ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING COMMUNITY RIGHT-TO-KNOW ACT (1986) AND SECTION 6607 OF THE POLLUTION PREVENTION ACT (1990) [AMENDED]

Amended 1996, 1997, and 2001

April 12, 2001

ENFORCEMENT RESPONSE POLICY

FOR SECTION 313 OF THE

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (1986)

And

SECTION 6607 OF THE

THE POLLUTION PREVENTION ACT (1990)

Issued by the

Office of Compliance Monitoring

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INTRODUCTION

On December 2, 1988, the U.S. Environmental Protection Agency (EPA) issued an Enforcement Response Policy for addressing violations of Section 313 of the Emergency Planning and Community Right-to-Know Act. Since that time, EPA has identified opportunities for refining and adding clarity to that policy. This revised enforcement response policy incorporates three years of enforcement experience with Section 313 of the Emergency Planning and Community Right-to-Know Act.

This policy is immediately applicable and will be used to calculate penalties for all administrative actions concerning EPCRA Section 313 issued after the date of this policy, regardless of the date of the violation.

The Emergency Planning and Community Right-to-Know Act, (EPCRA), also known as Title III of the Superfund Amendments and Reauthorization Act of 1986, contains provisions for reporting both accidental and nonaccidental releases of certain toxic chemicals. Section 313 (§313) of EPCRA requires certain manufacturers, processors, and users of over 300 designated toxic chemicals to report annually on emissions of those chemicals to the air, water and land. The Pollution Prevention Act (PPA) of 1990 requires additional data and information to be included annually on Form R reports beginning in the 1991 reporting year, for reports which are due on July 1, 1992. These reports must be sent to the U.S. Environmental Protection Agency (EPA) and to designated state agencies. The first reporting year was 1987, and reports were due by July 1, 1988, and annually by July 1 thereafter. The U.S. EPA is responsible for carrying out and enforcing the requirements of §313 of EPCRA and the PPA and any rules promulgated pursuant to EPCRA and the PPA.

Section 325(c) of the law authorizes the Administrator of the EPA to assess civil administrative penalties for violations of §313. Any person (owner or operator of a facility, other than a government entity) who violates any requirement of §313 is liable for a civil administrative penalty in an amount not to exceed $25,000 for each violation. Each day a violation continues may constitute a separate violation. The Administrator may assess the civil penalty by administrative order or may bring an action to assess and collect the penalty in the U.S. District Court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

The purpose of this Enforcement Response Policy is to ensure that enforcement actions for violations of EPCRA §313 and the PPA are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA §313 violations and the PPA.

For purposes of this document, "EPCRA," "§313" and EPCRA "EPCRA §313" should be understood to include the requirements of the Pollution Prevention Act.

LEVELS OF ACTION

Enforcement alternatives include: (a) no action; (b) notices of noncompliance; (c) civil administrative penalties (d) civil judicial referrals, and (e) criminal action under 18 U.S. Code 1001.

EPA reserves the right to issue a Civil Administrative Penalty for any violation not specifically identified under the Notice of Noncompliance or Administrative Civil Penalty section.

NO ACTION

Revisions to Form R reports

Generally, an enforcement action will not be taken regarding voluntary changes to correctly reported data in Form R reports. Changes to Form R reports are: revisions to original reports which reflect only improved or new information and/or improved or new procedures which were not available when the facility was completing its original submission. Facilities submitting revisions should maintain records to document that the information used to calculate the revised estimate is new and was not available at the time the first estimate was made. A facility which submits a revision to a Form R report which does not meet this description of a change or otherwise calls into question the basis for the initial data reported on the original Form R report will be subject to an enforcement action.

Discussion

Each Form R report must provide estimated releases: it is not acceptable to submit Form R reports with no estimate(s) of releases. Such reports will be considered incomplete reports and subject to an enforcement action as described below. An estimate of "zero" is acceptable if "zero" is a reasonable estimate of a facility's releases based on readily available information, i.e., monitoring data or emission estimates.

Every Form R report submitted after July 1 for a chemical not previously submitted is not a revision, but a failure to report in a timely manner.

Facilities considering whether to submit a revision should refer to the September 26, 1991 Federal Register policy notice which explains for what circumstances a facility should submit a revision and the correct format for submitting a revision. Additionally, the notice explains the purpose of EPA's policy of delaying data entry of all revisions received after November 30th of the year the original report was due until after the Toxic Release Inventory (TRI) database can be made available to the public. Revisions submitted after November 30th will be processed and made available to the public in updated versions of the TRI database. The EPA cannot accept and process revisions to the TRI database on a continuing basis without significantly delaying the public availability of the data. Following on the September 26, 1991 Federal Register policy notice, this ERP adopts the November 30th date to determine the gravity of voluntarily disclosed data quality violations.

