ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT ALSO KNOWN AS TITLE III OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT (SARA)

OFFICE OF COMPLIANCE MONITORING
OFFICE OF PESTICIDES AND TOXIC SUBSTANCES
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

December 2, 1988

ENFORCEMENT RESPONSE POLICY FOR SECTION 313 OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

INTRODUCTION

The Emergency Planning and Community Right-to-Know Act (EPCRA), also known as Title III of the Superfund Amendments and Reauthorization Act of 1986, contains provisions for reporting both accidental and nonaccidental releases of toxic chemicals. Section 313 of EPCRA requires certain manufacturers, processors, and users of over 300 designated toxic chemicals to report annually on emissions of those chemicals to the air, water and land. These reports must be sent to the U.S. Environmental Protection Agency (EPA) and to designated state agencies. The first annual report, for the 1987 calendar year, was due by July 1, 1988. The EPA is responsible for carrying out and enforcing the requirements of section 313 of the EPCRA and any rules promulgated pursuant to EPCRA.

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

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

DETERMINING THE LEVEL OF ACTION

Enforcement alternatives include (1) taking no action; (2) Notices of Noncompliance; (3) administrative civil penalties, and (4) criminal action under 18 U.S. Code 1001.

NO ACTION

No action for late reporting is to be taken against persons who submit reports after July 1, 1988, but prior to August 1, 1988, provided the report is submitted prior to any contact by EPA or an authorized representative of EPA in preparation for an inspection. The Agency believes that the impact on its ability to make this information available to the public will be minimal during this first 30-day period due to the amount of time to input the data into the tracking system and data base.

Also, no action is appropriate if a facility is amending its submission(s) after the reporting period to reflect improved information/procedures which were not previously available.

NOTICES OF NONCOMPLIANCE (NON)

Summary of Circumstances Warranting an NON

Reports containing readily-detectable errors found by EPA during its data entry process. Facilities must provide corrections in response to the NON by the specified time of 30 days or be subject to a Civil Complaint (See Appendix A for discussion of errors and NONs). Please note that EPA reserves the right to issue a Civil Complaint for errors which are egregious or fraudulent.

Reports with errors which would warrant an NON if found by EPA during data entry, which are voluntarily disclosed by the facility or found during an inspection and which are fully corrected within 30 days of their discovery but within 180 days after the reporting date. EPA reserves the right to issue a Civil Complaint for errors which are egregious or fraudulent.

Late reports which are submitted within 31-90 days after the due date of July 1, 1988. Late reports which are submitted within 1-60 days after the due date of July 1, 1989/or the first year a report is required if not 1988. Late reports which are submitted within 1-30 days after the due date of July 1, 1990 and for subsequent reporting years. For a report to be considered late, it must be submitted to the Agency prior to any contact by EPA or an authorized representative of EPA in preparation for an inspection or for purposes of determining compliance or if there is no contact prior to an inspection, prior to the inspection. AN NON IS APPROPRIATE PROVIDED THE FACILITY HAS NEVER RECEIVED AN NON FOR LATE REPORTING DURING THE PREVIOUS FIVE REPORTING PERIODS.

The submission of a form with trade secrets without a sanitized version, or the submission of the sanitized version of the form without the trade secret information.

Summary of Circumstances Warranting an NON (continued)

Those facilities which report to EPA but report late or not at all to the state PROVIDED THE FACILITY HAS NEVER RECEIVED AN NON FOR THIS VIOLATION DURING THE PREVIOUS FIVE REPORTING PERIODS. States may also take action under their own laws, if applicable.

Recordkeeping violations. Please note that NONs which are issued for recordkeeping violations will disallow penalty reductions related to culpability and attitude for future EPCRA section 313 violations. A list of the various recordkeeping violations are listed below:

- Falsified records
- No required records/serious recordkeeping deficiencies and compliance cannot be verified/determined based on the facility's records.
- Incomplete/inadequate records.
- Records available but not at facility or submitter's headquarters. If records cannot be presented within 14 calendar days from the date of the inspection, the violation is failure to keep records in accordance with the regulations.

