UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
VALIMET, INC.,	)	**Docket No. EPCRA-09-2007-0021**
	)	
Respondent.	)	

INITIAL DECISION

By Accelerated Decision previously issued, Respondent Valimet, Inc. was found liable on ten counts of violating Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11023 and its implementing regulations at 40 C.F.R. Part 372, for failing to timely submit for each of the calendar years 2001-2005 a toxic chemical release form identifying its processing of both aluminum and copper compounds in excess of the reporting threshold. Pursuant to Subsection 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), an aggregate civil administrative penalty in the amount of $193,996 is imposed on Respondent for these ten violations.

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: June 30, 2009

Appearances:

For Complainant:

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I. PROCEDURAL HISTORY

On September 24, 2007, the United States Environmental Protection Agency Region IX ("Complainant" or "EPA") filed a ten-count Complaint against Valimet, Inc. ("Valimet" or "Respondent") alleging violations of Section 313 of the Emergency Response and Community Right-to-Know Act ("EPCRA" or "the Act"), 42 U.S.C. § 11023, and its implementing regulations at 40 C.F.R. Part 372. Specifically, the Complaint charges Valimet with failing to timely file with EPA the requisite toxic chemical release forms ("Form Rs") reporting the quantities of aluminum and copper compounds that it processed during the calendar years 2001 through 2005. Respondent filed its Answer to the Complaint on December 13, 2007, admitting that it processed each of these toxic substances in excess of the reporting threshold of 25,000 pounds during those five years and that it did not file the Form Rs, while raising numerous affirmative defenses to liability and penalty. Thereafter, the parties filed their prehearing exchanges. In its Prehearing Exchange, Complaint proposed the assessment of a $249,186 penalty for the ten counts of violation alleged in the Complaint.

On September 16, 2008, the parties filed a Joint Set of Stipulated Facts, Exhibits, and Testimony indicating, *inter alia*, that "the parties hereby stipulate to Respondent's liability for the violations, and agree that the hearing held in this matter will pertain only to the proper amount of the penalty to be assessed against Respondent." Subsequently, Complainant moved, *inter alia,* for accelerated decision as to Respondent's liability on the ten counts of violation alleged in the Complaint. Respondent filed a non-opposition to the motion stating it "agrees that there are no genuine issues of material fact related to the elements of violation as set forth in Complainant's memorandum." By Order dated November 6, 2008, Complainant's motion was granted.

A hearing was held on December 9-11, 2008 in Sacramento, California on the issue of the appropriate penalty to be assessed for the violations.[1] Complainant presented the testimony of six witnesses at hearing: Russell Frazer, Robert Lucas, Mary Wolf, Fletcher Clover, Richard Ross, and Jonathan Shefftz. Respondent presented two witnesses' testimony at hearing: David Oberholtzer and James W. Embree, Ph.D. In addition, during the hearing, sixty-four documents previously marked as Complainant's exhibits 1-18, 21-22, 26-64 and Respondent's exhibits 7, 15-17, 20, were offered by Complainant and admitted into evidence. Tr. 663. Nineteen documents previously identified as Respondent's exhibits 2, 5, 6, 8-13, 18, 26, 27, 29-34 and Complainant's exhibit 19 were offered by Respondent and admitted into evidence.[2] Tr. 663. At Complainant's request the parties' Joint Set of Stipulations, dated September 16, 2008, were also

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[1] The transcript of the hearing, received by the undersigned on February 23, 2009, consists of three volumes (one for each day of hearing) with consecutively numbered pages. Citations to the transcript will be in the following form: "Tr. _."

[2] For the sake of clarity and continuity, the admitted exhibits will be cited using their original party identification and number (*i.e*. as either "C's Ex. _" or "R's Ex. _"), regardless of which party moved the exhibit into evidence at hearing.

admitted into evidence (cited hereinafter as "Stip. _"). Tr. 40.

Complainant filed its Initial Post-Hearing Brief (C's Brief) in this case on April 23, 2009. Respondent submitted its initial Post-Hearing Brief (R's Brief) on April 24, 2009. Complainant filed its Reply to Respondent's Brief (C's Reply Brief) on May 14, 2009, and Respondent submitted its Reply Brief on May 14, 2009, upon filing of which the record closed.

II. FACTUAL BACKGROUND

Respondent Valimet, Inc. is a Delaware corporation, which has been in business since 1964. Stips. 1-2; Tr. 429; C's Ex. 13; R's Ex. 7. The company owns and operates a facility at 431 Sperry Road in Stockton, California, in which it manufacturers finely divided metal powders such as aluminum, aluminum alloy, and copper alloy powder. Stips. 3-5, 12; Tr. 428-29; C's Exs. 1, 11, 12, 22; R's Ex. 7. Such powders are used in the manufacture of numerous products including pigments, coatings, printing inks, refractory materials, insulating materials, thermal management devices, electric conductive materials, electromagnetic shielding, powder metallurgy parts, solid rocket fuel, decoy flares and other military equipment. Stip. 4; Tr. 429-30, 146, 156-57; C's Exs. 1, 11; R's Ex. 7. Valimet produces the powders utilizing a closed loop, inert atomization process involving the ejection of hot molten metal through a spray nozzle into a chamber filled primarily with either helium or argon gas, creating minute droplets which solidify into discrete spherical particles. Tr. 430-31, 148; C's Exs. 1, 11; R's Ex. 7. The solid metal particles are then removed from the gas stream by a series of cyclone separators and discharged into containers, while the gas is recycled back into the system. *Id*. Next, the particles are sized and separated via sieves and screens or a centrifuge system containing nitrogen gas. C's Ex. 1; 148-49. At the end of the process, the company blends the metal particles together as necessary to meet customer product specifications and packs the powder for storage and/or shipment. Tr. 430, 149; C's Ex. 11. In 2007, Valimet's operations, using the equivalent of 53.5 full-time employees, resulted in gross sales of approximately $18.5 million dollars. Stips. ¶¶ 42-44; R's Ex. 11.

As a result of its manufacturing process, Valimet is subject to the requirements of EPCRA and from 1990 through 2000, it timely filed with EPA its Form Rs thereunder, reporting *inter alia* the quantity of aluminum fume or dust (*i.e.* powder) it manufactured, processed or otherwise used during those calendar years. R's Ex. 13, C's Ex. 1; Tr. 145-147, 160, 535. However, it ceased making such routine filings in 2001. *Id*. Consequently, it thereafter became a "target of interest" to EPA, and on April 22, 2004, two EPA inspectors, Karen Vitulano and Robert Lucas, conducted an EPCRA compliance inspection of the company. C's Ex. 3; Tr. 147-48. During the inspection, David Oberholtzer, Valimet's Director of Corporate Services, provided Ms. Vitulano and Mr. Lucas with a tour of the facility and information in regard thereto. C's Exs. 1, 3; Tr. 148-49, 485, 534-35; R's Ex. 7. Included among the data conveyed by Mr. Oberholtzer to the inspectors was that Respondent processed about 3.5 million pounds of aluminum per year, and that the throughput of aluminum is 1000 pounds per hour in the aluminum powder manufacturing unit. Tr. 150; C's Ex. 1. Nevertheless, Mr. Oberholtzer indicated to the inspectors that he could not state with certainty the total quantity of aluminum

dust (*i.e*. powder) produced each year without prior review of company records. Therefore, at the conclusion of the inspection, EPA requested, and Mr. Oberholtzer agreed to provide, on or before May 19, 2004, "threshold calculations" indicating the quantities of aluminum and zinc powders, as well as copper and nickel in any form, that Valimet manufactured, processed or otherwise used in calendar years 2000 through 2002. Tr. 150-52, 486, C's Exs. 1, 3. On its end, in response to Mr. Oberholtzer's inquiries, EPA agreed to provide Valimet with guidance as to whether there is a reporting exemption as to the *de minimus* level of lead in aluminum alloys and the method for reporting a "not detected" test result for mercury. C's Exs. 1, 3; Tr. 155-56, 160-64, 486-89.

During the following two years, Mr. Oberholtzer, Valimet's "one-man environmental shop," was engrossed in handling other pressing business matters and, as a result, he neither provided EPA with the requested threshold calculations nor filed any of the previously or subsequently due Form Rs. Tr. 95, 158, 164, 465-67, 520, 603-05. Coincidentally, during that same time period, EPA was otherwise engaged and thus it did not further prompt Valimet regarding submitting the threshold calculations or Form Rs. C's Ex. 43, 55; Tr. 491. In August 2006, however, EPA's Mary Wolf left a telephone message for Mr. Oberholtzer regarding the missing data and, hearing nothing, followed up with a telephone conference. C's Ex. 43, 55; Tr. 172-173, 497. During that conversation, Mr. Oberholtzer agreed that by September 29, 2006, he would provide EPA with threshold calculations covering all the intervening years through 2005, and Ms. Wolf agreed to send Valimet blank Form R forms for completion and filing. *Id.*; Tr. 173-74. On August 30, 2006 Ms. Wolf mailed the forms and instructions to Mr. Oberholtzer, simultaneously advising of the posting by e-mail. Tr. 174.

Approximately two months later, on or about October 26, 2006, Valimet provided its threshold calculations to EPA. C's Ex. 17, 55; Tr. 68, 175, 498-500. Mr. Oberholtzer testified that before he submitted them, he "did have some questions particularly related to copper which [he] did get answers to, but it took a little while . . . . " Tr. 498-99. Those calculations evidenced that in each of the five calendar years from 2001 through 2005, Valimet manufactured, processed or otherwise used aluminum (fume or dust) and copper compounds in excess of the 25,000 pound EPCRA reporting threshold. Tr. 176. Specifically, Respondent represented to EPA that in 2001 it manufactured 4,316,000 pounds of aluminum dust and 52,583 pounds of copper compounds; that in 2002 it manufactured 4,125,000 pounds of aluminum dust and 60,000 pounds of copper compound; that in 2003 it manufactured 3,910,000 pounds of aluminum dust and 60,000 pounds of copper compound; that in 2004 it manufactured 4,884,000 lbs of aluminum dust and 52,700 lbs of copper compound at its facility; and that in 2005 it manufactured 2,985,000 pounds of aluminum dust and 62,400 pounds of copper compound at its facility. Stip. ¶¶ 15-24.

