

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

In the Matter of :
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DIC AMERICAS, INC. : Dkt. No. TSCA-II-8(a)-90-0109
:
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Respondent :
:

Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. Section 8(a), 15 U.S.C. § 2607; section 16, 15 U.S.C. § 2615(a); section 15(3)(B), 15 U.S.C. § 2614(3)(B); 40 C.F.R. § 710.33(a): (1) The appropriate civil penalty to be assessed in this matter is the amount proposed by complainant, such proposal being in accord with authority and no extenuating circumstances appearing. (2) In this case, because the failure to file reports deprived the inventory data base of information respecting chemical substance imports, the appropriate amount of the penalty must be determined in accordance with the potential for harm.

APPEARANCES:

Katherine Yagerman, Esquire, Office of Regional Counsel, Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 20460; for complainant.

Vincent E. Gentile, Esquire, Cohen, Shapiro, Polisher, Shiekman and Cohen, Princeton Pike Corporate Center, 1009 Lenox Drive, Building Four, Lawrenceville, New Jersey 08648; for respondent.

BEFORE: J. F. Greene
Administrative Law Judge

Decided: December 30, 1993

DECISION AND ORDER

This matter arises under sections 8, 15, and 16 of the Toxic Substances Control Act ("TSCA," or "the Act"),, 15 U.S.C. §§ 2607, 2615, and 2614, as well as 40 C.F.R. § 710.33(a) of the implementing regulations. The complaint charged respondent with five violations of section 15(3(B) of the Act, for failure or refusal to comply in a timely manner with 40 C.F.R. § 710.33(a), which requires that persons who import for commercial purposes 10,000 or more pounds of a chemical substance listed in the "Master Inventory File" of chemical substances maintained by the U. S. Environmental Protection Agency (EPA) pursuant to § 8(b) of the Act submit a report to EPA.¹ The form for this report, the Partial Updating of the Inventory Data Base Production and Site Report ("Form U") was required to be completed and submitted for each chemical substance so imported during the importer's latest complete fiscal year prior to August 25, 1986, no later than December 23, 1986. Complainant moved for partial "accelerated decision" as to liability, asserting that no issue of material fact remained and that complainant was entitled to judgment as a matter of law. The motion was granted.²

The issue of appropriate penalty for the violations found could not be resolved, and went to trial. Complainant seeks a

¹ See 40 C.F.R. § 710.25.

² **Order Granting Motion for Partial "Accelerated Decision"**, January 3, 1993, attached hereto.

penalty of \$85,000 for the violations found in the five counts of the complaint.³

Complainant argues forcefully and at length that the penalty for failure to file Form U's must be severe enough to deter noncompliance and casual attitudes toward section 8(a) filing requirements, stating that anything less undermines both Congressional intent that chemical substances in commerce should be regulated, and the ability of EPA to carry out its responsibilities under the Act. Complainant urges, citing relevant authority, that the seriousness of section 8(a) violations must be determined at the time the violation occurs, and must not be based upon fortuitous circumstances in a given instance that no particular harm may result because the chemicals in question were not dangerous, or for some other reason. Complainant points out that the data base which was deprived of information as a result of respondent's failure to file Form U's is utilized extensively in risk assessment and other regulatory determinations, is "dispersed among many agency and governmental bodies,"⁴ and is also used by state governments, at least one international agency,⁵ and, in a different version, by the public. In other words, "(T)he relevant

³ Complainant sought judgment as to the amount of the penalty, but this motion was denied.

⁴ Complainant's brief at 11; see also TR 64-66, where complainant's witness testified that about 18 federal government agencies utilize the data.

⁵ The Organization for Economic Cooperation and Development, TR 64.

inquiry in instances of nonreporting under TSCA is not actual harm but rather the potential for harm caused by the absence of data 'reasonably required by the Administrator' ".⁶

Finally, complainant asserts that EPA guidance documents (Guidance for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Federal Register 59770, September 10, 1980; and Recordkeeping and Reporting Rules in TSCA Section 8, 12, and 13 Enforcement Response Policy) have been followed in calculating the penalty proposed herein, based upon the nature, circumstances, extent, and gravity of the violation, after which a variety of "adjustment" factors were considered. These factors include ability to pay the calculated amount and to continue to do business, history of prior violations, culpability, and "such other factors as justice may require." Complainant's witness testified that the ability to pay and to continue in business were not factors in the calculation because respondent had not raised them and there was no reason to believe that respondent could not pay the amount proposed. Further, there was no history of prior violations of the Act, and no reason to believe that culpability should be considered as a mitigating factor because any good faith efforts to comply had been offset, in the witness's opinion, by respondent's failure to comply promptly with the reporting requirement during the three months following the issuance of the complaint.⁷ Accordingly, no further

⁶ Complainant's brief, at 14.

⁷ TR 181-182.

adjustments in the penalty calculation were made by complainant because no other factors recognized by the guidance documents seemed appropriate for consideration.

Respondent's position, to summarize, is that no actual harm has been shown to have been caused by respondent's failure to file, that significant improvements in respondent's compliance system have been made, and that the penalty is excessive in these circumstances.

Complainant's evidence and brief are persuasive as to the importance of calculating the penalty based upon the probability of harm where, as here, it is really not possible to determine whether depriving the inventory data base of certain information has caused harm in a particular instance. What is clear, however, is the importance, in the statutory scheme here, of maintaining as complete a data base as possible. Further, formal agency policy as set forth in the guidance documents appears neither unfair nor unreasonable in specifying that penalties for such violations should be based upon the violations being regarded as "significant." The penalty proposed is appropriate here, where no circumstances out of respondent's control have been shown, and where there was a three-month delay between issuance of the complaint and compliance by respondent, and where lack of compliance in the first instance may fairly be attributed to insufficient vigilance on respondent's employees' part. Respondent must be commended for instituting a new recordkeeping arrangement and demonstrating that its system will now operate in a more

efficient manner, but the expense of doing this cannot be set off against the properly calculated penalty. Respondent has ably presented a sympathetic case, and careful effort has been made to determine whether any showing which could form the basis of a reduction in penalty has been made. However, none appears on the facts of this case. Accordingly, it is found that the penalty proposed by complainant is appropriate and reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant correctly applied guidelines set forth in the Guidelines and Enforcement Response Policy documents, wherein failures to report of the type found here are to be treated as "significant" with a high probability of harm resulting from the violation. This guidance is neither unfair nor unreasonable in the circumstances of failures to report information that will be added to the inventory data base, when the result is that the data base is deprived of information.

2. The penalty proposed conforms to EPA guidance documents, is fair and reasonable in the circumstances here, and is properly based upon the probability of harm at the time of the issuance of the complaint where, as here, the actual harm is absence of complete information from respondent's facility in the inventory data base.

3. Based upon the violations found previously in this matter, respondent is liable for a civil penalty in the amount of \$85,000.

ORDER

Respondent is liable for a civil penalty in the amount of \$85,000, and shall pay such civil penalty in the form of a cashier's or certified check payable to the United States of America, within 60 days from the date of this Order. The payment shall be mailed to

Regional Hearing Clerk
EPA Region II
c/o Mellon Bank
Post Office Box 360188M
Pittsburgh, Pennsylvania 15251



Administrative Law Judge

December 30, 1993
Washington, D. C.