6/24/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COLONIAL PROCESSING, INC.,	)	Docket No. II EPCRA-89-0114
	)	
Respondent	)	

EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $6,000.00 is assessed for the violation of Section 313, 42 U.S.C. § 11023 previously found herein.

Appearances:

For Complainant:

Lee A. Spielmann, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region II
Jacob K. Javits Federal Building
New York, New York 10278

For Respondent
(appearing pro se):

John C. Gove
President
Colonial Processing, Inc.
1930 So. Sixth Street
Camden, New Jersey 08104

Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision

On August 7, 1990, an Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision (Partial Accelerated Decision) was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency (EPA, Complainant, or the Agency), found that Colonial Processing, Inc. (Respondent, Colonial Processing), had violated Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. § 11023 and the regulations promulgated pursuant thereto, to 40 C.F.R. Part 372, as alleged in the complaint. More particularly, it was found that Respondent failed to submit to EPA, by July 1, 1988, a Form R for each of two chemicals, Sulfuric Acid and Methyl Ethyl Ketone, which Respondent used at its facility during calendar year 1987 in excess of the applicable threshold level for reporting each such chemical.

II. Background - Processing of the Case

On August 28 and 29, 1990, a hearing, which had been requested by Colonial Processing, was held in Philadelphia, Pennsylvania, for the purpose of deciding the sole remaining issue of the amount, if any, of civil penalties which appropriately should be assessed for the violations previously found. Three witnesses were called by the Complainant; none by the Respondent. Six joint exhibits were received and several additional exhibits offered by Complainant or

by Respondent were received. (Mr. Gove appeared briefly under oath for the purpose of admitting Respondent's exhibits.)

EPA proposed a Class II administrative penalty of $10,000 for the two violations of Section 313 found. Respondent contends that the lowest possible penalty or no penalty at all should be assessed.

The Complainant submitted a post-hearing brief on November 13, 1990. Respondent elected not to file a post-hearing submission.

III. Findings of Fact

In addition to the findings of fact previously made in my Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. Colonial Processing's facility has less than 50 "full time employees," as that term is defined by 40 C.F.R. § 372.3. (Transcript (Tr.) 80, 90; Complainant's Exhibit (Compl. Exh.) 3.)

2. For calendar year 1987, Colonial Processing had sales of less than ten million dollars ($10,000,000). (Tr. 80, 90; Compl. Exh. 3; Respondent's Exhibit (Resp. Exh.) 6.)

3. Colonial Processing submitted Forms R for Sulfuric Acid and Methyl Ethyl Ketone for calendar year 1987 on or about May 4, 1989. (Tr. 95; Compl. Exh. 10.)

4. Since the enactment of EPCRA, EPA has engaged in a number of "out-reach" activities to inform members of industry of their responsibilities to report under Section 313 of EPCRA. EPA operates an industry assistance hot line telephone which is a toll free 800 number to provide information to any caller concerning the requirements of Section 313 of EPCRA. Around February 1988, EPA made a mass nationwide mailing of a brochure containing an explanation of the Section 313 reporting requirements to smaller companies, i.e., those with fewer than fifty employees, which may have been subject to the Section 313 reporting requirements. Prior to July 1988, mass mailings were sent to approximately 18,000 manufacturing firms, including all that had fewer than 50 employees, in New York and New Jersey, announcing a series of workshops to be conducted by EPA on Title III of SARA, including Section 313 requirements. Eight seminars were conducted in New Jersey. Respondent, Colonial Processing, Inc., was on the mailing list for the announcements. (Tr. 51-61; Compl. Exh. 9.)

5. During the first six months of 1990 the address which EPA used when mailing Section 313 information to Colonial Processing was

2500 Broadway, Drawer 14, Camden, NJ 08104. (Tr. 109-111, Resp. Exh. 11.)

6. Form R information that is submitted 10 months late would not be included in general reports already published and disseminated to the public, thus depriving the public of some sources of accurate and comprehensive information that EPCRA was designed to provide. (Tr. 64-68, 97-98.)

7. Form R information that is submitted late will not become accessible by the states and local users of such information in the computerized data bases of the EPA Toxic Release Inventory System and the National Library of Medicine until the data is put into the database, thus depriving the public of that source of information required by Section 313(j) of EPCRA, 42 U.S.C. § 11023(j). (Tr. 67-68.)