NOTICES OF NONCOMPLIANCE (NON)

Summary of Circumstances Generally Warranting an NON

- Form R reports which are incorrectly assembled; for example, failure to include all pages for each Form R or reporting more than one chemical per Form R.

- Form R reports which contain missing or invalid facility or chemical identification information; for example, the CAS number reported does not match the chemical name reported.

- Submission of §313 and Pollution Prevention Act data on an invalid form.

- Incomplete Reporting, i.e., reports which contain blanks where an answer is required.

- Magnetic media submissions which cannot be processed.

- The submission of a Form R report with trade secrets without a sanitized version, or the submission of the sanitized version of the Form R report without the trade secret information.

- Form R reports which are sent to an incorrect address.

  NOTE: An incorrect address is any address other than that of the U.S. EPA Administrator's office, or other than the address listed in the §313 regulation or on the Form R. Form R reports not received by EPA due to an incorrect address and/or packaging are not the

responsibility of EPA and are subject to a civil administrative penalty for "failure to report in a timely manner" violation.

NOTE: The Agency reserves the right to assess a Civil Administrative Complaint for certain data quality errors; see page five for a definition of these types of errors. Generally, these are errors which cannot be detected during the data entry process.

Discussion

A Notice of Noncompliance (NON) is the appropriate response for certain errors on Form R reports detected by the Agency. Generally, these are errors which prevent the information on the Form R from being entered into EPA's database. The NON will state that corrections must be made within a specified time (30 days from receipt of the NON). Failure to correct any error for which a NON is issued may be the basis for issuance of a Civil Administrative Complaint.

The decision to issue NONs for the submission of a Form R report with a trade secret claim without a sanitized version, or of the sanitized version without the trade secret information, is being treated the same as a Form R report with errors. This is a violation of EPCRA §313 as well as the trade secret requirements of EPCRA.

CIVIL ADMINISTRATIVE COMPLAINTS

A Civil Administrative Complaint will be the appropriate response for: failure to report in a timely manner; data quality errors; failure to respond to a NON; repeated violations; failure to supply notification and incomplete or inaccurate supplier notification; and failure to maintain records and failure to maintain records according to the standard in the regulation.

Definitions:

<u>Failure to Report in a Timely Manner</u> This violation includes the failure to report in a timely manner to either EPA or to the state for each chemical on the list. There are two distinct categories for this violation. A circumstance level one penalty will be assessed against a category I violation. A <u>"per day" formula</u> is used to determine category II penalties; see this per day formula on page 13.

- <u>Category I</u>: Form R reports that are submitted one year or more after the July 1 due date.

- <u>Category II</u>: Form R reports that are submitted after the July 1 due date but <u>before</u> July 1 of the following year.

EPCRA §313 Subpart (a) requires Form R reports to be submitted annually on or before July 1 and to contain data estimating releases during the preceding calendar year. Facilities which submit Form R reports after the July 1 deadline have failed to comply with this annual reporting requirement and have defeated the purpose of EPCRA §313, which is to make this toxic release data available to states and the public annually and in a timely manner.

Data Quality Errors: Data Quality Errors are errors which cause erroneous data to be submitted to EPA and states. Generally, these are errors which are not readily detected during EPA's data entry process.[1] Below are the range of actions which constitute data quality errors; generally, these are a result of a failure to comply with the explicit requirements of EPCRA §313:

- Failure to calculate or provide reasonable estimates of releases or off-site transfers.
- Failure to identify all appropriate categories of chemical use, resulting in error(s) in estimates of release or off-site transfers.
- Failure to identify for each wastestream the waste treatment or disposal methods employed, and an estimate of the treatment efficiency typically achieved by such methods, for that wastestream.
- Failure to use all readily available information necessary to calculate as accurately as possible, releases or off-site transfers.
- Failure to provide the annual quantity of the toxic chemical which entered each environmental medium.
- Failure to provide the annual quantity of the toxic chemical transferred off-site.
- Failure to provide information required by §6607 of the Pollution Prevention Act of 1990 and by any regulations promulgated under §6607 of the Pollution Prevention Act of 1990.

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[1]EPA's program office may issue Notices of Technical Error (NOTEs) for certain data quality errors which are detected during the data entry process.

- Under the requirements of §6607 of the Pollution Prevention Act of 1990, claiming past or current year source reduction or recycling activities which are not in fact implemented by the facility. This does not apply to activities which the facility may estimate for future years.

- A facility's Form R reporting demonstrates a pattern of similar errors or omissions as manifested by the issuance by EPA of NONs for two or more reporting years for the same or similar errors or omissions.

NOTE: If an error is made in determining a facility's toxic chemical threshold which results in the facility erroneously concluding that a Form R report for that chemical is not required, this is not a data quality error, but a "failure to report in a timely manner" violation.

