valimet were released as a result of the allegations alleged in the Complaint, which Valimet denies, then the amount of, and/or the harm or relief attributable to, such hazardous substances is de minimis."

#### **1. Arguments of the Parties**

Complainant argues that the amount of chemical released is not one of the elements establishing whether an entity is required to report under EPCRA § 313 and therefore is not a necessary element to establish a violation thereof, and should be struck "at least as it pertains to liability." Mot. at 12. As it pertains to penalty, Complainant refers to its arguments in its Motion *in Limine*, which are as follows: Reporting under EPCRA § 313 involves information sharing to support emergency planning efforts and provide information to residents and local governments regarding potential chemical hazards in their communities. Mot. at 14-15. The harm caused by violation of such reporting requirements is the harm to the regulatory scheme. Mot. at 16. Substantial penalties have been assessed for reporting violations under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Resource Conservation and Recovery Act (RCRA). The ERP does not include consideration of the amount of *release* of a toxic chemical; the ERP factors of "circumstances" and "extent" of violation are not defined to include the amount of release but instead, the quantity of the chemical *manufactured, processed or otherwise used* by the facility, *inter alia*, is considered under the "extent" factor. Mot. at 17-8. "[I]t is more critical to know the overall magnitude of toxic chemicals passing through or being stored at a given site, rather than what is incidentally being released from that site, when establishing emergency response capabilities," Complainant asserts. *Id.* at 18.

On the other hand, Respondent asserts that it releases a very small amount of aluminum to the environment, that its facility is distant from possible receptors such as residences, and that aluminum is not subject to requirements for transportation placarding, SARA Title III emergency planning, or CERCLA release notification, yet Complainant is seeking a "near-record penalty in this matter." Opp. at 6. Specifically, Respondent asserts that it "ranks as the 870<sup>th</sup> largest releaser of chemicals to the environment in the primary metals industry, with 550 pounds of chemicals released," as compared to the largest releaser of chemicals in the industry, with 33 million pounds of releases. Opp. at 9. Respondent argues that the aluminum powder it manufactures does not create the risks of harm that EPCRA was designed to prevent, and the risks are *de minimis*.<sup>1</sup>

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<sup>1</sup> Respondent's arguments do not appear to follow exactly the Eleventh Affirmative Defense as stated in the Answer, as the arguments omit any reference to hazardous substance released as a

In its Reply, Complainant asserts that a *de minimis* release of chemicals does not equate to a *de minimis* violation of EPCRA § 313, and that failure to file a Form R is the most egregious violation that can occur under Section 313. Complainant asserts further that “the actual amount of chemicals released has no significance to the extent or circumstance of a violation.” Reply at 5.

## 2. Discussion and Conclusion

As stated in the Section 313(h) of EPCRA, the Form R is “intended to provide information to the Federal, State and local governments and the public, including citizens of communities surrounding covered facilities . . . about *releases* of toxic chemicals to the environment . . . .” The regulations state that the purpose of filing the annual Form R is for collecting information “intended to inform the general public and the communities surrounding covered facilities about *releases* of toxic chemicals,” among other things.<sup>2</sup> 40 C.F.R. § 372.1 (emphasis added). Concomitantly, the ERP states in regard to the “extent” of violation that –

EPA believes that using the amount of § 313 chemical involved in the violation as the primary factor in determining the extent level underscores the overall intent and goal of EPCRA § 313 to make available to the public on an annual basis a reasonable estimate of the toxic chemical substances *emitted into their communities* from these regulated sources.

ERP at 9 (emphasis added)(quoted in Complainant’s Rebuttal Prehearing Exchange p. 7). Thus, the ERP indicates that the amount of chemical *released* is very relevant to the consideration of the extent of the violation.<sup>3</sup> The fact that the ERP’s method of assessing the extent level is

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result of the allegations, which is in the first clause of the Defense. Complainant refers to Respondent’s arguments without addressing that clause. Mot. at 12. It is likely a drafting oversight on the part of Respondent. Respondent’s Eleventh Affirmative Defense is understood by both parties, and thus is understood in this Order, as “the amount of, and/or the harm or relief attributable to, such hazardous substances [referenced in the Complaint] is *de minimis*.”