IV. Complainant's Contentions

The Complainant maintains that the penalty being sought has been determined in accordance with, and pursuant to, the provisions of the Enforcement Response Policy for Section 313 of EPCRA[1] (ERP or Section 313 ERP). It submits that the proposed penalty, derived from an application of the ERP to the facts in the case, represents a fair, reasonable and equitable penalty assessment that seeks to promote the interests of EPA in enforcing the provisions and objectives of EPCRA. More particularly, Complainant points out that the adjustment levels in the ERP take into account the

[1]Compl. Exh. 1.

economic conditions of small businesses such as Colonial Processing through consideration of the number of employees, the dollar volume of sales and the quantity of the chemical being used.

Complainant contends that the proposed penalty is fully justified because of Respondent's "extremely belated submission" of the required forms to EPA--just over ten months after they became due. The consequences of the belated submission were to frustrate EPA's efforts to fulfill its responsibilities to provide information to the general public under the Public Inventory Toxic Release Information System.

Complainant asserts that the penalty being sought is necessary and appropriate to attain the objectives Congress hoped to realize in its enactment of EPCRA. It insists that the holding in Riverside Furniture[2] should not govern the assessment of a civil penalty in this proceeding because of pronounced differences in the facts of the two cases. Thus, Complainant points out that the required Forms R were submitted 115 days late and 25 days after the EPA inspection in Riverside Furniture, while they were submitted 307 days late and 177 days after the EPA inspection in the present case. Also in Riverside Furniture the Court emphasized that, because the forms there had been submitted within 180 days of the July 1, 1988 deadline, the impact on the EPCRA program did not warrant the EPA having assigned circumstance level 1 to the violations.

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[2]In the Matter of Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-406S (September 28, 1989).

Complainant insists that in reviewing the EPA's application of the ERP to the facts of this case, which application gave rise to the penalty being sought, I, as Presiding Officer, "must uphold the penalty if any reasonable basis exists to do so."[3] Complainant argues that I am "required to uphold the Agency's decision unless the Court is unable to find any rational basis supporting the EPA action herein . . . ."[4] "Most certainly" EPA goes on, "this Court, as a reviewing court, is not to substitute its own judgment--its views on wisdom and efficiency--for that of the EPA."

Finally, Complainant avers that the record in this case demonstrates that Respondent is able to pay the penalty being sought by EPA and still maintain a level of financial viability and business operations equal to the level reflected in its tax returns for 1986 through 1988. Complainant maintains that the proposed penalty would not affect the ability of Colonial Processing to remain in business at a level comparable to the level it has maintained during this period of time. The Agency asserts that the issue is not whether Respondent would "feel" the impact of the penalty but whether Respondent's ability to continue in business would be affected. Complainant submits that EPA's financial analysis and evaluation of Respondent's financial situation through the use of the ABEL computer model demonstrates that Respondent could readily withstand being required to pay the proposed penalty

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[3]Complainant's Post-Hearing Brief (November 13, 1990) at 42 (emphasis added).

[4]Id. at 43.

without suffering any adverse consequences to its business operations or financial stability and certainly without placing its ability to remain in business in any jeopardy. Complainant emphasizes that Respondent has failed to demonstrate under any standard that it does not have the ability to pay the proposed penalty or that requiring it to pay that penalty would threaten its ability to remain in business.

V. Respondent's Contentions

The Respondent maintains that the proposed civil penalty is unfair and unreasonable considering the nature of the violation which was simply the late filing of a document. In assessing the proper penalty, the violation "should be considered late and under the penalties of an incomplete form rather than a failure to file."[5] The amount of the proposed penalty is equal to that which would be imposed upon an offender with ten times as much sales volume as Respondent. The proposed penalty would place "an extreme financial burden"[6] on Colonial Processing and would cause it irreparable harm.

Respondent filed the required reports following the inspection. Respondent is a small company without computer capability. In order to file the necessary reports, Respondent was required to go through its records manually to determine the amount

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[5]Response to Complaint, Joint Exh. 3 at 2.

[6]Id. at 3.

of paint and of solvent which was used during the time in question. This was a difficult, time consuming and laborious task.

Colonial Processing has never been charged with a violation of an environmental law prior to this complaint. Respondent has been unfairly singled out as a scapegoat while other offenders are not being penalized. This amounts to random selective enforcement.