Failure to respond to an NON When a facility receives a Notice of Noncompliance (NON) and fails to comply with the Notice of Noncompliance, i.e, fails to correct the information EPA requests to be corrected in the NON by the time period specified in the NON, the violation is "failure to respond to an NON." Included here is the failure to also provide the state with corrected information requested in the NON within 30 days of receiving the NON.

Repeated violation This category of violation only applies to violations which would generally warrant an NON for the first time. A repeated violation is any subsequent violation which is identical or very similar to a prior violation for which an NON was issued. Separate penalty calculation procedures (discussed on page 16 under "history of prior violations") are to be followed for violations which warrant a civil administrative complaint for the first violation and are repeated.

Failure to Supply Notification Under 40 CFR §372.45, certain facilities which sell or otherwise distribute mixtures or trade name products containing §313 chemicals are required to supply notification to (i) facilities described in §372.22, or (ii) to persons who in turn may sell or otherwise distribute such mixtures or products to a facility described in §372.22(b) in accordance with paragraph §372.45(b). Failure to comply with 40 CFR §372.45, in whole or in part, constitutes a violation. A violation will be "failure to supply notification" or "incomplete or inaccurate supplier notification."

Failure to Maintain Records Under 40 CFR §372.10, each person subject to the reporting requirements of 40 CFR §372.30 must retain records documenting and supporting the information submitted on each Form R report. Additionally, under 40 CFR

§372.10, each person subject to the supplier notification requirements of 40 CFR §372.45 must retain certain records documenting and supporting the determination of each required notice under that same section. These records must be kept for three years from the date of the submission of a report under 40 CFR §372.30 or the date of notification under 40 CFR §372.45. The records must be maintained at the facility to which the report applies or at the facility supplying notification. Failure to comply with 40 CFR Part 372.10, in whole or in part, constitutes a violation. Violations will be a "failure to maintain records as prescribed at 40 CFR Part 372.10 (a) or (b)", or a "failure to maintain complete records as prescribed at 40 CFR Part 372.10 (a) or (b)" or "failure to maintain complete records at the facility as prescribed at 40 CFR Part 372.10(c)."

CIVIL JUDICIAL REFERRALS

In exceptional circumstances, EPA, under EPCRA §325(c), may refer civil cases to the United States Department of Justice for assessment and/or collection of the penalty in the appropriate U.S. District Court. U.S. EPA also may include EPCRA counts in civil complaints charging Respondents with violations of other environmental statutes.

CRIMINAL SANCTIONS

EPCRA does not provide for criminal sanctions for violations of §313. However, 18 U.S.C. §1001 makes it a criminal offense to falsify information submitted to the U.S. Government. This would specifically apply to, but not be limited to, EPCRA §313 records maintained by a facility that were intentionally generated with incorrect or misleading information. In addition, the knowing failure to file an EPCRA §313 report may be prosecuted as a concealment prohibited by 18 U.S.C. §1001.

ASSESSING A CIVIL ADMINISTRATIVE PENALTY

SUMMARY OF THE PENALTY POLICY MATRIX

This policy implements a system for determining penalties in civil administrative actions brought pursuant to §313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). Penalties are determined in two stages: (1) determination of a "gravity-based penalty," and (2) adjustments to the gravity-based penalty.

To determine the gravity-based penalty, the following factors affecting a violation's gravity are considered:

- the "circumstances" of the violation
- the "extent" of the violation

The circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government. Circumstance levels are described on pages 11-13.

The extent level of a violation is based on the quantity of each EPCRA §313 chemical manufactured, processed, or otherwise used by the facility; the size of the facility based on a combination of the number of employees at the violating facility; and the gross sales of the violating facility's total corporate entity. The Agency will use the number of employees and the gross sales at the time the civil administrative complaint is issued in determining the extent level of a violation.

To determine the gravity-based penalty, determine both the circumstance level and the extent level. These factors are incorporated into a matrix which establishes the appropriate gravity-based penalty amount. The penalty is determined by calculating the penalty for each violation on a per-chemical, per-facility, per-year basis (see special circumstances for per day penalties on page 13).

Once the gravity-based penalty has been determined, upward or downward adjustments to the proposed penalty amount may be made in consideration of the following factors:

- Voluntary Disclosure
- History of prior violation(s)
- Delisted chemicals
- Attitude
- Other Factors as Justice May Require
- Supplemental Environmental Projects
- Ability to Pay

The first three of these adjustments may be made prior to issuing the civil complaint.

EXTENT LEVELS

In the table below, the total corporate entity refers to all sites taken together owned or controlled by the domestic or foreign parent company. EPA Regions have discretion to use those figures for number of employees and total corporate sales which

are readily available. If no information is available, Regions may assume the higher level and adjust if the facility can produce documentation demonstrating they belong in a lower extent level.

