United States Environmental Protection Agency

Office of Solid Waste and Emergency Response

EPA

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TITLE: Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act

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LEVEL OF DRAFT

- ☐ A — Signed by AA or DAA
- ☒ B — Signed by Office Director
- ☐ C — Review & Comment

REFERENCE (other documents):

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United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1. Directive Number: 9841.2

2. Originator Information

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3. Title: Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act.

4. Summary of Directive (include bnef statement of purpose)

The Directive provides guidance to EPA Regions on assessing civil administrative penalties under EPCRA and CERCLA section 103.

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Darlene Williams	7/3/90
10. Name and Title of Approving Official	Date

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JUN 13 1990

MEMORANDUM

SUBJECT: Transmittal of the Final Penalty Policy for CERCLA §103 and EPCRA §§302-312

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

Michael J. Walker
Acting Associate Enforcement Counsel
for Pesticides and Toxic Substances
Office of Enforcement

TO: Addressees

The purpose of this memorandum is to transmit the Final Penalty Policy for the Emergency Planning and Community Right-to-Know Act (EPCRA) §§302-312 and CERCLA §103. This policy is effective immediately and should be used to calculate penalties in administrative complaints and used to determine the minimum acceptable settlement amount in civil judicial cases.

This policy reflects input from a number of Headquarters and Regional offices. Our thanks go out to all who provided their comments and insights. It could not have been done without your assistance.

Attachment

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OSWER DIR. #9841.2

Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act

United States Environmental Protection Agency

Office of Solid Waste and Emergency Response
Office of Waste Programs Enforcement

and

Office of Enforcement

[June 13, 1990]

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I. INTRODUCTION

The Superfund Amendments and Reauthorization Act of 1986 (SARA) created the Emergency Planning and Community Right-To-Know Act (EPCRA). EPCRA §325 authorizes the U.S. EPA Administrator to issue orders compelling owners or operators of facilities to comply with §§302(c) and 303(d) relating to Emergency Planning and to assess penalties administratively for violations of §304 Emergency Notification, §311 Material Safety Data Sheets, §312 Emergency and Hazardous Chemical Inventory, §313 Toxic Chemical Release Forms, §322 Trade Secrets, and §323(b) Provision of Information to Health Professionals, Doctors and Nurses. The EPA Administrator delegated this authority to the Regional Administrators by EPA delegation No. 22-3 dated September 13, 1987. Delegation 22-3 was updated by the Administrator on October 31, 1989.

SARA also amended the enforcement provision for violation of §103(a) or (b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA §103(a) and (b) require the person in charge of a facility or vessel to notify the National Response Center (NRC) immediately after the release of a hazardous substance in an amount that exceeds its reportable quantity. CERCLA §109 authorizes the President to assess penalties for violations of CERCLA §103(a) and (b). This authority has since been delegated to the Regional Administrators through the EPA Administrator by EPA delegation No. 14-31 dated September 13, 1987.

Because the reporting requirements for CERCLA §103(a) and (b) and EPCRA §304 are similar and violations of these provisions may arise out of the same set of facts, EPA has decided to combine enforcement of these provisions where possible. Also, EPA proposed in a formal rulemaking that all EPCRA extremely hazardous substances (EHSs) be included on the CERCLA hazardous substance list. When this is accomplished, releases required to be reported under EPCRA §304 will require notification of the National Response Center (NRC) as well.

This penalty policy will provide guidance to Regional EPA case development teams in assessing administrative penalties for violations of CERCLA §103(a) and (b) and EPCRA §§304, 311, and 312. This policy should also be used to develop internal negotiation penalty figures for civil judicial enforcement actions. Other EPCRA provisions not covered by this policy include §§313, 322, and 323. On December 2, 1988, the Office of Pesticides and Toxic Substances (OPTS) issued penalty assessment guidance for violations of §313. The Office of Waste Programs Enforcement (OWPE) is coordinating with OPTS to develop an enforcement response policy for EPCRA §§322 and 323.

This penalty policy provides a framework for assessing penalties within the Agency's established goals of:

- fair and equitable enforcement of the regulated community and appropriateness of the penalty to the gravity of the violation committed;
- deterrence; and
- swift resolution of environmental problems.

This policy does not discuss whether or not an enforcement action seeking a penalty is the correct enforcement response given the specific violative condition. Rather, this policy focuses on determining what the proper civil penalty should be given that a decision has been made to pursue that line of enforcement.

This policy is immediately applicable and should be used to calculate penalties for all administrative actions concerning violations of CERCLA §103(a) and (b) and violations of EPCRA §§302, 303, 304, 311, and 312 instituted after the date of the policy, regardless of the date of violation.

In civil judicial cases, EPA may use the policy to calculate the minimum acceptable penalty amount for settlement purposes, and may use the narrative penalty assessment criteria set forth in the policy to argue for as high a penalty as the facts of a case justify. EPA will revise these calculations as the case progresses to the extent new facts arise which warrant different evaluation of the penalty policy criteria.

Because this policy is intended to provide guidance in assessing administrative and civil judicial penalties only, it does not constitute a statement of EPA policy regarding the appropriate circumstances in which the United States may prosecute violations of CERCLA §103 and EPCRA §304, nor the criminal sentence that a Court should impose upon conviction for violations of either of these two provisions of Federal law.

The procedures set out in this document are intended solely for the use of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

II. STATUTORY REQUIREMENTS FOR ASSESSING ADMINISTRATIVE PENALTIES UNDER CERCLA §109 AND EPCRA §325.

CERCLA §103(a) and (b) require the person in charge of a facility or vessel from which a CERCLA hazardous substance has been released in an amount that meets or exceeds its reportable quantity (RQ) to immediately notify the NRC as soon as he/she has knowledge of the release. Violation of the requirements of CERCLA §103 may result in a Class I penalty not to exceed $25,000 per violation. CERCLA §109(a)(3) states that in assessing a Class I penalty for violations of CERCLA §103, EPA must 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 other matters as justice may require."

Violations of CERCLA §103(a) or (b) may also result in a Class II penalty not to exceed $25,000 per day for each day the violation continues. For second or subsequent violations, the amount of the Class II penalty is not to exceed $75,000 for each day in which the violation continues. CERCLA §109(b) states that Class II penalties 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 after notice and opportunity for hearing on the record in accordance with the Administrative Procedure Act, 5 U.S.C. 554.

Under CERCLA §103(b)(3), any person who fails to notify the appropriate agency of the United States Government or who submits in such notification any information which he knows to be false and misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 of the U.S. Code or imprisoned for not more than 3 years (or not more than 5 years for a second or subsequent conviction), or both.

EPCRA §302 requires the owner or operator of a facility that has present any extremely hazardous substances (EHSs) in amounts that exceed the chemical-specific threshold planning quantity (TPQ) to notify the State Emergency Response Commission (SERC) that the facility is subject to the planning provisions of the Act. For facilities with existing inventories of EHSs in excess of the TPQs, the deadline for notification was May 17, 1987. Thereafter, if a facility newly acquires an EHS in excess of the TPQ, the owner or operator is required to notify the SERC and the Local Emergency Planning Committee (LEPC) within 60 days. EPCRA §325(a) authorizes EPA to issue orders compelling compliance. The U.S. District Court has authority to enforce the order and assess penalties of up to $25,000 per violation per day.