VI. Applicable Statutory Provisions Governing Penalty Assessment[7]

Section 325(c)(1) of EPCRA governs the assessment of civil and administrative penalties for violations of the Section 313 reporting requirements. It permits the Administrator to assess a civil penalty of not more than $25,000 per violation. Section 325(c)(3) provides that each day a violation continues constitutes a separate violation for purposes of Section 325(c).

Section 325(c) of EPCRA does not expressly provide criteria to be considered in assessing a penalty for a violation of the reporting requirements of Section 313. However, Section 325(b) sets forth the criteria which must be considered in assessing penalties for violations of the emergency notification requirements under Section 304.

Section 325(b) establishes two types of administrative penalties which may be assessed for a violation of the emergency

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[7]This material is taken from my recent initial decision In the Matter of Pease and Curren, Inc., EPCRA-I-90-1008 (March 13, 1991) slip op. at 9-12.

notification requirements of Section 304 of EPCRA: Class I administrative penalties and Class II administrative penalties.[8]

Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), which provides for Class II administrative penalties, requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15. Section 2615 of Title 15 governs the assessment of penalties under the Toxic Substances Control Act (TSCA). Section 2615(a)(2)(B) of Title 15 provides that in "determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior

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[8]Section 325, 42 U.S.C. § 11045, provides, in pertinent part:

(b) Civil, administrative and criminal penalties for emergency notification

(1) Class I administrative penalty

(A) A civil penalty of not more than $25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title.

* * * * * *

(C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) Class II administrative penalty

A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title . . . . Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

such violations, the degree of culpability, and such other matters as justice may require." (Section 16(a)(2)(B) of TSCA.)

In contrast, Section 325(b)(1)(C) prescribes the following criteria for determining the amount of a Class I penalty: "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Thus, the only differences between the criteria which must be considered in assessing Class I and Class II civil penalties under Section 325(b) of EPCRA are that (1) the effect on the ability of the violator to continue to do business be taken into account for a Class II penalty but not for a Class I penalty, and (2) the economic benefit or savings (if any) resulting from the violation be taken into account for a Class I penalty but not for a Class II penalty.

Since EPCRA itself is silent as to the criteria which should be applied in assessing civil penalties under Section 325(c), the question is whether reference should be made to either or both sets of criteria which are utilized under Section 325(b). The legislative history of EPCRA fails to provide any guidance. It would appear that by setting only a maximum penalty of $25,000 for each violation of Section 313, Congress did intend that the penalties which are assessed under Section 325(c) be subject to some degree of discretion. Since Section 304, like Section 313, establishes reporting and notification requirements, it appears

reasonable to conclude that the criteria utilized in assessing penalties under Section 325(b) for violations of Section 304, although not binding, could serve as general guidelines for assessing penalties under Section 325(c) for violations of Section 313.

The penalties in this case are being assessed by an order made on the record after opportunity for hearing in accordance with Section 554 of the Administrative Procedure Act (APA). Because of the cross-reference to Section 2615 of TSCA found in Section 325(b)(2), Class II penalties for violations of Section 304 of EPCRA are also assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the APA. (This is in contrast to Class I penalties which are assessed by EPA through less formal administrative procedures.) Therefore, it would appear reasonable to rely upon the criteria spelled out in Section 2615(a)(2)(B) of TSCA.

VII. Application of Penalty Guidelines[9]

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. § 22.27(b):

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any

[9]Much of this material is taken from my recent initial decision In the Matter of Pease and Curren, Inc., slip op. at 13-15.

> civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Judicial Officer has held that "the requirement to give the guideline consideration is 'entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate.' [citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)]."[10]

While I must consider the civil penalty guidelines in determining the amount of the recommended civil penalty and must set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant, I am not bound to assess the same penalty as that proposed by the Complainant.[11] I may assess a different penalty if, upon consideration I conclude, for example, the guidelines have been improperly interpreted and applied by the Complainant; or circumstances in the case warrant recognition; or, where they may have been recognized by the Complainant, warrant a weight not accorded them by EPA;[12] or the

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[10]Bell and Howell Company, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 10, n. 6, quoting the Presiding Officer's Initial Decision.

