No. 23-3765

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MULTISTAR INDUSTRIES, INC.,

Defendant - Appellant.

On Appeal from the United States District Court for the Eastern District of Washington, No. 2:21-CV-00262-TOR (Honorable Thomas O. Rice)

RESPONSE BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

In 2017, Defendant Multistar Industries, Inc., began storing large amounts of trimethylamine (TMA)—an extremely hazardous and explosive chemical—in stationary railcars on its property in Othello, Washington. Before bringing TMA on site, Multistar did not take basic steps to prevent or minimize accidents—such as training its employees how to safely handle TMA, analyzing the potential harms of a release, or informing local responders. In failing to take those and other safety measures, Multistar violated an array of provisions under two statutory programs designed to protect workers, first responders, and communities from catastrophic chemical accidents: the Clean Air Act's Risk Management Program and the Emergency Planning and Community Right-to-Know Act (EPCRA). After the United States brought suit, the district court found Multistar liable on all counts and imposed an $850,000 civil penalty. This Court should affirm.

Multistar argues that it is exempt from compliance with the two programs under their similarly worded transportation exemptions because, according to Multistar, the TMA on its property is stored "incident to transportation." But the facts are to the contrary. As "Warehouseman," Multistar assumes "care, custody, and control" of up to ten TMA-filled railcars at a time on its private rail track. For extended periods—typically months and as long as six months—the railcars function as stationary storage containers. They sit unmoving, unconnected to any

motive power source, and uncovered by active shipping papers. While the criteria that the Environmental Protection Agency (EPA) uses to assess whether storage is incident to transportation vary by statutory context—connection to motive power under the Risk Management exemption and active shipping papers under the EPCRA exemption—here those guideposts align, refuting Multistar's claim of exemption no matter the analytical frame. And it is simply false to suggest that this suit deviates from EPA's long-held interpretations or enforcement history.

Much of Multistar's argument centers on a claim that the programs administered by EPA conflict with the Department of Transportation's (DOT) charge to regulate hazardous materials in transportation. But Multistar identifies no conflict between the agencies' regulatory schemes that would require one federal law to yield to another. And because DOT's regulations do not apply to Multistar's storage of TMA during the long periods that railcars sit immobile on its private rail tracks, no such conflict is possible.

Nor can Multistar seriously claim that, given the extent and severity of its violations, the district court abused its discretion in imposing a civil penalty well under one percent of the statutory maximum. While Multistar contends that it acted in "good faith," the district court reasonably found otherwise given the company's cavalier and haphazard approach to compliance.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this civil action seeking penalties and other relief for violations of the federal Clean Air Act and EPCRA. 28 U.S.C. §§ 1331, 1345, 1355; *see also* 42 U.S.C. § 7413 (authorizing district court suits to enforce Clean Air Act violations); *id.* § 11045(c)(4) (authorizing district court suits to seek penalties for EPCRA violations). This court has jurisdiction to hear Multistar's appeal of a final judgment, 28 U.S.C. § 1291, which appeal was timely filed on November 21, 2023, within 60 days of the district court's September 28, 2023, denial of Multistar's post-judgment motion for additional testimony, a new trial, and other relief. 1-ER-8; 4-ER-879; Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A)(ii), (iv), (v).

STATEMENT OF THE ISSUES

1. Whether Multistar is liable under the Risk Management Program and EPCRA because the TMA-filled railcars on its property are not performing storage "incident to transportation" for the lengthy periods they sit immobile—disconnected from motive power and uncovered by active shipping papers—on Multistar's private rail tracks.

2. Whether the district court abused its discretion in imposing a civil penalty of $850,000.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum to Defendant's Opening Brief ("Def.'s ADD") and an Addendum ("ADD") to this brief.

STATEMENT OF THE CASE

A. Legal Background

1. Clean Air Act's Risk Management Provisions

a. Statutory and Regulatory Context

The Clean Air Act is the comprehensive federal law that regulates air emissions from stationary and mobile sources. In 1990, spurred by a spate of "high-profile chemical accidents that harmed workers, local communities, and the environment," Congress enacted a regulatory and enforcement program "to prevent the accidental release" of extremely hazardous substances and "to minimize the consequences of any such release." *Air All. Houston v. EPA*, 906 F.3d 1049, 1053 (D.C. Cir. 2018); 42 U.S.C. § 7412(r)(1).[1] These Risk Management provisions, located in Section 112(r) of the Act, directed EPA to swiftly "promulgate

[1] The most significant incident was the 1984 Bhopal disaster, a chemical accident at a Union Carbide plant in India that killed over 2,000 people. Between 1982 and 1986, over 11,000 chemical accidents in the United States—i.e., four per day—also killed hundreds and injured thousands. *See* Statement of Sen. Chafee, S. 1630, 136 Cong. Rec. S208 (Jan. 24, 1990) (ADD-3a); Statement of Sen. Durenberger, S. 1630, 136 Cong. Rec. S16,925-26 (Oct. 27, 1990) (ADD-4a–5a).

reasonable regulations and appropriate guidance" for preventing, detecting, and responding to accidental releases into the air of extremely hazardous substances. 42 U.S.C. § 7412(r)(7)(B)(i), (ii). Congress specified that those regulations would require each covered source, among other things, to "prepare and implement a risk management plan" with certain mandatory components, including "a hazard assessment [of] the potential effects of an accidental release." *Id.* § 7412(r)(7)(B)(ii).

At Congress's direction, EPA in 1996 promulgated regulations comprising the Risk Management Program. 61 Fed. Reg. 31,668 (June 20, 1996) (codified, as amended, at 40 C.F.R. pt. 68). The regulations divide sources into three categories based on their size and the risks posed by their covered "processes"—a term defined broadly as "any activit[ies] involving a regulated substance including . . . storage," 40 C.F.R. §§ 68.3, 68.10(j)-(l).[2] Sources qualifying for the stringent "Program 3" classification level (like Multistar) are required to implement, and document compliance with, an array of safety measures, including analyzing the impacts of worst-case release scenarios, *id.* §§ 68.25, 68.28, training and assuring the competency of employees in safe operating procedures, *id.* §§ 68.69, 68.71, ensuring the integrity of pipes, tanks, shutdown systems, and other equipment, *id.* §

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[2] In a passing reference, Opening Brief of Appellant (Br.) at 15, Multistar fails to acknowledge that "storage" is a "covered process."

68.73, and communicating and coordinating with local emergency responder agencies, *id.* §§ 68.90, 68.93. All covered sources must submit adequate risk management plans and update those plans before using new regulated substances. *Id.* §§ 68.150, 68.190(a), (b)(4).

b. Definition of Covered "Stationary Sources"

The Risk Management Program applies to the owners and operators of any "stationary source" whose processes involve "more than a threshold quantity of a regulated substance." 40 C.F.R. § 68.10; 42 U.S.C. § 7412(r)(7)(B)(ii). Rather than draw on a preexisting Clean Air Act "stationary source" definition, Congress adopted a new definition unique to Section 112(r). 42 U.S.C. § 7412(a), (a)(3) (standard definition for air-control provisions applies across Section 112, "except subsection (r)"). Under that definition, "'stationary source' means any buildings, structures, equipment, installations or substance emitting stationary activities" that meet certain enumerated criteria and "from which an accidental release may occur." *Id.* § 7412(r)(2)(C).[3]

EPA's regulatory definition of "stationary source" incorporates the statutory formulation and then delineates a limited transportation exemption, whose effect is

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[3] The items comprising the stationary source must also "belong to the same industrial group," be "located on one or more contiguous properties," and be "under the control of the same person." *Id.* None of those elements are disputed on appeal.

central to this appeal. 40 C.F.R. § 68.3. The exemption states: "The term stationary source does not apply to transportation, including storage incident to transportation, of any regulated substance," and further clarifies that a "stationary source includes transportation containers used for storage not incident to transportation." *Id.*

In the preamble to the 1998 rule finalizing that language, EPA explained why it rejected a proposal to categorically exempt transportation containers. A container—for example, "a railroad tank car"— might "remain at one location for a long period of time, serving as a storage container" and posing an ongoing and stationary "hazard to the community" at that site. 63 Fed. Reg. 640, 643 (Jan. 6, 1998). Even though that container might still be "suitable for transportation," it would then be functioning as a stationary storage container, and thus could properly "be considered a stationary source or part of a stationary source." *Id.* Explaining how it would apply the regulation, EPA advised that it considers a container to be "in transportation," and thus exempt, if the container remains "attached to the motive power that delivered it to the site." *Id.* EPA noted its substantial "consultation with DOT" to harmonize the agencies' respective authorities and that it would "continue to work closely with DOT." *Id.* at 642-43.

2. Emergency Planning & Community Right-to-Know Act

Enacted four years before the Clean Air Act's Risk Management provisions, EPCRA embodies Congress's earlier effort—spurred by many of the same concerns—to begin tackling the hazards of "toxic chemicals in our communities" by addressing "the lack of reliable, accessible information regarding the location and use of" such chemicals. *Citizens for a Better Envt. v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996), *vacated on other grounds*, 523 U.S. 83 (1998). To that end, "EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of a health-threatening release." *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 86 (1998). At the heart of EPCRA are its "reporting requirements" that, among other things, "compel[] users of specified toxic hazardous chemicals to file annual" inventory forms with state and local first responders. *Id.*; 42 U.S.C. § 11022; 40 C.F.R. §§ 370.40, 370.44, 370.45. The inventory forms ensure that fire departments and other emergency agencies have critical information about the types and amounts of chemicals at covered facilities. *See* 42 U.S.C. § 11022(c)-(e).

The requirement to annually submit inventory forms falls on "[t]he owner or operator of any facility" where certain hazardous chemicals are present above specified thresholds. *Id.* § 11022(a)(1), (a)(3), (b)(1). A "facility" is broadly

defined as "all buildings, equipment, structures, and other stationary items" under common control at a particular location. *Id.* § 11049(4); *see also* 40 C.F.R. § 370.66 (reiterating statutory definition with clarifications).

Like the Risk Management provisions of the Clean Air Act, EPCRA contains a transportation exemption, specifying that—apart from EPCRA's emergency notification procedures—the statute "does not apply to the transportation, including the storage incident to such transportation, of any [covered] substance." 42 U.S.C. § 11047; *see also id.* § 11004(d) (exemption "does not apply to" emergency notification procedures). EPCRA's legislative history illustrates that the exemption was designed to have a "limited" scope, covering only "the storage of materials which are still moving under active shipping papers and which have not reached the ultimate consignee." Conf. Comm. Rep., H. Rep. 99-962 at 311 (Oct. 3, 1986) (ADD-2a).

3. Department of Transportation's Hazardous Materials Regulations

Several agencies other than EPA also have been tasked by Congress with protecting the public from the multifaceted dangers of hazardous substances. As relevant to the arguments on appeal, the Hazardous Materials Transportation Act charges the Department of Transportation to ensure "the safe transportation . . . of hazardous material in . . . commerce." 49 U.S.C. § 5103(b)(1); *see id.* § 5101. Implementing that mandate, DOT's Hazardous Materials Regulations set forth an

array of safety standards to govern, among other things, the marking, packaging, and handling of hazardous materials during "transportation," defined as "the movement of property and loading, unloading, or storage incidental to the movement." *Id.* § 5102(13); *see* 49 C.F.R. § 171.1.[4]

Under those regulations, a railcar containing hazardous materials is performing a "transportation" function subject to DOT requirements only "until the car is delivered to a private track or siding," at which point the "storage of a rail car on private track" is a "[f]unction[] not subject to" DOT's regulations. 49 C.F.R. § 171.1(c), (d)(3). The synonymous terms "private track" and "private siding" refer to railroad track that is privately owned or controlled, rather than under a rail carrier's control. *Id.* § 171.8. Outside of that railcar-specific rule, the "transportation" of a hazardous material by other types of carriers ends when "the material is delivered to the destination indicated on a shipping document," unless "the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations." *Id.* § 171.1(c), (c)(4)(i)(A); *see id.* § 171.1(c)(4)(ii) (material stored at "final destination [] shown on a shipping document" is not in transportation).

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[4] Beyond covering "[t]ransportation functions," 49 C.F.R. § 171.1(c), DOT's regulations, in ways not material to this appeal, also set out "packaging" requirements and govern the performance of certain "pre-transportation functions." *Id.* § 171.1(a), (b).

While performing covered transportation functions, regulated entities also "may be subject to applicable standards and regulations of other Federal agencies." 49 C.F.R. § 171.1(e). As DOT has explained, its regulations "do[] not preempt . . . regulations issued by other Federal agencies to implement statutorily authorized programs," such as "EPA's risk management" and "community right-to-know" programs. 68 Fed. Reg. 61,906, 61,907 (Oct. 30, 2003).