Reports which are sent to the incorrect address/office (i.e., any address other than that listed in the section 313 regulation or on the Form R or the Administrator's office) warrant an NON the first time. A Civil Complaint is warranted for violations in subsequent years.

Discussion

A Notice of Noncompliance (NON) is the appropriate response for errors in forms submitted to the Agency on a timely basis and which are detected without an inspection. However, the NON is to state that corrections must be made within a specified time (30 days from receipt of the NON) or a Civil Complaint assessing a penalty will be issued. In general, NONs will be issued for errors as defined in Appendix A. The Agency does reserve the right to assess a Civil Complaint for those errors which it believes are egregious (an example would be underreporting by a large factor, such as reporting emission of 1,000 pounds when there are a million pounds emitted) or which EPA believes are fraudulent in nature. The use of NONs prior to issuing a Civil Penalty is in recognition that this is a new program and that the facilities for which errors are being identified are for those facilities which did report.

Although an NON may be issued for any single error, NONs will generally be issued for those reports containing numerous errors. The Office of Compliance Monitoring and the Office of Toxic Substances will prioritize NONs based on available resources. It is likely that this portion of the policy will be revised to provide for penalties for errors, especially repeat errors.

Similarly, an NON is appropriate if a company realizes it has made errors and submits corrected information on a timely basis, i.e, within 30 days of the discovery of the error and within 180 days of the reporting date. EPA wants to encourage companies to self audit and to notify EPA of errors. Again, EPA reserves the right to issue Civil Complaints in situations of egregious errors or suspected fraud.

NOTE: The exception to issuing an NON for reports with errors are for those companies which submitted information on the proposed form found in the proposed regulation prior to July 2, 1988, instead of on the final form. The Office of Toxic Substances will write a letter to those facilities indicating that the correct form must be submitted within a specified time. Failure to submit the corrected form within that specified time may result in an NON being issued, and a subsequent Civil Penalty if noncompliance continues.

In reference to NONs for certain late reports, EPA believes an NON is appropriate for the 31-90 day interval after the reporting due date for the first year. This is in deference to the start-up of a new and innovative law which is requiring submissions from facilities, including small-business users of toxic chemicals, who may never have been required to report on toxic chemical releases to the Federal government. Due to the time to input the information into the newly developed data base, late reports submitted within this time frame will have less impact on the Agency being able to ensure the availability of data to the public, than a report submitted after 91 days.

NOTE: A Civil Complaint is to be issued which assesses the same penalty as if the facility failed to report when the report is submitted during this time frame but after the facility has been contacted in preparation for a pending inspection or for the purpose of determining compliance or in the absence of such contact, after the inspection. Regions are encouraged to document any contact made with a facility regarding an inspection. If contact is not made, the date for determining if the report is late or is to be treated the same as a nonreport will be the date of the notice of inspection. The Agency is taking this position, i.e., distinguishing between facilities submitting late on their own volition and those submitting after EPA has contacted the facility in regard to an inspection, because it wants to encourage noncomplying facilities to report and discourage nonreporters from waiting until EPA contacts them.

The decision to issue NONs for the submission of a form with a trade secret claim without a sanitized version, or of the sanitized version without the trade secret information is being treated the same as a report with errors. Please note that this is a violation of section 313 as well as the trade secret requirements. Other violations pertaining to trade secrets will be addressed in a separate penalty policy.

The last violation for which an NON is to be issued deals with facilities which report to EPA but report late or not at all to the state. This was discussed with State representatives convened by the National Governor's Association. It was decided that NONs were appropriate for this first reporting year. One reason is that the information will be available to the state through EPA's data bases, although at a later time. However, a repeat violation will be subject to a penalty, i.e., a violation in subsequent years. This policy in no way precludes states from taking action under their own laws, if applicable. EPA also reserves the right to assess a Civil Complaint if the facility refuses to report to the state after the state has requested the report, or if EPA requests the facility to send the report to the state.

Note on NONs: In those cases where a Region plans to issue a Civil Complaint for a nonreporter (including for a form R submitted after facility is contacted in regard to an inspection), any NONs for errors or other violations should be incorporated into that Civil Complaint with compliance required within 20 days for those items or additional penalties provided for. In order to make this work, it is essential that Regions notify the Office of Compliance Monitoring of any pending action as soon as possible. Alternatively, the Civil Complaint may be settled with a provision that failure to correct information as indicated either in the Complaint or in a subsequent NON is subject to a stipulated penalty.