Section 303(d) requires owners or operators subject to §302 to provide the LEPC with the name of a person who will act as the facility emergency coordinator. Additionally, §303(d)(3) requires the owner or operator to promptly supply information to the LEPC upon request. The scope of the information request encompasses anything necessary for developing and implementing the emergency plan. EPA is authorized to issue orders compelling compliance with §303(d). The U.S. District Court has authority to enforce the order and assess penalties of up to $25,000 per violation per day.

EPCRA §304(a) requires the owner or operator to notify immediately the appropriate governmental entities for any release that requires CERCLA notification and for releases of EPCRA §302 EHSs. The notification must be given to the SERCs for all States affected by the release and to the community emergency coordinators for the LEPCs for all areas affected by the release. Additionally, EPCRA §304(c) requires any owner or operator who has had a release that is reportable under EPCRA §304(a) to provide, as soon as practicable, a follow-up written notice (or notices) updating the information required under §304(b).

Section 325(b)(1) authorizes EPA to assess a Class I penalty of up to $25,000 per violation of any requirement of §304. EPCRA §325(b)(1)(C) states that in determining the amount of any Class I penalty assessed for a violation of §304, 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 other matters as justice may require."

Section 325(b)(2) authorizes the Administrator to assess a Class II penalty for violations of §304 in an amount not to exceed $25,000 for each day a violation continues. For second or subsequent violations, the amount of the Class II penalty is not to exceed $75,000 for each day in which the violation continues. Any civil penalty under §325(b)(2) 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 §16 of the Toxic Substances Control Act (TSCA). TSCA §16 mandates that EPA consider the same factors in assessing penalties that are laid out in EPCRA §325(b)(1)(C) and includes the additional requirement for EPA to consider the effect on the ability to continue to do business. EPA interprets EPCRA §325(b)(2) to mean that the Agency must follow the procedural aspects of TSCA §16 (i.e., using the Consolidated Rules of Practice codified at 40 CFR Part 22) and consider §16 statutory

factors for assessing penalties, but not any specific penalty policies developed by the Agency under TSCA §16.

Under EPCRA §325(b)(4), any person who knowingly and willfully fails to provide notice in accordance with section 304, shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than two years, or both. In the case of a second or subsequent conviction, such person shall be fined not more than $50,000 or imprisoned for not more than 5 years, or both.

EPCRA §311 requires that the owner or operator of a facility who is required to prepare or have available a Material Safety Data Sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act of 1970, shall submit to the SERC, LEPC, and the fire department with jurisdiction over the facility, on or before October 17, 1987 (or 3 months after the owner or operator first becomes subject to OSHA), a MSDS for each such chemical present at the facility in quantities equal to or greater than 10,000 pounds (or a list of such chemicals as described in that section). If the hazardous chemical is a listed EHS under §302, the threshold for reporting is 500 pounds or the chemical-specific threshold planning quantity (TPQ), whichever is less.

For facilities newly covered by EPCRA §311 as a result of the OSHA Hazard Communication Standard expansion to the non-manufacturing sector, MSDSs or a list of MSDSs were required to be submitted by September 24, 1988 to the SERC, LEPC and fire department with jurisdiction over the facility. Construction industry facilities, due to a court ordered delay, were required to comply by April 30, 1989. Additionally, if a facility changes its inventory and becomes subject to EPCRA §311, the facility must report within 3 months.

Section 312 of EPCRA provides that the owner or operator of a facility required to prepare or have available a MSDS for a hazardous chemical under OSHA, shall submit to the SERC, LEPC, and the fire department with jurisdiction over the facility, by March 1, 1988 (and thereafter annually), a completed emergency and hazardous chemical inventory form containing the information required under that section.

For non-manufacturing facilities that were newly covered by the OSHA expansion, the first reporting deadline for EPCRA §312 was March 1, 1989. Facilities in the construction industry must report for the first time by March 1, 1990. Additionally, if a facility changes its inventory and becomes subject to EPCRA §312, the facility must report by March 1 of the following year for the previous year's inventory.

EPCRA §325(c) states that any person who violates §§312 is liable for a penalty in an amount not to exceed $25,000 for each violation. For violations of §311, §325(c)(2) provides that the violator is subject to a penalty in an amount not to exceed $10,000 per violation. Section 325(c)(3) states that each day a violation of §§311 or 312 continues constitutes a separate violation. The statute provides no further guidance for calculating penalties under §325(c) for violations of §§311 and 312. However, as a matter of policy, the Agency will use the statutory factors listed in §325(b)(1)(C) as guidance in calculating penalties for §§311 and 312.

III. ELEMENTS OF THE CIVIL PENALTY SYSTEM

The civil penalty system established in this document is designed to comport with the requirements for assessing administrative penalties established in CERCLA §109, 42 U.S.C. 9609 and EPCRA §325, 42 U.S.C. 11045. Penalties are to be determined in two stages. First, a preliminary deterrence (base) penalty is calculated using the statutory factors[1] that apply to the violation (nature, circumstances, extent, and gravity). After that base penalty is calculated, the statutory factors that apply to the violator are considered (ability to pay/continue in business, prior history of violations, the degree of culpability, economic benefit or savings, and other matters as justice may require). Together, the two calculations will yield a penalty amount that considers all the statutory factors and is appropriate for the violation. To determine the base penalty, the following factors related to a violation are considered:

- The "Nature" of the violation;
- The "Extent" of the violation;
- the "Gravity" of the violation; and
- The "Circumstances" of the violation.

These factors are incorporated into one matrix for CERCLA §103 and EPCRA §302, §303, §304, and §312 violations and another

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[1] Note "statutory factors" apply as a matter of law only to Class I penalties under CERCLA §109(a)(3) for violations of CERCLA 103 and EPCRA §325(b)(1)(C) for violations of §304 only. EPA applies them to Class II penalties and violations of EPCRA §§302, 303, 311, and 312 as a matter of policy.

matrix for §311 violations. Two matrices are used because of the difference in the statutory maximum associated with the different violations. For §311 the maximum daily amount is $10,000; for CERCLA §103 and EPCRA §§302, 303, 304 and §312, the first violation maximum daily amount is $25,000. The base penalty can be calculated from the matrices in Table I (Infra, Page 20).

The penalty amounts in the matrix were established so that a worst-case scenario violation could result in the statutory maximum penalty being assessed. The Agency believes that the amount of the chemical involved in the violation and the timeliness of the required reports are both significant factors in determining the appropriateness of a penalty. The penalty calculation scheme in this policy assumes that the greater the quantity of chemicals one uses in conducting business operations, the more likely that a violation of the reporting requirements will undermine the emergency planning, emergency response, and right-to-know intentions of CERCLA §103 and EPCRA. It also assumes that the greater the quantity of chemicals one uses in conducting business operations, the more responsible one should be for the safe handling of those chemicals in both emergency and non-emergency situations. Thus, the penalty scheme in this policy is equitable and should provide an appropriate level of deterrence to would-be violators.