Facilities which manufacture, process or otherwise use ten times or more the threshold of the §313 chemical involved in the violation and meet the total corporate entity sales and number of employees criteria below:

	LEVEL
$10 million or more in total corporate entity sales and 50 employees or more.	A
$10 million or more in total corporate entity sales and less than 50 employees.	B
Less than $10 million in total corporate entity sales and 50 employees or more.	B
Less than $10 million in total corporate entity sales and less than 50 employees.	B

Facilities which manufacture, process or otherwise use less than ten times the threshold of the §313 chemical involved in the violation and meet the total corporate entity sales and number of employee criteria below:

	LEVEL
$10 million or more in total corporate entity sales and 50 employees or more.	B
$10 million or more in total corporate entity sales and less than 50 employees.	C
Less than $10 million in total corporate entity sales and 50 employees or more.	C
Less than $10 million in total corporate entity sales and less than 50 employees.	C

Discussion

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. A necessary component

of making useful data available to the public is the supplier notification requirement of §313, as a significant amount of toxic chemicals are distributed in mixtures and trade name products. An additional goal of §313 is to ensure that purchasers of §313 chemicals are informed of their potential §313 reporting requirements. The extent levels underscore this goal as well.

The size of business is used as a second factor in determining the appropriate extent level to reflect the fact that the deterrent effect of a smaller penalty upon a small company is likely to be equal to that of a larger penalty upon a large company. Ten times the threshold for distinguishing between extent levels was chosen because it represents a significant amount of chemical substance. Thus, the two factors, the amount of §313 chemical involved and the size of business, are combined and used to determine the extent level table.

PENALTY MATRIX

PENALTY MATRIX			
	EXTENT LEVELS		
CIRCUMSTANCE LEVELS	A	B	C
1	$25,000	$17,000	$5,000
2	$20,000	$13,000	$3,000
3	$15,000	$10,000	$1,500
4	$10,000	$ 6,000	$1,000
5	$ 5,000	$ 3,000	$ 500
6	$ 2,000	$ 1,300	$ 200

CIRCUMSTANCE LEVELS

A penalty is to be assessed for each §313 chemical for each facility. There are two "per day" penalty assessments; see page 12 and 13 for further clarification.

The date used to determine the circumstance level for "failure to report in a timely manner" is the postmark date of the Form R submission(s).

All violations are "one day" violations unless otherwise noted.

Base Penalty Matrices For Violations Which Occur After January 30, 1997

EPCRA § 313
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES LEVELS	EXTENT A Major	 B Significant	 C Minor
1	$27,500	$18,700	$5,500
2	$22,000	$14,300	$3,300
3	$16,500	$11,000	$1,650
4	$11,000	$6,600	$1,100
5	$5,500	$3,300	$550
6	$2,200	$1,430	$220

*Gravity Based Penalty Matrix to supplement the "Final EPCRA §313 Enforcement Response Policy" (8/10/92). Insert behind page 11 of the "Final EPCRA §313 Enforcement Response Policy" (8/10/97).

LEVEL 1

Failure to report in a timely manner, Category I.

LEVEL 2

Failure to maintain records as prescribed at 40 CFR §372.10(a) or (b).

Failure to supply notification; per chemical, per year.

LEVEL 3

Data Quality Errors.

Repeated NON violations.

LEVEL 4

Failure to report in a timely manner, Category II: Per Day formula applies.

Failure to maintain complete records as prescribed at 40 CFR §372.10(a) or (b).

LEVEL 5

Failure to Respond to an NON.

Data Quality Errors which are voluntarily disclosed after November 30th of the year the original report was due.

Incomplete or inaccurate supplier notification; per chemical, per year.

LEVEL 6

Data Quality Errors which are voluntarily disclosed on or before November 30th of the year the original report was due.

Revisions which are voluntarily submitted to EPA but are not reported to the State within 30 days of the date the revision is submitted to EPA.

Failure to maintain records at the facility (40 CFR §372.10(c)).

MULTIPLE VIOLATIONS

Separate penalties are to be calculated for each chemical for each facility. If a company has three facilities and fails to report before July 1 of the year following the year the report was due, a penalty is to be assessed for each facility and for each chemical. Assuming the annual sales of the corporate entity exceed $10 million dollars, the facility has more than 50 employees, and each facility exceeds the threshold limits by more than ten times, the penalty would be $25,000 X 3 or $75,000. If each facility manufactured two chemicals, again at more than ten times the threshold, the penalty would be $25,000 X 3 X 2 or $150,000.