[11]In re: Electric Service Company, TSCA Docket No. V-C-024, Final Decision No. 82-2, at 20, n. 23.

[12]Thus, for example, the Judicial Officer has held that: "There is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix . . . . The

penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

Therefore, I categorically reject Complainant's characterization of my role in determining a penalty assessment in this matter. My role is no more that of a "reviewing court" than Complainant's role is that of a trial court. As the Rules require, I am to "determine the dollar amount of the recommended civil penalty to be assessed." The Rules do not require me to uphold "the penalty recommended to be assessed in the complaint" unless I am "unable to find any rational basis" for EPA's recommended penalty. Instead, if I decide to assess a penalty different in amount from that sought by EPA, I am simply required to "set forth in the initial decision the specific reasons for the increase or decrease." Complainant's reliance upon the holdings in Chevron,

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guidelines were never intended to establish an inflexible policy which would force the presiding officer to elect between one amount or the other . . . . Instead, it is better to view the amounts shown in the matrix as points along a continuum, representing convenient bench marks for purposes of proposing and, in some instances, assessing penalties. Accordingly, if warranted by the circumstances, other points along the continuum may be selected in assessing a penalty. Although the guidelines do not purport to give specific guidance on how this should be done, it seems evident that, at a minimum, the additional evidence adduced at a hearing can be used as a basis for justifying deviations (up or down) from the amounts shown in the matrix. In other words, by viewing the amounts shown in the matrix as benchmarks along a continuum, a range of penalties . . . becomes available to account for, among other things, some of the less tangible factors which the presiding officer is in a unique position to evaluate. Moreover, the existence of this range constitutes tacit acknowledgement of the fact that, no matter how desirable, mathematical precision in setting penalties is impossible." Bell and Howell Co., (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 18-19 (emphasis added).

U.S.A. Inc. v. National Resources Defense Council, Inc.,[13] United States v. Shimer,[14] and Red Lion Broadcasting Co. v. F.C.C.[15] must be rejected.

In those cases there were challenges to the statutory bases for agency regulations which had been promulgated through publication in the Federal Register.[16] The tests which the Court enunciated were to be applied in the context of judging whether regulations promulgated by Federal agencies and published in the Federal Register to implement a statutory requirement are consistent with the statute authorizing the issuance.

Here, there is no challenge to any Agency regulation duly promulgated and published in the Federal Register. Indeed, no agency regulation is in issue; the ERP is the focus of our attention. In a nutshell, the question here is nothing more than one of the proper interpretation and application of an internal agency policy document - the ERP - to the facts of this case. The Agency regulation requires me to "consider" the ERP. I will comply with that direction.

The ERP provides for the determination of a gravity-based penalty amount, utilizing the factors of circumstance level and a penalty adjustment level. These factors are incorporated into a

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[13]467 U.S. 837 (1984).

[14]367 U.S. 374 (1961).

[15]395 U.S. 367 (1969).

[16]In Red Lion, the regulations were also challenged on constitutional grounds.

matrix which allows determination of the appropriate base penalty amount. The total penalty is determined by calculating the penalty for each violation on a per chemical, per facility basis.

Once the gravity-based penalty amount has been determined, upward or downward adjustments to the penalty amount are made in consideration of the factors which relate to the violator: voluntary disclosure, culpability, history of prior violations, ability to continue in business, and such other matters as justice may require.

EPA has proposed a penalty of $5,000 for each of the violations in this case or a total penalty of $10,000.

EPA classified Respondent's violations as nonreporting violations because Colonial Processing submitted its Forms R after EPA conducted its inspection at Colonial Processing on November 8, 1988. Therefore, the circumstance level for each of the violations (two toxic chemicals) was set at "Level 1."

After determining the circumstance level, the penalty adjustment level was determined by EPA. Since the ERP provides that the penalty adjustment level is based on the quantity of Section 313 chemical which is manufactured, processed, or used by the facility, and the size of the total corporate entity in violation, and since the Respondent company had sales of less than ten million dollars or less than 50 employees and used the Section 313 chemicals associated with the violation at less than 10 times the reporting threshold of 10,000 pounds, EPA set the penalty adjustment level at "Level C." Therefore the circumstance level

and penalty adjustment level for each chemical was set by EPA, with the resulting penalty, as follows:

a. Sulfuric acid - Level 1.C. - $5,000 and

b. Methyl Ethyl Ketone - Level 1.C. - $5,000

TOTAL PENALTY: $10,000.