B. Factual Background

1. Multistar's Operations

For decades, Multistar has operated property near downtown Othello, a small city in Eastern Washington, as a storage and distribution center for large quantities of anhydrous ammonia—a dangerous chemical regulated under EPCRA and the Risk Management Program. During that time, Multistar has been embroiled in EPA enforcement actions for repeated non-compliance with its obligations. 2-153–54, 182, 254–55.[5] In 2017, amidst disputes with EPA over EPCRA and Risk Management Program violations for its ammonia activities,

[5] Multistar reached administrative settlements with EPA in 2004 for violating EPCRA, in 2005 and again in 2016 for violating the Risk Management Program, and in 2019 for failing to report a release of ammonia and other EPCRA violations. 2-ER-153–55, 182, 254–55. Extensive negotiations between Multistar and EPA led to a 2021 consent decree for Risk Management violations, since which time Multistar has failed to abide by the decree's reporting obligations. 2-ER-155, 182.

Multistar expanded into a new line of business involving another extremely hazardous chemical—trimethylamine. 2-ER-255.

Covered under EPCRA and the Risk Management Program, TMA is an "[e]xtremely flammable gas" that can explode when heated; it is also highly toxic—capable of causing "severe burns" to skin and "serious eye damage." 2-ER-155; 3-ER-581–82; 587-90, 594. TMA's odor is so potent that, as Multistar's president described, "if you spill one teaspoon, you can smell it like half a mile away." 3-ER-574. And because TMA is denser than air, it tends to travel as a vapor cloud along the ground when released, meaning that it has higher odds than other substances of contacting an ignition source that would trigger a catastrophic explosion. 2-ER-215–16.

Beginning in December 2017, Multistar began storing large quantities of TMA on its Othello property pursuant to an agreement with Eastman Chemical, a TMA manufacturer based in Florida. As Eastman had earlier explained to Moses Lake Industries—a major customer located in Eastern Washington about 40 miles from Othello—Eastman had been looking to expand its regional "supply position" by obtaining "the ability to store about 400,000 lbs or more of TMA" in the area. 4-ER-691; 3-ER-616–18. Eastman's contract with Multistar fulfilled that aim by ensuring that large quantities of TMA could be stored in "within a few days[']"

reach of Moses Lake, thus protecting against "unforeseen short or long term supply disruptions." 4-ER-691.

The September 2017 "Warehousing Services Agreement" between Multistar and Eastman designates Multistar (and refers to Multistar throughout) as the "Warehouseman." 5-ER-938. The contract specifies that Eastman's "[i]nbound shipments" of TMA are "consigned to care of Warehouseman," and that Multistar, as Warehouseman, maintains "care, custody, and control of the rail cars and [TMA] contained therein" until Moses Lake requests delivery, at which time Multistar "will arrange for delivery of product via carriers" specified on an Eastman-approved "carrier list." 5-ER-938–39. Multistar is also contractually responsible for transferring TMA from railcars into the vehicles delivering the product to Moses Lake—a process called "transloading." The Warehousing Agreement entitles Multistar to a "Railcar Storage Fee" for each day a railcar sits on its property, as well as a fee per pound of TMA transloaded from railcars into delivery vehicles. 5-ER-938, 946.

While they remain on Multistar's property, the TMA-filled railcars—each of which contains upwards of 150,000 pounds of TMA—are stored on Multistar's private rail siding, a small offshoot of track that Multistar operates and controls. 3-ER-617; 4-ER-735–36. Upon arrival, the container cars are swiftly disconnected from locomotive power, the railroad personnel depart, Multistar takes sole custody

of the cars from Eastman's rail carrier, and Multistar employees place chocks by the wheels to keep the railcars stationary. 3-ER-571–72; 5-ER-938. The TMA-filled railcars remain on the siding, unmoving and disconnected from any power source, until Moses Lake is ready for a TMA delivery, at which point Multistar transloads TMA from a railcar into a cargo truck. 4-ER-767–69; 1-SER-37. Rather than arranging for a third party to deliver the transloaded TMA, as authorized by the Warehousing Agreement, Multistar uses its own in-house cargo trucks, charging Eastman separately for that delivery service. 4-ER-768–69; 3-ER-618; 5-ER-939 (Warehousing Agreement provision that Eastman would "consider[] . . . use of Warehouseman's in-house carrier").

Each railcar shipment to Multistar's property is covered by an initial bill of lading—a legal document issued by the shipper (i.e., Eastman) that details the contents, quantity, and destination of the shipment. In setting out Eastman's transportation arrangement with its rail carrier, these bills of lading identify Multistar's Othello facility as the destination for the TMA and list the consignee—i.e., the shipment's official recipient—as an Eastman subsidiary, "c/o Multistar Industries, Inc. Transloading Facility." *E.g.*, 4-ER-695 (capitalizations changed). These initial bills of lading do not identify the TMA shipments as through-shipments, nor do they identify any further destination. Separate bills of lading covering the later trucking of TMA from Multistar's property are issued only after

Moses Lake requests a TMA delivery. *E.g.*, 4-ER-711–12. Between the time that TMA-filled railcars arrive at Multistar's private siding and the time that Multistar receives a bill of lading directing transport to Moses Lake, the TMA is not covered by active shipping papers.

The stationary TMA-filled railcars typically sit for months on Multistar's private siding, unconnected to any power source and under no active shipping papers. In 2018, the Agreement's first full year, every railcar arriving at Multistar's property remained on site for at least 100 days, and the average time on site was 133 days—about four-and-a-half months. 2-SER-58. Through 2021, the last full year for which information is available, no railcars remained on Multistar's property for less than 6 days and the maximum period a railcar remained was 185 days—i.e., more than 6 months. 2-SER-58; 1-SER-37; *see also* 2-SER-58 (in every year through 2021, at least one railcar remained on property for 17 weeks).

Eastman describes the TMA held in stationary railcars on Multistar's private siding as Eastman's "inventory," and over the course of the Warehousing Agreement, Eastman has aligned its use of Multistar's track with Moses Lake's requests to store large amounts of TMA locally. *See, e.g.*, 2-SER-69–70; 5-ER-939–40 (Warehousing Agreement describing TMA as "inventory" in Multistar's "warehouse"). In October 2019, for example, an Eastman employee noted that Multistar was holding sufficient "TMA inventory" to address Moses Lake's supply

concerns, and he asked his coworkers the following month to "make sure we have 7 cars at any given time parked at Multistar." 2-SER-69–70; 4-ER-738. In later years, Multistar's private siding has been filled nearly to capacity, holding 10 railcars at a time to ensure sufficient local supply. 4-ER-693; *see* 3-ER-632 ("at least ten Eastman rail cars" fit on siding).

2. Multistar's Noncompliance with EPCRA and the Risk Management Program

Before accepting its first TMA shipment in December 2017, Multistar did not comply with EPCRA or the Risk Management Program. Declining to file an EPCRA inventory form for TMA meant that state and local emergency responders would not have known that TMA was stored on site and would not have been prepared for the hazards of a TMA accident. 2-ER-256–58. Failing to follow its Risk Management obligations meant that Multistar was storing large quantities of TMA without first taking basic safety precautions to prevent and minimize accidents—including training its employees or analyzing the possible harms of a release. 2-ER-152, 162–72. And indeed, an accidental TMA vapor-cloud explosion could be catastrophic given that over 900 people live in nearly 300 dwellings within a half-mile radius of Multistar's facility. And the recommended one-mile evacuation zone—which first responders would not have known to implement—encompasses over 6,000 people, four schools, as well as churches, community centers, and senior centers. 2-ER-257–58.

Even though EPA had repeatedly engaged Multistar over Risk Management and EPCRA deficiencies for its ammonia business, Multistar's president, Peter Vanourek, testified that he could not remember whether he consulted an attorney before storing TMA on site in late 2017. 2-ER-309–10. Rather than follow professional advice from the company's usual consultants or lawyers, Vanourek himself performed some back-of-the-envelope legal analysis, which supposedly led him to believe that EPCRA and the Risk Management Program did not apply to Multistar's new TMA processes. 2-ER-275–76. The total costs of complying from the outset would have been routine—about $10,000 for the Risk Management Program and essentially $0 to list TMA on the online EPCRA forms. 2-ER-174–75, 253.

Nonetheless, it was only after EPA sought information about Multistar's TMA operations and compliance status in 2019 that Multistar belatedly filed EPCRA inventory forms for TMA and submitted a Risk Management Plan. 2-ER-277. After consulting an attorney at that time, who counseled the company to come into compliance, Multistar compiled a Risk Management Plan "pretty quickly" and "fairly inexpensively." 2-ER-277, 288. But after EPA identified basic shortcomings in the submission, Vanourek dug in his heels, deciding that "I don't have to do this," and that Multistar would not take the additional steps necessary to comply. 2-ER-292–95. As Vanourek explained in private communications, he

believed the violations EPA identified were "BS" and "not a big deal." 1-SER-44, 50. Accordingly, Multistar ceased all efforts by late 2019 to remedy its outstanding Risk Management violations.

C. Procedural History

On August 8, 2021, the United States sued Multistar in the Eastern District of Washington, alleging seven claims for relief: two for Multistar's untimely EPCRA filings, and five for Multistar's violations—some of which remained ongoing—of the Risk Management Program. 4-ER-856–73. Throughout the district court proceedings, Multistar defended against liability mainly by arguing that the TMA on its property fell under the transportation exemptions in EPCRA and the Risk Management Program. *See* 42 U.S.C. § 11047; 40 C.F.R. § 68.3. Multistar did not dispute that, if those programs applied to its operations, it would be liable for the specific failures alleged.

In a February 7, 2023, order on cross-motions for summary judgment, the court denied Multistar's motion and granted in full the United States' motion for summary judgment on five claims. 1-ER-43. Rejecting Multistar's claim of exemption from the Risk Management Program, the court held that the undisputed facts foreclosed an argument that "the rail cars at issue are stored incident to transportation when they sit for extended periods of time on [Multistar's] rails while completely disconnected from any mode of power." 1-ER-51. The court

likewise rejected Multistar's claim of exemption from EPCRA, focusing—in line with that statute's legislative history—on the lack of "active shipping papers that cover the rail cars" while stored on Multistar's private track. 1-ER-54–56.

Because Multistar did not contest liability on the remaining two claims or the appropriateness of an injunction requiring compliance and reporting, the case proceeded to a July 2023 bench trial centering on the appropriate civil penalty. 3-ER-354 (conceding only defense was transportation exemption that court already rejected and describing proposed injunctive approach as unobjectionable); *see also* Br. at 19 (agreeing trial was "to determine a remedy"). Multistar asked for "a nominal penalty of one dollar," whereas the United States sought $150 per day, per violation, for a total of $1,028,850 based on 6,859 violation-days. 2-ER-117, 124; *see* 1-ER-38 (totaling violations).

On August 1, 2023, the district court issued a written order and opinion imposing a civil penalty of $850,000. The court rejected Multistar's claim of "good faith" efforts to comply with its legal obligations and emphasized that Multistar's "extensive" failures represented "extremely serious" violations of statutes designed to protect the public from catastrophic accidents. 1-ER-35–36, 38–40. The total penalty amounts to under $125 per day, per violation; it is about $180,000 less than the United States sought; and it represents a small fraction of the maximum $782 million penalty the court was statutorily authorized to impose. 1-ER-38, 40; *see*

infra at 51 (listing statutory authorities setting Clean Air Act and EPCRA penalties at $117,468 and $67,544 per day per violation).

Multistar paid the penalty and timely filed this appeal. 4-ER-879.

SUMMARY OF ARGUMENT

This Court should affirm Multistar's liability under the Clean Air Act and EPCRA, as well as the $850,000 civil penalty.

1. Multistar asserts that it is exempt from the Risk Management Program and EPCRA under their similarly worded transportation exemptions. But neither exemption applies in this case.

Starting with the Risk Management Program, the undisputed facts establish that the TMA-filled railcars stored for long stretches on Multistar's private siding—for which Multistar receives a daily "storage fee" as Eastman's "Warehouseman"—are unambiguously not stored "incident to transportation." Once the containers are dropped off, they are disconnected from locomotive power and sit stationary on private track for months at a time, presenting the same hazard as any other stationary container full of an extremely hazardous substance—exactly what the statute guards against. Moreover, the regulation's text confirms that a container must actively be "in transportation" to be performing storage "incident to transportation"; it is not enough, as Multistar asserts, merely that some future transport is contemplated at some later date.

The regulatory history and purpose of the Risk Management Program further refute Multistar's claim of exemption from that Program. When drafting the Risk Management regulations, EPA rejected broader exemptions specifically to ensure that railcars serving as stationary storage containers would be covered by the Program. And it would undermine the statutory purpose of the Program to exempt railcars when they are used, and pose the same dangers, as any other stationary container full of a hazardous substance.

This case does not implicate any potential ambiguities in the Risk Management Program's exemption. But even if there were ambiguity, Multistar would be liable under EPA's longstanding and reasonable interpretation. To determine whether a transportation container is functioning as a stationary storage unit or providing storage only incidental to transportation, EPA considers whether the container remains connected to "the motive power that delivered it to the site." The railcars on Multistar's siding are not exempt under that inquiry because they are disconnected from motive power, typically for months at a time. And EPA's motive-power interpretation deserves *Kisor* deference (*Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)) because EPA is the expert agency charged with regulating "stationary sources" under the Clean Air Act and determining when objects perform storage as part of a stationary source. EPA's interpretation is also longstanding—it was announced in 1998 and has been reiterated since that time in public guidance.