ADMINISTRATIVE CIVIL PENALTY

An administrative civil penalty will be the appropriate response for:

Nonreporting, including the failure to report for each chemical (i.e., some chemicals reported but not all as required) and including reports submitted by a facility after being contacted regarding a pending inspection or for the purpose of determining compliance or after inspection.

Incomplete reporting.

Failure to respond to or comply with an NON, as specified in the NON (i.e., those errors specifically identified).

Certain late reporting, as specified, and for repeated late reporting.

Repeat violations which otherwise would warrant an NON, as identified in the Circumstance Levels.

Other violations not specifically referenced in the discussion of NONs.

Note: See specific list in the next section under Circumstance Levels.

Concurrence

Civil penalties are to be assessed according to this policy. Pursuant to the Delegations Manual, Regional enforcement personnel must obtain written concurrence from the Office of Compliance Monitoring of the Office of Pesticides and Toxic Substances prior to initiating an administratiave civil penalty for section 313 violations. A region may request the relaxation of the concurrence requirements once three civil administrative actions have been successfully issued and closed out. For these actions to be considered successful, regional cases must have been supported by adequate evidence of the violation, and the proposed penalties and final assessment must conform to this section 313 enforcement response policy.

CRIMINAL SANCTIONS

The statute does not provide for criminal sanctions for violations of section 313. However, 18 U.S. Code §1001 makes it a criminal offense to falsify information being submitted to the U.S. Government. In addition, the knowing failure to file a section 313 report may be prosecuted as a concealment proscribed by 18 U.S.C. §1001.

ASSESSING A CIVIL ADMINISTRATIVE PENALTY

SUMMARY OF THE PENALTY POLICY

To determine the base penalty, determine the circumstance level and the penalty adjustment level. These factors are incorporated into a 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 has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors: culpability, history of prior violations, ability to continue in business, and such other matters as justice may require, as described in this policy.

DISCUSSION

The circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the government.

The penalty adjustment level is based on the quantity of section 313 chemical for which the violation is being issued which is manufactured, processed, or used by the facility, and the size of the total corporate entity in violation. A large company is defined as a facility for which the total corporate entity has sales of ten million dollars or more. A small company is defined as a facility for which the total corporate entity has sales of less than ten million dollars. The total corporate entity refers to all sites taken together owned or controlled by the foreign or domestic parent company.

Thus, a large company which manufactures 10 times or more section 313 chemical than the threshold limit is assessed the highest penalty for the specific violation (i.e., based on the circumstance level). If a company is large but manufactures/ processes/uses less than 10 times the threshold, the penalty for that violation falls in the appropriate circumstance level and penalty adjustment level B. If the corporate entity is small and manufactures/ processes/uses 10 times or more of the violative section 313 chemical, then the penalty remains in the middle penalty adjustment level B. If the corporate entity is small and manufactures, processes, or uses less than 10 times the threshold level, then the penalty for that particular circumstance level falls into penalty adjustment level C, which is the least penalty for that particular circumstance level.

A size of business adjustment factor is being used to reflect the fact that small businesses are deterred by a smaller penalty and that impact of the penalty is likely to be the same as a larger penalty for a large company. Thus, the Agency believes that the deterrent effect is comparable. EPA also recognizes that EPCRA is a new statute affecting a broad range of facilities and that this law may bring certain small businesses into EPA's purview for the first time.

Furthermore, penalty policies under other statutes often assess the same initial penalty for a violation and then provide for substantial adjustments based on the firm's ability to pay and ability to continue in business. By making a size of business adjustment up front in the base penalty, the Agency

hopes to avoid the large disparity between penalties proposed and penalties collected.

However, it was pointed out that a small company may manufacture/process/use a large amount of a section 313 chemical and its emissions may be substantial. Thus, the two factors are combined and used to determine the penalty adjustment level of the matrix. Please note that the size of business level is based on the definition for small business orginally developed in conjunction with the Small Business Administration when the section 313 rule was being developed and thus has been subject to public review and comment.