The two primary factors used to establish the penalty amount in the matrix (gravity and extent) are equally weighted. Thus, the matrices are symmetrical. The penalties range from 100% of the statutory maximum penalty to 10%. The mid range penalty cells reflect 66%, 33%, 25%, and 18% of the statutory maximum penalty. Two penalty amounts are displayed in each cell of the matrices, with the lower amount being 80% of the upper range of the cell. These penalty amounts were developed under the assumption that the violator has the ability to pay.

A. Use of the Matrix

The success of EPCRA is attained primarily through voluntary, strict and comprehensive compliance with the Act and its regulations. Deviation from the reporting requirements weakens the expressed intent of the Act to allow communities to plan for and respond to chemical emergencies and to allow citizens guaranteed access to information on chemical hazards present in their community.

Owners or operators of facilities are responsible for ensuring that reports for each chemical required to be submitted under §§304, 311, and 312 are submitted to all recipients on or before the required deadline. Failure to submit the required report to any one of the recipients by the reporting deadline is

a violation subject to the full penalty allowed by the applicable section of EPCRA. For example, if Company X fails to submit a §312 inventory form for its hazardous chemicals to all three points of compliance (SERC, LEPC, fire department), it is liable for three separate $25,000 per day penalties. The term "points of compliance" refers to the specific entities designated to receive submissions and notices under EPCRA.

In assessing penalties, EPA shall consider Respondent's failure to submit required reports to each point of compliance as separate violations. Accordingly, the matrix should be used for each separate violation of a given section. A facility may submit information on one chemical to each of the three recipients at different times. Therefore, the extent factor may be different for each violation resulting in different penalty amounts. For first time violators, where the facts and circumstances of the case warrant it, e.g., it is clear that the respondent had no prior actual knowledge of the CERCLA §103 or EPCRA reporting requirements, Regions have the option to assess one penalty for multi-point of compliance situations. For second or subsequent violations, penalties should be assessed per point of compliance.

The penalty amounts shown in Table I are meant for first time offenders. For second or subsequent violations of CERCLA §103 and EPCRA §304, the Acts authorize penalties of up to $75,000 per violation per day. For these violations, treble the amount shown at the appropriate position of the matrix. Second and subsequent violations of §§311 and 312 may be addressed through per day assessment of the base penalty found on the matrix. (See also, the sections on multi-day penalties and prior history of violations.)

IV. DETERMINATION OF THE BASE PENALTY

A. Nature

Nature describes the type of violation or requirement violated. In the context of this penalty policy, it is used to determine which specific penalty guidelines should be used to determine appropriate matrix levels of extent and gravity. For the purposes of the EPCRA and CERCLA reporting requirements, there are basically two types of violations: emergency response violations and emergency preparedness/right-to-know violations. Emergency response violations are those in which the violator failed to perform some function or duty during or after a release of a CERCLA hazardous substance or an EPCRA extremely hazardous substance (EHS). Emergency preparedness /right-to-know violations are those in which the violator was required to submit

notifications, information, or reports under the EPCRA statutory or regulatory timeframes. The types of violations addressed by this penalty policy include, but are not limited to:

i). Emergency Response Violations

- Failure to notify the National Response Center as required under CERCLA §103(a) or failure to provide all of the information required by statute or implementing regulations.

- Failure to notify all affected State Emergency Response Commissions (SERCs) and the emergency response coordinators for all affected local emergency planning committees (LEPCs) immediately as required under §304(a) or failure to provide all of the information required by statute or implementing regulations.

- Failure to submit a written follow-up report to all affected State emergency response commissions (SERCs) and the emergency response coordinators for all affected local emergency planning committees (LEPCs) as soon as practicable after the release as required under §304(c) or failure to provide all of the information required by statute or implementing regulations.

ii). Emergency Preparedness/Right-to-Know Violations

- Failure to notify the State Emergency Response Commission that the facility is subject to the provisions of the Act as required under EPCRA §302.

- Failure to inform the LEPC of the name of the facility emergency coordinator as required under EPCRA §303(d)(1).

- Failure to notify the LEPC of any relevant changes at the facility as required under §303(d)(2).

- Failure to provide information to the Local Emergency Planning Committee (LEPC) upon request as required under EPCRA §303(d)(3).

- Failure to submit Material Safety Data Sheets (MSDSs) or a list of MSDSs (or failure to include a chemical on the list) to each of the following: the appropriate LEPC; the SERC; and the fire department with jurisdiction over the facility as required under EPCRA §311(a).

- Failure to submit a MSDS to the LEPC upon request as required under EPCRA §311(c).

- Failure to submit (or incomplete submission of) Emergency and a Hazardous Chemical Inventory Form to each of the following: the appropriate LEPC; the SERC; and the fire department with jurisdiction over the facility as required under EPCRA §312.

- Failure to provide Tier II information as described in EPCRA §312(d) to a SERC, LEPC, or fire department upon request as required under EPCRA §312(e).

B. Extent

The extent factor is used in this penalty policy to reflect the amount of deviation from CERCLA or EPCRA and their regulatory requirements. In other words, a violation may range from being substantially in compliance with the provisions of CERCLA §103 or EPCRA to being in total disregard of the requirement. Because the immediate notification requirements under CERCLA §103 and EPCRA §304 simply require phone calls to the NRC, SERC, and LEPC community emergency coordinator, deviation from the requirement is mainly measured in terms of timeliness. The person providing the notice must provide the information required in 40 CFR Part 355.40 (chemical identity, estimated quantity released, time/duration of the release, etc.) to the extent known at the time of notice and so long as no delay in notice or emergency response results.

LEVEL 1: The violation deviates from the requirements of the statute to such an extent that there is substantial noncompliance.

LEVEL 2: The violation significantly deviates from the requirements of the statute, but some of the requirements are met.

LEVEL 3: The violation deviates somewhat from the requirements of the statute, but there is substantial compliance.

i). Emergency Response Violations

Under both CERCLA and EPCRA, in the event of a reportable release, notification of the proper authorities is required to occur immediately after the owner, operator or person in charge has knowledge of the release. The statutes, and regulations codified at 40 CFR Parts 302 and 355, identify the information required to be reported in the event of an accidental release. A

delay in the notification, or incomplete notification, could seriously hamper Federal and State response activities and pose serious threats to human health and the environment. Thus, the extent factor focuses on the notification and follow-up actions taken by the respondent and the expediency with which those actions were taken.

The statutes require that notification be made by the person in charge (or owner or operator) immediately after he/she has knowledge of a release of an RQ or more of a substance. Although this policy does not define "immediate", it does establish guidelines to assist Agency personnel in determining whether or not an "immediate" standard was met. The immediate notification is required to allow Federal, State, and local agencies to determine what level of government response is needed and with what urgency the response must take place. Early and effective communication of the release event is crucial. At some point, the delay in notification is the same as no notification at all. For both the CERCLA and EPCRA notification requirements, EPA may assess the statutory maximum for any notification that does not occur "immediately" after the "person in charge" (CERCLA) or the "owner or operator" (EPCRA) has knowledge of the release. The levels identified below reflect the benefit of expeditious notification by discounting from the maximum statutory penalty for the timeliness of the notification.