For many of the same textual reasons that Multistar cannot utilize the Risk Management Program's regulatory exemption, Multistar also cannot utilize EPCRA's similarly worded statutory transportation exemption. Exempting Multistar from EPCRA would also undermine that statute's informational purposes. And as EPCRA's legislative history confirms, Congress intended railcars storing hazardous materials to be exempt from EPCRA only while "under active shipping papers." For the long periods that railcars sit immobile on Multistar's private track, they are not under active shipping papers, and thus are not storing TMA "incident to [] transportation."

Multistar asserts two other main arguments, neither of which has merit. First, Multistar advances a selective-enforcement defense for the first time on appeal. That argument is forfeited, but there is, in any event, no factual basis to conclude that EPA is treating Multistar differently than other similarly situated entities. To the contrary, EPA is faithfully adhering to its longstanding regulatory interpretation that is embodied in federal register notices, guidance documents, and recent consent decrees against violators who, like Multistar, used railcars as stationary storage containers.

Nor is Multistar correct that EPA's enforcement of the Risk Management Program and EPCRA infringes on DOT's authority to regulate hazardous materials in transportation. Multistar does not identify any conflict between the agencies'

statutes or regulations that would require a court to enforce one federal law over another. Instead, Multistar identifies ways the programs' terms and definitions differ—differences that are unsurprising and irrelevant. As DOT's regulations and public statements confirm, its Hazardous Materials Regulations do not preclude other agencies from enforcing their own rules in areas of concurrent jurisdiction. And in any event, because Multistar's storage of TMA is not covered by DOT regulations during the periods that railcars sit, unmoving, on Multistar's private siding, there is no possibility of conflict.

2. As to remedy, the district court's $850,000 civil penalty—a tiny fraction of the statutory maximum and less than the amount requested by the United States—was well within the court's discretion and readily justified by Multistar's repeated violations. The court considered the pertinent statutory factors and rationally based its determination on the duration and seriousness of Multistar's violations, which endangered workers, first responders, and hundreds of residents within range of a potentially catastrophic accident. And Multistar's claim to have acted in good faith rings hollow given its history of noncompliance and its failure to take responsibility even after EPA provided notice of the violations and the district court rejected Multistar's legal theories.

Multistar's assertions of legal error are similarly without merit. The district court was not required ignore the number of violations Multistar committed, nor does the Eighth Amendment impose any pertinent constraints on the penalty here.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment and will affirm if, viewing the facts in the light most favorable to the nonmoving party, the movant has established "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 926 (9th Cir. 2014); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1082 (9th Cir. 2019).[6] Although questions of law are generally reviewed de novo, courts defer to an agency's reasonable interpretation of its genuinely ambiguous regulations. *Kisor*, 139 S. Ct. at 2415-16.

A district judge's determination of a civil penalty for violating environmental laws is a "highly discretionary" ruling reviewed for abuse of discretion. *Tull v. United States*, 481 U.S. 412, 427 (1987); *Nat. Res. Def. Council*

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[6] The parties agree that, although two claims were technically live at trial, all issues relevant to liability were resolved at summary judgment. Br. at 19. In any event, the standard of review—de novo—is the same for legal issues decided after a bench trial as for issues decided on summary judgment. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843 (9th Cir. 2004).

v. Sw. Marine, Inc., 236 F.3d 985 (9th Cir. 2000); *United States v. Oliver*, 394 Fed. App'x 376, 377 (9th Cir. 2010). Factual findings in support of a penalty determination are reviewed for clear error. *Consumer Fin. Prot. Bur. v. CashCall, Inc.*, 35 F.4th 734, 748 (9th Cir. 2022).

ARGUMENT

I. This Court Should Affirm Multistar's Liability Under the Clean Air Act and EPCRA.

Pursuant to its contractual obligations as Eastman's Warehouseman, Multistar stores up to ten TMA-filled railcars at a time on its private rail siding. These railcars, loaded with hundreds of thousands of pounds of TMA, typically sit unmoving—disconnected from motive power and uncovered by active shipping papers—for months at a time. On these facts, the district court correctly held that the railcars fall within Clean Air Act Section 112(r)'s "stationary source" definition, that Multistar's storage of TMA in those railcars is subject to EPCRA, and that the TMA on Multistar's property is not, contrary to Multistar's claim of exemption from those statutes, stored as a mere "incident to transportation."

A. Because the TMA on Multistar's Property Is Not Stored "Incident to Transportation," Multistar's TMA Operation Is Subject to Clean Air Act Section 112(r).

Section 112(r) of the Clean Air Act defines a "stationary source" covered by the Risk Management Program to encompass "structures, equipment," and other "substance emitting stationary activities," capacious terms that include

transportation containers, like railcars, when such containers are used for stationary storage. 42 U.S.C. § 7412(r)(2)(C). EPA's regulatory definition makes the point explicit: a stationary source "includes transportation containers used for storage," so long as that storage is "not incident to transportation." 40 C.F.R. § 68.3. To the extent Multistar contends that railcars cannot be part of a stationary source because they are movable and not permanently fixed, Br. at 3, 33, 36, Multistar simply ignores the regulation's text. Nor does Multistar develop any argument for why a railcar—or any other movable "structure[]" or piece of "equipment"—would fall outside the statutory definition while it is unmoving and performing a stationary function. 42 U.S.C. § 7412(r)(2)(C); *see United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485 (5th Cir. 2014) (rejecting argument that Section 112(r) "stationary source" definition includes only "fixed and unchanging object[s]" and not "movable" objects).

Thus, so long as the stationary railcars sitting on Multistar's private track—each holding TMA in quantities far above the 10,000-pound threshold for regulation—are not stored "incident to transportation," Multistar operates a stationary source subject to the Risk Management Program. On these facts, the TMA-filled railcars warehoused for weeks or months on Multistar's private siding are unambiguously not stored "incident to transportation." But even if this Court

finds EPA's regulation ambiguous, EPA's reasonable and long-standing motive-power interpretation of its regulation controls and confirms liability.

1. Multistar Is Not Storing TMA on its Property as a Mere "Incident to Transportation."

To reiterate, EPA's Risk Management regulations state that a "stationary" source "*includes transportation containers*" when "used for storage not incident to transportation." 40 C.F.R. § 68.3 (emphasis added). Thus, contrary to Multistar's most sweeping suggestions, *e.g.*, Br. at 3, 33, 36, the regulatory text makes clear that some transportation containers used for storage necessarily fall outside of the Risk Management Program's regulatory transportation exemption, which encompasses only those containers performing storage "incident to transportation."

Turning to the plain language of that key phrase, Multistar acknowledges that an activity is commonly understood to be "incident to" another activity if it is performed in a way that is "subordinate to" that latter activity, which is typically "of greater importance." Black's Law Dictionary, "Incident" (11th ed. 2019); Br. at 39-40; *Mt. Cmtys. for Fire Safety v. Elliot*, 25 F.4th 667, 676 (9th Cir. 2022) (interpretation "begin[s] with the language of the regulation"). Undoubtedly, a transportation container actively moving towards its shipping destination is storing its contents as a subordinate part—i.e., as an "incident"—of its function of transporting those contents. But once a container has been dropped off, is disconnected from locomotive power, and sits stationary on private track for

months at a time—like the railcars on Multistar's property—storage has become a principal, not merely a subordinate, "incidental" function. Reading "incident to" in this way aligns with the term's usage in other contexts. Just as a police search is "incident to an arrest only if it is substantially contemporaneous with the arrest," *Shipley v. California*, 395 U.S. 818, 819 (1969), so too is storage "incident to transportation" only if it occurs substantially contemporaneous with—i.e., as a subsidiary part of—the act of being transported. *See* 63 Fed. Reg. at 643 (exemption applies if containers are "in transportation").

Multistar's contrary interpretation—that a railcar's contents are stored "incident to transportation" so long as transport of those contents to an "ultimate" or "final destination" at some future date is contemplated—does not withstand scrutiny. *See* Br. at 3, 10, 39-40, 58. As a textual matter, a "stationary source" excludes "transportation, *including* storage incident to transportation." 40 C.F.R. § 68.3 (emphasis added)); *accord* Conf. Comm. Rep., H. Rep. 101-952, 136 Cong. Rec. H13,199 (Oct. 26, 1990) (ADD-1a) ("conferees do not intend the term 'stationary source' to apply to transportation, *including* the storage incident to such transportation" (emphasis added)). By situating "storage incident to transportation" as an activity "includ[ed]" within the broader category of "transportation," the regulation confirms that exempt storage must occur as part of an activity qualifying as "transportation." In other words, a container performs storage "incident to

transportation" only when the container is "in transportation." 63 Fed. Reg. at 643. For the weeks and months that TMA-filled railcars sit on Multistar's private siding—unmoving and unconnected to a motive power source—those containers are not "in transportation" and thus are not storing TMA "incident to transportation."

Moreover, if a stationary railcar's contents were exempt merely because future delivery to a "final destination" was contemplated, the exemption would be so broad as to swallow the Risk Management Program's general rule that "[a] stationary source includes transportation containers." 40 C.F.R. § 68.3. The purpose of storing any container at a warehouse or other storage facility, as Multistar acknowledges, is to hold the contents "in safekeeping for future delivery." Br. at 39-40, 59 (quoting Black's Law Dictionary, "Store"). There would be little storage not "incident to transportation" if products destined for later delivery were exempt.

Multistar's expansive reading of the exemption is also squarely refuted by the regulation's "history[] and purpose." *Sec'y of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019) (quotation marks omitted); *Love v. Marriot Hotel Servs.*, 40 F.4th 1043, 1048 (9th Cir. 2022) (court employs all "traditional tools of construction" when interpreting regulations (quotation marks omitted)). When crafting the exemption, EPA rejected proposals to categorically

exempt "all containers that are suitable for transportation." 63 Fed. Reg. at 642. In adopting the narrower "incident to transportation" formulation that exempts such containers only while "in transportation," EPA explained that it did not want to exclude from regulation a container—like "a railroad tank car"—that "remain[ed] at one location for a long period of time," essentially "serving as a storage container" and posing the same "hazard to the community" as any other stationary container. *Id.* at 643.

In other words, EPA drafted the regulatory text precisely so that a party in Multistar's circumstances could not invoke the exemption and create the very risks that Congress intended the Risk Management Program to prevent. It is that regulatory history—reflecting a tailored approach for addressing dangerous chemicals in stationary containers—that provides the relevant interpretive context, not inapposite case law Multistar cites about whether goods are in "interstate" or "intrastate" commerce for taxation and other purposes. Br. at 56-59.[7] And here, the

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[7] The "interstate commerce" cases turn on distinct operative language and principles and are thus irrelevant. Nonetheless, Multistar would struggle under that framework to establish that the TMA stored on its property is in "continuous interstate movement." *See Aircraft Serv. Int'l v. FERC*, 985 F.3d 1013, 1019 (D.C. Cir. 2021). Multistar's long-term storage of TMA—for up to six months—is not a mere pause in shipping occasioned by logistical challenges, but the fulfillment of Eastman's aim to maintain a large regional storage supply—up to ten railcars worth—of TMA. *Id.* (pause disrupts continuous interstate movement unless "solely to facilitate continued transportation"); *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 109 (1929) (same).

Risk Management Program's protective purposes would be disserved by recognizing a broad exemption covering railcars that are stored for weeks or months while they function, and pose the same dangers, as any other stationary container full of an extremely hazardous substance. *See Glaser*, 945 F.3d at 1085 (noting, in Clean Water Act context, that "[c]laims of exemption" from environmental statute's "mandate must be narrowly construed to achieve the [statute's] purposes"). Indeed, Multistar's approach would create a glaring loophole, allowing entities to readily circumvent the Risk Management Program's detailed safety requirements by using railcars for extended storage. *See supra* at 5-6; *cf. County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 178-79, (2020) (interpretive presumption against creating "large and obvious loophole").

As explained in more detail below, *see infra* Section I.A.2, in evaluating whether a container's contents are in "transportation, including storage incident to transportation," under the Risk Management Program, EPA considers whether the container remains connected to the motive power source that delivered it to the site. Because the railcars on Multistar's private track are disconnected from locomotive power, typically for months on end, Multistar cannot invoke the exemption under EPA's test.

Other objective factors point to the same conclusion. Up to ten railcars at a time sit immobile on Multistar's private siding for weeks or months while holding

enormous quantities of TMA. Storage is also an essential and express purpose of the parties' arrangement. In service of Eastman's desire to obtain and maintain a regional TMA storage depot, Multistar has contracted to be the "Warehouseman" of Eastman's "inventory"; it is responsible for the "care, custody, and control of the rail cars and [TMA] contained therein"; and it receives a daily "storage fee" for the containers on its tracks. *See supra* at 13-16. While Multistar argues that transloading is more important to its business than storage, Br. at 60-64, this Court need only recognize that, during the long periods when TMA-filled railcars are warehoused on Multistar's private siding, storage is a principal purpose in its own right, not merely an "incident to transportation."