The enforcement-related use of ten times or more the threshold established in the statute is established as a level which is likely to be of more interest to the community and to the government, at least initially. After a review of incoming reports, it was believed that ten times the threshold level was a reasonable cutoff to distinguish between manufacture /process/use of a large amount of section 313 chemical.

Definition of Late Report

To be considered a late report instead of a failure to report for those reports submitted after the deadline of July 1, the report must be submitted prior to the facility 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, prior to the date of the inspection. Any report which is submitted after such contact/ inspection is to be treated the same as a nonreport in assessing the penalty. Regions are encouraged to keep written records which document any such contact with the facility.

Definition of Failure to Report

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.

If a facility reports to a state but not to EPA, the violation is considered a failure to report, unless it is submitted late prior to the contact by EPA or its representative as described in the previous paragraph.

Notification of Pending Actions

It is the Regional Office's responsibility to notify the Office of Compliance Monitoring (OCM) Case Development Coordinator for that Region that an inspection has been conducted and a nonreporter detected in order to avoid the issuance of an NON by OCM for a late report when the nonreporter submits his report.

For those facilities inspected by the National Enforcement Investigations Center (NEIC) for which violations are found, NEIC will notify the Region, who will notify OCM. Alternatively, NEIC and the Region may work out a different arrangement to assure that OCM is informed of the violation.

PENALTY MATRIX

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

* Penalty is to be assessed for each chemical for each facility. See discussion on per day penalties for further clarification.

** See circumstance definitions below for detail.

CIRCUMSTANCE LEVELS

Level 1

($25,000 $17,000 $5,000)

Nonreporting/failure to report a chemical (See definition of late report and failure to report in previous sections.)

Falsified report

Level 2

($20,000 $13,000 $3,000)

Late Reporting after 180 days. (These reports may be subject to NONs if they contain errors which warrant an NON and subsequent penalties if errors are not corrected in response to the NON.)

Level 3

($15,000 $10,000 $1,500)

Errors (fail to respond/correct information identified by EPA as an error during data entry by due dates specified in NON or if errors found during an inspection, failure to correct information within 30 days of the facility being informed of the errors). See section on Initial Offer of Settlement for error violations identified in NONs.

Serious errors/incorrect reports found through audit/inspection/tip/complaint/voluntary disclosure. (Errors which seriously affect the utility of the data; does not include those which would generally warrant an NON as a result of data entry.) Voluntary disclosures of serious errors are subject to voluntary disclosure reductions.

LEVEL 4

($10,000 $6,000 $1,000)

Errors/incorrect reports which are voluntarily disclosed but not disclosed and corrected within 30 days of the discovery and within 180 days of the reporting date. These disclosed violations are subject to the first voluntary disclosure reduction provided errors are corrected prior to issuance of the complaint.

LEVEL 5

($ 5,000 $ 3,000 $ 500)

Late Reporting (91-180 days after the due date for 1988 reports and 61-90 days after the due date for 1989 reports and 1-30 days for 1990 and future reporting years. Facilities which do not become subject until future years may have the benefit of 61-90 days after the due date for the first year they have to report and the 1-30 days thereafter.)

Reports to EPA but not to State and the facility has received a previous NON from EPA for this violation.

LEVEL 6

($ 2,000 $ 1,300 $ 200)

Late Reporting from 1 to 59 days for 1939 reporting year if an NON has been issued for late reporting or a Civil Complaint for a section 313 violation for a violation during the 1988 reporting year.

Error corrections not reported to State when responding to NON/Civil Complaint for errors.

Minor errors in report found through audit/inspection/tip/ complaint/voluntary disclosure and which are not corrected within 30 days of the discovery.

PENALTY ADJUSTMENT LEVELS

Level A

Facility for which the total corporate entity* has sales of ten million dollars or more or 50 employees or more** and which manufactures/processes/ uses the section 313 chemical associated with the violation at 10 times or more the threshold level for reporting.

* Total corporate entity refers to all sites taken together owned or controlled by the foreign or domestic parent company.