<sup>2</sup> Complainant’s argument regarding the overall magnitude of chemicals being stored at the site and emergency response capabilities, is more applicable to violations of the *inventory* reporting requirements of Section 312 of EPCRA. *See*, 40 C.F.R. § 370.1 (reporting inventory of hazardous chemicals present at a facility is for the purpose of enhancing community awareness of hazardous chemicals in the community and facilitating development of State and local emergency response plans).

<sup>3</sup> The term “release” is defined in regulations implementing EPCRA § 313 as “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of . . . closed receptacles) of any toxic chemical.” 40 C.F.R. § 372.5.

based, in part, on an *estimate* of the releases - by the amount “manufactured, processed or otherwise used” - does not preclude the presiding judge from considering the amount of chemical *actually* released, if that information is presented, in assessing a penalty.

While the lack of actual harm to the environment resulting from a failure to submit a Form R is not a basis for reducing the penalty, Section 313 of EPCRA is intended to “provide residents and local governments with information concerning potential chemical hazards present in their communities.” *Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 780 (EAB 1998). Depriving the community and local government of that information by failing to file a timely Form R may be more or less significant to the community and government depending on the likelihood and/or severity of potential harm from a chemical release. Therefore, an argument may be made in some cases for adjusting a penalty for failure to file a Form R based on a very low level or very high level of potential hazard to the community from the subject chemical. *See, Pitt-Des Moines*, EPA Docket No. VIII-89-06, 1991 EPA ALJ LEXIS 26 \*33 (ALJ, July 24, 1991)(purpose of EPCRA reporting requirements includes determining the danger of substances being released; penalty pre-dating the ERP was reduced where release would not be dangerous); *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-627, 1991 EPA App. LEXIS 48 \*23 (CJO 1991)(respondent “could argue that the gravity of the alleged violations was not serious since the chemical turned out to be less dangerous than the Agency had originally believed”); *cf., Hall Signs, Inc.*, Appeal No. 97-6, 1998 EPA App. LEXIS 113 (EAB 1998)(unpublished)(upholding presiding judge’s departure from the ERP in the circumstances of the case in reducing the penalty in proportion to the amount of chemical used above the threshold amount). The likelihood of success of such an argument in this case need not be addressed here. For purposes of a motion to strike, and considering the standard for granting such motion, a conclusion cannot be made at this point that Respondent’s argument of de minimis harm is immaterial to a penalty assessment.

Accordingly, the Motion to Strike the Eleventh Affirmative Defense is denied.

## **VI. Motion in Limine**

Complainant in its Motion *in Limine* seeks to prevent the introduction of testimony and exhibits pertaining to: (1) the level of releases of toxic chemicals from the Facility; (2) adjudications or settlements of other EPCRA § 313 cases, including Respondent’s Prehearing Exchange (“R’s PHE”) Exhibits 3, 4 and 14; (3) releases of toxic chemicals from other regulated facilities, including R’s PHE Exhibit 8; and (4) an argument that the penalty proposed is prohibited by the Eighth Amendment.

Respondent argues that the Presiding Judge is not limited to evidence relevant to the ERP, but must look at surrounding circumstances, to decide whether to deviate from the ERP. Opp. at 2, 7. Respondent asserts that it will argue that using the ERP is not appropriate in this case, and that the evidence that Complainant seeks to exclude is relevant to the issue of whether to deviate from the ERP. Respondent opposes the Motion, except with respect to R’s PHE

Exhibit 14, upon which, Respondent asserts, its expert will rely in any event. Opp. at 13.