LEVEL 1:

CERCLA §103: No notification to the NRC within 2 hours after the person in charge had knowledge that a reportable quantity of a substance was released unless extenuating circumstances existed that prevented notification.

EPCRA §304(a): No notification to the appropriate SERC(s) and LEPC(s) within 2 hours after the owner or operator had knowledge of the release unless extenuating circumstances existed that prevented notification.

EPCRA §304(c): No written follow-up report to the appropriate SERC(s) and LEPC(s) within 2 weeks following the release unless extenuating circumstances prevented its submission.

LEVEL 2:

CERCLA §103: No notification to the NRC within 1 hour (but within 2 hours) after the person in charge had knowledge that a reportable quantity of a substance was released unless extenuating circumstances prevented the notification.

EPCRA §304(a): No notification to the appropriate SERC(s) and LEPC(s) within 1 hour (but within 2 hours) after the owner or operator had knowledge of the release unless extenuating circumstances prevented the notification.

EPCRA §304(c): No written follow-up report to the appropriate SERC(s) and LEPC(s) within 1 week (but within 2 weeks) following the release unless extenuating circumstances prevented its submission.

LEVEL 3:

CERCLA §103: No immediate notification to the NRC, i.e., although notification occurred within one hour, the facts and circumstances indicate that the notification could have been made sooner then actually made.

EPCRA §304(a): No immediate notification to the appropriate SERC(s) and LEPC(s), i.e., although notification occurred within one hour, the facts and circumstances of the incident indicate that the notification(s) could have been made sooner than actually made.

EPCRA §304(c): No written follow-up report to the appropriate SERC(s) and LEPC(s) as soon as practicable, i.e., although follow-up notification occurred within one week, the facts and circumstances of the incident indicate that the follow-up was not as soon as practicable.

ii). **Emergency Preparedness/Right-to-know Violations**

The emergency preparedness/right-to-know provisions require that owners or operators submit information to State and local entities. For emergency preparedness/right-to-know violations, the extent factor reflects the potential deleterious effect the noncompliance has on the Agency's, SERC's or LEPC's ability to implement the Act or the public's ability to access the information. For each of these violations, the Agency could

assess the statutory maximum for each violation on a per day basis. However, the Agency can exercise discretion in penalizing violations to set amount levels below the statutory maximum for differences in the extent of the violation. Extent addresses the timeliness and utility of reports submitted. Therefore, the extent factor is used, in part, to provide some built-in incentives for nonreporters to submit the required reports (self confess) as soon as possible, albeit late, and to provide incentives for submitters to fill out the forms in a manner consistent with the statutory and regulatory requirements.

The goal of this part is to establish a standard for timeliness and completeness. It will allow potential violators to know by what standard penalties may be assessed should they violate EPCRA. It will also promote Agency consistency in assessing penalties by establishing uniform assessments for late reporting and failure to report.

The matrix levels for measuring extent for the emergency planning/right-to-know violations are as follows:

LEVEL 1:

EPCRA §302:	Respondent fails to notify the SERC that it is subject to the Act within 30 calendar days of the reporting deadline.
EPCRA §303:	Respondent fails to notify the LEPC within 30 calendar days of reporting obligation. Respondent fails to respond to Administrative Order for §303(d)(3) within 30 calendar days of required response date. Respondent submits information in response to §303 information request, claims trade secret any chemical identity, but fails to submit trade secret substantiation to justify the claim (thereby rendering the §303 submission substantively incomplete and potentially fraudulent).
EPCRA §311:	Respondent fails to submit MSDS for each required hazardous chemical (or list of MSDSs) as required by §311(a) to the SERC, LEPC, or fire department within 30 calendar days of the reporting obligation.

Respondent fails to include chemical on list submitted.

Respondent submits MSDS or list claiming chemical identity a trade secret, but fails to submit trade secret substantiation to justify the claim (thereby rendering the §311 submission substantively incomplete and potentially fraudulent).

Respondent fails to respond to request under §311(c) within 30 calendar days of the reporting obligation.

EPCRA §312: Respondent fails to submit Inventory Form to the SERC, LEPC, or fire department within 30 calendar days of reporting deadline.

Inventory form submitted fails to address each hazard category present at the facility.

Respondent fails to respond to request under §312(e) within 30 calendar days of the reporting obligation.

Respondent submits form that claims trade secret status for chemical identification, but Respondent fails to submit trade secret substantiation to justify the claim (thereby rendering the §312 submission substantively incomplete and potentially fraudulent).

LEVEL 2:

EPCRA §302: Respondent fails to notify the SERC that it is subject to the Act within 20 (but does within 30) calendar days of reporting obligation.

EPCRA §303: Respondent fails to notify the LEPC within 20 (but does within 30) calendar days of reporting obligation.

Respondent fails to respond to an Administrative Order within 20 (but does within 30) calendar days of required response date.

EPCRA §311: Respondent fails to submit MSDS (or list of MSDSs) to the SERC, LEPC, or fire department within 20

(but does within 30) calendar days of reporting obligation.

Respondent fails to respond to request under §311(c) within 20 (but does within 30) calendar days of the reporting obligation.

EPCRA §312: Respondent fails to submit Inventory Form to the SERC, LEPC, or fire department within 20 (but does within 30) calendar days of reporting deadline.

Inventory form submitted covers all hazard categories present at the facility, but fails to cover all hazardous chemicals present at the facility during the preceding calendar year in amounts equal to or greater than the reporting thresholds. Respondent's failure to address all of the hazardous chemicals renders the submission incomplete (i.e., all general locations not supplied) or inaccurate (i.e., different ranges apply).

Respondent fails to respond to request under §312(e) within 20 (but does within 30) calendar days of required response date.

LEVEL 3:

EPCRA §302: Respondent fails to notify the SERC within 10 (but does within 20) calendar days of reporting obligation.

EPCRA §303: Respondent fails to notify the LEPC within 10 (but does within 20) calendar days of reporting obligation.

Respondent fails to respond to an Administrative Order within 10 (but does within 20) calendar days of required response date.

EPCRA §311: Respondent fails to submit MSDS (or list of MSDSs) to the SERC, LEPC, or fire department within 10 (but does within 20) calendar days of reporting obligation.

Respondent fails to respond to request under §311(c) within 10 (but does within 20) calendar days of the reporting obligation.

EPCRA §312: Respondent fails to submit Inventory Form to the SERC, LEPC, or fire department within 10 (but does within 20) calendar days of reporting deadline.

Respondent submitted form addresses all hazard categories, but fails to meet the standard required by the Statute or Rule.

Respondent fails to respond to request under §312(e) within 10 (but does within 20) calendar days of required response date.