Mr. Oberholtzer testified at hearing that after submitting the threshold calculations to EPA, he started preparing the company's missing Form Rs for submission. Tr. 500. Cognizant of the fact that despite the passage of time, such forms had not yet been filed, in early November and early December 2006, and then again in early January 2007, Ms. Wolf telephoned Valimet and either left a message or spoke to Mr. Oberholtzer attempting to prompt compliance. C's Exs. 43, 55; Tr. 176-77. Such attempts being unsuccessful, three months later, on April 10,

2007, Ms. Wolf's supervisor, Nancy Sockabasin contacted the company by telephone once again. C's Ex. 55; Tr. 178. Apparently unsatisfied with the company's response, the very next day, on April 11, 2007, EPA issued a written notice of its intent to initiate an EPCRA enforcement action against Valimet based upon the missing Forms Rs. C's Exs. 2, 55; Tr. 500-01.

About two weeks later, on or about April 25, 2007, Valimet filed its missing Form Rs for 2001 through 2005. Stip. ¶ 38; C's Ex. 10, 14-16, 55; R's Ex. 13; Tr. 68-69, 126, 500-01. EPA subsequently entered the information Valimet provided to it on the Form Rs into its publicly accessible Toxics Release Inventory (TRI) database. C's Exs. 15, 16; R's Ex. 30. Thereafter, Valimet timely filed its Form Rs for 2006 and 2007. C's Ex. 32; R's Ex. 13; Tr. 521, 136-37.

On September 24, 2007, EPA filed this ten count administrative penalty action against Valimet under EPCRA Section 313(a) for its failure to timely file its Form Rs for 2001 through 2005.[3] C's Ex. 55.

III. STATUTORY PROVISIONS, REGULATIONS AND PENALTY POLICIES

A. Statutory Provisions

EPCRA Section 313(a) provides that:

> (a) Basic requirement. The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) for each toxic chemical listed under subsection (c) that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

42 U.S.C. § 11023(a).[4] *See also*, 40 C.F.R. § 372.30(a).

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[3] The action was timely filed as the parties had entered into a tolling agreement on June 27, 2007. C's Ex. 5.

[4] In order to fall under the purview of EPCRA Section 313, a facility must have ten or more full-time employees, fall within Standard Industrial Classification Codes 20 through 39, and have manufactured, processed or used more than the threshold amount of a toxic chemical listed in 40 C.F.R. § 371.65 during the relevant year. EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A); 40 C.F.R. § 372.30. The threshold amount of aluminum (fume or dust) and

(continued...)

EPCRA § 325(c)(1) provides that any person violating EPCRA § 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation,"[5] but neglects to furnish criteria to guide the assessment of civil penalties under that provision. 42 U.S.C. § 11045(c)(1). As a result, the penalty criteria relating to violations of EPCRA § 304, the emergency notification provisions, which are set forth in EPCRA § 325(b), 42 U.S.C. § 11045(b)(1)(c), have been relied upon to guide administrative penalty assessments for Section 313 violations. *See e.g., Catalina Yachts, Inc.,*, 8 E.A.D. 199 n. 7, 1999 EPA App. LEXIS 7 (EAB 1999); *Trinity Industries, Inc.*, EPA Docket No. EPCRA-6-99-006, 2002 EPA ALJ LEXIS 26 *40 (ALJ 2002), *Gilbert Martin Woodworking Co.*, EPA Docket No. EPCRA 09-99-0016, 2001 EPA ALJ LEXIS 27 *28 (ALJ 2001), *Steeltech, Ltd.*, EPA Docket No. EPCRA-037-94, 1998 EPA ALJ LEXIS 35 *16 (ALJ 1998), *aff'd,* 8 E.A.D. 577, 1999 EPA App. LEXIS 25 (EAB 1999). EPCRA § 325(b) establishes two classes of administrative penalties for violations of EPCRA § 304. Class I violations carry a maximum penalty of $25,000 *per violation*, and Class II violations carry a maximum penalty of $25,000 *for each day the violation continues*. 42 U.S.C. §§ 11045(b)(1)(A), (b)(2)(A).

In determining the appropriate penalty for a Class I violation of Section 304, EPCRA § 325(b)(1)(C) directs consideration of the "nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. 42 U.S.C. § 11045(b)(1)(C). In determining the appropriate penalty for a Class II violation of Section 304, EPCRA § 325(b)(2), directs the use of the factors enumerated in Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 1615. The factors listed under TSCA § 16 are identical to those found under EPCRA § 325(b)(1)(C) for Class I violations except that the former includes consideration

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[4](...continued)
copper compounds triggering the reporting requirements under EPCRA § 313 is 25,000 pounds. 40 C.F.R. § 372.25(a).

[5] As adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701), the maximum civil penalty recoverable under EPCRA § 313 for violations that occurred "between January 30, 1997 and March 15, 2004," is $27,500, and for those occurring "after March 15, 2004" is $32,500. *See* 40 C.F.R. Part 19. In addition, EPCRA § 325(c)(3) provides that "[e]ach day a violation [under EPCRA § 312] . . . continues shall . . . constitute a separate violation." 42 U.S.C. § 11045(c)(3). Pursuant thereto, it has been held that EPA has the statutory authority to assess multi-day penalties for violating the annual reporting requirement of EPCRA for up to one year after the reporting deadline. *See*, *Loes Enterprises, Inc.*, Docket no. EPCRA-05-2005-0018, 2006 EPA ALJ LEXIS 39 *34 (ALJ 2006). Thus, in this case, the Agency could have sought up to $32,500 for *each day* the violations alleged in the six counts relating to filings for the 2003-2006 calendar years continued and up to $27,500 for *each day* the other four violations relating to filings for previous calendar years continued.

of the effect of the penalty on the violator's ability to continue to do business (rather than "ability to pay") and omits inquiry into the violator's economic benefit or savings.[6] 15 U.S.C. § 1615.

Further, the Environmental Appeals Board ("EAB") has consistently held, pursuant to Section 22.24 of the Rules of Practice (40 C.F.R. § 22.24), that in every case, EPA bears the burden of proving that the proposed penalty is appropriate after considering all the "applicable statutory penalty factors." *See, e.g., B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 217 (EAB 1997); *Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 756 (EAB 1997); *James C. Lin*, 5 E.A.D. 595, 599 (EAB 1994); *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). Where, as in this case, there are no "applicable statutory penalty factors," the EAB has held that EPA must alternatively prove that the proposed "penalty is appropriate in light of the particular facts and circumstances of the case." *Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 773-774 (EAB 1998)(emphasis removed)(citation omitted). The standard of proof required is a "preponderance of the evidence." 40 C.F.R. § 22.24(b).

B. Penalty Assessment

Section 22.27(b) of the Consolidated Rules of Practice that govern this proceeding provides in pertinent part that:

> . . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with <u>any criteria set forth in the Act</u> relating to the proper amount of a civil penalty, <u>and must consider any civil penalty guidelines issued under the Act</u>.

40 C.F.R. § 22.27(b)(emphasis added).

The Rules further provide that deviations from the amount of penalty recommended to be assessed in the complaint be accompanied by specific reasons therefor. *See,* Rule 22.27(b)(40 C.F.R. §22.27(b)).

In August of 1992, EPA issued an Enforcement Response Policy ("ERP") for EPCRA § 313, which it has thrice amended. C's Ex. 6; R's Ex. 12.[7] The stated purpose of the ERP is to "ensure that enforcement actions for violations of EPCRA § 313 . . . are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations . . . ." C's Ex. 6 p. 1.

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[6] "Ability to pay" and "ability to continue in business" are analogous concepts and the same evidentiary burdens apply. *Commercial Cartage Co.*, 7 E.A.D. 784, 807 (EAB 1998).

[7] C's Ex. 6 and R's Ex. 12 are both copies of the ERP.

The ERP utilizes a matrix and/or a per-day formula to determine a "gravity-based" penalty accounting for a violations particular “Extent Level”and “Circumstance Level.” Under the ERP the Extent Level of a violation is determined by looking at the size of the violator's business, as evidenced by total sales and number of employees, and the quantity of the subject chemical used. C’s Ex. 6 pp. 8-10.; C’s Ex. 56; Tr. 73. The Circumstance Level for a failure to timely file a Form R violation is determined by the “category” of the violation. A Category I Form R violation, one in which the Form R is not submitted until *one year or more* after the due date, is classified as a “Circumstance Level 1" violation. Category I, Circumstance Level 1 gravity-based penalties are calculated by plotting the circumstance and extent levels on a matrix provided in the ERP. C’s Ex. 6 p. 11; C’s Ex. 56. A Category II violation is one in which the Form R is submitted *less than 1 year* after the due date and is classified as a “Circumstance Level 4" violation. Category II, Circumstance Level 4 gravity-based penalties are calculated following a per-day formula provided in the ERP. C’s Ex. 6 pp. 13-14; C’s Ex. 56. After a gravity-based penalty amount is determined, the ERP provides for upward or downward adjustments to the penalty based on other factors such as voluntary disclosure, history of prior violations, delisted chemicals, attitude, other factors as justice may require, and the violator's ability to pay. C’s Ex. 6 pp. 14-20.

Nevertheless, it is important to note that the Administrative Procedure Act, 5 U.S.C. §§551-559, which also governs this proceeding, provides that penalty guidelines issued by the Agency without the benefit of notice and comment are not to be unquestionably applied as if they were a rule with "binding effect." *See, Employers Ins. of Wausau*, 6 E.A.D. 735, 755-762 (EAB 1997). Thus, in setting the penalty, this Tribunal has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant." *DIC Americas, Inc.,* 6 E.A.D. 184, 189 (EAB 1995).

