

## ***EPCRA Penalty Properly Assessed, Court Holds***

The U.S. District Court for the Western District of Michigan has held that the U.S. Environmental Protection Agency properly assessed a civil penalty against a castings manufacturer for failure to timely report toxic chemical releases under the Emergency Planning and Community Right-to-Know Act (EPCRA).

Steeltech, Limited (Steeltech) is a castings manufacturer in Grand Rapids, Michigan. From 1989 through 1993, Steeltech manufactured and processed iron, nickel, chrome and cobalt alloy castings. Nickel, chromium and cobalt are classified as toxic chemicals under Section 313 of EPCRA. Reporting of these toxic chemicals is required under EPCRA if the amount manufactured exceeds the threshold report limit specified by statute, which for the calendar years after July 1, 1989, was 25,000 pounds per year. Reporting is required on a yearly basis on or before July 1 of each year.

During 1989, Steeltech processed 351,625 pounds of nickel and 256,238 pounds of chromium. Steeltech did not report the processing of these chemicals until February 1992 when it submitted a report known as a Form R. During 1990, Steeltech processed 285,890 pounds of nickel and 208,335 pounds of chromium. Steeltech did not report the processing of these chemicals until the February 1992 Form R was submitted. During 1992, Steeltech processed 283,901 pounds of nickel and 189,268 pounds of chromium. These chemicals were not reported until November 1994 when it again filed a Form R. During 1993, Steeltech processed 347,933 pounds of nickel, 231,955 pounds of chromium and 162,369 pounds of cobalt. These chemicals were not reported until the November 1994 Form R was submitted.

On September 2, 1994 EPA filed an Administrative Complaint against Steeltech, alleging violations of Section 313 of EPCRA by failing to timely report the processing of toxic chemicals for the years of 1988 - 1990. EPA requested civil penalties for the violations. On March 14, 1995, EPA amended its Administrative Complaint, seeking additional penalties for reporting violations during the years of 1992 and 1993.

On September 23, 1997 a hearing was held before an Administrative Law Judge (ALJ) in Grand Rapids, Michigan. At the hearing, EPA withdrew its allegations as to the 1988 violations. Steeltech presented the testimony of Michael Farmer (Farmer), who was president of Steeltech from 1986 to 1990; Gary Salerno (Salerno), who was the majority shareholder and president of Steeltech starting in 1990; and James Pews, who was chief financial officer of Steeltech. Farmer and Salerno claimed that ignorance and a lack of knowledge of the regulatory requirements were the cause of Steeltech's failure to report. Pews testified that Steeltech lacked notice because the company had been erroneously left off of the EPA's mailing list for forms. Pews claims that he learned of Steeltech's failure to report in 1992 and 1993 when he received a phone call from Bob Allen of the EPA in October of 1994. Pews filed the proper forms in November of 1994.

Based on the evidence of record, Steeltech was fined \$61,736 by an administrative law judge (ALJ) under EPA's Environmental Response Policy (ERP). The ERP provides a system for assessing civil penalties based on the seriousness of the violations, and then allows adjustments to the penalties based on several factors.

Steeltech's subsequent motion for rehearing on the penalty was denied. Steeltech then appealed the decision to the EPA's Environmental Appeals Board (EAB). The EAB issued a Final Decision affirming the penalty against Steeltech on August 26, 1999. Steeltech then appealed the Final Decision by filing its Notice of Appeal in district court.

Steeltech's first argument was that the EPA improperly treated the ERP as a rule of law. Contrary to a law, the ERP is a policy statement. The court argued with Steeltech that the ERP is not binding. The district court stated that if the EPA's decision in assessing Steeltech a penalty was based on its belief that the ERP was binding, the case would have to be sent back to EPA for further proceedings. However, the district court found that both the decision of the ALJ and the decision of the Appeals Board clearly recognized that the ERP simply provides guidance for assessing penalties, and that departure from the ERP is appropriate in certain circumstances.

Steeltech next argued that the decision to apply the ERP was not supported by evidence, and was arbitrary and capricious. Steeltech believed that the EPA acted arbitrarily in failing to consider several mitigating factors that Steeltech believed should have been taken into account in EPA's penalty decision. Some of these factors were: 1) the fact that Steeltech's failure to report was unintentional; 2) Steeltech was under severe financial pressures (possible bankruptcy); and 3) EPA contributed to Steeltech's non-filing by not mailing them the proper forms or notices.

Contrary to Steeltech's argument, the district court found that both the ALJ and the EAB took all of these factors into consideration, and rejected them for legitimate reasons as stated in their decisions. The district court held that the EPA's decision not to reduce the penalty for Steeltech's unintentional violations was reasonable, as such a policy might encourage a lack of diligence on the part of regulated facilities under the ERP. Furthermore, the district court found that the EPA's decision not to reduce the penalty due to Steeltech's financial pressures was reasonable, given that reporting is a minimal, relatively inexpensive and important regulatory requirement. Finally, the district court found that EPA's decision not to further reduce Steeltech's penalty due to its failure to send the required forms was also reasonable, as EPA had taken other steps, such as inspections and notices, which should have had the effect of notifying Steeltech of its reporting responsibilities.

Steeltech also argued that EPA misapplied the ERP in not giving Steeltech a 30% attitude reduction and a 25% voluntary disclosure reduction on its penalties. The district court found that Steeltech's request for both attitude and voluntary disclosure reductions was contrary to EPA's policy of treating those reductions as "mutually exclusive", and did not believe that the circumstances of Steeltech's case warranted a double reduction in penalties, as the EPA has discretion in setting the penalties under the ERP and determining the facility's level of cooperation and compliance.

Therefore, the district court found that EPA's decision was not arbitrary and capricious, and issued a judgment affirming the decision of the EAB.

***Steeltech, Limited v. United States Environmental Protection Agency***, 2000 WL 1014303 (W.D. Mich)

This article was prepared by S. Lee Johnson, a partner in our Environmental Department, and previously appeared in the September, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.