After calculating the gravity-based penalty of $10,000 EPA considered the additional adjustment factors under the ERP and determined that no adjustments were appropriate.

VIII. Determination of Penalty Amount[17]

The seminal decision concerning the determination of penalties for violations of Section 313 of EPCRA was the decision issued by Judge Jones in Riverside Furniture which decision has become a final order of the Administrator pursuant to 40 C.F.R. § 22.27(c).

In that decision it was noted that "the filing of such reports [Forms R] was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed."[18]

It was found that "the EPCRA program must require voluntary and timely compliance with the Act and regulations to succeed in

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[17]Much of this material is taken from my recent initial decision In the Matter of Pease and Curren, Inc., slip op. at 18-21 and 31-33.

[18]Riverside Furniture, supra FN 2, at 10.

attaining the objective envisioned by the Act: having available information for the government and the public reflecting the location, character and quantities of toxic chemicals released by industry into and onto air, water and land. The Act and regulations provide for a date certain for the initial filing of Form[s] R . . . ."[19]

The decision also recognized the outreach efforts which EPA undertook to inform the regulated community of the Section 313 requirements. (See Finding of Fact 4 herein, supra p. 3.) In Riverside Furniture it was pointed out that "EPA outreach efforts were undertaken with the recognition that to achieve compliance with Section 313 of EPCRA on a broad scale would be difficult and that a lack of compliance would defeat the purposes of said Section 313 of the Act . . . . Its broad outreach program on the national, regional and state levels were designed to make the regulated community aware of the requirements of said Section 313 . . . ."[20] As for Riverside's professed lack of actual knowledge as a basis for penalty mitigation, it was found that "the success of such outreach efforts [by EPA] must be predicated not on whether Riverside, acting through its employees, had actual knowledge of what requirements of the Act were pertinent to its continued operation but, rather, on whether Riverside should have known of such requirements as a result of such efforts. On this premise,

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[19] Id. at 11. [Footnote omitted.]

[20] Id. at 6.

Riverside is charged with actual knowledge."[21] As the decision noted, the failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.[22]

"[H]owever," the decision noted, "in recognition of difficulties in making the regulated community aware of the provisions of subject regulation, the guidelines for the assessment of civil penalties provided, in the interest of assuring that such penalties are arrived at in a fair, uniform and consistent manner, that certain 'late filings' would be tolerated."[23]

In applying the ERP in Riverside Furniture it was noted that "[u]nder the guidelines, once the contact with Riverside was made by EPA, any report filed thereafter is considered to be a failure to report."[24] The decision held "that such disposition is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and consistent manner."[25]

Respondent does not contend that it lacked knowledge of the requirements of Section 313 of EPCRA. As for EPA's outreach efforts, Respondent did introduce into evidence a copy of an EPA

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[21]Id. at 7 [Footnote omitted.]

[22]Id. at FN 2, citing Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (M.D. Fla., 1970), aff'd 441 F.2d 728 (5th Cir. 1971), cert. denied, Howard v. Florida East Coast Ry. Co., 404 U.S. 897 (1971).

[23]Riverside Furniture at 11.

[24]Id. at 12.

[25]Id.

brochure entitled "Reporting Requirements under SARA Title III, Emergency Planning and Community Right-to-Know Act"[26] which had been mailed to Colonial Processing, Inc. at "2500 Broadway Drawer 14, Camden, NJ 08104."[27] In so introducing this exhibit, Respondent was apparently attempting to suggest that EPA had sent the brochure to the wrong address. As previously found, Colonial Processing is located at 1930 South 6th Street, Camden, New Jersey 08104.[28] Whether the address to which the EPA's brochure was sent was a proper mailing address for Colonial Processing at the time of mailing was not established. Nevertheless, Respondent did possess the document because Respondent introduced it into evidence. There was no forwarding address on the front of the mailing envelope, nor was there any other indication that "2500 Broadway Drawer 14 Camden, NJ 08104" was an address at which Respondent did not receive mail. Indeed, Respondent must have received the brochure because Respondent introduced a copy of it and the front of the mailing envelope into evidence.