C. Gravity

For the purposes of the emergency response violations, gravity is determined by the amount of the substance involved in the violation. CERCLA hazardous substances and EPCRA EHSs have reportable quantities (RQs) that vary depending on the substance, but range from 1 pound to 10,000 pounds. Reportable quantities were established for hazardous substances to indicate an amount, which if exceeded in a release, would require immediate notification to the proper governmental authorities. The RQ scale itself is a relative measure of the hazards posed by the chemical and therefore the potential threat to human health and the environment; the lower the RQ, the greater the potential threat to human health and the environment. The greater the amount released over the RQ, the greater the potential for the need for immediate notification. Likewise, the greater the amount stored on site, the greater the need for fire departments and emergency planners to know of its existence and location prior to any explosion or unpermitted release. The goal of setting standards for the gravity component is to establish, prospectively, the Agency's expectations for those who handle hazardous and extremely hazardous chemicals.

i). Emergency Response Violations

For emergency response violations, the Agency will penalize a failure to notify relative, in part, to the amount by which the RQ was exceeded. To determine gravity for emergency response violations, use the following levels:

LEVEL A: The amount released was greater than 10 times the RQ;

LEVEL B: The amount released was greater than 5, but less than or equal to 10 times the RQ;

LEVEL C: The amount released was greater than 1, but less than or equal to 5 times the RQ.

ii). Emergency Preparedness/Right-to-know Violations

For the purposes of emergency preparedness/right-to-know violations, the number and/or amount of the chemical(s) in excess of the reporting threshold present at the facility forms the basis for determining gravity. For §§311 and 312, the reporting threshold for EHSs is 500 pounds or the EHS-specific threshold planning quantity (TPQ), whichever is less. For other hazardous chemicals, the reporting threshold is 10,000 pounds. Under §311, a MSDS is required for each chemical over the threshold. Alternatively, if a list is submitted, each chemical that exceeded the threshold must be specifically identified on the list. For §311 violations, the gravity levels are:

LEVEL A: Amount of hazardous chemical present at the facility at any time during the reporting period was greater than 10 times the reporting threshold;

LEVEL B: Amount of hazardous chemical present at the facility at any time during the reporting period was greater than 5, but less than or equal to 10 times the reporting threshold;

LEVEL C: Amount of hazardous chemical present at the facility at any time during the reporting period was greater than 1, but less than or equal to 5 times the reporting threshold.

Under §312, if one or more hazardous chemicals are present above thresholds at any time during the previous calendar year, an owner or operator of the facility is required to submit an Emergency and Hazardous Chemical Inventory Form, which may either be aggregate information by hazard category (Tier I) or specific information by chemical (Tier II). The form must report all hazards by category and must include information on all hazardous chemicals present at the facility during the previous calendar year in amounts that meet or exceed thresholds. For §312, the gravity levels are:

LEVEL A: For nonreporting situations: The amount of any hazardous chemical not included in the report was greater than 10 times the reporting threshold;

For reports timely submitted: 10 or more hazardous chemicals, which were required to be included in the report, were not included in said report.

LEVEL B: For nonreporting situations: The amount of any hazardous chemical not included in the report was

greater than 5, but less than or equal to 10 times the reporting threshold;

For reports timely submitted: More than 5, but less than 10 hazardous chemicals, which were required to be included in the report, were not included in said report.

LEVEL C: For nonreporting situations: The amount of any hazardous chemical not included in the report was greater than 1, but less than or equal to 5 times the reporting threshold;

For reports timely submitted: 1 - 5 hazardous chemicals, which were required to be included in the report, were not included in said report.

Level C shall also apply to those submissions in which respondent's submitted form addresses all hazard categories necessary and all hazardous chemicals present above thresholds during the previous calendar year, but otherwise fails to meet the standard required by the Statute or Rule.

D. Circumstances

Circumstances refers to the potential consequences of the violation. The main objectives of the emergency notification provisions are to alert local, State, and Federal officials in the event of chemical accidents so that an appropriate emergency response action can be taken and to prevent injuries or deaths to emergency responders from exposure to chemicals. The main objectives of the emergency planning and community right-to-know provisions are to assist local and State committees in planning for emergencies and to make information on chemical presence and hazards available to the public. Thus, a respondent's failure to report in a manner that meets the standard required by the Statute or rule could result in a situation where there is potential for harm to human health and the environment. The potential for harm may be measured by:

- the potential for emergency personnel, the community and/or the environment to be exposed to hazards posed by noncompliance, or
- the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the CERCLA §103/EPCRA program.

There are some requirements of the EPCRA or CERCLA programs which, if violated, may not be likely to give rise directly or immediately to a significant risk of exposure to hazards. Nonetheless, these requirements are fundamental to the continued integrity of the CERCLA and EPCRA programs. Violations of such requirements may have serious implications and merit substantial penalties where the violations undermine the statutory or regulatory purposes or procedures for implementing the EPCRA or CERCLA programs. Also, failure to provide the required information denies citizens their right to information regarding the chemical hazards that are present in the community.

After the extent and gravity of the violation have been determined (placing the proposed penalty in a given cell on the matrix), the circumstance factor is used to arrive at a specific penalty within the range for that cell. To incorporate the circumstances of the violation into the base penalty selection process, the case development team may choose any amount between, or including, one of the two end points for that cell. For example, a violation of §312 has been determined to have a Level 1 extent and a Level B gravity placing the proposed penalty in the matrix cell that contains the range of $16,500 - $13,200. The circumstances of the violation indicate that the potential for emergency personnel and the surrounding community to be at risk of exposure in the event of a release was high (the emergency personnel did not know of a chemical's presence and could not plan for the safety of the surrounding community in the event of a release). The case development team decides that the maximum amount for that cell is the appropriate base penalty.

The selection of the exact penalty amount within each range is left to the discretion of the enforcement personnel in any given case. In determining the circumstance level, consideration may be given to the relative proximity of the surrounding population, to the effect the noncompliance has on the LEPC's ability to plan for chemical emergencies, and any actual problems that first responders and emergency managers encountered because of the failure to notify (or submit reports) in a timely manner.

Table I. Base Penalty Matrices

CERCLA §103 and EPCRA §§302, 303, 304 and 312

Extent	Gravity Level A	Level B	Level C
Level 1:	$25,000	$16,500	$8,250
	20,000	13,200	6,600
Level 2:	16,500	6,250	4,500
	13,200	5,000	3,600
Level 3:	8,250	4,500	2500
	6,600	3,600	2000

EPCRA §311 Violations

Extent	Gravity Level A	Level B	Level C
Level 1:	$10,000	$6,600	$3,300
	8,000	5,280	2,640
Level 2:	6,600	2,500	1,800
	5,280	2,000	1,440
Level 3:	3,300	1,800	1000
	2,640	1,440	800

V. ASSESSMENT OF MULTI-DAY PENALTIES

EPCRA §325 and CERCLA §109 authorize the Agency to assess penalties for violations on a per day basis. Two primary goals exist for using per day assessments: added deterrence and the need to receive the information sought. Use of a per day assessment may promote an expeditious return to compliance by creating disincentives for continued noncompliance and may be appropriate deterrence for those with a history of violations.