IV. DISCUSSION

Russell Frazer, an Environmental Protection Specialist in the Toxics Office at EPA Region IX, testified at the hearing as to Complainant’s calculation of its proposed penalty using the ERP methodology. Tr. 42, 69-70; C’s Ex. 57. In further support thereof, Complainant also presented the expert testimony of Richard Ross, along with his report, on ignitability, flammability, reactivity and explosivity of materials, specifically as to the risk of harm presented by aluminum dust. C’s Ex. 52. With regard to the financial issues bearing on the penalty, Complainant presented evidence from Jonathon Shefftz, a financial expert.

In its case, Respondent presented at hearing the testimony of James W. Embree, an expert toxicologist, as to the toxicity of aluminum dust, and Mr. Oberholtzer, who testified as to Respondent’s facility and operations, and the circumstances surrounding the violations.

A. Extent Level of Violations

Under the ERP, EPCRA violations are designated as one of three Extent Levels - A, B or C, in descending order of magnitude. Extent Level A is assigned to facilities which annually use

ten times or more of the threshold amount of the chemical at issue, have more than $10 million in total corporate sales, *and* 50 or more employees. Extent Level B is assigned to facilities which use ten times or more of the threshold amount of the chemical but do not meet the numerical criteria for sales and employees, or which use less than ten times the threshold amount but have more than $10 million in sales and 50 employees or more. Extent Level C is assigned to facilities which use less than ten times the threshold amount but have neither 50 employees or $10 million in sales.

1. Complainant's Calculation

In regard to determining the Extent Level, which takes into account the quantity of chemical unreported and the size of the violator's business, Mr. Frazer noted preliminarily that the EPCRA reporting threshold for both aluminum (fume or dust) and copper compounds is 25,000 pounds. Tr. 79. Based upon the Form Rs eventually submitted by Valimet, he then determined that the company had processed in each calendar year from 2001 through 2005 *more than ten times* the reporting threshold for aluminum and *less than ten times* the reporting threshold for copper compounds. Tr. 79-81. Mr. Frazer further concluded from financial records on the company that Valimet had more than 50 employees and more than $10 million dollars in sales. Tr. 82. Based upon these factors, following the ERP, he then classified each of the five aluminum violations (Counts 1, 3, 5, 7 and 9) as being within "Extent Level A," and each of the violations pertaining to copper compounds (Counts 2, 4, 6, 8 and 10) as falling within "Extent Level B." Tr. 79-80, 83-85; C's Ex. 57.

2. Respondent's Arguments and Evidence

As to the size of business factor, Respondent argues that it should be considered a "small" business consistent with EPA's "Small Business Compliance Policy," which classifies companies with fewer than 100 employees as small, rather than being treated under the ERP in effect as a "large" business because it has 50 or more employees. R's Brief at 2, 11; R's Ex. 31 (EPA brochure "Opening Doors for America's Small Businesses"). In further support thereof, Valimet notes that the ERP's threshold number of 50 employees has not been amended in 17 years, since the ERP was first published in 1992, and that Mr. Frazer testified that EPA is presently discussing revising the ERP to reflect small businesses as those with less than 100 employees in order to be congruent with the Small Business Compliance Policy. R's Brief at 13; Tr. 134-35. Such process of change, Valimet argues, evidences that the ERP's existing definition of a small business is "essentially obsolete," and that the definition set forth within the Small Business Compliance Policy is of broader application than the ERP. R's Reply at 4. Additionally, Respondent asserts, the Small Business Compliance Policy provides that the number of employees, rather than annual sales, is *the factor* that distinguishes large from small businesses. *Id.*

Additionally, Valimet suggests that its compliance problem - an overburdened one-person compliance staff, inadequate management and lack of time - is exactly the type of situation which EPA's small business policies are meant to address. R's Brief at 11-13, citing to R's Ex. 31. Moreover, Valimet urges, there is precedent for treating an entity just over the 50

employee threshold as a small business, citing as authority therefor *Hall Signs, Inc.,* EPA Docket No. 5-EPCRA-96-026 (ALJ, Oct. 30, 1997), *aff'd*, EPA App. LEXIS 113 (EAB, Dec. 16, 1998). It further notes in this regard that EPA Region 9 did not provide it with compliance assistance or provide small businesses with any outreach. R's Brief at 13.

As to the quantities of chemicals involved in the violations, Respondent argues that the amount of *releases* from a facility is more relevant than the amount of material *used* at the facility. R's Reply at 3. Respondent suggests that Section 313 of EPCRA, concerned with *releases* of chemicals and curtailing releases through publicity from reporting them, does not provide a basis for the ERP's approach of assessing the extent of a violation by the amount of substance *used* at the facility. *Id.*

3. Complainant's Arguments and Evidence

Complainant argues that the ERP's highest Extent Level is warranted here for the five aluminum violations because the amount of aluminum dust Valimet processed each year greatly exceeded 100 times the regulatory threshold of 25,000 pounds and Respondent had over $18.5 million in total sales in 2007. C's Brief at 18-19. For determining a penalty's deterrence value, a company's revenues is a more significant indicator than the number of employees, which only marginally reflects a company's economic activity, Mr. Shefftz claimed. Tr. 371-72. He further argued that a larger penalty is needed to deter a larger business against future violations, and the ratio of sales to number of employees may indicate that Valimet is more profitable than if it employed more workers, *i.e* that it is maximizing its profits by controlling its number of employees. C's Brief at 19-20; Tr. 371-73.

Complainant further asserts that the Agency's Small Business Compliance Policy, 65 Fed. Reg. 19630 (April 11, 2000), addresses only *voluntary disclosure* of violations and thus is inapplicable here. Further, it notes that the Small Business Policy does expressly extend its definition of a "small business" into any other Agency policy documents, that the ERP has not yet been formally revised, and that no reduction in a penalty can be made until the ERP is actually revised, because to do so would place Valimet unfairly in a better position than other similarly situated violators. Complainant's Reply Brief ("C's Reply") at 3-5. Moreover, Complainant asserts that *Hall Signs* does not support Respondent's position because in that case, the penalty was reduced on the basis that the amount of sales, not employees, was close to the ERP's 10 million dollar threshold, and only the quantity of chemical was used to calculate the extent of the violation. Complainant emphasizes that Valimet processed far more than the threshold amount of the chemical and clearly exceeded the sales threshold, which it reiterates are more reliable indicators of extent than the number of employees. C's Reply at 5-7. Finally, Complainant exclaims that any lack of compliance assistance outreach on its part is irrelevant here because Respondent had actual knowledge of its reporting requirements as a result of its prior compliance therewith, and EPA Region IX did provide EPCRA 313 compliance assistance outreach through 2005, during the time when most or all of the violations at issue here occurred. C's Reply at 8, citing Tr. 116.

4. Findings and Conclusions as to the Extent Level of the Violations

Respondent's violations regarding aluminum dust fit squarely within the Extent Level A criteria. Its full-time employee equivalent of 53.5 employees is clearly within the category of 50 employees or more, and its corporate sales of $18.5 million clearly exceed the $10 million threshold. Furthermore, it is uncontested that during the years at issue, Valimet processed more than 10 times the ERP Extent Level threshold of 250,000 pounds, or more than 100 times the EPCRA § 313 reporting threshold. Tr. 79-81; C's Exs. 14-17; Stips ¶¶ 15-24.

The question of whether the slight exceedance over the threshold for number of employees is sufficient to place Respondent in Extent Level B for the violations regarding aluminum and Extent Level C for those concerning copper compounds may be considered by comparing the range of facilities encompassed within each Extent Level, and determining which best fits Valimet's circumstances. Extent Level B encompasses those facilities which use zero to *less than* 10 times the threshold amount of the chemical but have over 10 million in sales and 50 employees, and those facilities which use more than ten times the threshold amount but which have 0-$10 million in sales and 0-50 employees. Extent Level C covers facilities with less than ten times the chemical threshold amount, less than $10 million in sales, fewer than 50 employees. As such, Valimet's situation is simply not comparable to such facilities, and therefore, under the ERP, Extent Level A is the appropriate level for Valimet's violations regarding aluminum dust, and Extent Level B is the appropriate level for the violations concerning copper compounds.

Furthermore, while it is true that the Agency's Small Business Compliance Policy describes a small business as having less than 100 employees, this fact does not compel a finding that Valimet should be assessed a lower Extent Level under the EPCRA ERP. The purpose of a particular policy being applied affects which criterion - number of employees, annual sales, or amount of chemical at issue - is most determinative of a "small" business. For penalty purposes, deterrence is the primary goal, and therefore the number of employees is not the most determinative criterion. As Mr. Shefftz testified –

> For a deterrent effect, since the idea is that the larger a company is, the higher penalty will be needed to have a deterrent effect, that needs to be compared to a measure of the finances for the company. . . . By contrast, comparing the penalty size to the number of employees really just doesn't have any resonance with regard to deterrence. Just because a company has more employees, it doesn't mean that a higher penalty is going to be needed to have an impact on the company.

Tr. 378. Mr. Shefftz noted that "other size factors" are controlling for other purposes such as "to determine whether a company is even subject to a regulation in the first place." Tr. 372. He also mentioned that in some industries the number of employees may even decrease over time as production becomes increasingly mechanized. Tr. 375-376. A highly mechanized factory with 50 employees but which handles very large volumes of toxic chemicals and has a sales volume many times more than $10 million does not warrant a smaller penalty than a facility with the same violations but with many more employees who are manually operating the equipment, and barely more than $10 million in sales volume and just over ten times the threshold for the

chemical, particularly where the highly mechanized facility may be more profitable and in a better position than the other facility to retain someone to prepare its Form Rs.