If there is more than one violation for the same facility involving the same chemical, the penalties are cumulative. For example, if a firm reports more than one year after the report was due, and the form also contains errors which the firm refused to correct after receiving an NON, the penalty is $25,000 plus $15,000. However, since it is the same form involved, and since the statute imposes a maximum of $25,000 per violation for each day the violation continues, the penalty which will be assessed should be the one day $25,000 maximum.

PER DAY PENALTIES

Generally, penalties of up to $25,000 **per day** may be assessed if a facility within the corporate entity has received a Civil Administrative Complaint, which has been resolved, for failing to report under §313 for any two previous reporting periods. A Civil Administrative Complaint is resolved by a payment, a Consent Agreement and Final Order, or a Court Order.

Penalties of up to $25,000 **per day** may also be used for those facilities which refuse to submit reports or corrected information within thirty days after a Civil Administrative Complaint is resolved. Such refusal may be the basis for issuing a new Civil Administrative Complaint to address the days of continuing noncompliance after the initial Civil Administrative Complaint is resolved. For example, a respondent may respond to a Civil Administrative Complaint by paying the full penalty, yet not correct the violation; in such a situation, a new Civil Administrative Complaint should be issued.

PER DAY FORMULA FOR FAILURE TO REPORT IN A TIMELY MANNER

The following per day penalty calculation formula is to be used only for violations involving failure to report on or before July 1 of the year the report is due and before July 1 of the following year:

Level 4 Penalty +

$$\frac{(\text{\# of days late} - 1) \times (\text{Level 1} - \text{Level 4 Penalty})}{365}$$

For example, the penalty for a facility which submitted one Form R report on October 11 of the year the report was due, and met the criteria for extent level A, would be calculated as follows:

$$\$10{,}000 + \frac{(102-1)(\$15{,}000)}{365} = \$10{,}000 + \$4151 = \$14{,}151.$$

CAPS ON PENALTIES

While there is a $25,000 per day per violation maximum penalty under EPCRA §326, which outlines EPA's enforcement authority for EPCRA §313, there are no caps on the total penalty amount a facility may be liable for under EPCRA §313.

ADJUSTMENT FACTORS

The Agency intends to pursue a policy of strict liability in penalizing a violation, therefore, no reduction is allowed for culpability. Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available. In fact, if a violation is knowing or willful, the Agency reserves the right to assess per day penalties, or take other enforcement action as appropriate. In some cases, the Agency may determine that the violation should be referred to the Office of Criminal Enforcement.

Voluntary Disclosure

To be eligible for any voluntary disclosure reductions, a facility must: submit a signed and written statement of voluntary disclosure to EPA and submit complete and signed report(s) to their state and EPA's TRI Reporting Center within 30 days, or submit complete and signed Form R report(s) immediately to their state and EPA's TRI Reporting Center as indicated on the Form R. In the case of supplier notification violations, the facility must submit a signed and written statement of voluntary disclosure to EPA.

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 determining compliance with EPCRA §313.

This enforcement response policy establishes two reductions in penalties for voluntary disclosure of violations; the first reduction is a fixed 25%; the second reduction is capped at 25% and can be applied in full or in part according to the extent to which the facility meets the criteria for the second 25% reduction. All facilities which voluntarily disclose violations of §313 (except those identified below) are eligible for the first fixed 25%. The voluntary disclosure reductions apply to the following violations: failure to report in a timely manner, category I and II; and failure to supply notification.

In order to obtain the second reduction for voluntary disclosure a facility must meet the following criteria and explain and certify in writing how the facility meets these criteria:

- The violation was immediately disclosed within 30 days of discovery by the facility.
- The facility has undertaken concrete actions to ensure that the facility will be in compliance with EPCRA §313 in the future. Such steps may include but are not limited to: creating an environmental compliance position and hiring an individual for that position; changing the job description of an existing position to include managing EPCRA compliance requirements; and contracting with an environmental compliance consulting firm.
- For supplier notification violations, the facility provides complete and accurate supplier notification to each facility or person described in §372.45(a) within 60 days of notifying EPA of the violation.
- The facility does not have a "history of violation" (see below) for EPCRA §313 for the two reporting years preceding the calendar year in which the violation is disclosed to EPA.

This policy is designed 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.

This enforcement response policy does not allow for voluntary disclosure adjustments in penalties for the following violations because these violations will, in almost all circumstances, be discovered by EPA: failure to maintain records, failure to maintain records according to the standard in the regulation, failure to submit Form R reports containing error corrections or revisions to the state, and failure to supply

corrections or revisions to the state, and failure to supply notification according to the standard in the regulation. In the rare case that a facility identifies such violations and voluntarily discloses them, EPA Regional offices have discretion to adjust the penalty under the "as justice may require" reduction. Consideration of voluntary disclosure for data quality errors is already structured into the circumstance levels: voluntarily disclosed data quality errors are assessed two and three levels lower than data quality errors which are discovered by EPA. Therefore no further "voluntary" reduction is allowed.