**A. Standard for Adjudicating a Motion in Limine**

A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value. “[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.” *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). “Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context.” *Id.* at 1400-1401. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion *in limine* means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

**B. Level of Releases from Respondent’s Facility and Other Facilities**

Complainant seeks to exclude evidence of Respondent’s releases, pursuant to arguments summarized above with respect to the Eleventh Affirmative Defense. Complainant also seeks to exclude evidence and testimony regarding releases of toxic chemicals from other regulated facilities, including R’s PHE Exhibit 8, which appears to be a printout from the Toxic Release Inventory (TRI) listing amounts of metal and metal compounds released in 2006 from all facilities in the primary metals industry. Complainant asserts that “trying to cabin the calculation [of a penalty] by looking at one factor pertaining to other facilities would only cause to confuse and misguide the analysis” and would greatly burden the hearing process to admit evidence of factors pertaining to other cases, “many of which are misleading or uninformative when considered in isolation.” Mot. at 27-28.

Respondent argues that its compliance with other sections of EPCRA, where it “‘fits’ in the EPCRA universe,” where it “falls on the TRI Inventory,” are all relevant to the “nature, circumstances, extent and gravity” of the violations, which are factors for penalty assessment under EPCRA § 325(b)(1)(C) and of guidance to penalty assessment in this proceeding. Opp. at 7, 9. Respondent asserts that it is a “very small player” as to releases, as stated above, having released only 550 pounds of chemicals in a year and ranking 870<sup>th</sup> in the list of the largest releasers of chemicals in the industry. Opp. at 9.

Complainant asserts that EPCRA “in no way attempts to regulate or control actual releases of toxic chemicals” and that EPCRA’s focus is on the deficiencies in the information about production, use and disposal of hazardous substances. Reply at 7. Complainant argues that the penalty should not depend upon the level of Respondent’s actual releases, where Respondent processes and stores large quantities of aluminum dust, which, considering its high

reactivity and flammability, poses a “high level of risk” about which “the local community would want to be fully informed. *Id.* at 7-8.

As discussed above, the actual amount of releases of the chemicals subject to Section 313 from a facility is relevant to the extent of violation under the ERP, and to the potential chemical hazards present in the community, and therefore, an argument may be made for adjusting a penalty based on a very low level or a very high level of potential hazard to the community from the chemical releases. It cannot be concluded at this point in the proceeding that evidence of releases from Respondent’s facility is “clearly inadmissible for any purpose.” *Noble*, 116 F. Supp. 2d at 969. The Motion in Limine is therefore denied as to evidence and testimony regarding the level of releases of toxic chemicals from Respondent’s facility.

As to releases from other facilities, in general they have no bearing on the determination of a penalty under EPCRA. Generally there is no need to compare specific facts as to other facilities to determine the extent, circumstances and gravity of Respondent’s violations of Section 313 of EPCRA. *Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48 at \* 21 (“What has happened in other cases can have no bearing on any factual issues in this case.”). Comparing facts regarding other facilities may lead to large expenditures of time and resources of the parties and tribunal, including additional discovery, on numerous issues with regard to those facilities as each party attempts to compare or distinguish additional facts with those of the respondent’s facility. Such expenditures are inconsistent with the purpose of efficiency in administrative proceedings.

Nevertheless, the level of releases from a respondent’s facility in some cases may be difficult to put into perspective unless there is some comparison with the amount of releases from the universe of similar facilities. The list of facilities, including Respondent’s facility, with the amounts of their releases as shown on R’s PHE Exhibit 8, gives meaning to Respondent’s assertion that it is a “very small player” as to chemical releases in the industry. Given these circumstances, R’s PHE Exhibit 8 may be relevant to the penalty assessment. As to other exhibits and testimony regarding releases from other facilities, at this point in the proceeding they cannot be declared as clearly inadmissible for any purpose, and rulings as to their admissibility must be “deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context.” *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. at 1400-1401.

Accordingly, the Motion in Limine is denied with respect to R’s PHE Exhibit 8 and any other evidence or testimony with regard to releases from other facilities.