In addition, the fact that EPA is or may be considering amending the number of employees in the Extent Level Criteria in the ERP does not weigh in favor of reducing the penalty for the Extent factor in this case. The status of any such consideration is unknown, and any conditions or other changes associated with any amendment to the number of employees is unknown. No assumption that the ERP will be amended, and that such amendment will simply substitute the threshold of 50 employees with a threshold of 100 employees, can be made or applied to this case.

It is further determined that the other factual evidence Valimet proffers in support of its attempt to cloak itself as only a small business is unconvincing. Such evidence consists primarily of the fact that it placed its EPCRA compliance in the hands of one overworked employee, Mr. Oberholtzer, who had many other responsibilities. Specifically, Mr. Oberholtzer testified that as Valimet's Director of Corporate Services, he has a "wide range of duties" which include basic responsibility for federal, state and local compliance issues and reporting, human resource functions, labor relations, training, the ISO 9000 quality system and the quality management function in general. Tr. 426-427, 465-468. He proclaimed that his "uninterrupted time [is] at a premium" and that he has "very little time at all," and that he has many demands on his time in the office. Tr. 497, 603-604.

In regard thereto, however, it must be noted that at no point did Valimet show or even attempt to show that its business was so small that it was not feasible for it to hire or assign another employee or contractor to perform or assist in the performance of its compliance responsibilities under EPCRA. In fact, at best the evidence in the record is rather murky in regard to Respondent's claim that its staff resources were limited. On the one hand, Mr. Oberholtzer stated that Valimet's employees are "very heavily weighed toward production and maintenance," that "[s]taff personnel is quite limited, by necessity, if nothing else" and that "we do the best we can." Tr. 523. He further claimed that when he occasionally mentioned to Valimet's president, Mr. Campbell, that he needed help to complete all the tasks assigned to him, such help was not provided. Tr. 605. On the other hand, *after* the Complaint was filed, the company did provide work relief to Mr. Oberholtzer in that it reassigned an existing employee to fill its newly created position of Health, Safety and Human Resources Analyst, whose duties include maintaining files and records, ensuring compliance with government reporting, and developing and maintaining an annual calendar to assist in compliance activities related to local, state and federal filing requirements. R's Ex. 5; Tr. 521-522. Thus, the record suggests that while Valimet was aware of the need to allocate more resources to assist Mr. Oberholtzer to, among other things, fulfill the company's Federal filing responsibilities under EPCRA, in an attempt to minimize its overhead costs, it chose not to allocate its resources in such manner and risk noncompliance with EPCRA and possibly its other environmental obligations. A company cannot be rewarded with a lower Extent Level based on such business decisions, particularly where it does not demonstrate that it had no resources to allocate, hire or contract with someone to ensure its compliance with EPCRA § 313.

In sum, the record presents no persuasive reason to deviate from the ERP's methodology as to the extent of violation. A sliding scale methodology used in the *Hall Signs* case was limited to the facts in that case, which are dissimilar to those in the present case. Such a sliding scale was rejected by the Environmental Appeals Board in *Clarksburg Casket Co.*, 8 E.A.D. 496, 1999 EPA App. LEXIS 23 *43 (EAB 1999), in which the respondent had $14.5 to $15 million in sales and 185 employees, but the amount of chemical used was only up to two times the ERP Extent Level threshold. Where, as here, the amount of chemical used is more than 10 times the ERP Extent Level threshold, and amount of corporate sales exceeds that in *Clarksburg*, there is even less reason to use a sliding scale methodology than in *Clarksburg*.

Next, as to Respondent's claim that this Tribunal should deviate from the ERP's method of assessing the extent of a violation considering the amount of the chemical "manufactured, processed or otherwise used," and derive such extent instead from the amount of the chemical *released* during the relevant year, it is noted that in any case in which the basic propositions upon which the penalty policy is based are genuinely placed at issue, the ALJ "must be prepared 'to re-examine those [basic] propositions.'" *Employers Insurance of Wausau and Group 8 Technology, Inc.,* 6 E.A.D. 735, 761 (EAB 1997) (quoting *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988)). Moreover, in this regard it is observed that Respondent's argument that Section 313 is concerned with releases of chemicals, and is thus more relevant than the amount manufactured, processed or used at a facility, ostensibly has some merit. Indeed, the ERP states with respect to Extent Level:

> EPA believes that using the amount of § 313 chemical *involved in the violation* as the primary factor in determining the extent level underscores the *overall intent and goal of EPCRA § 313* to make available to the public on an annual basis a reasonable estimate of the toxic chemical substances *emitted into their communities* from these regulated sources.

C's Ex. 6 at 9. This statement read alone would suggest that the amount "involved" to determine the Extent Level would reflect some estimate of the amount of the chemical "emitted" (released), into the community rather than merely the amount processed or used at the facility. However, the ERP's actual Extent Levels are clearly delineated only in terms of "Facilities which manufacture, process or otherwise use ten times or more the threshold of the § 313 chemical involved" and "Facilities which manufacture, process or otherwise use less than ten times the threshold," along with the criteria of sales and number of employees. *Id*. Thus, despite the above quoted expression of Agency intent, the amount of emissions into the community by the regulated source is not in fact considered in determining the extent level under the ERP.

Nevertheless, it is noted that the method of categorizing the extent of the violation actually utilized under the ERP is reasonable, perhaps even more reasonable than an estimate of releases. In this regard it is noted that the amount of the chemical manufactured, processed or used, considered along with annual sales and number of employees, correlates with the sophistication and size of the company and magnitude of its operation, and thus is indicative of the resources a company should have for compliance with Section 313 of EPCRA and the amount of penalty needed for deterring violations. On the other hand, the number of pounds of

the chemical released does not indicate the resources a company should have to comply with Section 313. Also, without other facts pertaining to the releases, the amount of releases does not provide all of the information from the Form R that would be important for the community to know, and which the community was deprived of by the failure to file the Form R. The amount of releases does not alone indicate its potential hazards to the community, which depend on several other facts, such as the environmental medium into which the chemical is released. It is more appropriate to consider all these facts together, which can be accomplished when adjusting the gravity-based penalty.[8] In particular, a very low level of releases, when considered along with other related facts, may support a downward adjustment for "other factors as justice may require," as discussed below.

B. Circumstance Level of Violation

As to the Circumstance Level, which takes into account the length of the filing delay, Mr. Frazer noted that the Respondent filed its Form Rs for 2001 through 2005 on or about April 25, 2007. Tr. 85. From this he concluded that each of the forms due for calendar years 2001 through 2004 were filed *more than one year* after their filing deadline. Tr. 85. As such, according to the ERP, the violations for those years (Counts 1-8) fall within "Circumstance Level 1." Tr. 86-87; C's Ex. 57. He further concluded that the violations pertaining to the filings due for the 2005 calendar year (Counts 9 and 10), due on or before July 1, 2006, were filed less than one year late. C's Ex. 57. As such, according to ERP, they fell within "Circumstance Level 4." Tr. 88-89.

Respondent did not contest the Circumstance Level, and the record does not support any different assessment of Circumstance from that proposed by Complainant under the ERP. Accordingly, Counts 1 through 8 are assessed as Circumstance Level 1 and Counts 9 and 10 are assessed as Circumstance Level 4.

C. Gravity-based Penalty Calculation

1. Arguments and Evidence

For the violations regarding aluminum, applying Extent Level A and Circumstance Level 1 to the ERP matrix results in imposition of the maximum penalty EPCRA allowed at the time of violation, which was $27,500 for Counts 1 and 3 (the 2001 and 2002 violations) and $32,500 for Counts 5 and 7 (the 2003 and 2004 violations). C's Ex. 57. As to the violations pertaining to the copper compounds, with Extent Level B and Circumstance Level 1, the matrix indicates that a appropriate penalty would be $18,700 for the violations pertaining to 2001 and 2002 (Counts 2

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[8] In addition, if the extent of violation was assessed in large part based on the amount of chemical released, a respondent might have an incentive to falsify the amount of release reported on its Form R in expectation that the penalty would be greatly reduced and that EPA would not detect such false data; EPA may be more easily able to verify the amount of chemical used.

and 4), and $21,922 for the violations pertaining to 2003 and 2004 (Counts 6 and 8). In regard to the 2005 aluminum and copper compound violations (Counts 9 and 10) which are assessed at Circumstance Level of 4, as they pertain to Form Rs filed less than one year late (and Extent Levels of A and B, respectively), following the ERP Mr. Frazer stated that penalties were calculated using a per-day formula. Tr. 88-91. In order to do so, he first determined that the forms were filed 296 days past their due date. Tr. 89-90. Then, following the ERP directive which proportionalizes the yearly maximum penalty to account for violations continuing for less than a year, he determined that an appropriate penalty for the 2005 aluminum violation would be $28,740 and an appropriate penalty for the copper compound violation would be $19,202. Tr. 90-91; C's Ex. 57. Adding the penalty sums so calculated for each of the ten violations together, and rounding to the nearest hundred, yielded the Agency's proposed gravity-based penalty of $249,186, or, rounded to the nearest hundred, $249,200. Tr. 92.

2. Findings and Conclusions as to Gravity-Based Penalty Calculation

The record supports Complainant's calculation of the gravity-based penalties for all ten counts of the Complaint. Accordingly, the gravity-based penalty is $249,186.