Regardless of when or where or even whether Respondent received this particular mailing, Respondent failed to submit the required Forms R by July 1, 1988, long before this brochure was mailed sometime in the first six months of 1990.[29] Moreover, Respondent, like everyone else, is charged with knowledge of the

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[26]Resp. Exh. 11.

[27]Id. at 5.

[28]Partial Accelerated Decision, Finding of Fact 2 at 2.

[29]Tr. 109-111.

United States Code and rules and regulations duly promulgated thereunder.[30] Therefore, the contention implicit in Respondent's introduction of this documentary evidence provides no basis for the mitigation of the penalty herein.

I also reject Respondent's contention that he has been the victim of "random selective enforcement." EPA can legitimately enforce EPCRA against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance. Selectivity in prosecution of violations of the statute is not only inevitable, but also desirable when it conserves resources. EPA rationally may decide that imposing civil penalties on 10% or so of offenders is the best way to enforce the law against all. This means that no firm may insist that its rival be prosecuted.[31]

In determining the amount of the penalty to be assessed under the ERP for Section 313, I adopt the holding in Riverside Furniture that treating a late report submitted by a facility "after being contacted by EPA or an EPA representative in preparation for a pending inspection . . . or . . . after EPA begins an inspection"[32] as a failure to report "is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and

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[30]44 U.S.C. § 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947)."

[31]Falls v. Town of Dyer, Indiana, 875 F.2d 146, 148 (7th Cir. 1989).

[32]ERP at p. 8.

consistent manner."[33] Like Judge Jones in Riverside Furniture, "I find that the guidelines are impractical in application and produce a resultant civil penalty incommensurate with the facts presented by the record."[34]

Moreover, as previously noted, (p. 11, supra) as Presiding Officer I am required to determine the civil penalty "in accordance with any criteria set forth in the Act." Both Section 325(b)(1)(C) of EPCRA and Section 16(a)(2)(B) of TSCA require that I consider the "nature, circumstances, extent, and gravity of the violation" when assessing a civil penalty. While the Section 313 ERP establishes a "gravity-based" amount by considering a "circumstance level" and a "penalty adjustment level," the "circumstance level" takes into account "the seriousness of the violation" while the "penalty adjustment level is based on the quantity of the section 313 chemical . . . and the size of the total corporate entity in violation." To treat a late report as a failure to report in the facts of this case would distort the full nature, circumstances, extent, and gravity of the violation and would prevent me from properly applying these statutory criteria. I am compelled by EPCRA to give full weight to the totality of the nature, circumstances, extent, and gravity of the violations herein.

Whether a firm files a late report because of a general mailing from EPA explaining the requirement and/or announcing a

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[33]FN 25, supra.

[34]Pease and Curren, slip op. at 31. See also In the Matter of CBI Services, Inc., EPCRA-05-1990, (April 30, 1991) slip op. at 9-10.

workshop or seminar concerning the requirement or because of contact prior to or during an EPA inspection, the report is still, in fact, a late report. In each instance EPA's action has "catalyzed" the firm into complying with a legal obligation. Whatever may motivate a firm to file the required reports after the deadline, there is compliance, albeit tardy compliance, with the law. There is a failure to file a timely report in each of these circumstances, but there is no failure to file a report altogether. The filing of a late report by a firm after contact by EPA prior to or during an inspection does not create a nonreport. I am required by the statute to consider the actual nature, circumstances, extent and gravity of the violation, not a fictionalized version of the circumstances. In my view, the gravity of the violation is not increased because the late filing took place following such contact by EPA.

In Riverside Furniture Judge Jones determined that Circumstance Level 3 was appropriate. He cited the fact that the Forms R were received by EPA 115 days late and, hence, "the unfavorable impact on the EPCRA program was discernably less than had Riverside taken 180 days or more to file said reports."[35] He also "considered that the charge here made is a failure to report in 1988 (at the initiation of subject enforcement effort), and actually prior to promulgation of the Enforcement Response Policy on December 2, 1988."[36] In contrast, Colonial Processing filed the

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[35]Riverside Furniture at 12.

[36]Id.

Forms R more than 180 days late and not until May 4, 1989. As recognized in Findings of Fact 6 and 7, the late submission of Form R information has a serious impact upon the availability of such information. Therefore, giving full weight to the totality of the nature, circumstances, extent, and gravity of the violations herein, I determine the circumstance level to be that of "Late Reporting after 180 days" or Level 2.