** Region has discretion to use whichever figures are readily available. If no information is available, Regions may assume the higher level and adjust if the facility can show that they are subject to the small business definition. Please note that to be subject to the section 313 requirements, the facility must employ 10 or more employees.

Level B

Facility for which the total corporate entity has sales of ten million dollars or more or 50 employees or more and which manufacturers/processes/uses the section 313 chemical associated with the violation at less than 10 times the threshhold level for reporting.

Facility for which the total corporate entity has sales of less than ten million dollars or less than 50 employees and which manufactures/processes/uses the section 313 chemical associated with the violation at 10 times or more the threshhold level for reporting.

Level C

Facility for which the total corporate entity has sales of less than ten million dollars or less than 50 employees and which manufactures/processes/uses the section 313 chemical associated with the violation at less than 10 times the threshhold level for reporting.

MULTIPLE VIOLATIONS

Separate penalties are to be calculated for each chemical for each facility. If a company has 3 facilities and fails to report for the same chemical at each facility, a penalty is to be assessed for each facility and for each chemical. Assuming the annual sales exceed ten million dollars and each facility exceeds the threshhold limits by more than 10 times, the penalty would be $25,000 X 3 or $75,000. If each facility manufactured the same two chemicals again more than 10 times the threshhold, the penalty would be $25,000 X 3 X 2 or $150,000.

If there is more than one violation for the same facility involving the same chemical, the penalties are cumulative. For example, if a firm reports after 180 days and the form also contains major errors which the firm refused to correct, the penalty is $20,000 plus $15,000. However, since it is the same form involved, the penalty which will be assessed should be the $25,000 maximum per day.

PER DAY PENALTIES

Per day penalties are appropriate for those facilities which continue to fail to report in subsequent reporting years. Generally, per day penalties will not be used unless a facility/ a company within the corporate entity has received Civil Complaints for failing to report under section 313, which has been settled (i.e., by payment or by a Consent Agreement and Final Order, or by a Court Order), for two previous reporting periods.

Per day penalties may also be used for those facilities which refuse to submit reports or corrected information after a Civil Complaint is issued. Such refusal may be the basis for amending the Civil Complaint to assess per day penalties or a new Complaint issued which addresses the days of continuing noncompliance after the initial Civil Complaint is closed, e.g., a facility may pay the penalty in full and not come into compliance, in which case a new Civil Complaint should be issued.

In cases where the EPA has determined that facility has knowingly failed to submit a report, per day penalties may be assessed. Regions should consult with the Office of Compliance Monitoring prior to issuing a Civil Complaint with a per day assessment, even if concurrence has been relaxed. Prior to the relaxation of concurrence, Regions should discuss per day assessments in advance of submitting the drafted Civil Complaint.

ADJUSTMENT FACTORS

Voluntary Disclosure

Disclosures of nonreporting prior to EPA contacting a facility in preparation for an inspection are considered late reporters so no further adjustment is needed provided completed report is submitted. The circumstance level of the violation is based on the day the report is submitted.

Disclosures regarding serious errors or incorrect reports will be made in the following manner:

	25%	Voluntarily disclosed and corrected within 30 days of the disclosure.
Additional	25%	If disclosed and corrected within 30 days of discovery.

Please note that disclosures of those types of errors which would otherwise result in an NON if detected by EPA warrant an NON and not a Civil Penalty if corrections are made within 30 days of the discovery by the facility and within 180 days of the reporting period. If a facility reports the error more than

180 days after the reporting period, it is subject to a Civil Complaint and may be eligible for the voluntary disclosure reductions. EPA wishes to foster self-auditing and submission of corrected forms by facilities on a prompt basis.

A violation is not considered to be voluntarily disclosed if it is done after EPA or its representative has contacted the facility in preparation for an inspection of that facility or for the purposes of determining compliance or if an inspection has started.

Culpability

The Agency intends to pursue a policy of strict liability in penalizing for a violation, though some allowance may be made on the extent of the violator's culpability. The base penalty may be increased or decreased or may remain the same depending on the violator's culpability.

The principal criteria for assessing culpability are (a) the violator's knowledge, (b) the violator's control over the violative condition, and (c) the attitude of the violator.