D. Attitude

The ERP provides for a downward adjustment to the gravity-based penalty for the factor of "attitude." Specifically, the ERP provides for a reduction of up to 15 percent of the penalty for a violator's cooperation and up to an additional 15 percent for a violator's good faith efforts to come into compliance. C's Ex. 6 (ERP at 18). Under the first component, the penalty may be reduced based on "factors such as degree of preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process." *Id*. Under the second component, the penalty may be reduced for the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." *Id.*

1. Complainant's Arguments and Evidence

Mr. Frazer determined that the attitude factor was inapplicable to this case because Valimet was not cooperative in that it took an extended period of time to produce the threshold calculations requested by the Agency and then only did so after a series of telephone calls prompting it. Tr. 94. Complainant compares this to *Clarksburg Casket Co.,* EPA Docket No. EPCRA-III-165, 1998 EPA ALJ LEXIS 50 (ALJ, June 25, 1998), *aff'd*, 8 E.A.D. 496 (EAB 1999), in which the ALJ found the respondent to be non-cooperative in waiting two years after the inspection to provide the usage data. C's Brief at 29. Complainant characterizes Respondent's conduct as a "flagrant disregard for its commitment to work cooperatively with EPA" by continually ignoring deadlines to submit the data. C's Brief at 29. Further, Mr. Frazer noted that Valimet took an extended period of time to submit its Form Rs, which he concluded evidenced a lack of good-faith efforts on its part to come into compliance. Tr. 94-95. Complainant emphasizes that the Form Rs were filed almost 6 months after the company

gathered and submitted its threshold data and three years after the inspection, and only after EPA notified it of a potential enforcement action. C's Brief at 30-31. These facts should not be negated by Valimet's cooperative behavior during the inspection and participation in mandated settlement discussions, Complainant urges. C's Reply at 19-20.

Further bolstering its arguments, Complainant asserts that although it did not increase the penalty to account for culpability of Respondent, Respondent's violations were shown at the hearing to be "knowing" and/or "willful" and therefore its level of culpability supports the proposed penalty. C's Brief at 44. The ERP does not include culpability as a factor in calculating a penalty, but does allow Complainant to "assess per day penalties, or take other enforcement action as appropriate" for "knowing or willful" violations. *Id.*, citing ERP (C's Ex.. 6) p. 14. Respondent was aware of its filing obligations for aluminum dust, having submitted Form Rs from 1990 through 2000, and was aware that it was not allocating enough resources to timely file the Form Rs. C's Brief at 46, C's Reply at 20. EPA notes that the person in charge of filing, Mr. Oberholtzer, was too busy, and sought but did not receive help from Mr. Campbell, the president of Valimet. Complainant submits that Mr. Oberholtzer and Mr. Campbell were benefitting from a "profit-sharing" plan, which includes profiting from a failure to act or hire additional staff necessary to ensure compliance. *Id.*

2. Respondent's Arguments and Evidence

Respondent maintains that the penalty should be reduced by the full 30 percent for the factor of "attitude." Valimet cites testimony evidencing it prepared for and cooperated in the April 2004 inspection, and asserts that its counsel cooperated in and was prepared for settlement discussions in the Alternative Dispute Resolution process. R's Brief at 23. Valimet asserts that there is no evidence of bad faith on Respondent's part, and suggests that the fact that it is a small business with over-burdened staff, where EPA did not provide outreach, no longer issued reminder notices, and did not supply the information on low levels of lead and mercury impurities, should be taken into account in assessing "attitude." R's Brief at 10-11, 24; Tr. 115-16. Respondent further points out that it was in compliance with EPCRA Sections 311 and 312, that it conducted training exercises with the local fire department at its facility, that it filed the Form Rs prior to the filing of the Complaint, and that it was 85-90 percent complete with the Form Rs when it received the Notice of Violation on April 11, 2007. R's Brief at 10; Tr. 468-470, 502. Further, Valimet states it undertook compliance measures to prevent recurrence of the violations, in that it created a new job position for an existing employee that includes compliance assistance functions, and ensures compliance with regulatory deadlines with an automated calendaring system. Tr. 521-522; R's Exs. 5, 6.

Finally, Respondent distinguishes *Clarksburg Casket* on the basis that there were six reasons therein for finding a lack of cooperation, including not preparing for the inspection and not filing its Form Rs as of the date of the hearing. R's Reply at 5-6. Respondent emphasizes that in comparison, Mr. Oberholtzer here was not acting with malice or dishonest purpose but was willing to comply, and simply lacked quiet time to gather information and prepare the Form R when he had competing demands for his time. *Id.* at 6-7.

3. Findings and Conclusions as to Attitude Factor

As to the first half of the attitude adjustment factor reflecting a violator's cooperation, it is noted that Inspector Lucas did testify that Mr. Oberholtzer was "very cooperative during the inspection," allowed him access to Valimet's records, and was "prepared for the inspection . . . and answered whatever questions we had." Tr. 159-160. Furthermore, while Respondent does not cite to any testimony to support its assertion of cooperation and preparedness during the settlement process, it is noted that such evidence is not typically presented, and that Complainant does not appear to dispute Respondent's assertion. S*ee*, C's Reply at 19-20 (Complainant merely refers to "participation in mandated settlement discussions."). Nevertheless, this Tribunal is wary to consider and adjudge allegations of conduct during confidential settlement discussions in the context of litigation. *See, Woodcrest Manufacturing, Inc.,* 7 E.A.D. 757, 777 and n. 16 (EAB 1998). However, the case file does indicate that the parties voluntarily engaged in Alternative Dispute Resolution and engaged in settlement conferences prior to the hearing, and it was observed by the Tribunal that both parties were cooperative and prepared for the litigation of this case. On the other hand, the evidence of record also clearly establishes that Respondent was not at all expeditious in providing supporting documentation requested by EPA after the inspection. Therefore, a reduction of 8 percent of the gravity based penalty, rather than the full 15 percent, is warranted for the first component of the "attitude" factor.

As to the second component, Respondent eventually came into compliance by filing all of the missing Form Rs, albeit only after EPA issued the notice of intent to initiate an enforcement action, and Respondent timely filed Form Rs for 2006 and 2007. Stip. ¶ 38; C's Ex. 10, 14-16, 32, 55; R's Ex. 13; Tr. 68-69, 125-26, 500, 521. This fact does merit some reduction in the penalty, in order to distinguish Respondent from violators such as in *Clarksburg Casket* and *Woodcrest Manufacturing* who failed to file Form Rs *even after* issuance of the complaint. In addition, the record indicates that Mr. Oberholtzer was honest and that he made efforts to be thorough and accurate in his calculations of amounts of chemicals to be reported on Form Rs, including the amounts of aluminum, copper compounds, nickel and zinc powder that EPA requested, and mercury and lead that may occur in very low levels in aluminum. Tr. 486-492, 494-99, 159-165. For these efforts and eventual compliance, a four percent reduction will be applied to the penalty.

No further reduction is warranted based on the argument that Respondent's good intention or good faith effort was hindered by being a small business with over-burdened staff, lacking time to complete the Form Rs. The record shows that even after the inspection, Valimet chose to give other business matters higher priority than compliance with Section 313 of EPCRA. Valimet chose to allocate its resources toward the success of its business - along with safety matters and compliance with other government requirements - but did not allocate sufficient resources for past or present compliance with Section 313 of EPCRA. Respondent does not allege that there was any tragic or unusual occurrence that required reallocation of resources set aside for completing the Form Rs, and thus does not show any basis for further reduction of the penalty for "attitude."

The fact that EPA did not provide the information to Mr. Oberholtzer regarding low

levels of lead and mercury in aluminum does not change this conclusion. Tr. 491. Mr. Oberholtzer admitted that he could perform the calculations for aluminum and copper compounds without the information from EPA concerning lead and mercury. *Id.* Mr. Oberholtzer was concerned about whether he had to report a *separate* Form R for lead, and how to report an amount of mercury that is below the detection limit. Tr. 486-91, 162-64. For materials that are composites or mixtures of different listed chemicals, for Form R purposes the amount of chemical processed or used is calculated from the percentage of the chemical in the composite or mixture. Tr. 146-47, 154. According to Mr. Lucas, this calculation is "not difficult" and all the threshold calculations he requested from Mr. Oberholtzer would have taken two weeks, including time to make sure it is correct. Tr. 146-47, 154-55.

The fact that no reminder notices were issued by EPA during the time of the violations also does not weigh in favor of a further reduction for the compliance component. Such courtesies on the part of EPA in providing reminder notices in some instances cannot be converted to a penalty mitigating factor when reminder notices are not issued by EPA in other instances, particularly in the circumstances of this case. Similarly, any absence of EPA providing outreach to regulated entities does not provide a basis for penalty mitigation. The record indicates that EPA Region 9 did provide annual training programs and speakers to groups upon request, and took calls for assistance. Tr. 127. The record does not indicate that Respondent would have filed its Form Rs for the time period at issue if EPA had provided more outreach.

Respondent's compliance with Sections 311 and 312 of EPCRA does not warrant any adjustment to the penalty either. *Pacific Refining Company,* 5 E.A.D. 607 n. 19 (EAB 1994)(penalty not reduced for respondent making local agencies aware of chemicals it uses). Finally, Respondent's efforts to prevent further violations do not warrant a further reduction in the penalty, as the evidence shows that Valimet did not allocate a portion of Mr. Oberholtzer's duties to another employee to help with EPCRA compliance until after the Complaint was filed. R's Ex. 5; Tr. 521-22. Respondent's printout from its automated calendaring system commences with January 2007, two and a half years *after* EPA's inspection. R's Ex. 6; Tr. 522.

It is concluded that the gravity based penalty will be reduced by 12 percent to account for the factor of "attitude."

E. <u>Other Adjustment Factors</u>

Mr. Frazer considered whether the initial gravity-based penalty should be altered either up or down based upon the various other adjustment factors set forth in the ERP, and concluded that no such change was warranted. Tr. 92. Specifically, he noted that a downward adjustment was not appropriate based upon "voluntary disclosure" because Valimet's violations were discovered as a result of an inspection, and not as a result of any disclosure on its part. Tr. 92-93. He also concluded that an upward adjustment was not warranted on the basis of a prior history of violations because Valimet had no such history. Tr. 93. Mr. Frazer noted that the adjustment factor applying to delisted chemicals was inapplicable as neither aluminum nor copper compounds had been delisted. Tr. 93-94.

Although Valimet did not claim an inability to pay the proposed penalty, Complainant demonstrated that it met its initial burden to consider Valimet's ability to pay by considering a Dun & Bradstreet report and other publicly available information. C's Brief at 25; C's Ex. 12. Complainant points out that the proposed penalty is only 1.3 percent of Respondent's gross sales in 2007. C's Brief at 26; Tr. 379-80.