NOTE: Reductions available for attitude and for voluntary disclosure are mutually exclusive, as both recognize the facility's concern with, and actions taken toward, timely compliance. Therefore, a facility cannot qualify for reductions in both of these categories.

History of Prior Violations

The penalty matrix is intended to apply to "first offenders." Where a violator has demonstrated a history of violating any section(s) of EPCRA, the penalty should be adjusted upward according to section (d) below prior to issuing the Administrative Civil Complaint. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation, either because of certain factors consciously analyzed by the firm, or because of negligence. Another reason for penalizing repeat violators more severely than "first offenders" is the increased enforcement resources that are spent on the same violator.

The Agency's policy is to interpret "prior such violations" as referring to prior violations of any provision of the Emergency Planning and Community Right-to-Know Act (1986). The following rules apply in evaluating history of prior such violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator, except as discussed below at section (d). A consent agreement and final order/consent order (CAFO/CACO), or receipt of payment in response to a administrative civil complaint, are both considered to be the final resolution of the complaint against the violator. Therefore, either a CAFO/CACO, or receipt of payment made to the U.S. Treasury, can be used as evidence constituting a prior violation, regardless of whether or not a respondent admits to the violation.

(b) To be considered a "prior such violation," the violation must have occurred within five years of the present violation. Generally, the date used for the present violation will be one day after July 1 of the year the Form R report was due for failure to report, data quality errors, recordkeeping violations, and supplier notification violations. For other violations, the date of the present violation will be the date the facility was required to come into compliance; for example, for a "failure to respond" violation, the date of the present violation will be the last day of the 30 day period the facility had to respond to a Notice of Noncompliance. This five-year period begins when the prior violation becomes a final order. Beyond five years, the prior violative conduct becomes too distant to require compounding of the penalty for the present violation.

(c) Generally, companies with multiple establishments are considered as one when determining history. Thus, if a facility is part of a company for which another facility within the company has a "prior such violation," then each facility within the company is considered to have a "prior violation." However, two companies held by the same parent corporation do not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors. In the case of wholly- or partly-owned subsidiaries, the violation history of a parent corporation shall apply to its subsidiaries and that of the subsidiaries to the parent corporation.

(d) For one prior violation, the penalty should be adjusted upward by 25%. If two prior violations have occurred, the penalty should be adjusted upward by 50%. If three or more prior violations have occurred, the penalty should be adjusted upward by 100%.

(e) A "prior violation" refers collectively to all the violations which may have been described in one prior Administrative Civil Complaint or CAFO. Thus, "prior violation" refers to an episode of prior violation, not every violation that may have been contained in the first Civil Administrative Complaint or CAFO/CACO.

<u>Delisted Chemicals</u>

For delisted chemicals, an immediate and fixed reduction of 25% can be justified in all cases according the following policy:

If the Agency has delisted a chemical by a final <u>Federal Register</u> Notice, the Agency may settle cases involving the delisted chemical under terms which provide for a 25% reduction

of the initial penalty calculated for any Section 313 violation involving that chemical. The reduction would only apply to chemicals delisted before or during the pendency of the enforcement action. This reduction may be made before issuing the Administrative Civil Complaint. Facilities will not be allowed to delay settling Administrative Civil Complaints in order to determine whether the violative chemical will be delisted.

Attitude

This adjustment has two components: (1) cooperation and (2) compliance. An adjustment of up to 15% can be made for each component:

(1) Under the first component, the Agency may reduce the gravity-based penalty based on the cooperation extended to EPA throughout the compliance evaluation/enforcement process or the lack thereof. Factors such as degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process.

(2) Under the second component, the Agency may reduce the gravity-based penalty in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance.

NOTE: See note on page 16 regarding the mutual exclusion of reductions for attitude reduction and voluntary disclosure.

Other Factors as Justice May Require

In addition to the factors outlined above, the Agency will consider other issues that might arise, on a case-by-case basis, and at Regional discretion, which should be considered in assessing penalties. Those factors which are relevant to EPCRA §313 violations include but are not limited to: new ownership for history of prior violations, "significant-minor" borderline violations, and lack of control over the violation. For example, occasionally a violation, while of significant extent, will be so close to the borderline separating minor and significant violations or so close to the borderline separating noncompliance from compliance, that the penalty may seem disproportionately high. In these situations, an additional reduction of up to 25% off the gravity-based penalty may be allowed. Use of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file.