Multistar assigns error to the district court's consideration of these factual circumstances, arguing that the district court should somehow have resolved the case in the abstract, without considering any "fact[s]" or "[c]ontext" or "criteria." Br. at 40-41, 44-49. But the contours of the interpretive question posed by this case are informed by the circumstances at hand and Multistar's interpretation is incorrect for the reasons above. *See Am. Fed'n of Govt. Emps. v. O'Connor*, 747 F.2d 748, 755-56 (D.C. Cir. 1984) ("Courts customarily deal in . . . legal questions trimmed to fit" the "specific facts or circumstances [of a case,] drawn with some precision," and "are not in the business of deciding the general without reference to the specific."). More broadly, Multistar fails to recognize that "[c]ases are not

decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 683 (9th Cir. 1990) (quotation marks omitted).[8] And here, every potential factual indicator of whether storage is a mere "incident" of transportation, rather than a principal function of Multistar's TMA operation, points in the same direction.

2. Even if this Court Finds the Regulation Ambiguous, Multistar Is Liable Under EPA's Reasonable Motive-Power Interpretation.

This case does not implicate any potential ambiguities in the "incident to transportation" exemption, but if this Court were to find EPA's regulation "genuinely ambiguous" in any material respect, EPA's "reasonable reading" confirms Multistar's liability. *Goffney v. Becerra*, 995 F.3d 737, 739 (9th Cir. 2021) (citing *Kisor*, 139 S. Ct. 2400). In 1998, when promulgating the current "incident to transportation" exemption, EPA explained that it would assess the exemption's applicability by considering whether a container remained connected to "the motive power that delivered it to the site." 63 Fed. Reg. at 643; *accord* Def's ADD-178 (guidance reiterating interpretation). Because the railcars arriving at Multistar's private siding are swiftly detached from locomotive power—and

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[8] *Accord United States v. Johnson*, 718 F.2d 1317, 1321 (5th Cir. 1983) ("in every case application of a legal principle turns on the presence of particular facts").

typically remain unconnected to any motive power source for months thereafter—the exemption is unavailable under EPA's test.

EPA's interpretation is reasonable and entitled to controlling weight. *See Kisor*, 139 S. Ct. at 2416. Looking to whether a railcar remains connected to motive power creates a common-sense, easily understandable guidepost for assessing whether, at a given moment, a transportation container is functioning as a stationary storage unit or providing storage only as incidental to a transportation function. As EPA explained when it promulgated the transportation exemption, disconnecting a container from its source of propulsion is a clear indicator that it is no longer "in transportation," and thus no longer storing its contents merely as an "incident to transportation." 63 Fed. Reg. at 643.[9] Indeed, Multistar acknowledges that "transportation" entails "the movement of goods . . . from one place to another by carrier," Br. at 39 (quoting Black's Law Dictionary, "Transportation"), and a container has lost the capacity for "movement" when disconnected from motive power. Accordingly, EPA's interpretation falls well within "the outer bounds of permissible interpretation." *Kisor*, 139 S. Ct. at 2416.

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[9] Multistar suggests that EPA's interpretation might be unreasonable if applied in vastly different factual circumstances. Br. at 71-72. But EPA's interpretation is plainly reasonable here, and it is not "the function of the courts to decide hypothetical future cases not yet in being." *Mitchell v. Riddell*, 402 F.2d 842, 846 (9th Cir. 1968) (quotation marks omitted).

While the Supreme Court has cautioned that an agency interpretation qualifies for deference only if "the character and context of the agency interpretation entitles it to controlling weight," *Kisor*, 139 S. Ct. 2400, EPA's interpretation easily "meets all three of the additional criteria identified in *Kisor*," *Goffney*, 995 F.3d at 744-45. First, the motive-power interpretation is EPA's "authoritative" and "official" position, set forth in the preamble to the 1998 rule creating the current version (not some "earlier version," Br. at 44) of the "incident to transportation" exemption. *Id.* at 745. Multistar does not dispute this prong.

Second, the interpretation "implicates [EPA's] core expertise because it involves the administration" of EPA's own statutory program, in an area where Congress expressly directed EPA to promulgate regulations. *Id.* at 746; 42 U.S.C. § 7412(r)(7)(A), (B)(i). When crafting a regulatory definition of stationary sources under Section 112(r), EPA drew on its long experience regulating different types of "stationary sources" under other Clean Air Act provisions. *See Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 937 F.2d 465, 466-67 (9th Cir. 1991) (contrasting another agency's lack of special competence with EPA's "superior expertise" interpreting the "term 'stationary source'"). EPA applied that expertise in interpreting when moveable containers perform a stationary storage function such that they become part of a stationary source for purposes of Clean Air Act Section 112(r), posing the same "hazard to the community" as a source's other

"structures, equipment, [or] installations . . . from which an accidental release may occur." 63 Fed. Reg. at 643; 42 U.S.C. § 7412(r)(2)(C); 40 C.F.R. § 68.3.

Multistar contends that DOT, not EPA, is the expert in transportation, Br. at 52-53, but EPA is the agency charged with determining which stationary objects, and in which circumstances, are properly considered part of a regulated "stationary source." And because it also regulates mobile sources under Title II of the Clean Air Act, EPA is accustomed to understanding and drawing distinctions between stationary and mobile sources. *See* 42 U.S.C. §§ 7521-7590; *see also, e.g.*, 40 C.F.R. § 51.491 (defining "[m]obile sources"). Moreover, EPA's interpretation reflects its extensive "consultation with DOT" on a coordinated approach to regulating hazardous materials that appropriately respects both agencies' roles and powers. *E.g.*, 63 Fed. Reg. at 642; *see* 42 U.S.C. § 7412(r)(7)(B)(i), (D) (directing EPA to "utilize [DOT's] expertise" and "coordinate requirements" with DOT). As explained below, *infra* at 48-50, DOT's position aligns with EPA's position here, as containers are not performing a "transportation" function under DOT's regulations, and thus are not engaged in storage subject to DOT requirements, once they reach private siding. *See* 49 C.F.R. § 171.1(c); *see also supra* at 10. So, for the extended periods that TMA-filled containers sit on Multistar's private siding unconnected to motive power, EPA and DOT agree that their storage of hazardous materials is subject *only* to EPA requirements.

Third, EPA's interpretation represents its "fair and considered judgment," and is not a mere "convenient litigating position or post hoc rationalization." *Kisor*, 588 U.S. at 579. Indeed, "far from being a new interpretation or one that would create unfair surprise, the agency's reading is consistent with how it has previously interpreted the relevant regulations." *Goffney*, 995 F.3d at 745. Although Multistar suggests that EPA's interpretation is novel and might even "impose retroactive liability," Br. at 54-55, EPA announced the interpretation when promulgating the current exemption in 1998. And as Multistar acknowledges, in guidance documents dating back to at least 2000, EPA has advised the regulated community that it considers transportation containers to be "part of [a] stationary source" when they are "unhooked from motive power . . . and left on [] site for short-term or long-term storage." Defs' ADD-178 (2000 guidance document). Multistar points to no EPA statements contradicting that interpretation. And to the extent Multistar asserts that EPA's prior enforcement practices are inconsistent with EPA's current position or otherwise relevant to interpreting the exemption, that argument, as explained below, *infra* at 44-45, is both unpreserved and incorrect. Any surprise is due to Multistar's inadequate diligence, *see infra* at 55-56, not a "new interpretation" or lack of fair warning. *See Kisor*, 139 S. Ct. at 2417-18.

B. Because the TMA on Multistar's Property Is Not Stored "Incident to [] Transportation," Multistar's TMA Operation Is Subject to EPCRA.

Similar to the Risk Management Program's broad "stationary source" definition, EPCRA expansively defines a covered "facility" to encompass "all . . . equipment, structures, and other stationary items" under common control[10] at a site—language that includes transportation containers, like railcars, when used for stationary storage. 42 U.S.C. § 11049(4); 40 C.F.R. § 370.66.[11] Also like the Risk Management Program, EPCRA exempts substances that would otherwise trigger the statute's reporting obligations when they are in "transportation, including the storage incident to such transportation." 42 U.S.C. § 11047. The EPCRA inquiry

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[10] Multistar's suggestion in a footnote that it lacks control over the railcars is refuted by the Warehousing Agreement, which specifies that Multistar, as Warehouseman, assumes "care, custody, and control" of them. Br. at 42.

[11] Below, Multistar unsuccessfully argued that by including "motor vehicles, rolling stock, and aircraft" within the "facility" definition "[f]or purposes of" EPCRA's emergency notification provision (42 U.S.C. § 11004), Congress categorically excluded rolling stock, like railcars, under other EPCRA sections. By declining to even cite that language in its opening brief, Multistar forfeited the argument and cannot raise it on reply. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (court "review[s] only issues which are argued specifically and distinctly in a party's opening brief"). In any event, the clause's plain import is ensuring that emergency responders are swiftly notified of releases even if hazardous substances are in transportation. *See* 42 U.S.C. § 11004(b)(1)-(2) (owner or operator of substance in "transportation . . . or storage incident to such transportation" must notify responders); *id.* § 11047 (excluding emergency notification from transportation exemption). It does not suggest that, for purposes of EPCRA's other requirements, railcars (or other listed conveyances) cannot be part of a "facility" when used for stationary storage.

thus tracks the inquiry under the Risk Management Program: if the stationary railcars on Multistar's private siding—each holding TMA in quantities far above the regulatory threshold—are not performing storage "incident to [] transportation," Multistar is liable for failing to timely file EPCRA inventory reports for TMA. 42 U.S.C. § 11022(a).

The outcome is also the same: the railcars warehoused on Multistar's private track are not performing storage as a mere "incident" to transportation. Much of the textual analysis that refutes Multistar's interpretation of the Risk Management exemption, *supra* Section I.A.1, also refutes Multistar's position as to the EPCRA exemption. Indeed, the only notable textual difference between the exemption provisions is that EPCRA's statutory exemption contains the word "such," which reinforces that a container must be in "transportation" to store its contents "incident to *such* transportation." 42 U.S.C. § 11047. And for much of the same reasoning detailed above, for the long periods that TMA-filled railcars sit unmoving on Multistar's track—disconnected from motive power and under no active shipping papers—they cannot be characterized as in "transportation" or storing TMA "incident to such transportation." *See supra* at 27-29, 31-32.

Broadly construing EPCRA's transportation exemption to exclude TMA-filled railcars at Multistar's facility would also subvert EPCRA's critical informational purposes. Rather than enhancing public knowledge "about the

presence of hazardous and toxic chemicals" continuously stored in stationary containers near a significant population center, Multistar's interpretation would keep the public and first responders in the dark. *Steel Co.*, 523 U.S. at 86. And Multistar's interpretation would allow regulated entities to evade EPCRA's notification requirements by structuring their businesses to warehouse extremely hazardous substances on rail siding for months at a time. *Cf. County of Maui*, 590 U.S. at 178-79.

EPCRA's legislative history likewise forecloses Multistar's claim of exemption. The Conference Report illustrates that Congress intended EPCRA's exemption to be "limited to the storage of materials which are still moving under active shipping papers and which have not reached the ultimate consignee." H. Rep. 99-962 at 311 (ADD-2a). Accordingly, the Conference Committee observed that "storage of materials in rail cars" is exempt only "if the materials [a]re under active shipping papers." *Id.* That shipping-papers criterion—which EPA uses as a touchstone when evaluating claims of exemption under EPCRA—unequivocally refutes Multistar's claim.[12] Eastman's initial bills of lading identify Multistar's

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[12] *See. e.g.*, 61 Fed. Reg. 16,598, 16,601 (Apr. 15, 1996) ("storage in containers not under active shipping papers" falls outside EPCRA exemption); EPA, "When does 'storage incident to transportation' end?," https://www.epa.gov/epcra/when-does-storage-incident-transportation-end (last updated May 4, 2023). The Court can take notice of EPA's posted guidance as an "undisputed matter[] of public record" on a

facility as the only shipping destination; the TMA is "consigned to care of Warehouseman"—i.e., Multistar; and, most critically, the TMA is not under active shipping papers for the weeks or months it sits on Multistar's private track before Moses Lake requests delivery and a new bill of lading issues. *Supra* at 13-15.

In contending that the district court improperly relied on the absence of active shipping papers, Multistar conflates EPCRA's statutory transportation exemption with the Risk Management Program's separate regulatory exemption. Br. at 39, 46-48. To be sure, EPA in 1998 "remove[d] the reference to active shipping papers" as a guidepost for applying its Risk Management regulations that implement Clean Air Act Section 112(r). 63 Fed. Reg. at 643. But that regulatory amendment has not changed EPA's position that, to faithfully administer EPCRA's statutory exemption, it may consider the lack of "active shipping papers" under that separate statutory program. Multistar fails to appreciate either that EPA administers distinct programs—one under the Clean Air Act and one under EPCRA—or that the United States and the district court have considered "active shipping papers" only in the EPCRA context.[13]

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government website. *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

[13] To the extent this court identifies any material ambiguity in EPCRA's transportation exemption, EPA's reading, for all the reasons in this section, is the best interpretation.

C. EPA Had Authority to Bring an Enforcement Action Against Multistar

Multistar raises two challenges to EPA's authority to bring enforcement action against it, both of which entail basic misunderstandings of law. First, Multistar raises a belated and unsupported argument that EPA is selectively enforcing the Risk Management Program. Second, even though it cannot identify any actual conflict, Multistar asserts that EPA's enforcement of the statutes it administers would somehow conflict with DOT's administration of the Hazardous Materials Transportation Act. Both arguments fail.