Complainant's assessment of these adjustment factors are not disputed. However, the parties strenuously dispute whether the penalty should be reduced on the basis of the risk of harm, so this factor is discussed separately below.

F. <u>Other Factors as Justice May Require - Risk of Harm</u>

Mr. Frazer decided that no adjustment to the penalty was necessary "for other factors as justice may require," as there were no such other factors. Tr. 99. Respondent, however, strongly urges that the penalty be reduced on the basis that aluminum dust is not toxic, and suggests that the reduction be under the rubric "other factors as justice may require." R's Reply at 5.

1. <u>Complainant's Arguments and Evidence</u>

Complainant's view is that penalty assessment for a violation of Section 313 of EPCRA generally should not take into consideration the actual harm or risk of harm to human health or the environment posed by the facility's chemical management activities. C's Brief at 33. Apparently in support of that view, Complainant cites to a preamble to a 1997 regulation expanding the reporting requirements of Section 313. *See*, 62 Fed. Reg. 23834 at 23839, 23840, 23843 (May 1, 1997)("EPA believes that a risk-based approach to EPCRA section 313 reporting is at odds with the basic premise of EPCRA section 313, which is to get information about the use, disposition, and management of toxic chemicals into the public domain, enabling the users of this information to evaluate the information and draw their own conclusions about risk."). Complainant also cites to *Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 780 (EAB 1998)("any lack of actual harm to the environment resulting from a respondent's violation of the EPCRA § 313 reporting requirements is not grounds for reducing the penalty for such violation . . . .") and *Pacific Refining Co.*, 5 E.A.D. 607 (EAB 1994)("In light of the statutory penalty scheme, there is simply no compelling basis for further reducing the per-violation gravity-based penalties on the grounds that Pacific's ten reporting violations may not have increased by tenfold any risk to the environment."). However, acknowledging the ruling in the Order issued in this case on November 6, 2008, allowing Respondent to present evidence as to potential hazards to the community from the chemical required to be reported on the Form R, Complainant presented evidence at the hearing of risks posed by Valimet's chemical handling activities. C's Brief at 35. Complainant argues that to the extent that risk posed by toxic chemicals is considered in assessing a penalty for violation of EPCRA § 313, the risk should be broad based, pointing out that the reporting requirements of EPCRA § 313 cover many aspects of a facility's chemical management practices. C's Brief at 36-37. Complainant also refers to the statement of the undersigned at the hearing, that the issue of aluminum dust being a high risk, in that it could explode, is a relevant factor to be considered. C's Reply at 8-9, citing Tr. 20.

Complainant argues that Valimet's failure to file the Form Rs deprived the public for almost five years of vital information necessary to make informed decisions about the dangers posed by millions of pounds of aluminum dust and thousands of pounds of copper compounds managed by its facility, and that the risks posed by the facility's activities are demonstrated by testimony of Mr. Ross, an expert on ignitability, flammability, reactivity and explosivity of materials. C's Brief at 13-14. Mr. Ross testified that aluminum dust is ten times more explosive than trinitrotoluene (TNT), and described potential scenarios in which aluminum dust could accidently be ignited and explode at Valimet's facility, including a scenario in which an initial explosion could cause a larger secondary explosion. Tr. 240-52, 305-09; C's Ex. 52. Mr. Ross explained that satellite photos of the area around the facility, superimposed with blast profile rings, showed that an explosion of 400 pounds of aluminum dust would cause lethality, lung damage, and eardrum rupture at a large portion of Valimet's facility and that a residential area, a highway and portion of the airport, would not be a "safe distance" from the blast. C's Ex. 46; Tr. 188-89, 253-60. Mr. Ross further testified that an explosion of 400 pounds of aluminum dust would create a risk of lethality in a diameter of 157 feet from the explosion. Tr. 253-54; C's Ex. 46. He testified that an explosion of 6,000 pounds of aluminum dust would be lethal to everyone at the Valimet facility, and would cause risk of serious bodily harm to those in an expansive residential area, nearby roads and railroads. Tr. 257-60; C's Ex. 47, 48. Mr. Ross mentioned that exposure of aluminum dust to water will produce hydrogen gas, which could ignite in the presence of heat. Tr. 238, 284. He also mentioned that an explosion could occur if a truck transporting aluminum dust was in an accident, or if hydrogen gas was released as a result of the aluminum dust becoming wet and heated up in the truck by the sun. Tr. 336-37.

Moreover, Complainant points to Mr. Oberholtzer's admission made at hearing that two accidental explosions have previously occurred at Valimet's facility in 1987 and 1997. Tr. 503-10. The first explosion involved a malfunction of an operating machine, releasing approximately 40 pounds of aluminum dust, which resulted in an employee getting burned from the flash and minimal damage to the building. Tr. 505-11. The second incident in 1997 occurred when a maintenance operator trying to diagnose a problem with a machine bypassed the interlock, and operated the machine without a full purging procedure. This explosion lifted the roof of the building, but caused no injuries and minimal damage to the equipment, because there was a minimal amount of aluminum powder in the area. Tr. 513-16.

Finally, on this point, Complainant argues that Valimet's workers and other interested members of the public deserve to be informed of Respondent's chemical management activities so they can assess the risks posed by the facility, and that "this case embodies the very harm that EPCRA § 313 was enacted to address, the lack of access by the public to vital information that would inform them of serious risks in their community pertaining to the industrial management of chemicals." C's Brief at 15-16.

2. <u>Respondent's Arguments and Evidence</u>

Respondent's position is that the penalty should be substantially reduced on the basis that there is no dispute that aluminum dust is not toxic, and that there is significantly less harm in failing to submit information about a substance that is non-toxic than for a substance that is

highly toxic. R's Brief at 16-18. At the hearing, Respondent presented its expert toxicologist, Dr. Embree, who testified that "as commonly defined, aluminum dust is not toxic," that if all substances on the EPCRA 313 list were ranked in order of toxicity, aluminum dust would place at or very close to the bottom of the list, and that aluminum dust was included on the EPCRA list of toxic substances because OSHA had placed it on its list, but it would not meet the criteria for being added to the EPCRA list. Tr. 611-12, 627, 629. Respondent asserts that aluminum dust has the same health effects - respiratory irritation - as any small particle, simply due to its size, citing to the same OSHA standard of 10 milligrams per liter for aluminum as for any other small particles, such as nuisance dust. Tr. 621-22. Noting that EPA did not present any toxicology expert at the hearing, Respondent asserts that Mr. Ross, EPA's expert on explosivity, "was of the view that aluminum was essentially non-toxic," citing to his testimony that, "other than respiratory hazards and, of course, the unknowns that have been presented, of things like Alzheimer's disease, I'm not aware of any other toxicological issues." R's Brief at 2, 6, 18; Tr. 348-349. Respondent also asserts that the Agency for Toxic Substance and Disease Registry (ATSDR), the National Institute of Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH), are of the view that aluminum dust is not toxic, referring to Dr. Embree's testimony that his review of Complainant's Exhibits 8, 18, and 19 and Respondent's Exhibit 9 confirmed his opinion that aluminum dust is not toxic. Tr. 616-17, 619-20, 623-24. Valimet also cites to Dr. Embree's testimony that the combustion product of aluminum powder, aluminum oxide, is also not toxic. R's Brief at 6; Tr. 635.

This evidence is not countered by Complainant's evidence of fire and explosion risk, Respondent asserts, because EPCRA is concerned with toxic substances, not explosion risk, which has no nexus to the statutory scheme. R's Brief at 19. Valimet points out that substances posing high explosion risks such as flour and trinitrotoluene (TNT) are not listed under EPCRA. *Id.* Further, Respondent argues, Section 313 of EPCRA seeks information about actual releases to the environment in the past year, whereas Sections 311 and 312 of EPCRA, with which Valimet has always been in compliance, seek information about substances located in a facility to prevent and respond to future incidents. R's Brief at 19-20; Tr. 50. Valimet asserts that worst-case scenario explosion incidents are very unlikely. R's Brief at 6, 20. In particular, Valimet asserts, its dust hazard prevention practices comply with all recommendations and standards promulgated by the National Fire Protections Association and other entities, citing to Mr. Oberholtzer's testimony as to Respondent's control of ignition sources, by bonding and grounding all equipment and containers, a permit program to control the types of work that uses an energy source or may create a spark or open flame, removing combustible material, having extinguishing materials available and inspected, and training personnel and contractors, and as to Respondent's policies and practices to mitigate damage from an incident, such as explosion venting, use of non-combustible building materials, isolating processes in separate buildings, and emergency procedures. Tr. 434-41.

Therefore, Respondent urges that a significant reduction of the penalty be granted by this Tribunal in light of the fact that its failure to report concerned only releases of small amounts of a non-toxic substance. Brief at 2. Respondent points out that during 2006, the most recent year for which data is available, it released 50 pounds of aluminum dust to the environment, and was ranked as the 870th largest emitter of toxic metals to the environment out of 1603 facilities in the

primary metals industry. R's Brief at 3-4; Tr. 110, 471-72, 477; R's Ex. 8, 13. Respondent further avers that its closed-loop system and the seals used in its operations prevent or minimize emissions, citing to testimony of Mr. Oberholtzer. Brief at 3; Tr. 431. Respondent adds that it has an aggressive housekeeping policy and that metals recaptured from housekeeping are recycled. Brief at 3; Tr. 432-433.