A number of situations may arise that would warrant the consideration of per day assessment of penalties. A violation may be so egregious that the case development team feels that a single day assessment will not be adequate. Situations where

there is a continuing harm may also be cause for assessing penalties on a per day basis. These situations may warrant the assessment of the full base penalty (as calculated from the matrix) for each and every day the violative condition exists. Understanding that every case has its own peculiarities, the use of per day penalties will be at the discretion of the case development team. However, as with any other assessment, the justification for using, or not using, per day penalties should be incorporated into a memorandum to the case file.

Per day assessments can also be used in a more routine fashion. As was stated previously, one reason to use a per day assessment is to create incentives for violators to return to compliance as expeditiously as possible. One method to promote the expeditious return to compliance is to assess the base penalty for a single day and an additional smaller penalty from the date of the violation until the date of compliance. Therefore, when a complaint is issued for a violation of §304(c), §311, or §312 and the situation warrants it, the complaint may seek a penalty based on calculations from the matrix and seek a per day assessment of a smaller penalty (e.g., $400 per day for each day the CERCLA §103 or EPCRA §304(a) notification, §304(c) report, §311 MSDS, or §312 inventory form continues) from the date of the violation until the required reports are submitted. The case development team should require the respondent to send EPA copies of required submissions to verify compliance. This approach normally should be used for first time violators.

For second and subsequent violations, CERCLA §109 and EPCRA §325 authorize the Agency to assess penalties of up to $75,000 per day for each and every day violations of CERCLA §103 and EPCRA §§304(a) and 304(c) continue. Per day penalties may be calculated by trebling the amount of the base penalty calculated in the matrix and assessing that amount each day the violation continues.

Section 325 of EPCRA does not authorize a special category of penalties for second and subsequent violations of §§311 and 312. Using the per day assessment of penalties should be adequate to handle second and subsequent violations of §§311 and 312. The per day assessment for a second or subsequent violation should run from the date the violation began until the date the violative condition ends. For second time violations, the base penalty should be assessed for the first day of violation and 50 per cent of the calculated base penalty should be assessed for every other day the violation continues. Third and subsequent violations should be assessed the full statutory daily amount (See also the section on Prior History of Violations).

VI. CALCULATION OF PENALTY FACTORS RELATING TO THE VIOLATOR

The base penalty reflects the overall seriousness of the violation. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered in choosing the appropriate penalty from the matrix. However, any system for calculating penalties should have enough flexibility to make adjustments for legitimate differences between similar violations. CERCLA §109 and EPCRA §325 require (for Class I violations of CERCLA §103 and EPCRA §304) the Agency to consider certain factors related to the violator. Specifically, in calculating a penalty the Agency must consider ability to pay/continue in business, any prior history of such violations, the degree of culpability, economic benefit or savings (if any), and such other matters as justice may require (See Footnote 1). These factors, while not exculpatory, need to be considered in every penalty assessment.

With respect to settlement, before EPA considers adjusting the penalty contained in the complaint and applies the factors relating to the violator, it may be necessary, under certain circumstances, for enforcement personnel to recalculate the base penalty. If new information becomes available after the issuance of the complaint that makes it clear that the initial calculation of the penalty contained in the complaint is in error, enforcement personnel should adjust this figure (either up or down). The basis for any recalculation of the base penalty made at this time should be documented on the Penalty Calculation Worksheet. For example, if after the issuance of the complaint, information is presented that indicates that much less of the chemical is involved than was believed when the complaint was issued, it may be appropriate to recalculate the base penalty.

In applying the factors relating to the violator, it must be kept in mind that the statutory maximums of $25,000 per violation (§304 Class I penalty), $25,000 per violation per day (§304 Class II penalty and §312) or $10,000 per violation per day (for §311) cannot be exceeded for any violation no matter which adjustment factors apply.

A. Ability To Pay/Continue In Business (Downward Adjustment Only)

The Agency will generally not request penalties that are clearly beyond the financial means of the violator. However, EPA reserves the option, in appropriate circumstances, of seeking a

penalty that might put a company out of business[2]. For example, even when there is an ability-to-pay problem, it is unlikely that EPA would reduce a penalty when a facility refuses to correct a serious violation or where a facility has a long history of violations. That long history would demonstrate that less severe measures are ineffective.

As mentioned previously, the penalty amounts reflected in the matrix assume that the violator has the ability to pay. The financial ability adjustment will normally require that the Agency receive a significant amount of information specific to the violator. The case development team should assess this factor after commencement of the negotiation with the violator as more information becomes available. The burden to demonstrate inability to pay, as with the burden to demonstrate any other mitigating factor, rests with the violator. If the violator fails to provide sufficient information, then the case development team should continue to assume ability to pay exists.

There are several sources available to assist the Regions in determining a firm's ability to pay. The National Enforcement Investigations Center (NEIC) can help obtain information assessing the financial ability to pay of publicly held corporations. Additionally, enforcement personnel should acquaint themselves with the Office of Enforcement's ABEL, the Agency's computer model that helps analyze ability to pay for compliance, clean-up, and/or penalties. Although ABEL was designed with privately held corporations in mind, it will soon be expanded to include other forms of business entities and it may serve as an adjunct to other programs available through NEIC (e.g., the Superfund Financial Assessment System).

If an alleged violator raises the ability to pay argument 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:

- Tax returns
- Balance sheets
- Income statements
- Statements of changes in financial position
- Statements of operations

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[2] Ability to continue in business must be considered, as a matter of law, only when assessing penalties for violations of EPCRA §304 under EPCRA §325(b)(2).

- Retained earnings statements
- Loan applications, financing agreements, security agreements
- Annual and quarterly reports to shareholders and the SEC, including 10 K reports

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 through other sources, then the violator will be presumed to have the ability to pay.

B. Prior History of Violations (Upward Adjustment Only)

The Base Penalty Matrix is designed to apply to first time offenders. Where a violator has a history of similar violations under CERCLA and EPCRA at the same or a different site, this is usually clear evidence that the previous penalty did not provide sufficient deterrence. For the purposes of this policy, the Agency interprets "prior violations" to mean violations of CERCLA (for releases) or EPCRA only. The following rules apply to evaluating the history of prior violations:

- o A prior violation is considered to be any act or omission for which a formal enforcement response has occurred regardless of whether or not respondent admits to the violation (e.g. complaint, default judgment, consent decree, or consent agreement/final order).

- o To be considered a prior violation, the final order, default judgment, or consent decree must have been entered within five (5) years of the present violation.

- o In the case of large corporations with many divisions or wholly-owned subsidiaries, it may be difficult to determine whether a previous instance of noncompliance should trigger upward adjustments to the base penalty. New ownership often raises similar problems. In general, enforcement personnel should begin with the assumption that if the same corporation was involved, adjustments for history of noncompliance should apply. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental

compliance. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating facilities are independent. In the case of wholly- or partially-owned subsidiaries, the violation history of the parent corporation shall apply to its subsidiaries and that of the subsidiaries to the parent.