1. Multistar's Selective-Enforcement Argument Is Forfeited and, in Any Event, Incorrect.

Multistar argues that EPA "overreached" in enforcing the Risk Management Program[14] against it because, according to Multistar, EPA had not previously enforced against a "transloading operation." Br. at 26. Although Multistar does not articulate this argument's legal basis, at its heart, this is a selective-enforcement claim: that Multistar cannot be liable because other similarly situated entities supposedly have not been held to the same standards. The argument is thus an affirmative defense that Multistar should have raised, but did not, in its answer. Fed. R. Civ. P. 8(c). Nor did Multistar seek discovery on the defense, raise it at

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[14] Multistar only addresses enforcement of the Risk Management Program, not EPCRA. *See* Br. at 26-28.

summary judgment, or assert it during trial as a basis for avoiding liability. Multistar's failure to raise the "affirmative defense below results in waiver, and the issue cannot be raised for the first time on appeal." *Kelson v. City of Springfield*, 767 F.2d 651, 657 (9th Cir. 1985).

In any event, Multistar's undeveloped argument is meritless. To prove unlawful selective-enforcement in the absence of a claim of unconstitutionally discriminatory animus—which Multistar has not alleged—Multistar must establish that it was intentionally treated differently from others similarly situated and that no rational basis justifies such treatment. *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1122-23 (9th Cir. 2022); *ArchitectureArt, LLC v. City of San Diego*, 745 Fed. App'x 37, 37 (9th Cir. 2018). But Multistar offers nothing to satisfy even its initial burden to identify entities whose circumstances bear "an extremely high degree of similarity . . . in all relevant respects." *SmileDirectClub*, 31 F.4th at 1123. It has not identified, for example, instances where EPA declined to pursue Risk Management violations against transloading facilities where railcars, filled with hazardous substances, were disconnected from motive power for extended periods.

In fact, an essential premise of Multistar's belated selective-enforcement argument—that it operates the only transloading facility in the state subject to the Risk Management Program, Br. at 26—is based on a misunderstanding. When

asked, at the trial on remedy, whether he could identify "any specific number" of "transloading facilities" in Washington subject to the Program, EPA's regional program coordinator testified that "right now" he could not name "any other ones." 2-ER-178–79.[15] While Multistar takes the statement to mean that such facilities do not exist, Br. at 26, one employee's momentary inability to recall such facilities is not proof of their absence. And indeed, had Multistar timely raised a selective-enforcement defense, or otherwise put at issue EPA's treatment of similar facilities, EPA would have apprised Multistar of several Washington transloading facilities subject to the Risk Management Program because they, like Multistar, store hazardous material in railcars before transloading it.[16]

Lacking the factual record to support its selective-enforcement argument, Multistar suggests that EPA "appears to" be deviating from standard practice. Br. at 26, 54. But EPA is faithfully adhering to the regulatory interpretation it issued more than a quarter century ago and that it has, for decades, articulated to the

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[15] To avoid confusion, there are not 250 transloading facilities in Washington, as Multistar's brief may be read to imply. Br. at 28. Rather, there are 250 state facilities—of all types—that comply with the Risk Management Program. 2-ER-177-79.

[16] These facilities are readily accessible on EPA's Risk Management Database (https://cdxapps.epa.gov/olem-rmp-pds/), where the public can search for entities that have submitted Risk Management Plans, including Rosalia Trans Load in Rosalia, WA; Offut Lake Transloading Facility in Tenino, WA; Pacific Propane NW Transloading Facility, in Wapato, WA; Washington Eastern Railroad in Cheney, WA; and Vancouver Facility in Vancouver, WA.

regulated community. Def.'s ADD-178 (2000 guidance document explaining that containers "unhooked from motive power . . . and left on [] site for short-term or long-term storage" are covered). EPA's enforcement of that interpretation is embodied in recent settlements with entities that, like Multistar, violated their Risk Management Program obligations when employing railcars as stationary storage containers on private track.[17] It is therefore incorrect to suggest that EPA has enforced the Risk Management Program only against entities that store covered substances in "brick and mortar buildings." Br. at 28.

2. There Is No Conflict Between DOT and EPA Rules that Would Preclude EPA from Enforcing Its Regulations.

Multistar fares no better in arguing that EPA lacks enforcement authority because its regulation of stationary transportation containers assertedly conflicts with DOT's authority to regulate hazardous substances in transportation. Br. at 28-37. Critically, Multistar identifies no "irreconcilable conflict" between the

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[17] *E.g.*, Consent Agreement and Final Order, *In re: GAC Chemical Corp.*, 2021 WL 5982295, ¶¶ 42-43 (EPA Region 1 Sept. 29, 2021) (Risk Management violations for storing substances "in railcars" that were "disconnected from motive power" on a "private spur"); Consent Agreement and Final Order, *In re: Borden & Remington Corp.*, 2014 WL 12911422, ¶ 61 (EPA Region 1 Sept. 23, 2014) (same); *see also Aberdeen Carolina & Western Ry. v. N.C. Dep't of Air Quality*, 2017 WL 2644309, ¶ 22 (N.C. Off. of Admin. Hrgs. May 22, 2017) (upholding state enforcement of Risk Management Program for hazardous material stored in "railcars for months at a time while . . . disconnected from locomotive power").

programs administered by DOT and EPA such that a court would need to "enforce one [federal law] over the other." *See San Luis Obispo Coastkeeper v. Santa Maria Valley Water Cons. Dist.*, 49 F.4th 1242, 1249 (9th Cir. 2022).

Although Multistar repeatedly alludes to "different and inconsistent obligations" that it faces under the programs administered by EPA and DOT, Multistar offers no concrete examples of how it is "impossible . . . to comply with both" agencies' programs. *DOT v. Public Citizen*, 541 U.S. 752, 766 (2004); *see King v. Blue Cross & Blue Shield of Ill.*, 871 F.3d 730, 740 (9th Cir. 2017) ("irreconcilable conflict" exists only when "it is impossible . . . to conform to the requirements of both" laws). Instead, Multistar merely identifies ways that the agencies' authorities differ. Br. at 36. For example, Multistar notes that DOT and EPA use different "stationary source" definitions and apply different factors to assess whether storage is "incidental to movement" (DOT) or "incident to transportation" (EPA). Br. at 36. But it is hardly unexpected, much less a conflict, that DOT and EPA—agencies with different statutory authorities, different focuses, and different expertise—use differing terminology and approaches when implementing different regulatory schemes.[18] Indeed, it is common for multiple federal agencies to be charged with regulating different aspects of cross-cutting

[18] Even under the Clean Air Act, EPA applies different statutory definitions of a "stationary source" under different programs. *Compare* 42 U.S.C. § 7412(r)(2)(C), *with id.* § 7411(a)(3).

problems; in such cases the agencies' "obligations may overlap, but there is no reason to think the [] agencies cannot both administer their obligations and yet avoid inconsistency." *Mass. v. EPA*, 549 U.S. 497, 532 (2007).

Multistar presumes that it would somehow be problematic if its railcars were subject to concurrent obligations under DOT and EPA programs, but Multistar fails to explain how that fact alone would evidence an "irreconcilable conflict" requiring one law to yield to the other. *San Luis Obispo*, 49 F.4th at 1249. When two federal laws apply at once, a court's duty is simply to "giv[e] effect to both laws if possible." *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010); *accord Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018).[19] And here, there would be no difficulty giving effect to both laws, as the agencies' governing authorities expressly anticipate and allow for concurrent regulation in those instances where their charges' overlap. *E.g.*, 49 C.F.R. § 171.1(e) (functions regulated by DOT "may be subject to applicable standards and

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[19] Multistar assumes that, just as a "federal regulatory scheme [can be] so pervasive" as to preempt "state regulations in the same field," *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157, 1168 (9th Cir. 2021), so too can a federal agency "occupy an area of regulation" to preclude another federal agency from acting in that field, Br. at 28. Field preemption, however, has no application here. That doctrine "originates in the Supremacy Clause of the Constitution and focuses on the conflict between *state* and federal law," not claims of "conflict between the applicable federal laws." *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340 (Fed. Cir. 1999) (emphasis added); *accord Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 684 (9th Cir. 2001).

regulations of other Federal agencies").[20] In DOT's words, its hazardous materials rules "do[] not preempt . . . regulations issued by other Federal agencies to implement statutorily authorized programs"—including "EPA's risk management" and "community right-to-know" programs." 68 Fed. Reg. at 61,907.

In any event, DOT's regulations do not apply to Multistar's storage of TMA from the time the railcars are "delivered to [Multistar's] private track" until the time—typically months later—their contents are transloaded onto trucks. 49 C.F.R. § 171.1(c); *accord id.* § 171.1(d)(3) (DOT rules "do not apply" to "storage of a rail car on private track"); *id.* § 171.1(c)(4)(i)(B) (railcar is not performing covered "[s]torage incidental to movement" if it is "stored on track" that "meet[s] the definition of 'private track or siding'"). DOT regulations thus cannot impose conflicting obligations on Multistar during that period. And by arguing that the unmoving railcars on its private siding are not subject to EPA-administered

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[20] *See also* 42 U.S.C. § 7610(a) (Clean Air Act does not "supersed[e] or limit[] the authorities and responsibilities . . . of any other Federal . . . department"); 42 U.S.C. § 7412(r)(7)(D) (acknowledging EPA's administration of Risk Management Program would overlap with DOT's "comparable" duties regulating "transportation of hazardous material"); 64 Fed. Reg. 28,696, 28,698 (May 26, 1999) ("To the extent that DOT is authorized . . . to regulate activities that are at a stationary source, nothing . . . prohibits [EPA and DOT] from exercising concurrent jurisdiction over [] activities" within both agencies' mandates.); 70 Fed. Reg. 20,018, 20,024 (Apr. 15, 2005) (noting "areas of overlapping jurisdiction" between DOT and other agencies).

programs, Multistar effectively argues that its storage of TMA should not be regulated *by either DOT or EPA* for months at a time.

Although Multistar might argue on reply that railcars on its private track fall within DOT's ambit because they perform "storage at a transloading facility," that would be incorrect. *Id.* § 171.1(c)(4)(i)(A). First, whether at a transloading facility or any other facility, railcars stored on private track are outside DOT's jurisdiction. *Id.* § 171.1(c), (d).[21] Second, even when stationed *off* private track, containers at transloading facilities are subject to DOT rules only if "the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination . . . of the hazardous materials." *Id.* § 171.1(c)(4)(i)(A). Here, the bills of lading governing Eastman's TMA shipments to Multistar, *e.g.*, 4-ER-695, do not identify the shipments as "through-shipment[s]" or list a "destination" other than Multistar's facility. Nor is it relevant that later bills of lading, issued once Moses Lake is ready for delivery, describe the TMA loaded onto cargo trucks as part of a through-shipment. Br. at 63. The "original" rail shipping documents, which expired weeks or months earlier, did not do so—and in fact, Eastman has

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[21] DOT reiterated this point in recent interpretive guidance. DOT Interpretation Response No. 20-0026 (May 21, 2020) (railcars "stored on private track at [a] transloading facility" for "2-3 day period" are not subject to DOT rules), available at https://www.phmsa.dot.gov/regulations/title49/interp/20-0026; DOT Interpretation Response No. 22-0062 (March 10, 2023) (reaffirming and explaining same), available at https://www.phmsa.dot.gov/regulations/title49/interp/22-0062.

repeatedly declined Multistar's requests to alter those initial bills of lading to support Multistar's claim of exemption. 1-SER-41–42.[22]

Ultimately, Multistar's inability to identify an actual conflict is a testament to EPA's extensive coordination among programs and agencies. *See* 42 U.S.C. § 7412(r)(7)(D) (EPA "Administrator shall consult with . . . Secretary of Transportation and shall coordinate any [Risk Management Program] requirements with" DOT). EPA has taken pains to avoid conflicts and "regulatory confusion," and Multistar identifies no basis to upset EPA's successful efforts on that score. 63 Fed. Reg. at 642-43.[23]

II. This District Court Acted Within Its Sound Discretion by Imposing an $850,000 Civil Penalty.

After calculating that Multistar's noncompliance—amounting to 6,379 daily violations of the Risk Management Program and 462 daily violations of EPCRA—allowed for a maximum statutory penalty of over $782 million, the district court

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[22] *See also* 4-ER-714 (Vanourek noting that "while listing Multistar" as consignee "is technically correct, it doesn't 'look' good," and asking Eastman to change bills of lading to state that "shipment is part of a through-shipment"); 1-SER-44, 45, 47.