3. Complainant's Reply

Complainant responds to Respondent's non-toxicity argument by asserting that the penalty should account for "the actual impairment to the public's ability to assess risks resulting from a company's failure to file its Form Rs" and thus "all risks that could have been discerned from the untimely filed Form R information" should be considered, and not just risks related to actual releases and toxicity of the chemical. C's Reply at 9-10. Complainant argues that Respondent's focus on the lack of toxicity of aluminum, based on the criteria for *new* listings of chemicals, set out in EPCRA § 313(d)(2), is irrelevant to determination of a penalty unless a chemical is delisted. C's Reply at 9. Complainant points to EPCRA § 313(h), which states that Form Rs are not only to inform persons about releases of toxic chemicals but also to assist in research, data gathering, developing regulations, guidelines and standards, and for "other similar purposes," and that Form Rs require information not only on releases but also on maximum amounts of the chemical present at the facility, category of use, and waste treatment or disposal methods. C's Reply at 10-11. Complainant further points to a passage in the legislative history of EPCRA stating that "the reporting provisions in this legislation should be construed expansively to require the collection of the most information permitted under the statutory language." C's Reply at 11-12, citing C's Ex. 39 p. 107 (132 Cong. Rec. H9564, at H9593 (Oct. 8, 1986). As to Section 311 of EPCRA, requiring filing of Material Safety Data Sheets, Complainant asserts that they convey only generalized hazard information about a chemical, and as to Section 312, Complainant asserts that it provides chemical inventory information to state and local governments for emergency planning and to the public upon request from those government entities, whereas Section 313 provides the public with easy instant access to computerized data. C's Reply at 13-14. Complainant emphasizes that the EPCRA § 313 program empowers local communities to hold companies accountable about their management of toxic chemicals, not only their releases, as evidenced by EPA's webpage presented in Respondent's Prehearing Exchange. C's Reply at 15, citing R's Ex. 10.

Moreover, Complainant asserts that Mr. Embree did not demonstrate that aluminum dust is non-toxic, as he never elaborated on what standard he was using in stating "as commonly defined, aluminum dust is not toxic," except for his belief that it would not be listed today for EPCRA § 313 purposes. C's Reply at 15-16, citing Tr. 611-12. He only relied upon summaries of studies rather than the actual studies in making his conclusions, never considered potential exposure pathways to workers or nearby residences from Valimet's aluminum dust, and acknowledged that respiratory problems and neurological changes are associated with aluminum dust exposure, Complainant points out. C's Reply, citing Tr. 613, 616-17, 633. Complainant also notes that no one has petitioned EPA to delist aluminum dust under EPCRA 313(e)(1).

Finally, Complainant urges that the level of risk of aluminum dust explosion or fire at

Respondent's facility would interest the public, and that it is of more concern than materials such as TNT or flour, which are less explosive and flammable than aluminum dust. C's Reply at 18-19.

4. Respondent's Reply

Respondent points out that EPCRA § 313 data on the Toxics Release Inventory is available on-line, so a company's data is available from previous years even if the company failed to file a Form R for a period of time. R's Reply at 2. Valimet additionally argues that the smaller the release and less toxic the substance, the less "undermining" of EPCRA's purpose occurs as a result of a violation, as a motorist who exceeds the speed limit by one mile an hour undermines the law and is fined less than one who exceeds it by 50 miles per hour. *Id.* Respondent urges that this is not a typical case, where the violation involves one of the least toxic substances on the list and where its releases are very small, and therefore the public information gap is far less than if the violation involved large releases of a highly toxic substance. R's Reply at 8-9.

Moreover, Valimet argues that risk other than toxicity of a substance is of "marginal relevance" to penalty assessment for EPCRA Section 313 violations, which is concerned with reporting of actual releases of toxic substances that occur as a result of normal business operations, citing to legislative history, House Conf. Rep. No. 99-962, reprinted in U.S. Code and Cong. & Admin. News, 99th Cong., 2nd Sess. (1986) at 3276, 3385. Respondent cites to Mr. Oberholtzer's testimony that tests conducted on Valimet's aluminum powder show that it is not ignitable or reactive, and is not a flammable solid. R's Reply at 9, citing Tr. 478-82, 541-50. In contrast, Valimet notes, Mr. Ross's testimony was not based on knowledge of Valimet's materials.

As to the two explosions at its facility, Valimet points out that it took corrective action as a result of them, which decreases the risk. R's Reply at 10.

5. Findings and Conclusions as to Risk of Harm

The first question to address is whether a penalty for violation of Section 313 of EPCRA can be reduced under the ERP on the basis that the chemical involved has a low level of toxicity and/or low levels of releases.[9] The amount of releases of the chemical for the year reported is a primary piece of information to be reported on the toxic chemical release forms (Form Rs), and is central to its purpose. Section 313(a) sets out the facilities required to report thereunder, and the due date and recipients of the report, and only one item of data, namely, "data reflecting releases during the preceding calendar year." As stated in Section 313(h) of EPCRA, entitled

[9] The term "release" is defined in regulations implementing EPCRA § 313 as "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of . . . closed receptacles) of any toxic chemical." 40 C.F.R. § 372.5.

"Use of Release Form" –

> The release forms required under this section (Form Rs) are intended to provide information to the Federal, State and local governments and the public, including citizens of communities surrounding covered facilities. The release form shall be available . . . to inform persons about *releases* of toxic chemicals to the environment; to assist governmental agencies, researchers and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines and standards; and for other similar purposes.

42 U.S.C. § 11023(h)(emphasis added). Data from the Form R is required under EPCRA § 313(j) to be conveyed to a publically available national database, the Toxics Release Inventory (TRI). The regulations state that the purpose of filing the annual Form R is for collecting information "intended to inform the general public and the communities surrounding covered facilities about *releases* of toxic chemicals," among other things. 40 C.F.R. § 372.1 (emphasis added). EPA has stated in an Interim Final Rule, as quoted by the Environmental Appeals Board, that EPCRA is intended to "provide residents and local governments with information concerning potential chemical hazards present in their communities." *Woodcrest Manufacturing, Inc.,* 7 E.A.D. 757, 780 (EAB 1998)(quoting Interim Final Rule, 51 Fed. Reg. 41,570 (Nov. 17, 1986)).

The seriousness of the failure to file a Form R is taken into account in the ERP in terms of the *accuracy and availability* of the information in the Form R to the community, states and the Federal government, in assessing the Circumstance Level. ERP at 8, 11-12. But the ERP does not take into account the seriousness of failure to file a Form R in terms of the relative *importance* of the information to the community, states and Federal government. When such entities are deprived of the information in the Form R by failure to file, they may be affected to a larger or smaller degree depending on the importance to them of the information that was required to be reported in the Form R. The greater the danger posed by the releases, the greater the importance to the local community, governments and general public of the information in the Form R, and the greater the impact on them from the facility's failure to file the Form R. *See, Pitt-Des Moines,* EPA Docket No. VIII-89-06, 1991 EPA ALJ LEXIS 26 *33 (ALJ, July 24, 1991)(purpose of EPCRA reporting requirements includes determining the danger of substances being released; penalty pre-dating the ERP was reduced where release would not be dangerous); *Chautauqua Hardware Corp.,* 3 E.A.D. 616, 628, 1991 EPA App. LEXIS 48 *23 (CJO 1991)(respondent "could argue that the gravity of the alleged violations was not serious since the chemical turned out to be less dangerous than the Agency had originally believed"). The likelihood and severity of potential harm from the releases, along with the accuracy and availability of the Form R information, reflects the potential harm to the EPCRA 313 program by the failure to file a timely Form R. The potential harm to the particular regulatory program is generally considered in assessment of penalties. *Woodcrest Manufacturing,* 7 E.A.D. at 781 ("we have consistently held that failure to comply with the reporting . . . requirements of environmental statutes can cause significant harm to the applicable regulatory scheme and may be grounds for imposition of a substantial penalty"); *see*, *e.g.*, C's Ex. 50 (PCB Penalty Policy, 45 Fed. Reg. 59770, 59772 (Sept. 10, 1980))(measure of extent of harm from violation of hazard

assessment data gathering requirements "focus[es] on the goals of the given . . . regulation, and the types of harm it is designed to prevent."); EPA General Enforcement Policy "GM-22" pp. 3, 13-14 (Feb. 16, 1984)(gravity of the violation should consider actual or possible harm and importance of the requirement to the goal of the regulatory scheme).

The likelihood and severity of potential harm from the releases depends on facts such as the amount of chemical released, the environmental medium to which it is released, its toxicity, its form, its concentration, the human exposure pathway, and the likelihood of such exposure. *See*, Tr. 612-614, 623, 631, 635. While the first two items are required to be reported on a Form R and are made available if and when a facility files its Form R, the other information may not generally be known or easily obtained in a given case. Therefore, these factors may not be appropriate to consider in EPCRA § 313 enforcement proceedings in general. However, in a particular case, where the respondent establishes that the likelihood and severity of potential harm from the releases is extremely low, it may be unjust not to consider it in assessing a penalty. The appropriate factor for adjusting a penalty which, calculated under the ERP, would be unjust to assess is "other factors as justice may require." *Catalina Yachts, Inc.,* 112 F. Supp. 2d 965, 970 (C.D. Cal. 2000)("the 'justice' factor should only be applied when not giving someone credit would be a manifest injustice and . . . application of this factor should be far from routine because the application of the other factors normally produces a penalty that is fair and just.").

The ERP provides that such "other factors as justice may require" –

> include, but are not limited to: new ownership for history of prior violations, 'significant-minor' borderline violations, and lack of control over the violation. For example, occasionally a violation, while of significant extent, will be so close to the borderline separating minor and significant violations or so close to the borderline separating noncompliance from compliance, that the penalty may seem disproportionately high.

ERP at 18. This list is not exclusive, and as the Environmental Appeals Board has stated, other factors as justice may require "vests the Agency with broad discretion to reduce the penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *Spang & Company*, 6 E.A.D. 226, 249 (EAB 1995).