For the purposes of this penalty policy, a violation of §313 will count as a prior violation if the §313 violation occurred in one of the previous five years. The situation may arise where a §313 enforcement action will lead to other EPCRA enforcement actions being filed against the same facility arising from the same set of facts. If the owner or operator entered into a consent agreement with EPA for the §313 violation and in that consent agreement certified their compliance with all of EPCRA requirements and later they were found to be in violation of §§302-312, the EPCRA §313 violation may be counted as a prior violation. Also, if they falsely certify their compliance, the respondent could be criminally liable. If this situation arises, contact the regional office that handles criminal investigations.

As noted in the section on multi-day assessments, for second or subsequent violations of CERCLA §103 and EPCRA §304, a penalty of up to $75,000 per violation per day is authorized. For second or subsequent violations of these requirements, treble the amount shown at the appropriate position in the base penalty matrix. If the prior violation was for a non-§304 EPCRA requirement, the case development team should consider assessing the base penalty for each day of violation. For second time violations, the base penalty should be assessed for the first day of violation and 50 per cent of the calculated base penalty should be assessed for every other day the violation continues. Third and subsequent violations should be assessed the full statutory daily amount (See also the section on multi-day penalties).

C. Degree of Culpability (Upward or Downward Adjustment)

The existence of a violation is established without a showing of failure to adhere to a standard of care. As with other statutes, EPA pursues a policy of strict liability in penalizing for a violation. Nonetheless, under the penalty system in this policy, the base penalty may be increased, decreased or remain the same depending on the violator's culpability.

Two concepts that underlie culpability are the violator's knowledge of the requirement and the violator's control over the violative act. The lack of knowledge of a particular requirement

would not necessarily reduce culpability. To do so would encourage ignorance of the law. The test under CERCLA §103 and EPCRA §§304, 311, and 312 will be whether the violator knew or should have known of the CERCLA/EPCRA requirements or that the general nature of his operation deals with hazardous chemicals. A reduction in penalty based upon lack of knowledge may only occur where a reasonably prudent and responsible person in the violator's position would not have known that the conduct was violative of CERCLA or EPCRA.

The amount of control that the violator had over how quickly the violation was remedied is relevant in certain instances. Specifically, if correction of the violative condition was delayed by circumstance that the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The violator can manifest good faith by promptly identifying and reporting noncompliance before the Agency detects the violation. This situation may justify mitigation of a penalty. Lack of good faith, on the other hand, can result in an increased penalty. No downward adjustment should be made for the respondent's efforts to comply after the Agency has detected a violation. Indeed, failure to take such actions may justify upward adjustment of the penalty.

If a respondent relies on written guidance by the state or EPA that an activity will satisfy EPCRA or CERCLA §103 requirements and later it is determined that the activity does not comply with EPCRA or CERCLA, a downward adjustment in the penalty may be warranted, but only if the respondent can substantiate its claim that it relied on those assurances in good faith. On the other hand, claims by a respondent that "it was not told" by EPA or the State that it was out of compliance should not justify any downward adjustment of the penalty.

Any prior contact that EPA, the State or LEPC has had with the respondent including, but not limited to, documented phone contacts, Administrative Orders under EPCRA §§302 and 303, Notices of Violation, warning letters, contact under EPCRA §313, and/or respondent's attendance at EPCRA seminars may be used to help determine the culpability of the respondent. Formal enforcement actions against the respondent that result in issuance of a consent decree, final order or default order should be counted under the Prior History of Violations determination.

For purposes of CERCLA §103 and EPCRA §§304, 311 and 312, three levels of culpability have been assigned:

Level 1: The violator had prior knowledge of EPCRA and its reporting requirements as evidenced by its attendance at an EPCRA seminar or workshop, or having been previously contacted by EPA, the SERC, or LEPC through a documented phone conversation concerning EPCRA, an EPCRA informational letter, EPCRA warning letter, EPCRA §313 activities, EPCRA Notice of Violation, etc. -- Increase the base penalty up to 25%.

Level 2: The violator did not comply either due to lack of knowledge of the requirement, lack of management requirements in systems, or failure to adhere to internal procedures. -- No adjustment to the base penalty.

Level 3: The violator attempted to comply properly or self-confessed before the Agency detected the violation. -- Decrease the base penalty up to 25%.

It is anticipated that most cases will present Level 2 culpability. However, if it can be shown that the facility had previous knowledge of EPCRA or had previously participated in an EPCRA training or seminar or received any outreach literature, notification, warning letter, etc., from EPA, the SERC, or LEPC regarding EPCRA reporting requirements, a Level 1 culpability ranking may be considered.

D. Economic Benefit or Savings

EPA should consider any economic benefit from noncompliance that accrues to the violator when assessing penalties. Whenever there is an economic incentive to violate the law, it encourages noncompliance and thus weakens EPA's ability to implement the Acts and protect human health and the environment. The violator should not benefit from its violative acts. An economic benefit component should be calculated and added to the base penalty (but not to exceed the stautory maximum) when a violation results in any economic benefit to the violator. However, the base penalty cannot exceed the statutory maximum

For EPCRA §§304(c), 311, and 312 reporting violations, the economic benefit or savings typically is derived from the estimated cost of producing and submitting the reports. The economic benefit derived from failure to provide emergency notification (e.g., the cost of a phone call) is considered negligible. The economic benefits for failure to submit §§311

and 312 reports include the cost of producing the reports and any filing fees that are imposed by States.

The Regulatory Impact Analysis (RIA) for the §§311/312 regulation establishes unit costs for producing the required reports (see Table II, Page 30, Infra). These cost estimates should be used unless more accurate data is available. Costs are disaggregated into costs associated with rule familiarization, establishment of filing systems, threshold effects, preparation and submission of required reports. In using this information to determine economic savings for multiple violations, the variable costs should be counted once only and the fixed costs counted for each chemical violation.

It is anticipated that most of the savings associated with these violations in a number of cases may be negligible. In the interest of simplifying and expediting the enforcement action, enforcement personnel may forego calculating the economic benefit if it appears to be less than $2,500. However, this decision should be documented in the narrative penalty justification kept in the case file. If it looks to be close to, or above $2,500, the economic benefit should be calculated using BEN. If the BEN evaluation derives an economic benefit above $2,500, that amount should be included in the penalty.

It is generally the Agency's policy not to settle cases for an amount that is less than the economic benefit of non-compliance. However, this civil penalty policy sets out four general areas where settling the case for less than the economic benefit may be appropriate. These include situations when:

- there are compelling public concerns that would not be served by taking a case to trial;
- it is highly unlikely, based on the factors of the case as a whole, that EPA will be able to recover the amount of the economic benefit in litigation;
- the company has documented an inability to pay more than the amount of the estimated economic benefit; or
- the economic benefit is insignificant (i.e., < $2,500).