Settlement With Conditions (SWC)

Supplemental Environmental Projects (SEPs):

Circumstances may arise where a violator will offer to make expenditures for environmentally beneficial purposes above and beyond those required by law in lieu of paying the full penalty. The Agency, in penalty actions in the U.S. District Courts under the Clean Air Act and Clean Water Acts, and in administrative penalty actions under the Toxic Substances Control Act, has determined that crediting such expenditures is consistent with the purpose of civil penalty assessment. Although civil penalties under EPCRA §313 are administratively assessed, the same rationale applies. This adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations.

Other Settlements With Conditions may be considered by EPA Regional Offices as appropriate.

Before the proposed credit amounts can be incorporated into a settlement, the complainant must assure himself/herself that the company has met the conditions as set forth in current or other program specific policy guidance. The settlement agreement incorporating a penalty adjustment for an SEP or any other SWC should make clear what the actual penalty assessment is, after which the terms of the reduction should be clearly spelled out in detail in the CAFO/CACO. A cash penalty must always be collected from the violator regardless of the SEPs or SWCs undertaken by the company. Finally, in accordance with Agency-wide settlement policy guidelines, the final penalty assessment contained in the CACO/CAFO must not be less than the economic benefit gained by the violator from noncompliance.

Ability to Pay

Normally, EPA will not seek a civil penalty that exceeds the violator's ability to pay. The Agency will assume that the respondent has the ability to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. Any alleged violator can raise the issue of its ability to pay in its answer to the civil complaint, or during the course of settlement negotiations.

If an alleged violator raises the inability to pay as a defense in its answer, or in the course of settlement negotiations, it shall present sufficient documentation to permit the Agency to establish such inability. Appropriate documents will include the following, as the Agency may request, and will be presented in the form used by the respondent in its ordinary course of business:

1. Tax returns
2. Balance sheets
3. Income statements
4. Statements of changes in financial position
5. Statements of operations
6. Retained earnings statements
7. Loan applications, financing and security agreements
8. Annual and quarterly reports to shareholders and the SEC, including 10 K reports
9. Business services reports, such as Compusat, Dun and Bradstreet, or Value Line.
10. Executive salaries, bonuses, and benefits packages.

Such records are to be provided to the Agency at the respondent's expense and must conform to generally recognized accounting procedures. The Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay.

SETTLEMENT

Any reductions in penalties are to be made in accordance with this penalty policy. In preparing Consent Agreements, Regions must require a statement signed by the company which certifies that it has complied with all EPCRA requirements, and specifically §313 requirements, at all facilities under their control.

Any violations reported by the company or facility in the context of settlement are to be treated as self-confessed violations or treated as a failure to report in a timely manner if the company has not submitted the report. If a Region wishes to enter into a Settlement Agreement for the facility/company to audit its facility/company, then the Consent Agreement and Final Order may contain this agreement. A Region may choose to agree to assess prior stipulated penalties for the violations found during the compliance audit, or may choose to assess any such violations in accordance with this enforcement policy. Reductions for compliance audits cannot exceed the after-tax value of the compliance audit. Finally, as stated above, a cash penalty must always be collected from the violator regardless of the SEPs or SWCs undertaken by the company.

AMENDMENT for 1991 Reporting Year Only

Due to the unusual circumstances in finalizing and distributing the revised Form R for use beginning with calendar year 1991 reports (reports due on July 1, 1992), the following amendment to the Enforcement Response Policy is issued:

Penalty Assessment for Failure to Report in a Timely Manner

One element of the Per Day Penalty Formula on page 14 is the number of days late a facility submits its Form R reports. For the 1991 reporting year only, the number of days late will be calculated beginning on September 2, 1992. Thus, if a facility submits its Form R report on September 15, 1992, the number of days late should be calculated as 14.

AMENDMENT FOR REPORTS DUE JULY 1, 1996

Penalty Assessment for Failure to Report in a Timely Manner

On page 12, one element of the Per Day Penalty Formula is the number of days late a facility submits its Form R reports. For the 1995 reporting year only, the number of days late will be calculated beginning on August 2, 1996. Thus, if a facility submits its Form R report on August 15, 1996, the number of days late should be calculated as 14. The one exception to this amendment will be Aerosol Forms of Hydrochloric Acid, which should be calculated beginning on August 16, 1996.