The record shows that aluminum has a very low level of toxicity relative to other chemicals required to be reported under Section 313. C's Exs. 18, 19; Tr. 611-13, 616-17, 619-20, 623-24, 627, 629, 635. Dr. Embree testified that if a toxicologist were to rank the chemicals required to be reported under EPCRA 313, aluminum dust would be "at the bottom [or if not], it would be very close to the bottom," and in his opinion, aluminum dust is "not toxic." Tr. 619-221, 623, 629. The record does indicate some adverse health effects from aluminum in certain contexts, such as respiratory problems where workers are exposed to very high levels of dust in the air, metal fume fever where metal fumes rather than dust are generated, and some evidence of pulmonary fibrosis or subclinical neurological effects where workers are chronically exposed to high levels of aluminum dust. Tr. 613-14, 617, 621, 632-637; C's Ex. 19 pp. 6, 12-15, 40-41;

R's Ex. 15. These effects must be considered in the context of Respondent's releases.

Respondent released a total of 50 pounds of aluminum in the year 2006, when it manufactured 4 million pounds of aluminum powder. Tr. 477; R's Ex. 13. Considering all releases of materials reported on Form Rs for 2006, Valimet released a total of 505 pounds of toxic chemicals, placing Valimet on the Toxics Release Inventory for 2006 at 870th place in total amount of toxic chemical releases of the 1,603 primary metals facilities listed in the United States. R's Ex. 8, 13; Tr. 471-73, 477, 655-57. The severity also depends on the media to which aluminum is released. Respondent's releases of aluminum were reported as under 500 pounds of fugitive emissions into the air and as stormwater runoff and 10,502 pounds by "other disposal"in 2000; 600 pounds by "other disposal" in year 2001; 250 and 370 pounds of "other disposal" in 2002 and 2003 respectively; and 720 and 750 pounds of "other disposal" in 2004 and 2005 respectively. R's Ex. 13. Mr. Frazer admitted that Respondent's "releases to the environment are relatively low." Tr. 110. The record shows that the facility does not have high concentrations of aluminum dust in the air, even when explosions have occurred at the facility. Tr. 150, 157, 432-434, 438, 448, 457, 514-516.

Given this evidence, Respondent's failure to report its releases of aluminum dust appears to be of reduced significance to the community and government when compared with the range of amounts and toxicities of releases reported on Form Rs. To assess the same penalty against Respondent as against a facility which failed to report extremely large volumes of very toxic releases that have much greater potential harm to human health would be unjust. Therefore, some reduction in the penalty is warranted for "other factors as justice may require" in regard to the violations concerning aluminum dust.

The next question is whether any such reduction in the penalty should be negated by or minimized by risks of harm to human health and/or the environment other than those related to toxicity. While Respondent makes a good argument that EPCRA is concerned with toxicity of chemicals rather than other hazards, the penalty assessment should consider the effect on the local community and governments of the failure to report the information required on a Form R, which would include not only the toxic effects, but also the danger of releases of the chemical in general. Therefore, the evidence presented by Respondent as to the toxicity of aluminum must be considered along with Complainant's evidence regarding the other dangers of aluminum dust for purposes of considering a penalty reduction under the rubric "other factors as justice may require." Such evidence, however, is not a factor for increasing the penalty, since the ERP does not take into account the danger of the chemical involved, and thus assumes a penalty calculated under the ERP is sufficiently large enough for a failure to report relatively large releases of very toxic chemicals.

Mr. Ross' testimony established that aluminum dust is highly explosive and an explosion involving 400 pounds or more of it, could cause death and/or serious injury to persons at Valimet's facility and serious injury to persons in the local area. C's Exs. 46, 47, 48, 52; Tr. 146, 188-89, 240-60, 305-09. Mr. Ross also mentioned that exposure of aluminum dust to water will produce hydrogen gas, which could ignite in the presence of heat. Tr. 238, 284. On the other hand, the evidence also shows that the facility is not in a very highly populated area, and

only an explosion of 6,000 pounds or more of aluminum dust could cause serious injury to a large number of residents in the area. C's Exs. 47, 48. Respondent's evidence shows that its aluminum powders do not propagate combustion. R's Ex. 27. Given the evidence of Respondent's management of aluminum dust and potential ignition sources at the facility, the magnitude of explosions at Respondent's facility, and the number and magnitude of explosions at other facilities, the risk of such a large explosion is highly unlikely, but some risk does exist and should be balanced against the Respondent's mitigating evidence as to the low level of toxicity and small amounts of releases of aluminum dust from Respondent's facility.

The final question is how much reduction of the gravity based penalty is appropriate considering the testimony and evidence presented by the parties as to risk of harm. The ERP (at 18) provides a maximum of 25 percent reduction of the penalty for "other factors as justice may require." It is noted that the ERP (at 17) allows for a 25 percent reduction in the penalty if a chemical has in fact been delisted by EPA during the pendency of the enforcement proceeding. Delisting a chemical suggests its low level of danger to the community. The level of seriousness of Respondent's failure to file Form Rs for aluminum, that is, the relatively lower importance to the community, states and Federal government of the information in the Form R, as reflected in the extremely low risk of harm from releases of aluminum dust from Valimet's facility, merits a 17 percent reduction in the penalties regarding aluminum dust, under "other factors as justice may require."

G. Economic Benefit of Non-compliance

1. Complainant's Arguments and Evidence

Mr. Frazer mentioned that the ERP does not provide guidelines for determining economic benefit of noncompliance, so he did not consider it in calculating the penalty. Tr. 96-97. Complainant, however, points out EPA's general policy that in order for penalties to achieve deterrence, they must recover the economic benefit of the noncompliance in addition to a gravity component. C's Brief at 46, citing C's Ex. 49 p. 4. Complainant argues that Valimet benefitted economically from its violations by not hiring sufficient staff to ensure compliance with EPCRA.

In support, Complainant's financial expert witness, Mr. Shefftz, calculated the economic benefit of Respondent's foregone wages. He calculated foregone wages of $40,000 per year over the five years of noncompliance, adjusted for tax deduction and a compound rate for present-day value, would result in an economic benefit of $155,000. C's Ex. 51 p. 6; Tr. 392. Acknowledging Respondent's evidence that the actual wages, or salary benefit package of the employee assigned to help Mr. Oberholtzer was about $35,000, and considering testimony suggesting that the employee spends most of her time on EPCRA § 313 compliance matters and suggesting that tracking, reviewing and calculating chemical usage data would take much more than 100 hours, Complainant urges a finding that Respondent's economic benefit of noncompliance is up to $135,000. C's Brief at 48; C's Reply at 21-22, citing Tr. 494-95, 152.

2. Respondent's Arguments and Evidence

In response to Mr. Shefftz' testimony as to economic benefit from the savings of not hiring a full-time employee for the five year violation period, or a fraction thereof, Valimet asserts that any economic benefit of its noncompliance was small, because the task of completing a Form R would be a small fraction of a full-time employee. Assuming that filing a Form R takes about 50 hours, to file two Form Rs would take 100 hours or one twentieth of a person's annual employment, Valimet asserts, so the economic benefit to Respondent would be about $11,000 for the relevant time period. R's Brief at 9-10, 22; Tr. 409-410. If, at most, it took one tenth of a person-year to file the Form Rs, the economic benefit would be $22,000, Respondent notes.

Respondent asserts that there is no evidence that its violations were associated with any person's attempt to increase the value of their profit-sharing plan, referring to the fact that it was in compliance with other requirements of EPCRA. R's Reply at 10. Valimet refers to Mr. Shefftz' testimony that it would not be efficient for a small business to hire additional workers to file a Form R that requires 60 hours a year to accomplish. R's Reply at 11, citing Tr. 401.

3. Findings and Conclusions as to Economic Benefit of Noncompliance

The EPA's General Enforcement Policy, GM-21, p. 3 (C's Ex. 49) provides the following guidance as to penalties in general:

> The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if he had obeyed the law. . . . In addition, the penalty's size will tend to deter other potential violators.

There is no question that the penalty thus far calculated significantly exceeds Complainant's modification to Mr. Shefftz' initial calculation of an economic benefit, "up to" $135,000, and thus serves as a sufficient deterrent to any future violation by Respondent and to any other potential violators. Therefore it is not necessary to address the Respondent's arguments for lowering the economic benefit.

V. CALCULATION OF THE PENALTY

For Counts 1 and 3, the gravity-based penalty of $27,500 for the violations pertaining to aluminum dust for 2001 and 2002, reduced by 12 percent for the "attitude" adjustment factor plus 17 percent for "other factors as justice may require," for a total reduction of 29 percent, yields a penalty of $19,525 for each count.

For Counts 5 and 7, the gravity-based penalty of $32,500 for the violations pertaining to aluminum dust for 2003 and 2004, reduced by 12 percent for the "attitude" adjustment factor plus 17 percent for "other factors as justice may require," for a total reduction of 29 percent,

yields a penalty of $ 23,075 for each count.

For Count 9, the gravity-based penalty of $28,740 for the violation pertaining to aluminum dust for 2005, reduced by 12 percent for the "attitude" adjustment factor plus 17 percent for "other factors as justice may require," for a total reduction of 29 percent, yields a penalty of $ 20,405.

For Counts 2 and 4, the gravity-based penalty of $18,700 for the violations pertaining to copper compounds for 2001 and 2002, reduced by 12 percent for the "attitude" adjustment factor, yields a penalty of $16,456 for each count.

For Counts 6 and 8, the gravity-based penalty of $21,922 for the violations pertaining to copper compounds for 2003 and 2004, reduced by 12 percent for the "attitude" adjustment factor, yields a penalty of $19,291 for each count.

For Count 10, the gravity-based penalty of $19,202 for the violation pertaining to copper compounds for 2005, reduced by 12 percent for the "attitude" adjustment factor, yields a penalty of $16,897.

Accordingly, the total penalty for the ten violations of Section 313 of EPCRA charged in the Complaint is $193,996.

ORDER

1. For the ten (10) violations of the EPCRA found to have been committed in this proceeding, Respondent Valimet, Inc., is hereby assessed an aggregate civil penalty of $ 193,996.00.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check in the requisite amount, payable to the **Treasurer, United States of America**, and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

3. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check;

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11;

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals
Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: June 30, 2009
Washington, D.C.