Table II. Cost Associated with EPCRA §311 and §312 Reports

COSTS ASSOCIATED WITH §§311 AND 312 REPORTS

Fixed Unit Costs under §311

Copy, handle and mail MSDS	$1.84
File MSDS	$2.84
MSDS Cover Letter	$14.56
	$18.73

Fixed Unit Costs under §312

Decision on Tier I/II	$239.25
Hazard Classification	$7.48
Typing and QA/QC	$67.81
Preparing forms	$6.18
Copying & Mailing	$5.37
	$326.09

Variable Unit Costs for Manufacturers*

Employees	0 - 19	20 - 99	100 - 249	>250
§311				
Rule Familiarization	$43.50	$65.25	$99.78	$146.81
Filing System	$400.88	$601.32	$901.98	$1352.97
Threshold Effects	$27.20	$40.80	$61.19	$91.79
§312				
Rule Familiarization	$43.50	$65.25	$99.78	$146.81

* Unit costs in the non-manufacturing sector for rule familiarization, filing system, and threshold effects for all facility size categories are assumed to be comparable to the unit costs in the manufacturing sector for the same activities in the size category of 0 to 19 employees.

E. Other Matters as Justice May Require

This policy acknowledges that no two cases are exactly alike. Unique circumstances above and beyond those taken into account by the factors discussed in the previous sections may be significant in determining the appropriateness of a penalty. The following discussions address some circumstances that may affect the settlement penalty amount.

i). Delisting Reductions

If the Agency proposes the delisting of a chemical on the extremely hazardous substance (EHS) list by a Federal Register Notice, the Agency may settle cases involving the proposed delisted chemical under terms which provide for a 25% deferral of the initial penalty calculated for any EPCRA §§302, 303, 304, 311, or 312 violation involving that chemical. Note, that if the chemical does become delisted, reporting obligations under §§311 and 312 may still apply, however, the applicable threshold would be the 10,000 pound threshold which normally applies to other "hazardous chemicals" under the OSHA Hazard Communication Standard. The deferral policy is only applicable to chemicals proposed for delisting before or during the pendency of the enforcement action. The penalty deferred becomes due and owing 30 calendar days after publication of the Agency's decision to retain the chemical on the extremely hazardous substance list. If the Agency's final published decision is to delist the chemical, the deferral becomes a reduction in penalty which is in addition to any other possible reductions possible in this policy.

ii). Environmentally Beneficial Expenditures

Instances may arise where a violator will offer to make expenditures for environmentally beneficial projects above and beyond those required by law. In these instances, it may be appropriate to accept a lower penalty amount for settlement in light of the totality of the agreement. The Agency, in settling penalty actions in the U.S. District Courts under the Clean Air and Water Acts, has determined that considering such expenditures is consistent with the purpose of civil penalty assessment in certain cases. The same rationale applies to penalties that are assessed in administrative settlements. In the past, the Agency has used its enforcement discretion to mitigate proposed penalties for some environmentally beneficial projects proposed and implemented by the respondent. In applying this penalty policy, this mitigation is completely discretionary.

This adjustment constitutes a basis for accepting a lower cash penalty amount. Before any proposed adjustments are incorporated into a settlement, the case development team should ensure that all of the following conditions are met:

- No adjustments can be given for activities that currently are or will be required under the current law or are likely to be required under existing statutory authority in the foreseeable future (e.g., through rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source.

- The project cannot be something that the violator could reasonably be expected to do as part of sound business practices.

- EPA must not lower the amount it decides to accept in penalties by more than the after tax net-present value of the project. (The after tax net-present value of a project can be calculated on BEN.)

- The project proposed by the Respondent should promote the goals of EPCRA: to increase emergency planning, preparedness, and response or to increase public awareness of EPCRA.

- Environmentally beneficial expenditures may include those expenditures that go to a SERC or LEPC for a designated use to further the goals of EPCRA.

- The mitigation for environmentally beneficial expenditures may not reduce the penalty below the economic benefit of noncompliance.

In all cases where alternative payments are accepted, the case development team should document that each of the conditions mentioned above are met and include this documentation in the case file. Additionally, the case development team should take into account the following:

- The project should not require a large amount of EPA oversight;

- The project should receive stronger consideration if it takes place in the locality in which the facility is located;

- The company should agree that any publicity it disseminates regarding its funding of the project must include a

statement that such funding is in settlement of a lawsuit brought by EPA.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds that are to be spent at the Agency's discretion. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe, as precisely as possible, the environmentally beneficial project the violator is expected to perform.

iii).Settlement Considerations

Any reductions in penalties are to be made in accordance with this penalty policy. In settling cases, if the case development team wishes to enter into an agreement with the company to an audit of the company's facility(ies), the consent agreement and consent order should contain related provisions. Any additional violations identified during the audit may be assessed penalties in accordance with this penalty policy and may include stipulated penalties. However, reductions for voluntary disclosure may be made as appropriate.

iv). Documentation

Any mitigation of the proposed penalty must be documented in the case file. A narrative justification and a revised penalty calculation worksheet should document the amount of the penalty mitigated and the justifications for the mitigation based on the statutory factors. A penalty calculation worksheet and a narrative explanation worksheet are included in Appendix I.

VII. APPENDIX I

PENALTY CALCULATION WORKSHEET

Respondent:_____ Complaint DCN:_____
Count #:_____ Inspection Date:_____
Chemical Name/CAS:_____RQ/TPQ:_____
Violation:_____
_____
_____

NATURE: a) Emergency Response (CERCLA §103/EPCRA §304) _____
b) Planning/Right-to-know (§§302, 303, 311, 312) _____

EXTENT: Time passed from deadline to performance of required action in hours or days, specify: _____ or the amount of deviation from the requirement. Matrix level _____

GRAVITY: 1) Amount of chemical involved in violation (lbs.) _____
2) Divide amount in 1) by _____ [RQ/TPQ/Threshold (circle one)] = _____. Matrix level _____

CIRCUMSTANCES: 1) Likelihood of exposure to hazards posed by violation, or
2) Adverse effect violation has on implementing the EPCRA program: High ____ Medium ____ Low ____.
Specify choice of penalty amount from range listed for the cell of the matrix _____.

1. Base Penalty.....$_____
2. Culpability (% increase or decrease +/- ____).$_____
3. Prior History: §§304/103: treble base amount per day penalty
§§311/312: per day penalty
4. If per day, multiply line 1 by days of noncompliance....$_____
If treble, multiply Line 1 by 3.....$_____
5. Add lines 2 and 4.....$_____
6. Economic gains from noncompliance.....$_____
7. Add lines 5 and 6.....$_____
8. Other adjustments as justice may require.....$_____
9. Total penalty* (line 7 +/- line 8).....$_____

*For first time violators, total penalty cannot exceed $25,000 per violation per day or $10,000 per violation per day (for §311).

Repeat procedure for each violation.

Prepared by:_____ Signature:_____

Date:_____ Page_____of_____

NARRATIVE EXPLANATION

Date:_____

[SECTION VIOLATED]

A. FACTORS THAT APPLY TO THE VIOLATION

NATURE:

EXTENT:

GRAVITY:

CIRCUMSTANCES:

B. FACTORS THAT APPLY TO THE VIOLATOR

ABILITY TO PAY:

PRIOR HISTORY OF VIOLATIONS:

DEGREE OF CULPABILITY:

ECONOMIC BENEFIT OR SAVINGS:

OTHER MATTERS AS JUSTICE MAY REQUIRE: