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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

6/11/91  
4:04 PM

IN THE MATTER OF	)	
	)	
CBI SERVICES, INC.	)	Docket No. EPCRA-05-1990
	)	
Respondent	)	
	)	

EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, a civil penalty in the amount of \$99,000.00 is assessed for the violation of Section 313, 42 U.S.C. § 11023 previously found herein.

EPCRA, Enforcement Response Policy Civil penalty guidelines: Because the date of inspection of a facility can be determined by EPA in each instance with respect to each possible respondent, the regulated community cannot determine the point at which penalties for failure to report will increase under the guidelines. Sooner or later, disparity of treatment, or the appearance of disparity, must creep into the application of a policy obviously designed to avoid disparity.

Appearances:

For Complainant:	Susan M. Tennenbaum, Esq. Office of Regional Counsel Region V - EPA 230 South Dearborn Street Chicago, Illinois 60604
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For Respondent:	Michael Ohm, Esq. Bell, Boyd & Lloyd Suite 3000 70 West Madison Street Chicago, Illinois 60602
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Before: J. F. Greene  
Administrative Law Judge



reporting.<sup>2</sup> Respondent further admitted that reporting forms had to be submitted, for each of these three chemicals, to the EPA administrator on or before July 1, 1988, and that the forms were not filed until May 16, 1989, 320 days late. Respondent denied liability, in its amended answer to the complaint, for Counts IV, V, and VI, which charged that nickel, chromium, and manganese had been "processed," as that term is defined at 40 CFR § 372.5, in quantities which exceeded the reporting threshold of 75,000 pounds.<sup>3</sup> By order of February 28, 1991, complainant's motion for "accelerated decision" was granted as to liability. Respondent was found to have "processed" chromium, manganese, and nickel in quantities which exceeded the reporting threshold.<sup>4</sup> The parties were given through April 5, 1991, to brief further the issue of appropriate penalty.<sup>5</sup>

With respect to the amount of the penalty urged by complainant, it is pointed out that respondent admits that the "adjustment level" in the penalty calculation from the matrix which appears in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (hereafter

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<sup>2</sup> 40 CFR § 372.25(b).

<sup>3</sup> 40 CFR § 372.25(a).

<sup>4</sup> Order Granting in Part Complainant's Motion for "Accelerated Decision" and Denying Respondent's Motion for "Accelerated Decision," February 28, 1991.

<sup>5</sup> Id., p. 12.

EPCRA)<sup>6</sup> at page 9, has been appropriately determined by complainant for all six counts of the complaint.<sup>7</sup> At issue, therefore, is whether the "circumstance level" for the penalty in this case has been appropriately determined.

The "circumstance level" for each of the six violations has been determined by complainant to be "Level 1" for "Failure to Report." The penalty policy defines the term "Failure to Report" as follows:

If a report is submitted by a facility after the reporting deadline and after being contacted by EPA or an EPA representative in preparation for a pending inspection or for purposes of determining compliance or in the absence of such contact, after EPA begins an inspection (i.e. issuance of a Notice of Inspection), the violation is considered a failure to report violation.

Here, respondent filed a report for the six chemicals on May 16, 1989, 320 days after it was due (July 1, 1988), and more than three months after the date of the EPA inspection (February 7, 1989). Therefore, because the report was submitted "after the reporting deadline and after . . . EPA begins an inspection . . . ." complainant considers the May 16, 1989, a "failure to report." "Circumstance level 1" provides a \$25,000 penalty (at "adjustment level A") for the "processed" chemicals, and a \$17,000 penalty (at "adjustment level B") for the "otherwise used" chemicals. If the

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<sup>6</sup> Also known as Title III of the Superfund Amendments and Reauthorization Act ("SARA").

<sup>7</sup> See Complainant's Memorandum Regarding the Appropriateness of the Proposed Penalty, April 5, 1991, at 2; and Respondent's Motion for Accelerated Decision, May 21, 1990, at 22.

report had been submitted before EPA contacted respondent in preparation for the inspection, the "circumstance level" would have been lower, i.e. "circumstance level 2", with penalties of \$20,000 and \$13,000 for "late reporting after 180 days" <sup>8</sup> of the "processed" chemicals and "otherwise used" chemicals, respectively. The bright line between "failure to report" and "late filing after 180 days," therefore, according to the EPCRA § 313 Enforcement Response Policy, is the date on which EPA contacts a facility. The date on which EPA contacts a facility is likely to vary with circumstances, and will not be the same for every potential respondent. Whether the determination of "failure to report" or "late filing after 180 days" can be fairly made under the test specified by the Enforcement Response Policy is highly problematical. Presumably the policy and the penalty calculation matrix contained therein are intended to assure fairness and consistency among the regulated community. Yet, because the test is a shifting date, and is moreover a date to be determined by EPA in each instance with respect to each possible respondent, the result is potential unfairness. The date upon which penalties increase significantly for a given respondent is entirely within the control of the government in each case. Further, the point at which penalties increase, under this arrangement, cannot be determined by the regulated community after reading the penalty policy, except perhaps in connection with the reader's own matter,

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<sup>8</sup> Enforcement Response Policy for Section 313 of EPCRA, at 10.

and only then if EPA has already been in contact for an inspection. It is only reasonable to suppose, in connection with a penalty policy, that the point at which penalties increase dramatically must be set out clearly, that this point must be fixed, and must be the same for every member of the regulated community. Failing this, disparity of treatment must sooner or later creep into the application of a policy which was obviously designed to avoid disparity.

Two administrative law judges have reduced the "circumstance level," where the date of contact was used as the point at which penalties increase in situations similar to this one, from "level 1" to "level 3"<sup>9</sup> or "level 2."<sup>10</sup> Both judges found that ". . . the guidelines are impractical in application and produce a resultant civil penalty incommensurate with the facts presented by the record."<sup>11</sup>

The civil penalty herein must be determined in accordance with principles of fairness and criteria set forth in EPCRA. Section 325(b)(1)(C) of EPCRA provides that "the nature, circumstances, extent, and gravity of the violation" must be taken into account when assessing a civil penalty. As has been noted, the "adjustment

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<sup>9</sup> In the Matter of Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-406S, September 28, 1989, (Judge Marvin Jones), where respondent had filed 115 days late.

<sup>10</sup> Pease and Curren, Inc., Docket No. EPCRA-I-90-1008, March 13, 1991, (Chief Judge Henry B. Frazier, III), where respondent had filed more than a year after the July 1, 1988, due date.

<sup>11</sup> Riverside Furniture, *supra*, at 12; Pease and Curren, *supra*, at 32.

level," which is based upon the quantity of the § 313 chemical manufactured, processed, or used and the size of the respondent's total corporate entity,<sup>12</sup> has been conceded by respondent to be appropriate.

Respondent makes several arguments which go to the nature, circumstances, extent, and gravity of the violation. Chief among these arguments is that the extent of respondent's commitment to ". . . ensure environmental compliance and protection"<sup>13</sup> and attendant significant expense, including the hiring of two environmental consulting firms,<sup>14</sup> should reduce the penalty to a nominal level. These expenditures do, indeed, appear to be very high.

Respondent argues further that a determination as to whether section 313 of EPCRA, as detailed in EPA's "complex regulations"<sup>15</sup> was difficult to make with respect to respondent's steel plate welding operations, and that this consideration requires the penalty to be nominal. Other arguments relate to respondent's effort to comply, and to its view that the violations are "paperwork in nature and in no way relate to the illegal emission or release of the subject toxic chemicals."<sup>16</sup>

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<sup>12</sup> Enforcement Response Policy, at 11-12.

<sup>13</sup> Respondent's Memorandum in Opposition to EPA's Proposed Civil Penalty, April 5, 1991, at 5.

<sup>14</sup> Id., at 3.

<sup>15</sup> Id., at 7.

<sup>16</sup> Id.

It is noted that respondent clearly knew of the possible applicability of section 313 of EPCRA no later than August, 1987, almost one year before the date on which the reports were to be made, when an official of respondent's parent company sent a request to the Corporate Safety Director for respondent and affiliated companies, whose duties include "coordination of corporate environmental activities," to investigate the applicability of section 313.<sup>17</sup> Thereafter, the matter was taken up at a meeting of an association of steel plate fabricators, in October, 1987, March, 1988, September, 1988, and April, 1989, where opinion was that section 313 did not apply to steel plate fabricating operations.<sup>18</sup> Not until May, 1988, did respondent decide to retain a consultant "to conduct an environmental review to determine whether section 313 applied . . . ." <sup>19</sup> From June, 1988, to August, 1988, as the July 1, 1988, filing date passed, respondent considered various consulting firms.<sup>20</sup> The ". . . report [ultimately produced by the consultant] was less than certain as to § 313 applicability and recommended that CBI may be

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<sup>17</sup> Respondent's Memorandum in Support of Respondent's Motion for Accelerated Decision, Affidavits of J.R. Rhudy, May 14, 1990, at 1, and James W. Exline, May 14, 1990, at 2.

<sup>18</sup> J. R. Rhudy Affidavit, supra, n. 17, at 2.

<sup>19</sup> James W. Exline Affidavit, supra, n. 17, at 2.

<sup>20</sup> J. R. Rhudy Affidavit, supra, n. 17, at 2.

covered by the § 313 reporting requirements."<sup>21</sup> Respondent points out that the report, received in January, 1989, arrived "after EPA's issuance of the Penalty Policy."<sup>22</sup> Under the circumstances of an impending deadline, respondent could have moved much more quickly to avoid late filing in a situation where there was reason to believe that the government's view of the applicability of section 313 differed from industry's view.<sup>23</sup> Nor does any legal principle come to mind that suggests that the mere decision to engage a consulting firm either tolls a regulatory filing date or denotes enormous complexities in questions of regulatory interpretation.

Considering next respondent's suggestion that its significant expenditures in connection with compliance efforts may be regarded as environmentally beneficial to reduce the amount of the penalty, it is clear that efforts to comply with a regulatory scheme may be congratulated, and may be beneficial to the environment, but are not "environmentally beneficial expenditures" such as might serve in lieu of paying a penalty where violations have been found.<sup>24</sup> Such expense as respondent has shown, while significant, is not

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<sup>21</sup> Respondent's Memorandum in Support of Respondent's Motion for Accelerated Decision, at 5.

<sup>22</sup> Id., at 5-6. This statement is attributed to p. 2 of Mr. Exline's affidavit, but does not appear there. The significance of the issue date for the penalty policy is unclear.

<sup>23</sup> "By virtue of the inconsistent views of industry and EPC, affiant was instructed by CBI management to interview and recommend an expert consulting firm to investigate the Section 313 applicability issue," J. R. Rhudy Affidavit, supra, n. 17, at 2.

<sup>24</sup> Enforcement Response Policy, supra, n. 8, at 16-17.

shown to be over and above what would be required to comply with the law.

Respondent contends also that the nature of the violation here, "paperwork," should cause a reduction in the penalty. In this connection, it will be found, as Judge Jones found in *Riverside Furniture Corporation*,<sup>25</sup> that ". . . 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" may indeed be paperwork, but it is no mere paperwork. Timely compliance with EPCRA and implementing regulations must be had in order to achieve statutory objectives.

Nothing further appears in the moving papers and pretrial exchange previously filed which would serve to reduce the "circumstance level" of the penalty amount as calculated from the Enforcement Response Policy matrix. Accordingly, from all that has been argued and shown here, it is found that "circumstance level 2" is the appropriate level, and the penalty will be calculated accordingly.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The holding in *Riverside Furniture*, *supra*, n. 9, at 12, to the effect that considering a report submitted late, and after EPA contact with the facility, is "arbitrary and opposed to the expressed interest of arriving at a civil penalty in a fair,

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<sup>25</sup> N. 9, *supra*, at 11.

uniform, and consistent manner," is adopted. Further, based upon all the circumstances here, including filing 320 days late, and taking particular note that respondent knew of the possible applicability of section 313 of EPCRA in August, 1987 -- and should have known no later than the June, 1987, Federal Register publication of the proposed rule (which explained the term "process" sufficiently to alert respondent to the possibilities) it is determined that "circumstance level 2" is the appropriate "circumstance level" here.

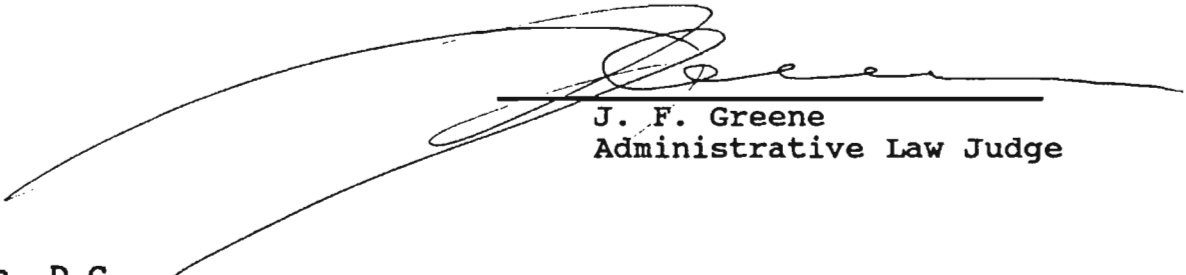
2. Based upon all the circumstances presented, and taking into account the nature, circumstances, extent, and gravity of the violations previously found (see Order Granting in Part Complainant's Motion for "Accelerated Decision" and Denying Respondent's Motion for "Accelerated Decision," February 28, 1991), it is determined that no further penalty adjustments under the "adjustment factors" guidelines of the Enforcement Response Policy, supra, n. 8, at pages 13-18, are appropriate.

3. "Penalty matrix adjustment levels," based upon the amounts of chemicals manufactured, processed, or used, and size of the entire corporate organization, are admitted by respondent to be at the "B" level. The appropriate "circumstance level" for the penalty here is "level 2." The penalty is calculated, accordingly, at \$20,000 per violation for "processed" chemicals, and \$13,000 per violation for "otherwise used" chemicals, based upon the matrix provided in the Enforcement Response Policy, supra, n.8, at page 9.

ORDER

Pursuant to section 325(c) of EPCRA, 42 U.S.c. § 11045(c), a civil penalty in the amount of \$99,000 is assessed against respondent CBI Services, Inc., for violations of EPCRA. Payment of the assessed penalty shall be made within 60 (sixty) days after receipt of this order by forwarding a cashier's check or certified check made payable to the Treasurer, United States of America, to:

Regional Hearing Clerk  
US EPA - Region 5  
P. O. Box 70753  
Chicago, IL 60673

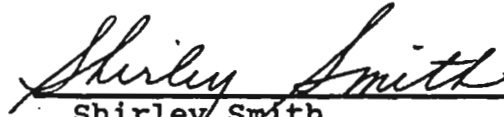


J. F. Greene  
Administrative Law Judge

Washington, D.C.  
April 30, 1991

CERTIFICATE OF SERVICE

I hereby certify that the original of the "Order Granting Motion for "Accelerated Decision" in the CBI Services, Inc. was mailed to the Regional Hearing Clerk , Region V, on May 1, 1991, and copies were sent to the complainant and respondent.

  
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Shirley Smith  
Secretary to Judge J. F. Greene