[23] *See also, e.g.*, 64 Fed. Reg. at 28,698 (approach "reflects the coordination between [EPA and DOT] that is called for under CAA section 112(r)(7)(D)"); 68 Fed. Reg. at 61,907 (given "potential for regulatory overlap, EPA has taken into account [DOT] regulation of hazardous materials in deciding whether and how to regulate"); *id.* at 61,928 (noting alignment of interpretations between EPCRA and DOT rules); *see also* 63 Fed. Reg. at 642-43 (confirming Risk Management Program and EPCRA regulations were "consistent").

imposed a civil penalty of $850,000. 1-ER-39–40; 2-ER-124 (table listing violations and durations); 42 U.S.C. § 7413(b)(2), (e)(2); *id.* § 11045(c)(1), (3); *see* 40 C.F.R. § 19.4 (inflation-adjusted Clean Air Act and EPCRA penalties of $117,468 and $67,544 per day per violation). The district court was well within its "substantial discretion" to impose a penalty that is about one-tenth of one percent—i.e., about one-thousandth—of the undisputed statutory maximum for the instant violations, and also nearly 20% less than the United States requested. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 818 (9th Cir. 2001); *see Sw. Marine*, 236 F.3d at 1001 (9th Cir. 2000) (civil penalties reviewed for abuse of discretion).

A. The District Court Judiciously Weighed All Required Penalty Factors.

In calculating a penalty, the district court properly considered and made particularized findings of fact for each of the seven Clean Air Act penalty factors: "[1] the size of the business, [2] the economic impact of the penalty on the business, [3] the violator's full compliance history and good faith efforts to comply, [4] the duration of the violation . . . , [5] payment by the violator of penalties previously assessed for the same violation, [6] the economic benefit of noncompliance, and [7] the seriousness of the violation." 42 U.S.C. § 7413(e)(1) (also allowing court to consider "other factors as justice may require"); 1-ER-35–36; *see Oliver*, 394 Fed. App'x at 377 (court considers "factors required by"

statute). The court reasonably relied on those same factors in assessing Multistar's noncompliance with EPCRA—which neither prescribes nor prohibits factors for courts to consider when penalizing reporting violators. 42 U.S.C. § 11045(c)(1); *cf.* 42 U.S.C. § 11045(b)(1)(C) (in assessing penalty for emergency notification violations, identifying similar factors as Clean Air Act).

In engaging in the "highly discretionary" task of weighing the factors, *Tull*, 481 U.S. at 427, the district court was plainly within its discretion to emphasize that Multistar's violations were "extensive, covering 6,859 days," and "extremely serious." 1-ER-36; 42 U.S.C. § 7413(e)(1) (factors include "duration" and "seriousness" of violations). To be sure, Multistar correctly notes that it did not release any TMA, Br. at 65, which the district court acknowledged. 1-ER-36. But as the court explained, "TMA is highly flammable and deadly," and Multistar's violations "put workers lives at risk as well as the lives of the people in the community." 1-ER-36; *see Pound v. Airosol Co.*, 498 F.3d 1089, 1099 (10th Cir. 2007) (courts look to "risk or *potential* risk of environmental harm" (emphasis added)). Indeed, Multistar did not take basic steps under the Risk Management Program to prevent or minimize catastrophic accidents—for example, it "did not *begin* to train its employees until two weeks after the TMA arrived on site." 1-ER-34 (emphasis added). And Multistar's EPCRA reporting failures meant that local responders would not have been prepared for a TMA accident that could have

impacted "more than 900 people within a half-mile radius." 1-ER-30. The court also noted that, even as of the date of the penalty proceedings, Multistar had not corrected Risk Management violations, including documenting that it "trained its employees" on critical "emergency shutdown procedures and operations." 1-ER-34.

The district court recognized that Multistar's TMA business had not previously violated EPCRA or the Risk Management Program, *see* Br. at 65, but that fact hardly supports a lower penalty when the company's TMA operations have been out of compliance for their entire existence. 1-ER-36; 42 U.S.C. § 7413(e)(1) (court considers "full compliance history"). And the broader context for these violations, which Multistar neglects to acknowledge, is that for twenty years, Multistar's ammonia business has been embroiled in enforcement actions for violations of the same statutes. *See supra* at 11 n.5 (listing consent decree and settlements addressing Risk Management and EPCRA compliance); 1-ER-36 (district court noting Multistar's history of "disagreements with the EPA"). Multistar's "full compliance history" thus reflects a company that does not take its obligations seriously and that has remained undeterred by smaller fines assessed against it in previous enforcement actions—including, for example, a $45,000 fine in 2014 for violating EPCRA. 3-ER-303.

Multistar states that the fine here was incommensurate with its status as a "small business," Br. at 68, but Multistar does not identify any relevant economic information the court failed to consider. *See* 42 U.S.C. § 7413(e)(1) (factors include company "size" and "economic impact of the penalty"). Acknowledging that Multistar "appears to be a small business with about 10 employees," the district court explained that Multistar's failure to produce evidence of its finances left the court without any further basis to determine the company's "financial strength" or a penalty's "financial impact." 1-ER-36. Because an offender facing a civil penalty "knows best [its] financial situation," Multistar here had the "burden to produce evidence of an inability to pay." *FEC v. Toledano*, 317 F.3d 939, 948-49 (9th Cir. 2002) (cleaned up); *accord United States v. Smith*, 149 F.3d 1172 (table), 1998 WL 325954 at *3 (4th Cir. 1998) (Clean Water Act penalty). It presented no relevant financial evidence, and the court thus fairly found that economic considerations did not "support a mitigation of the penalty." 1-ER-35.

Much of Multistar's argument centers on its claim to have acted under a "reasonable and good faith belief" that it was not subject to the Risk Management Program or EPCRA. Br. at 67. As a threshold matter, Multistar fails to explain why its asserted rationales for *declining* to make "efforts to comply" with those programs would support a reduced penalty. 42 U.S.C. § 7413(e)(1) (court considers "good faith efforts to comply"); *cf. Steeltech, Ltd. v. U.S. EPA*, 273 F.3d

652, 655 (6th Cir. 2001) (rejecting "lack of knowledge" of EPCRA rules as basis to reduce civil penalty). In any event, Multistar's cavalier approach to compliance, especially its intransigence after being notified of violations, amply supports the district court's factual finding—subject to review only for "clear error"— that Multistar did not make "good faith efforts [at] compliance." 1-ER-36; *CashCall*, 35 F.4th at 748 (9th Cir. 2022); 42 U.S.C. § 7413(e)(1).

Multistar contends that before storing TMA on site, its president, Peter Vanourek, "inquired extensively . . . and found nothing" to suggest that the company's TMA operation was "subject to these regulations." Br. at 67. But Multistar's claimed "good faith belief" of exemption from the Risk Management Program and EPCRA is inconsistent with the shifting positions it has taken about the basis for such a belief. At the outset of this litigation, Multistar asserted that it was exempt because the TMA in its railcars was "always under Active Shipping Papers," and because its role was "merely transport[ing]" TMA under a "transport agreement" with Eastman. 1-SER-14, 23, 35. Discovery proved these assertions false. As discussed above, *supra* at 13-15, the TMA-filled railcars on Multistar's property are uncovered by active shipping papers for long periods. And the purported "transport agreement" turned out to be a "Warehousing Services Agreement" that includes a daily railcar storage fee.

Even crediting Vanourek's self-serving testimony, the company's "inquir[y]" consisted of Vanourek personally leafing through the Risk Management rules. 2-ER-274–276, 285–86. In other words, amidst long-running disputes with EPA about the noncompliance of its ammonia operations, Multistar declined to rely on legal or other expert advice before bringing another extremely hazardous material on site. Had Multistar performed adequate diligence, EPA's statements in the Federal Register, enforcement history, and public guidance, *see supra* at 37, 44-45, would have provided exactly the "warning" that Multistar now claims it never received. Br. at 67; *see United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990) ("publication in the Federal Register" serves as "notice to all of those affected"). Indeed, as the district court emphasized in explicitly "reject[ing] Multistar's claim of good faith in researching the law," once Multistar finally sought advice in 2019, its "counsel advised it to comply with the EPA's directives." 1-ER-35; 2-ER-288.

Yet even after that date, Multistar's compliance efforts were haphazard, partial, and ultimately short-lived. 42 U.S.C. § 7413(e)(1). First, after submitting a belated and incomplete Risk Management Plan in 2019, Multistar soon ceased cooperating with EPA and declined to correct outstanding deficiencies. Thus, at a time when Multistar was aware of EPA's position and could have spent about $10,000 to comply, Multistar decided to fight EPA rather than meet its obligations.

Vanourek's private communications reflect Multistar's view that the violations were "not a big deal," and that negotiating a fine with EPA was a mere cost of doing business, amounting to little more than "'horse trading' for money with an agency." 1-SER-43, 50. Second, even after the district court rejected Multistar's legal theories at summary judgment, Multistar declined to remedy its outstanding violations in the five months before trial. Instead, Multistar continued to willfully accrue daily violations for conduct the court had already declared illegal. *See Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) (violations during litigation refute good-faith claim).[24]

B. Multistar's Claims of Legal Error Are Meritless.

Beyond challenging the court's analysis of the penalty factors, Multistar raises several claims of legal error, all of which lack merit. Multistar argues that the court should have set a penalty based on the raw number of days it was out of compliance, without considering the number of violations that occurred each day. Br. at 70. But the Clean Air Act and EPCRA contemplate the imposition of civil penalties "per day *for each violation*." 42 U.S.C. § 7413(b)(1) (emphasis added); *accord id.* § 11045(c)(1), (3) (penalty imposed "for each [] violation," with "[e]ach day" representing "a separate violation"). And "courts have consistently rejected

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[24] Multistar has failed to correct many violations that persist as of date of this filing. *See* Roper Decl. at 2-6, Dist. Ct. ECF No. 112-2 (Feb. 29, 2024).

attempts to limit civil penalties to the number of days in which violations would occur." *Borden Ranch*, 261 F.3d 810, 817 (9th Cir. 2001). Otherwise, committing "innumerable offenses" in a single day would not increase an offender's penalty. *Id.*

Without meaningfully developing the argument, Multistar asserts that "the penalty imposed should be reduced in light of the" Eighth Amendment's prohibition on excessive fines. Br. at 68-69. But "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and the penalty here was about a mere one-thousandth of the statutory maximum set by Congress. *Balice v. USDA*, 203 F.3d 684, 699 (9th Cir. 2000) (quotation marks omitted); *cf. United States v. Halbert*, 472 Fed. App'x 461, 464 (9th Cir. 2012) (holding forfeiture award not unconstitutionally excessive because it "was significantly less than the maximum fine").[25] In any event, given the extent of Multistar's noncompliance and the potential harms of a TMA explosion, *supra* at 16, the penalty is not "grossly disproportionate to the gravity of the offense." *Balice*, 203 F.3d at 698.

Nor did the district court err in failing to account for fines in a selection of prior EPA settlements, all involving unrelated parties, that Multistar identified,

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[25] The Ninth Circuit applies the Excessive Fines Clause to civil penalties. *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922 (9th Cir. 2020).

based on EPA press releases, for the first time in a post-judgment motion. Br. at 69 (citing 2-ER-91–95). Because Multistar did not cite those press releases or the underlying settlements until after judgment, the district court could not have "abuse[d] its discretion by failing to consider an argument that was [not] presented" to it before calculating a penalty. *Smith v. Marsh*, 194 F.3d 1045, 1052 n.5 (9th Cir. 1999). Moreover, Multistar does not now argue that the court erred in rejecting its post-judgment motion. *See* 1-ER-4, 6 (Multistar had "full and fair opportunity to introduce evidence and call witnesses" and other settlements were not "new and relevant evidence" warranting "amendment or reconsideration"). In any event, Multistar fails to explain why a hand-picked selection of negotiated settlements—in cases with different offenders, different violations, different compliance histories, and different evidence of culpability—would dictate the civil penalty in this case.[26]

Finally, Multistar misunderstands the purpose of civil penalties in arguing that the district court should have fashioned a penalty without considering any retributive aim. Br. at 68, 70-71. Civil penalties are not "intended simply to extract compensation or restore the status quo," but to "punish culpable individuals." *Tull*,

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[26] Multistar also grossly mischaracterizes the settlements in stating that the "highest fine imposed was just $45,000." Br. at 69 n.13; *see, e.g.*, 2-ER-91 ($492,000 penalty plus $939,852 in community equipment purchases); 2-ER-92 ($850,000 penalty); 2-ER-94 ($668,100 penalty).

481 U.S. at 422; *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1256 (10th Cir. 2021) (civil penalties are "designed . . . to penalize the defendant"). To that end, civil penalties further the twin aims of "retribution and deterrence." *Tull*, 481 U.S. at 422. Given the extent and potentially serious consequences of Multistar's violations, the company's decades-long history of checkered compliance, and its defiant approach to redressing the violations here, the district court's penalty appropriately serves those aims.

CONCLUSION

For all these reasons, this Court should affirm Multistar's liability and the district court's imposition of an $850,000 civil penalty.

Respectfully submitted,

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June 14, 2024
DJ# 90-5-2-1-12000/2

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FOR THE NINTH CIRCUIT

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

Dual regulation

The standard to be applied by the Administrator in determining whether the regulatory program under the Atomic Energy Act provides "an ample margin of safety to protect the public health" is the same as the "ample margin of safety to protect the public health" standard in effect under section 112 in the Clean Air Act prior to the date of enactment of the Clean Air Act Amendments of 1990.

In the first step of this analysis, the Administrator must determine a safe or acceptable level of risk considering only health factors. In the second step, the Administrator may consider cost, feasibility and other relevant factors in addition to health in order to set a standard to provide an "ample margin of safety."