(a) The violator's knowledge. The lack of knowledge would not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is available. However, if a violation is knowing or willful, the Agency reserves the right to assess per day penalties.

(b) Degree of control over the violation. There may be situations where the violator may be less than fully responsible for the violation's occurence. For example, an employee whose conduct caused the violation may have been disobeying his employer's instructions. Such situations would probably warrant some reduction in the penalties. Adjustments may be made at the Agency's discretion to adjust the penalty downwards a maximum 25%. However, the use of this factor is expected to be rare, and must be justified.

(c) Attitude of the violator. In assessing the violator's "attitude", the Agency will look at the following factors: Whether the violator made "good faith" efforts to comply and the promptness of the violator's corrective actions. Attitude may justify a penalty adjustment of up to 15% of the penalty in either direction. Objective evidence such as statements or actions of the violator should be used to justify such adjustments. This adjustment is to be made after the Civil Complaint has been issued in the context of settlement.

History of prior violations

The penalty matrix is designed to apply to "first offenders". Where a violator has demonstrated a history of violating EPCRA section 313, the penalty should be adjusted upward. The need for such an upward adjustment derives from the violator not being sufficiently motivated to comply (deterred from noncomplying) by the penalty assessed for the previous violation, either because of economic factors consciously analyzed by the firm, or because of negligence. Another reason for penalizing repeat violators more severely than "first offenders" is the increased enforce ment resources that are spent on the same violator.

The Agency's policy is to interpret "prior such violations" as referring only to prior violations of EPCRA section 313. The following rules apply in evaluating history of prior such violations:

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

(b) To be considered a "prior such violation", the violation must have occurred within five years of the present violation. This five year period begins when the prior violation becomes a final order. Beyond five years , the prior violative conduct becomes too distant to require compounding of the penalty for the present violation.

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

(d) For one prior violation, the penalty should be adjusted upward by 25%. If two prior violations have occurred, the penalty should be adjusted upward by 50%. If three or more prior violations have occurred, the penalty should be adjusted upward by 100%. Please note that in those cases where the penalty goes to per day penalties because of previous violations, upward adjustments would only be appropriate for violations which are committed after the initial complaint with per day assessments.

In those cases where an NON has been issued for record-keeping violations, the adjustment factor based on good attitude is not warranted and should not be given. Additionally, consideration should be given to whether a culpability finding of willful violation should be made and appropriate penalty adjustments made.

Application of ability to continue in business.

The matrix incorporates an ability to pay factor. Therefore, the application of an ability to continue in business adjustment is expected to be rare. Measuring a firm's ability to continue in business can be very complex. This adjustment factor should only be applied in making adjustments to the penalty after the Civil Complaint has been issued. If a firm raises the issue of inability to pay in its answer, or in the course of settlement discussions, the firm should be asked to document its inability to pay. In complex cases, the Agency may need to rely on a management division economist or an accountant to analyze the firm's ability to continue in business and, on a case-by-case basis, to further reduce the proposed penalty. Alternatively, this may be done in accordance with Policy GM-56 found in EPA's Enforcement Guidance Manual.

Other factors as justice may require.

* New Ownership for "history of violations". It may be unfair in some cases to burden new ownership with the previous owner's history.

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

the complainant must assure himself that the company is not expending the funds to come into compliance with other statutes/ regulations and has not already received credits in another enforcement action for the same environmentally beneficial expenditures. Agreements to come into compliance with EPCRA would not warrant a reduction in penalty other than in the context of an attitude adjustment factor. The settlement agreement incorporating such an adjustment should make clear what the actual penalty assessment is, after which the terms of the reduction should be spelled out in detail and in a clearly enforceable manner.

Any conditions which are to be met in exchange for a penalty reduction are to be imposed in accordance with the Toxic Substances Control Act Settlement with Conditions Policy which was issued November 22, 1983 (or in accordance with any revisions to that policy).

One area of environmentally beneficial expenditures for which a reduction in penalty would be appropriate is an agreement to reduce emissions from the facility or other facilities within the company by a certain amount within an agreed upon timeframe.