There is no question that Respondent had sales of less than ten million dollars and less than 50 employees and used the Section 313 chemicals associated with the violation at less than 10 times the reporting threshold of 10,000 pounds.[37] Consequently, the penalty adjustment level should be set at C. Under the penalty matrix the base penalty amount for each violation must be set at $3,000 or a total base penalty amount of $6,000.

Respondent contends that EPA's proposed penalty assessment would place an extreme financial burden on the company and cause it irreparable harm. In support, Respondent introduced a letter from a Certified Public Accountant (CPA) who serves as corporate accountant for Colonial Processing. That letter states, in pertinent part:

> [I] feel that a penalty of this size [$10,000.00] would most definitely have an adverse effect on the day to day financial operations of the Company; more specifically, its ability to pay short term and long term obligations.
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> * * * * * * *

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[37]Findings of Fact 1 and 2, supra, pp. 2-3 and Partial Accelerated Decision, Findings of Fact 13 and 16 at 3-4.

> In consideration of the above, I would greatly appreciate an abatement or some sort of leniency regarding the above penalties in question so that Colonial Processing, Inc. may weather what appears to be a somewhat rough economic future.[38]

Section 16(a)(2)(B) of TSCA requires that I take into account Respondent's ability to pay and the effect of the penalty on Respondent's ability to continue to do business. Section 325(b)(1)(C) of EPCRA likewise calls for consideration of Respondent's ability to pay. The ERP for Section 313 includes, as an adjustment factor, the ability to continue in business. The ERP states that this factor should be rarely applied because the matrix incorporates an ability to pay factor.

Respondents have the burden to raise and establish their inability to pay proposed penalties.[39] Thus, the inability to pay a penalty is an affirmative defense and the Respondent bears the burden of going forward with the evidence to establish it.[40] While Respondent has raised the defense here, the opinion of the corporate accountant and his subsequent Financial Report for Colonial Processing, Inc. for the three-month period ending on October 31, 1989,[41] fail to establish either that Respondent is unable to pay the proposed penalty or that Respondent's ability to

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[38]Letter from Marc G. Ricchezza, Certified Public Account, to EPA, dated July 7, 1989 (Resp. Exh. 1).

[39]In re Edward Pivirotto and Josephine Pivirotto d/b/a E&J Used Tool Co., TSCA Appeal No. 88-1 (February 15, 1990) at 9.

[40]In re Helena Chemical Company, FIFRA Appeal No. 87-3 (November 16, 1989).

[41]Resp. Exh. 8.

continue in business would be seriously affected by payment of that penalty. The mere allegation of an "adverse effect" is not sufficient. As noted previously, Respondent offered no witnesses to substantiate its assertions regarding ability to pay.

The Complainant argues that the issue is not whether Respondent would "feel" the impact or "sting" of the penalty; the issue is whether Respondent's payment of the penalty would jeopardize its ability to remain in business as an entity functioning with that level of economic viability at which it had been functioning for the previous few years. I agree that under EPCRA the issue in this regard is as stated by Complainant or, in the alternative, whether Respondent is simply unable to pay the assessed penalty. The Respondent's assertions regarding its ability to pay the penalty amounts to little more than a claim that it would "feel" the penalty.

Moreover, EPA offered two witnesses--one an expert witness[42] who testified concerning the application of ABEL to Respondent's financial situation. ABEL is a computer program designed to help analyze and evaluate the financial health of privately held companies and their ability to finance civil penalties.[43] ABEL was designed to focus on the firms' ability to finance proposed

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[42]Tr. 181-82.