This approach is required under the decision of the U.S. Court of Appeals in *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*) (interpreting section 112 as in effect prior to these Amendments), and is set forth in the rulemaking on emissions standards for benzene, 54 *Fed. Reg.* 38044 (Sept. 14, 1989).

Permits

It is the conferees' intent that EPA not use the permit hammer approach (case-by-case) to avoid or delay meeting MACT requirements.

Routine Emissions From "Area" Sources

Based on the list of pollutants mentioned above, EPA can also list an area source category just as the agency would list a major source category, and can require MACT. EPA must list sufficient source categories to assure that 90% of the emissions of the 30 most serious area source pollutants are regulated.

Five years after enactment, EPA is to propose a national urban air toxics strategy to reduce cancer risks associated with urban air toxics by 75%. EPA is to report on reductions achieved in 8 and 12 years intervals.

Accidental Releases

The agreement contains provisions that are designed to prevent chemical accidents.

EPA is to publich a list of at least 100 regulated substances, of which 16 are listed in the agreement.

EPA is authorized to promulgate accident prevention regulations.

The conferees do not intend the term "stationary source" to apply to transportation, including the storage incident to such transportation, of any regulated substance or other extremely hazardous substance under the provisions of this subsection.

The prohibition on listing substances for the accident prevention program which have been listed under this section 108(a) does not preclude the listing of anhydrous sulfur dioxide which is on the initial list.

The conference agreement establishes a Chemical Safety and Hazard Investigation Board, similar to the National Transportation Safety board, to investigate chemical accidents.

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

Hazard assessments required under this section shall include:

(1) basic data on the source, units at the source facility which contain or process regulated substances (including the longitude and latitude of such units), operating procedures, population of nearby communities, and the meteorology of the area where the source is located;

(2) an identification of the potential points of accidental releases from the source of regulated substances;

(3) an identification of any previous accidental releases from the source including the amounts released, frequencies, and durations;

(4) an identification of a range (including worst case events) of potential releases from the source, including an estimate of the size, concentration, and duration of such potential releases and a correlation of such factors with the distance from the source of the release;

(5) a determination of potential exposure (including the concentration and duration of exposure) for all persons who may be put at risk as the result of a release from the source;

(6) information on the toxicity of the regulated substances present at the facility; and

(7) a review of the efficacy of various release prevention and control measures, including process changes or substitution of materials.

The Administrator shall prepare and distribute information on the health effects and other hazards associated with each regulated substance, which shall be included in each hazard assessment prepared under this section.

The term "hazardous substances" is used to describe the substances with respect to which the Commission is to consider adverse effects and is not to be interpreted to be the same as that term is defined in section 101(14) of CERCLA or to imply that the effects of substances addressed by Superfund should be given more consideration than those substances controlled under other programs. The Commission should consider effects from a broad range of substances.

The charge to the Commission included in the conference agreement is broader than had been included in the Senate bill. The Commission should include programs to control exposure to hazardous substances under a broad range of programs, including:

(1) the regulation of hazardous air pollutants under section 112 of the Clean Air Act;

(2) effluent guidelines for priority toxic pollutants under the Clean Water Act;

(3) maximum contaminant levels for drinking water contaminants under the Safe Drinking Water Act;

(4) technology standards and other requirements for hazardous waste under the Solid Waste Disposal Act;

(5) clean-up requirements for hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act;

(6) tolerances for pesticide residues in food under the Federal Food, Drug and Cosmetic Act;

(7) label requirements and other restrictions on use under the Federal Insecticide, Fungicide and Rodenticide Act;

(8) restrictions on the use or manufacture of chemical substances under the Toxic Substances Control Act;

(9) the regulation of food additives under the Federal Food, Drug and Cosmetic Act;

(10) regulation of the transportation of hazardous materials by the Department of Transportation.

Municipal Incinerators

The conference agreement includes a provision to control the air emissions from municipal, hospital, and other commercial and industrial incinerators.

The Administrator entered into a consent decree in *New York, et al. v. EPA*, requiring the promulgation of new source performance standards for solid waste incineration units burning municipal waste by December 31, 1990. The provisions of section 129(a) do not disturb that schedule with respect to units with a capacity greater than 250 tons per day. To the extent that the provisions of section 129 are in conflict with the proposed standards, the proposal should be amended before promulgation. Requirements which are in addition to those already proposed, including any requirement for the use of scrubbers on existing units, shall be promulgated not later than 12 months after enactment. Proposed requirements for units smaller than 250 tons per day should be reconsidered in light of the new provisions of section 129 and shall be promulgated not later than 24 months after enactment.

In adopting the definitions of "solid waste incinerator unit" and "municipal waste" in section 129, the managers intend that the definition apply only for purposes of this section and section 306 of the Clean Air Act Amendments of 1990 and should not be interpreted to affect or apply in any manner to the Solid Waste Disposal Act.

The new section 129(g) also includes a definition of "modified solid waste incineration unit". The provisions of this definition only apply to the regulation of solid waste incineration units and shall not be carried over to other parts of the Act.

The definition of "municipal waste" excludes medical and industrial process wastes which have been segregated from other wastes. Segregated wastes would also include wastes that had not been mixed with other wastes but had always been in a separate waste stream.

The conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator Inc.*, 725 F. Supp. 758 (2d Cir.) and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.), or any State activity regarding ash.

TITLE IV—ACID RAIN PROVISIONS

The agreement reduces sulfur dioxide (SO_2) emissions by at least ten million tons per year from a 1980 baseline and provides a national cap on sulfur dioxide emissions beginning in the year 2000. This title, based on the Senate bill, also reduces emissions of oxides of nitrogen (NO_x) by approximately two million tons per year.

Baseline

The 1980 through 1989 baseline shall be determined based on EIA-767 or, if the relevant EIA-767 data is not available, as reported on EIA-759, unless the Administrator determines that adequate supporting documentation can be provided that shows that the particular unit consumed less than 90 percent natural gas even though the plant consumed more than 90 percent natural gas.

The Administrator shall adjust the baseline to account for forced and planned outages of 4 months or more between 1985 and 1987 as reported on the North American Electric Reliability Council's (NERC) Generating Availability Data System (GADS). For units not included in GADS, an adjustment shall only be made for units having only a single 4 month period with no fuel consumption between 1985 and 1987 as reported on Form EIA-767.

Marketable allowances

The conferees do not intend that any affected unit or affected source be subject to any penalty for "exceeding" its allowances for a given calendar year until that year has ended and all transfers of allowances applicable to that year have been completed within a reasonable time after the end of that year. In other words the bill does not

SECTION 327—EXEMPTION

Senate amendment—The Senate amendment contains no comparable provision.

House amendment—The House amendment provides exemption from the requirements of this Title to the transportation, including the storage incidental to transportation, of any hazardous chemical or hazardous substance.

Conference substitute—The conference substitute adopts the House amendment, clarified to assure the exemption of the transportation and distribution of natural gas. Therefore, with the exception of the provisions relating to emergency notification, the provisions of Title III do not apply to transportation or storage incidental to such transportation. The exemption relating to storage is limited to the storage of materials which are still moving under active shipping papers and which have not reached the ultimate consignee. This is consistent with the manner in which storage facilities are treated under the Hazardous Materials Transportation Act. For example, storage of materials in rail cars or in motor carrier warehouses would be exempt from the requirements of Title III (other than emergency notification) if the materials were under active shipping papers. On the other hand, storage of materials in facilities on the site of the consignor or consignee, even if such facilities are primarily transporatation-related, are subject to the provisions of Title III, since the storage would occur either before or after actual transportation of the materials.

who die of cancer each year. But another dimension of the problem is that the risk is not spread evenly. Those living near large chemical plants or in concentrated urban corridors face much higher risks than most Americans. So, it is also an equity issue.

And it is not just cancer. These substances also cause kidney and liver damage, blindness, nerve damage, birth defects, genetic mutations and reproductive disorders. The extent of those health effects have not been quantified by any Government agency.

Air pollution has also become a principal source of water pollution. Eighty percent of the toxics in Lake Superior and 50 percent in Lake Michigan is fallout from the air and not from sewage or industrial discharges to the lakes or the watershed.

There is a large island in Lake Superior called Isle Royale. It is essentially a wilderness area. There is a lake on that island which is not connected with the waters of Lake Superior in any way. This is the remote undeveloped area where there has never been industrial or commercial activity. Nevertheless, scientists find high levels of PCB's and the pesticide toxaphene in the waters of this isolated lake. The pollutants can only have come from the air. The toxaphene must have been transported hundreds of miles from locations in the South where it was used as a pesticide on cotton.

Mercury has also become a significant water pollutant in the Great Lakes region. Mercury bioaccumulates in the tissue of fish and may affect organisms all up the food chain including waterfowl and man. All of the lakes in Michigan are posted with warnings. Pregnant women and children shouldn't eat the fish at all. Healthy adults should not have more than one meal of fish per week.

Over 200 lakes in Minnesota are posted with mercury warnings. Ninety of Wisconsin's 300 lakes carry warnings. Lakes in several other States are also affected. This mercury comes from powerplants and municipal incinerators and is deposited in these lakes from the air.

EPA is authorized under the current Clean Air Act to regulate these pollutants. But the program has not worked well. In 20 years EPA has listed only eight pollutants and regulated only some sources of seven. At the same time a handful of active States have set standards for 708 different substances.

The problem under current law is a disagreement about the regulation of the cancer-causing pollutants. The law says that EPA is to provide an "ample margin of safety to protect the public health." Safety is the bottom line. But Government policy since the 1950's has been based on the principle that there is no safe level of exposure to a carcinogen.

Taken together the two principles imply that there can be no emissions of cancer-causing agents. That would be the only way to assure safety, but in an industrial society zero emissions is a practical impossibility. Over the years EPA has tried in a varity of ways to solve this dilemma by factoring cost considerations into the very stringent health standard for hazardous air pollutants in the current Clean Air Act. They have been sued and lost on each occasion.

The bill reported by the committee has a two phase regulatory program that is designed to get the program moving. There is a broad consensus on the first phase. It requires EPA to issue emissions standards for a large number of industrial categories which will require about 20,000 individual facilities which are major sources of about 200 air toxics to install best available control technology. These technology standards will take cost into account and should achieve emissions reductions that average 90 to 95 percent from current levels. They apply to the large industrial facilities like chemical plants, oil refineries and steel plants. A very similar program has already been implemented for toxic discharges to surface waters.

The bill contains a separate program to control the smaller area sources of these pollutants. Areas sources include dry cleaners, wood stoves, gas stations and cars, buses and trucks. EPA is to develop a national area source strategy which will reduce cancer risks from these pollutants by 75 percent which is the goal the President announced last summer.

The second phase of the program is called residual risk. It is the point of controversy in the air toxics title. It is the same controversy which has plagued current law. The technology standards of the first phase do not guarantee that emissions will be reduced enough to prevent all health risks. A 90-percent reduction in emissions of a cancer-causing substance cannot remove all risks, if by definition there is no safe level of exposure. The remaining 10 percent, the residual risk, is addressed in the second phase of the program.

The committee bill takes a middle ground position. On one side of this debate, the environmental community is asking that cancer risk from industrial point sources be limited absolutely to no more than a 1 in 1,000,000 chance of contracting cancer. That is a traditional definition of negligible risk and is included in the air toxics legislation which Congressman WAXMAN has introduced on the House side.

On the other side, the administration is proposing that no specific standard be placed in the law. Rather, EPA would be given authority to regulate any unreasonable risk should it be discovered. That same unreasonable risk standard has been used in the other laws for chemicals and pesticides, but has not worked well. Finding an unreasonable risk means balancing the costs of control against the adverse health effects of the pollutant on a case-by-case basis with no firm standard.

The bill reported by the Senate committee has a residual risk goal of 1 in 1,000,000. Sources which can reach that level will be required to do so as they would be under the Waxman bill. However, sources which can't get to 1 in 1,000,000 because it is not feasible may get a waiver. They may continue to operate at higher risk levels. But the bill puts an overall cap on the risk that will be allowed at 1 in 10,000.

A 1 in 1,000,000 risk means if 1,000,000 people were exposed to the emissions from a plant over their whole lifetime, just one person would contract cancer as a result of that exposure. A 1 in 10,000 risk is 100 times higher. There would be 1 additional cancer for every 10,000 persons exposed.

The administration and industry are asking that some flexibility be provided in the residual risk phase. That's their plea. The Senate bill provides flexibility. It adopts the traditional negligible risk threshold of 1 in 1,000,000 as a goal, but allows a waiver where that requirement is infeasible and more time is needed to develop control technology. It caps the range over which the Administrator can be flexible at 1 in 10,000—100 times more risk than the traditional negligible risk standard which the environmentalists want as an absolute.

In addition to this two-phase program to control routine emissions of air toxics, the bill also includes a program to prevent catastrophic chemical accidents like that which occurred in Bhopal in 1984. EPA hass published an inventory of these events which indicates that more than 11,000 chemical accidents occurred in the United States between 1982 and 1986. That is four per day. More than 300 people were killed. More than 11,000 were injured with hundreds of thousands evacuated from homes and jobs and hundreds of millions of dollars lost in property damage. The most surprising finding of this EPA study was that 17 of the events had the potential to cause more damage than Bhopal. The chemicals released were more toxic or released in larger amounts. That few were injured or killed in these 17 events is mere good fortune. The committee hopes to replace good fortune with good engineering so that fewer of these events occur.

