

Sixth Circuit Upholds Penalty for Reporting Violations

The United States Court of Appeals for the Sixth Circuit has upheld the assessment of a \$61,736 penalty imposed upon a Michigan company for failure to file reports required under the Emergency Planning and Community Right to Know Act (EPCRA) in a timely manner.

Steeltech, Ltd. (Steeltech) manufactures iron, nickel, chromium and cobalt-based alloy castings at a facility in Grand Rapids. Nickel, chromium and cobalt are considered “toxic” chemicals subject to annual reporting requirements known as “Form R” reports under EPCRA when produced in sufficient quantities. Steeltech’s failure to submit Form R reports for these chemicals first came to light during a consensual inspection of Steeltech’s facility by the United States Environmental Protection Agency (EPA) in February 1992. During that inspection, Steeltech was informed by EPA that the necessary Form R reports for 1988-1990 had not been submitted. Steeltech submitted Form R reports for 1988-1990 the day after the inspection.

In September 1994, EPA filed an administrative complaint against Steeltech for failure to file timely Form R reports for 1988-1990. Shortly thereafter, in October 1994, a Steeltech official notified EPA that the company had failed to file additional Form R reports in 1992 and 1993. In response, EPA amended its administrative complaint to include additional counts for the failure to submit the 1992 and 1993 Form R reports.

After a hearing, the administrative law judge (ALJ) dismissed all counts relating to the 1988 Form R reporting because the five-year statute of limitations had expired on those counts, but found Steeltech liable for a total of nine violations in 1989, 1990, 1992 and 1993. Although a maximum penalty of \$225,000 was permissible under EPCRA for nine violations, EPA had proposed a penalty amount of \$74,390 based on its “Enforcement Response Policy” (ERP). The

stated purposes of the ERP are to: “ensure that enforcement actions for violations of EPCRA . . . 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 . . . violations.” The ERP establishes an elaborate methodology for assessing civil penalties for EPCRA violations. Based on the ERP, the ALJ reduced the assessed penalty to \$61,736. This assessment was upheld by the Environmental Appeals Board and the United States District Court for the Western District of Michigan.

On appeal to the Sixth Circuit, Steeltech did not deny that it was liable for violations of EPCRA. Instead, Steeltech argued that the penalty imposed was excessive and that a penalty of \$10,000 would have been fair and appropriate under the facts of the case. In support of its appeal, Steeltech argued: (1) that the ALJ and EPA had inappropriately applied the ERP as if it were a regulation, rather than a policy; and (2) that the facts developed in the administrative hearing support the conclusion that the ERP should not have been applied in this case. The facts that Steeltech cited in support of its argument included: (1) its lack of knowledge of its reporting responsibilities under EPCRA prior to 1992; (2) its poor financial condition for much of the period at issue, which required its principal officers to concern themselves solely with keeping the company in business; and (3) the failure of EPA to demonstrate any harm to the environment or any adverse effect on the public’s right to know under the statute.

The Sixth Circuit concluded that the ALJ’s opinion clearly indicted that the ERP was only a policy, not a rule, and that the ALJ had discretion to depart from the ERP if there was reason for doing so. In particular, the ALJ concluded that it is appropriate to apply the ERP to a violator, such as Steeltech, that had not intentionally violated EPCRA because EPCRA imposes

strict liability for even unintentional violations and Steeltech's case did not present any extraordinary circumstances that required deviation from the ERP.

Regarding the calculation of the \$61,736 penalty, Steeltech argued that there was "substantial evidence" established during the hearing before the ALJ to support its position that the ERP should not have been applied to it at all. The Sixth Circuit held, however, that the relevant question was whether there was "substantial evidence" to support the ALJ's conclusion that the ERP should be applied to Steeltech, not whether there was substantial evidence to support Steeltech's position. The Sixth Circuit concluded that there was adequate evidence to support the ALJ's decision and, therefore, it affirmed the decision to assess a civil penalty of \$61,736 against Steeltech.

Steeltech, Ltd. v United States Environmental Protection Agency, 273 F.3d 652 (2001).

S. Lee Johnson