SETTLEMENT

This policy does not set a specific pencentage guideline for penalty reductions in the course of settlement. While, as a general rule, penalties may be altered in the course of settlement, there should always be a substantive reason given, which is to be incorporated in any settlement agreement and consent decree and final order for any penalty reduction.

Any reductions in penalties are to made in accordance with this penalty policy. In preparing Consent Agreements, Regions should require a statement signed by the company which certifies that it has complied with all EPCRA requirements and specifically section 313 requirements at all facilities under their control. For large companies with many facilities, Regions are encouraged to inspect a number of facilities, belonging to a corporation with a history of violation to assure full compliance. This does not mean prior to taking an initial action but afterwards to assure that the firm has come into compliance.

Any violations reported by the company or facility in the context of settlement is to be treated as a self-confessed violation and subject either as a late report if the company has failed to report or as eligible for the disclosure reductions.

If a Region wishes to enter into a Settlement Agreement for the facility/company to audit its facility/company, then the Consent Agreement and Final Order may contain this provision. However, no penalty reductions are appropriate for the audit which is considered the cost of compliance at this point in time. The violations detected during the audit are to be assessed in accordance with this enforcement response policy although reductions for voluntary disclosure may be given and reports submitted may be assessed as late reports, even though an inspection has been done.

OFFER OF SETTLEMENT FOR CIVIL COMPLAINTS RESULTING FROM A FACILITY'S FAILURE TO RESPOND TO AN NON FOR ERRORS

Background

The following policy will be utilized on a pilot basis for the first year for those cases issued by headquarters. This policy is aimed at fostering the submission of correct information on a timely basis and streamlining the enforcement process. It is hoped that companies will submit a corrected form within the 20 days and then after the form is determined to be free of readily detectable errors, pay its fine.

If this process becomes as time consuming as a Civil Complaint without an upfront offer of settlement, then it will be discontinued and settlements will be based on the larger proposed penalty amount, with adjustments as specified in this policy, if appropriate.

Policy

For violations involving readily detectable errors for which no response to an NON is made or the response was inadequate i.e, failed to submit correct information, a written offer of settlement for $300 is to be made at the time the initial civil complaint is issued.

This offer is contingent on the facility submitting corrected information within 20 days of receipt of the Civil Complaint. Payment for the above penalties must be made in full with no additional reduction with the exception of ability to continue in business.

If settlement is not made based on the initial offer of settlement, including the requirement that correct information is submitted within 20 days of the receipt of the Civil Complaint, any settlement agreement is to exceed the original offer and any and all reductions to the penalty must be justified based on the specific factors in this policy. The final Consent Agreement is to specifically identify and justify any reductions.

Continual Failure to Report or to Submit Corrected Information

Per day penalties may be appropriate if a facility continues to refuse to submit the required information. In addition, if a facility pays its penalty and continues to refuse to submit the information as required, then a criminal referral may be the appropriate response.

APPENDIX A

TRI ERROR TYPES

The Information Management Division (IMD) has divided errors found in TRI submissions into three broad classes:

1. Pre-Tracking Errors - These errors are manually identified, and involve Form R's which are incorrectly put together. For example, a Form R should consist of a completed Part I, II, III, and IV. Failure to include all four parts is a pre-tracking error. Also, including more than one Part III in a single Form R package is a pre-tracking error. Pre-tracking errors prevent the submission information from being entered into the document tracking system.

2. Tracking Errors - These errors are machine identified by the document tracking system, and involve missing or invalid facility or chemical identification information. For example, if the CAS number reported in Part III is 50-00-0 (the CAS number for formaldehyde), and the chemical name reported is Freon 112, the chemical identity is invalid because the reported CAS number and the reported chemical name do not match.

3. Major and Minor Errors - These errors are machine identified by the TRIS database edits on the EPA 3090 mainframe computer. They involve missing or invalid release data. For example, if the Form R instructions require a response of "NA" or a value in a specific data field, and the field is left blank by the submitter, a major or minor error is created. (More information about these edits is found is Toxic Chemical Release Inventory System Physical Design (appendix C) available from Ruby Boyd, TRIS Database Administrator, IMD, 202/475-8387.)