The bill establishes a Chemical Safety Board to investigate these accidents. It will operate much as the National Transportation Safety Board does for aviation accidents. EPA will be authorized to issue regulations to make chemical manufacturing and processing safer based on recommendations which the Board develops.

CONTROL OF CFC'S

Mr. President, title VII of this bill adds a new title V to the Clean Air Act. It repeals sections 150 through 159 of the existing law and replaces

policy was incorporated in the House bill.

That sounds like a most sensible policy. But there are problems with that approach. The fundamental problem is that EPA has no program to assure that the standards would, in fact, be met in use. There is no recall testing program for heavy duty engines. So a failure of a particular technology, like diesel particulate traps, would not be detected.

A second problem is that engines used in buses are not certified, that is tested before manufacture for compliance with the standards, on operational cycles reflecting the way in which buses are actually used.

We tried to address these issues in a compromise urban bus program included in the conference agreement. It starts with the House bill. EPA is to consider an urban bus standard that is 50 percent more stringent for particulates than the standard that would otherwise apply. This standard will go into place if it can be met by any technology and fuel system that is available for use in urban buses. If it can be met by natural gas, but can't be met by diesel, then we will have natural gas buses beginning in 1994 under this part of the compromise. If a 50-percent reduction cannot be met by any technology, then EPA can back the standard off to a 30-percent reduction.

The compromise also addresses the problems which caused the Senate to prefer an alternative fuels standards. Buses will be tested, both for certification and for recall, to assure that they are meeting the standard for operating cycles which actually reflect the driving patterns of urban buses and to assure that those standards are met in use. If the bus manufacturers select a compliance strategy that relies on diesel engines and diesel traps and that technology does not meet the standard in use over the full useful life of a bus as determined by tests reflecting the actual operating conditions of urban buses, then buses that fail the standard will be subject to recall for correction and the Administrator will be required, 3 years after the failure is determined, to impose a low polluting fuel standard which does not permit the use of diesel fuel in large cities and may impose such a standard for buses in all cities.

HAZARDOUS AIR POLLUTANTS

There are two kinds of pollutants regulated under the Clean Air Act. One group, called criteria pollutants, are emitted in millions of tons and are air pollution problems across broad regions of the country. There are six criteria pollutants including sulfur dioxide, carbon monoxide, lead, zone, nitrogen dioxide, and particulates. EPA sets ambient air quality standards for each of these pollutants and States must take actions to assure that the standard is not exceeded. This hearing is not about criteria pollutants.

The other kind of pollutants are called hazardous air pollutants or air toxics. They are generally cancer-causing substances, but other health and environmental problems may also be caused by toxics.

There are hundreds of air toxics of concern. Some examples are mercury, aresenic, asbestos, benzene, radionuclides, trichloroethylene.

OSHA regualtes 500 toxics in the workplace. A few States with active programs have regulated a total of 708 different air toxics. Recently major manufacturing facilities were required to report their air toxics emissions. The total for the firms reporting was 2.7 billion pounds per year. That is estimated to be about one-fifth of all emissions.

Under the Clean Air Act, EPA is to regulate these toxics by setting emissions standards limiting the amount of the pollutant that can be emitted by any particular source. The standard is to be set to a level which "provides an ample margin of safety to protect public health."

The law has worked poorly. In 18 years, EPA has regulated only some sources of only seven chemicals. One reason the law has worked poorly is the standard of protection required. "An ample margin of safety" has been interpreted by many to mean zero exposure to carcinogens, because any amount of exposures may cause a cancer. EPA has not been willing to write standards that tough because they would shutdown major segments of American industry. The legislation to be proposed and described to be considered at the hearings would entirely restructure the existing law, so that toxics might be adequately regulated by the Federal Government.

On April 12, 1989, EPA issued its toxic release inventory compiled from reports required by the Emergency Planning and Community Right-to-Know Act of 1986. The EPA data indicated that toxic releases to the air from major manufacturing facilities were approximately 2.7 billion pounds in 1987. The largest amounts of emissions were in Texas—240 million pounds, Ohio—173 million pounds, Louisiana—138 million pounds, Tennessee—135 million pounds, and Virginia—132 million pounds.

Chemicals most frequently released included toluene, ammonia, acetone, methanol, carbon disulfide, trichloroethane, methyl ethyl ketone, xylene, dichlormethane and chlorine. Actual emissions are likely to be 2 to 5 times higher, as the reporting requirements only applied to a fraction of the sources which are known to emit toxic pollutants.

In a 1985 study examining the potential cancer-causing effects of exposure to air toxics, EPA estimated a national annual cancer incidence of approximately 2,000 cases as the result of exposure to some 15 to 40 toxic air pollutants. This would mean that 140,000 of the Americans now alive—2,000 annually x 70 year life span—might be expected to contract cancer from exposure to air toxics. Again, this estimate may be low as a much larger number of air pollutants have been identified as potentially toxic.

In 1987, the South Coast Air Basin—southern California pollution control agency—released a study on ambient concentrations of approximately 20 air toxics in the Los Angeles area. Based on that data and extrapolating to the whole Nation, cancer incidence attributable to toxic air pollutants was projected to be as high as 500,000 cases for those Americans now alive.

Another aspect of the air toxics problem is the very high risk of health problems experienced by individuals living near large industrial facilities or in highly developed urban corridors. EPA has examined cancer risks at more than 2,600 industrial facilities across the United States as part of its effort to promulgate air toxics regulations. At more than one-quarter of these facilities, toxic emissions produced cancer risks greater then 1 in 10,000—that is 1 additional cancer for each 10,000 persons expose—for people living nearest these plants. If these sites were abandoned waste dumps, risks of that magnitude would qualify them for cleanup under the Federal Superfund Program.

The 1987, South Coast Air Basin study found cancer risks in the Los Angeles area for the mix of air pollutants from industrial sources, highway fuels, and small business to exceed 1 in 1,000. Based on the actual ambient concentrations recorded as part of the study, cancer deaths in the area were projected at 222 per year.

Beyond the cancer and other adverse health effects caused by exposure to air toxics, these air pollutants also cause widespread environmental degradation. It is estimated that a large percentage of the toxics in the Great Lakes—up to 80 percent of the toxics in Lake Superior—are deposited from the air rather than from surface runoff. Lakes all across the northern tier of States are now posted with warnings for pregnant women and children because of high mercury levels in fish attributable to mercury emissions from coal-fired powerplants.

In addition to these routinely occurring emissions, another aspect of the toxic problem is the sudden and potentially catastrophic chemical accident. In August 1988, EPA prepared an update of its Acute Hazardous Events Data Base—which was released on April 8, 1989—covering 11,048 events in the United States involving the accidental release of extremely hazardous substances between 1982 and 1988. These events caused 309 deaths, 11,341 injuries and the evacuation of 464,677 people from homes and jobs. Evacuation information was only reported for about one-half of the recorded events, so the actual figure may be much higher.

As part of its work on the accident database, EPA analyzed 29 events with

the highest potential for damage to health and the environment. These events were compared to the release at Bhopal, India which killed 3,000 and injured over 200,000. Considering only the toxicity and volume of the chemicals released in the 29 U.S. events, 17 of these events had the potential for more damage than Bhopal and all 29 had a potential of 50 percent or more of the Bhopal effects. That few were killed or injured in these accidents—650 people were injured in one event and 5 killed in another—is due principally to the location of the facilities and climate and operating conditions at the time of the release.

Section 112 of the Clean Air Act adopted in 1970 requires EPA to list each hazardous air pollutant which is likely to cause an increase in death or serious illness. Within a year after listing EPA is to establish emissions standards which would apply to sources of the listed pollutant providing an ample margin of safety to protect public health.

In the 18 years of administering section 112, EPA has listed only eight pollutants: Mercury, beryllium, asbestos, vinyl chloride, benzene, radionuclides, inorganic arsenic, and coke oven emissions. No standard has been promulgated for coke oven emissions and for many of the other pollutants only a few of the source categories emitting the substance are actually regulated. There is only one standard for benzene, while sources in several categories contribute significant emissions. Mercury is a listed substance, but mercury emissions from powerplant boilers—exempt from standards—are contributing to high mercury levels in the flesh of fish taken in the Great Lakes region.

While EPA has listed only eight substances for regulation, a handful of States with active air toxics programs developed on their own have set standards for 708 substances. In 1983, and upon his return to EPA, William Ruckelshaus committed to make decisions within 1 year on approximately 25 toxic air pollutants that had been under review since 1977. Subsequently, EPA decided that 14 of the substances did not require regulation, that 10 may be listed at some point in the future, and that one—coke oven emissions—was to be listed.

In 1985, EPA announced a new air toxics strategy shifting the focus from the regulation of hazardous air pollutants under section 112, to actions under other laws and by the States. The 1985 strategy elevated concern for emissions from the small, areas sources like automobiles, dry cleaners, small combustion units, and so on. One action announced in the strategy has been completed—a new source performance standard for wood stoves, but few of the other elements proposed have been implemented.

In 1987, the Court of Appeals for the District of Columbia reviewed decisions made by EPA with respect to vinyl chloride emissions. As with actions on other standards, EPA had considered cost in a decision to withdraw vinyl chloride standards that had been proposed during the Carter administration. The court found that cost cannot be considered when establishing a safe level of exposure to toxic air pollutants. It is only in determining the margin of safety that EPA is authorized to consider cost and other factors. Because cost has been considered in several of the other hazardous pollutant standards established by the Agency, 5 of the 7 standards that has been issued will be reconsidered. The first proposed revisions for benzene and radionuclides are due in August of 1989.

Recently, EPA began consideration of a new air toxics strategy that would shift the focus from individual pollutants to source categories. The Agency has screened some 900 pollutants and 360 source categories to establish priorities for regulation, identifying 27 source categories for high-priority review. But the legal status of such a policy is in doubt, since the current law requires pollutants rather than source categories to be listed and also requires all sources of every listed pollutant to be controlled. Regulation of high priority source categories would necessarily trigger actions on other sources of lower priority hampering the efficiency of a program already short on resources.

The 1985 air toxics strategy also included a new planning program for emergency response to events like the tragedy which occurred at Bhopal, India. The program included a listing of 402 extremely hazardous substances which might be involved in chemical accidents causing death or injury. The program was eventually incorporated in the Emergency Planning and Community Right-to-Know Act of 1986. With EPA guidance States have identified local planning areas and established emergency planning committees to prepare for response to chemical accidents.

The air toxics problem can be divided into three parts: First, everyday, up-the-stack and fugitive emissions from major sources like chemical plants, petroleum refineries and manufacturing facilities; second, everyday emissions from small, but numerous sources like cars and trucks, drycleaners, gasoline stations, wood stoves, and pesticide applications; and third, accidental, catastrophic releases of extremely hazardous substances which may cause immediate death or injury.

The bill would establish a list of 189 hazardous air pollutants. Any source emitting any one of these pollutants in quantities greater than 10 tons or any combination greater than 25 tons is classified as a major source and subject to regulation under the bill.

In addition to the list of pollutants, EPA is to establish a list of source categories for purposes of promulgating standards. The standards apply to sources in a category (refineries, smelters, boilers, incinerators, chemical plants, cotton gins, POTW's, coke ovens), rather than to pollutants. There may be 250 source categories.

For each category of sources, EPA will promulgate a standard which requires the installation of maximum achievable control technology [MACT] by the sources in the category. In setting MACT standards, EPA is to give priority to pollution prevention measures like process changes and materials substitution. Standards for all source categories are to be promulgated within 10 years, with standards for 40 source categories to be issued within 2 years. Existing sources must comply with MACT standards not later than 3 years of promulgation.

It may be that the MACT technology-based standards will not reduce emissions sufficiently to remove all risks to health and environment of concern. If significant risks remain, EPA is to tighten the standards 8 years after the initial MACT standard is promulgated. For carcinogens, EPA is to promulgate standards if the person most exposed to emissions from a source faces a risk exceeding 1 in 1,000,000.

Area sources are the small, but possibly numerous sources, of toxic pollutants. Although the risks from each source are small, EPA believes that in the aggregate they may cause as much as 75 percent of the cancers in some urban areas.

The area source program in the bill works off the same list of approximately 200 substances. The Administrator can also list an area source category just as he would a major source category and require installation of maximum achievable available control technology.

But for some sources this standard may be too costly, in which case the Administrator would likely not list the source category and no control would result. So the bill establishes an alternative area source control program that asks the Administrator to prepare a national urban air toxics strategy to reduce the risks from area sources. EPA is to monitor for a broad range (400) air toxics in several urban areas to better identify the area source problem. Five years after enactment of the bill, EPA is to propose a national urban air toxics strategy that will significantly reduce risks from toxics in urban areas by controlling the area source categories presenting the greatest risk and which account for 90 percent of the emissions of the 30 pollutants on the list which cause the greatest public health risk as the result of area source emissions.

EPA will report on the reductions achieved by the area source program at 8- and 12-year intervals.

The bill also contains a program to prevent chemical accidents. The purpose of this section of the bill is to prevent accidents like that which oc-