ALTERNATE THRESHOLD EXEMPTION ERP AMENDMENT
December 6, 1996

VIOLATION
Failure to File annual certification in a timely manner - Circumstance Level 1

VIOLATION
Filing an annual certification in lieu of the Form R when facility did not qualify for the exemption - Circumstance Level 3

VIOLATION
Recordkeeping

a) Failure to maintain records as prescribed at 40 CFR §372.10(d). Circumstance Level 2

b) Failure to maintain complete records as prescribed at 40 CFR §372.10(d) Circumstance Level 4

Interim Data Quality Amendment to the EPCRA Section 313 Enforcement Response Policy (ERP)

Significant Data Quality Errors are errors which significantly compromise the utility of the data submitted to EPA and states on the Form R or the Form A. Significant Data Quality Errors are subject to an administrative complaint and should be assessed as a circumstance level 2 violation in the EPCRA Section 313 ERP currently in effect. Generally, errors which are not readily detected during EPA's data entry will trigger a Civil Administrative Complaint. EPA will generally assess one data quality violation per reporting form according to the following circumstances:

- Significant Release Estimation Errors–Non PBT Chemicals[1]: This circumstance includes failing to make a reasonable estimate of the quantity of each toxic chemical entering each environmental medium, including transfers off-site. A significant data quality violation may result either by miscalculation, failure to use all readily available information (such as monitoring data or emission factors), or failure to make a reasonable estimate. The magnitude of error generally sufficient to issue a Civil Administrative Complaint for chemicals with reporting thresholds of 25,000 pounds for manufacturing and processing, and 10,000 pounds for otherwise use, is expressed as follows:

  ✓ The difference between reported releases or transfers and corrected releases and transfers is 2500 pounds or less, and the *difference between the* corrected amount *and the actual amount reported* reflects greater than a 50% increase of the reported amount.[2]

  Example: Facility X reports 2500 pounds of chemical Y releases to air in its Form R. EPA discovers that Facility X should have reported 4900 pounds of chemical Y releases to air. Facility X under reported chemical Y by 2400 pounds. This instance of under reporting, *2400 pounds, is less than 2500 pounds and* represents

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[1] If an error is made in determining a facility's toxic chemical threshold which results in the facility erroneously concluding that a Form R report for that chemical is not required, this is not a Significant Data Quality Error, but a Failure to Report in a Timely Manner. This includes facilities which erroneously file a Form A in lieu of a Form R.

[2] In order to calculate the percentage increase from the reported amount and the corrected amount, use the following equation: (*total of corrected releases less total reported releases*) ÷ reported releases *equals percentage of error.*

96% of the *actual amount reported, 2500 pounds.* Therefore, Facility X may be subject to a Civil Administrative Complaint for "Failing to Submit an Accurate and Complete Report," due to "Significant Data Quality Errors."

✓ The difference between reported releases and transfers and corrected releases and transfers is greater than 2500 pounds but less than 20,000 pounds, and the *difference between the* corrected amount *and the actual amount reported* reflects greater than a 25% increase of the reported amount.

Example: Facility X reports 12,000 pounds of chemical Y releases to air in its Form R. EPA discovers that Facility X should have reported 17,000 pounds of chemical Y releases to air. Facility X under reported chemical Y by 5,000 pounds. This instance of under reporting, *5000 pounds, is greater than 2500 pounds, but less than 20,000 pounds and* represents 42% of the *actual amount reported.* Therefore, Facility X may be subject to a Civil Administrative Complaint for "Failing to Submit an Accurate and Complete Report," due to "Significant Data Quality Errors."

✓ The difference between reported releases and transfers, and corrected releases and transfers is greater than or equal to 20,000 pounds, and the *difference between the* corrected amount *and the actual amount reported* reflects greater than or equal to *a* 15% increase of the reported amount.

Example: Facility X reports 125,000 pounds of chemical Y releases to land in its Form R. EPA discovers that Facility X should have reported 155,000 pounds of chemical Y releases to land. Facility X under reported chemical Y by 30,000 pounds. This instance of under reporting, *30,000 pounds is greater than 20,000 pounds and* represents 24% of the *actual amount reported, 125,000 pounds.* Therefore, Facility X may be subject to a Civil Administrative Complaint for "Failing to Submit an Accurate and Complete Report," due to "Significant Data Quality Errors."

- Significant Errors Identifying Chemical Use: Failure to identify all appropriate categories of chemical use, resulting in error(s) in estimates of release or off-site transfers.

- Significant Errors Reporting Treatment or Disposal Data: Failure to identify for each waste stream the waste treatment or disposal methods

employed, and an estimate of the treatment efficiency typically achieved by such methods for that waste stream.

- Pattern of Minor Errors: A facility's annual reporting consistently demonstrates a pattern of errors or omissions, and the facility has received a NON for two or more reporting years for the same or similar errors or omissions.

This Policy sets forth factors for consideration that will guide the Agency in its proposed penalty calculations for civil administrative violations. It states the Agency's views as to the proper allocation of its enforcement resources. The Policy is not final agency action and is intended as guidance. This Policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA may decide to follow guidance provided in this document or to act at variance with it based on its analysis of the specific facts presented. This Policy may be revised without public notice to reflect changes in EPA's approach to calculating proposed civil administrative penalties, or to clarify and update text.

for Ann Pontius, Acting Director
Toxics and Pesticides Enforcement Division

April 12, 2001
Date