### **C. Other EPCRA § 313 Cases**

Complainant seeks to exclude evidence and testimony of adjudications or settlements of other EPCRA § 313 cases, including R’s PHE Exhibits 3, 4 and 14. Exhibits 3 and 4 are summary charts of other EPCRA § 313 penalty assessments. Exhibit 14 is a statement of Granta Nakayama, Assistant Administrator of EPA’s Office of Enforcement and Compliance Assurance

and Donald Welsh, Regional Administrator of EPA Region 3, to the U.S. Senate Committee on Environment and Public Works. Complainant argues that they reflect facts specific to those cases and compromises needed to reach settlement, and thus cannot be relevant to a penalty calculation in this case. Mot. at 19. Complainant further points out that penalties assessed upon adjudication of other cases “are sufficiently fact- and circumstance-dependent that resolution of one case cannot determine the fate of another.” *Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999), *aff’d*, *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5<sup>th</sup> Cir. 2000), *cert. denied*, *Newell Recycling Co. v. EPA*, 534 U.S. 813 (2001).

Respondent contends that courts frequently look to comparable cases to establish penalties, citing *Pepperell Associates*, 9 E.A.D. 83, 113-114 (EAB 2000). Respondent intends to offer evidence as to the highest penalty in the history of EPCRA for failure to file Form Rs, and evidence or a compilation thereof as to the six EPCRA penalty assessments over the past five years in California involving between 5 and 15 counts, and as to the 13 EPCRA penalty assessments involving between 5 and 15 counts nationwide. Respondent argues that such evidence is relevant as to whether this Tribunal should follow or deviate from the rationale of the ERP in the penalty assessment. Opp. at 10-11. Respondent agrees that its PHE Exhibit 14 does not constitute evidence and does not oppose excluding it from evidence, but points out that its expert witness will rely on it in his testimony.

In its Reply, Complainant asserts that in *Pepperell Associates, supra*, the Environmental Appeals Board (EAB) considered how the penalty factor “other factors as justice may require” had been applied in a prior case decision but did not compare the penalty calculation from that case. Complainant notes that the EAB expressed that its jurisprudence on the question of comparing other penalty assessments “militates strongly against” the position that “previous cases involving the same statute should demarcate the size of a penalty in a current proceeding,” and that the EAB “had not found a circumstance in which separate cases were sufficiently identical to justify such an analysis.” *Ronald Hunt*, TSCA Appeal No. 05-01, 2006 WL 2847228 (EAB 2006).

While courts may, in determining a penalty or sanction in some contexts, consider penalties and sanctions imposed in similar cases, the EAB and other administrative tribunals do not do so because penalty policies function to ensure that penalties are assessed uniformly for cases with similar basic facts, because the complexity of the additional facts considered and weighed in each penalty assessment is unique to each case, and because consideration of such additional facts in other cases would require additional time and effort on the part of parties and the tribunal which is inconsistent with the purpose of efficiency in administrative proceedings. *See, Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48 at \* 20-21 (Settlements and decisions in other EPCRA § 313 cases cannot be used to prove a fact bearing on the issue of the appropriateness of the proposed penalty, “nor can other EPCRA cases be used to show that the penalty is inappropriate because it is more severe than penalties imposed in similar EPCRA cases.”); *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182 (1973) (“the employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.”).

Accordingly, Complainant's Motion *in Limine* is granted with respect to evidence and testimony of adjudications or settlements of other EPCRA § 313 cases, including R's PHE Exhibits 3, 4 and 14.

#### **D. Eighth Amendment**

In its Prehearing Exchange (at 10), Respondent asserts in support of a reduction of the proposed penalty, *inter alia*, as to the factor "Other matters as justice may require," that "[d]epending on the amount of the proposed penalty sought by EPA, Respondent may argue that the Eighth Amendment prohibits the imposition of disproportionate penalties."