[43]Tr. 133; 170-71. See also, ABEL USER'S MANUAL, prepared for EPA by Putman, Hayes & Bartlett, Inc. of Cambridge, MA (30 September 1987) of which I take official notice. Market Street Ry. Co. v. Railroad Comm'n, 324 U.S. 548 (1945).

penalties through the use of current and projected cash flows.[44] This computer model compares the value of projected, internally generated cash flows to the cost of a proposed civil penalty.[45] This is a more stringent measure than a cash-on-hand measure which appears to be the measure urged by Respondent in its contention concerning the impact of EPA's proposed penalty. The solvency of the firm constitutes the underlying financial constraint on the ability of the firm to supplement internally generated cash with funds from borrowings and/or asset and equity sales.[46] ABEL uses data from a firm's federal income tax return as the primary input for financial information.[47] In this case, Colonial Processing's tax returns from 1986, 1987 and 1988 were used to make the ABEL analysis.[48]

In Phase I of the ABEL analysis, these data are used to calculate a series of financial ratios or balance sheet ratios for the firm.[49] Once the data have been entered, ABEL performs an analysis of the firm's financial ratios and provides some suggested interpretations of the results.[50] In Phase II, ABEL integrates the income tax data with additional input (e.g., the amount of the

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[44]Tr. 185-87.

[45]Tr. 267-71; 302.

[46]Tr. 229; 288; 300-01.

[47]Tr. 134; 147-52; 176-78.

[48]Tr. 138, 158-59.

[49]Tr. 176-78.

[50]Id.

proposed penalty, the years' dollars in which this amount is expressed and a set of standard financial values to perform a more sophisticated discounted cash-flow analysis.[51]

The standard values which are used in Phase II are: a reinvestment rate which has a standard value of 0,[52] a nominal discount rate,[53] the inflation rate which is the GNP deflator[54] and a marginal income tax rate.[55] To forecast the distribution of future cash flows for the firm, ABEL computes a weighted average and standard deviation of the firm's historical cash flows. ABEL forecasts cash flows for a five-year period and computes the present value of these cash flows.[56] From this present value, the present value of any required new investment and associated O&M expenditures is subtracted. The resulting net present value represents the maximum amount of a civil penalty the firm could pay based on the strength of the firm's projected future cash flows.

The ABEL analysis which was performed for Colonial Processing by EPA in 1989 provided the following interpretation of the firm's ability to pay:

> There is a 100.0% chance that the firm can finance the proposed settlement penalty of $10000.00 based on the strength of internally

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[51]Tr. 153-55; 177-79.

[52]Tr. 189-90.

[53]Tr. 190-91.

[54]Tr. 191-92.

[55]Tr. 192.

[56]Tr. 184-86; 203-05.

generated cash flows for the next five years.[57]

Furthermore, EPA's expert witness ran another ABEL analysis for Colonial Processing in 1990[58] which showed a very slight increase in Respondent's ability to pay the penalty, primarily because of adjustments for inflation between 1989 and 1990.[59] Thus, the 1990 ABEL analysis indicates a full ability of Respondent to pay the penalty being sought by EPA. Moreover, EPA's expert witness testified as to certain aspects of Respondent's tax returns which artificially reduced the income levels generated by the firm.[60] These included the carryover of net operating losses incurred in previous years, the salary levels of officers of the corporation, benefits such as the payment of life insurance premiums for the President of the corporation and loans to the President of the corporation.[61] On the basis of the ABEL analysis of the three years of tax data, Colonial Processing was deemed to have a positive cash flow that ranged from $60,000.00 to $125,000.00.[62]

In summary, Respondent has failed to establish an inability to pay the proposed penalty of $10,000.00 sought by EPA, or to

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[57]Compl. Exh. 7; Tr. 194-95.

[58]Compl. Exh. 11.

[59]Tr. 214-15.

[60]Tr. 228-29.

[61]Tr. 235-40; 314-15.

[62]Tr. 299.

establish that the proposed penalty would jeopardize its ability to remain in business as an entity functioning with that level of economic viability at which it had been functioning for the previous few years. Clearly, therefore, the lesser penalty of $6,000 which I propose to assess has not been shown to be beyond Respondent's ability to pay or to have an adverse effect on Respondent's ability to continue to do business. Therefore, no adjustment in the total base penalty amount is warranted.

I find no basis in the record of this matter to adjust the total base penalty amount under the other adjustment factors in the statute and the ERP.

ORDER[63]

Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of $6,000.00 is assessed against Respondent, Colonial Processing, for the violations of Section 313 of EPCRA.

IT IS ORDERED that Respondent, Colonial Processing, Inc., pay a civil penalty to the United States in the sum of $6,000.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 360188M
Pittsburgh, PA 15251

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[63]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region II
Jacob K. Javits Federal Building
New York, New York 10278

Attn: Karen Maples

Henry B. Frazier III

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: June 24, 1991
Washington, DC