Complainant seeks an order excluding evidence pertaining to this claim from being introduced at the hearing. Mot. at 29. Complainant argues that the procedural protections of EPCRA providing for a hearing and setting maximum penalties, and the ERP, ensure that penalties are not excessive. Complainant cites *Frank Acierno*, EPA Docket No. CWA-03-2005-0376, 2007 WL 2192937 (ALJ, Feb. 28, 2007) ("The administrative penalty process protects against Eighth Amendment violations."). Therefore, Complainant argues, Respondent should be precluded from raising the issue at hearing as it is irrelevant and immaterial to a penalty assessment.

In response, Respondent discusses a Supreme Court decision addressing the Eighth Amendment, and agrees that the administrative hearing process is a significant protection against Eighth Amendment problems, but asserts that it is "not absolute and complete," and the administrative tribunal "can only protect against Eighth Amendment problems if that tribunal hears and weighs the evidence on the subject of potential Eighth Amendment violations." Opp. at 12. Evidence that would tend to support the argument that the proposed penalty could violate the Eighth Amendment is admissible, Respondent concludes.

In its Reply, Complainant asserts that, because Congress set the maximum penalty amount in EPCRA, it already determined that the assessment of penalties up to that maximum is consistent with the Eighth Amendment, citing *Kelly v. EPA*, 203 F.3d 519, 524 (7<sup>th</sup> Cir. 2000) (penalty assessment less than the statutory maximum under the Clean Water Act was not excessive under the Eighth Amendment).

Neither party has pointed to any evidence or testimony to be excluded. Respondent has not even clearly asserted that it is raising the Eighth Amendment argument in this proceeding. Given that the issue has not been raised, and no document or testimony has been referenced with respect to that issue, at this point in the proceeding there is nothing that can be excluded. *See, U.S. Diamond & Gold v. Julius Klein Diamonds, LLC.*, Case No. C-3-06-371, 2008 U.S. Dist. LEXIS 57825 \* 15 (S.D. Ohio, July 29, 2008) (motion *in limine* denied as premature where there was no proof that plaintiffs introduced evidence sought to be excluded into the case in any way that would impact the factual and legal decisions yet to be made). However, if Respondent were to move to supplement its prehearing exchange to add any such evidence or testimony, its

motion likely would be denied, as the Court of Appeals for the Fifth Circuit has stated, “No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.” *Newell Recycling* 231 F.3d 204, 210 (5<sup>th</sup> Cir. 2000), *cert. denied*, *Newell Recycling Co. v. EPA*, 534 U.S. 813 (2001).

## **VII. Extension of Time to File Prehearing Briefs**

By Order dated September 15, 2008, the date for commencement of the hearing in this case was rescheduled from November 18 to December 9, 2008. Given this three week postponement of the hearing, it is appropriate to extend the time for the parties to file prehearing briefs by three weeks. If any party wishes to file a prehearing brief, the deadline for filing it is Friday, November 28, 2008.

**ORDER**

1. Complainant's Motion for Accelerated Decision as to Liability is **GRANTED**.
2. Complainant's Motion to Strike the First Affirmative Defense is **GRANTED**.
3. Complainant's Motion to Strike the Second Affirmative Defense is **GRANTED**.
4. Complainant's Motion to Strike the Eleventh Affirmative Defense is **DENIED**.
5. Complainant's Motion *in Limine* is **DENIED** with respect to evidence and testimony as to the level of releases of toxic chemicals from Respondent's facility.
6. Complainant's Motion *in Limine* is **DENIED** with respect to evidence or testimony as to releases of toxic chemicals from other regulated facilities, including Respondent's Prehearing Exchange Exhibit 8.
7. Complainant's Motion *in Limine* is **GRANTED** with respect to adjudications or settlements of other EPCRA § 313 cases, including Respondent's Prehearing Exchange Exhibits 3, 4 and 14.
8. Complainant's Motion *in Limine* is **DENIED as moot** with respect to an Eighth Amendment argument.
9. If any party wishes to file a prehearing brief, it shall be filed on or before Friday, **November 28, 2008**.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: November 6, 2008  
Washington, D.C.