UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Colfax, Inc.	)	Docket No. EPCRA I-93-1076
	)	
Respondent	)	

ORDER Granting in Part and Denying in Part Complainant's Motion for An Accelerated Decision

The Complaint in this case charges Respondent, Colfax, Inc., with violations of the reporting requirements of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), §§ 311 and 312, 42 U.S.C. §§ 11021 and 11022. The violations charged can be summarized as follows:

EPCRA, § 311 requires that the owner or operator of any facility storing a hazardous chemical as defined in the Act in quantities in excess of its threshold quantity submit a material data safety sheet ("MSDS") to the Local Emergency Planning Commission ("LEPC"), the State Emergency Response Commission ("SERC") and the local fire department within the time required by the Statute and the regulations. During the calendar years 1989, 1990 and 1991, Colfax stored six hazardous chemicals: sulfuric acid, ammonia, sodium hydroxide, phosphoric acid, hydrogen and nitrogen in excess of their respective reportable quantities and did not file an MSDS for each of these chemicals with the specified

agencies.[1]

In addition, EPCRA, §312, requires that an owner or operator of a facility required to submit an MSDS for a hazardous chemical must also submit to the same agencies annually a chemical inventory form for the hazardous chemicals it has to report containing specified information (referred to as "Tier I" information). Colfax failed to submit this inventory for 1989, 1990 and 1991, for the six chemicals.

Colfax's failure to file the MSDS and the annual inventory form was discovered during an EPA inspection of Colfax's facility on July 2 and September 10, 1992.[2]

The violations themselves are undisputed.[3] Complainant, accordingly, is entitled to a partial accelerated decision finding Colfax liable for the violations charged in the complaint. The only issue remaining is the question of the appropriate penalty.

For failure to file the MSDS forms (a one-time filing requirement), the EPA requests a total penalty of $26,800. For failure to file the Tier I inventory for the three years 1989, 1990

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[1] Sulfuric acid and ammonia are classified as extremely hazardous chemicals, 40 C.F.R. Part 355, Appendix A. The reportable threshold quantity for each of these chemicals is 500 pounds. 40 C.F.R. §370.20(b). The reportable threshold quantity for each of the remaining four hazardous chemicals is 10,000 pounds. Id.

[2] Affidavit of Donald A. Mackie, Attachment 1 to Complainant's motion.

[3] Colfax argues that it did notify the Pawtucket Fire Department of the existence and location at its facility of various hazardous substances in March 1988, pursuant to its obligation under the Rhode Island Right-To-Know laws. This, however, did not constitute compliance with either EPCRA, §311 or §312. Affidavit of Robert J. Barton, Attachment 2 to Complainant's motion, ¶9.

and 1991, the EPA request a penalty of $20,000 per year or $60,000 in all. The total penalty requested, accordingly, is $86,800.

Complainant contends that there are no factual issues with respect to the amount of the penalty and that it is entitled as a matter of law to a decision assessing the penalty proposed in the complaint.

Any penalty assessed must conform to the statutory criteria.[4] The penalties sought are "Class II" administrative penalties. Such penalties are subject to a maximum amount of $25,000, per day per violation, and the Act further provides that they shall be assessed in the same manner as civil penalties assessed under the Toxic Substances Control Act, 25 U.S.C. 2615.[5] That Statute provides in pertinent part as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any prior history of such violations, the degree of culpability, and such other matters as justice may require.[6]

In its opposition to the motion for an accelerated decision, Colfax has submitted the affidavit of its President, Abbott W.

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[4] The amount of the penalty is also governed by whether it conforms to the Agency's policy statement providing guidance on the assessment of a penalty for violations of EPCRA. See, final penalty policy for violations of various sections of EPCRA dated June 13, 1990, Attachment 6 to Complainant's motion; 40 C.F.R. §22.27(b).

[5] EPCRA, §325(b)(2), 42 U.S.C. 11045(b)(2).

[6] TSCA, §16(a)(2)(B), 15 U.S.C. §2615(a)(2)(B).

Dressler, that Colfax is unable to afford $86,000 in penalties without laying off union workers because of difficult cash flow and poor average sales performance over the past four years. Such evidence is, of course, relevant to the assessment of the appropriate penalty. Complainant disputes that the affidavit is sufficient to raise a factual issue as to the effect of the penalty on Colfax's financial condition.

It is complainant's burden to establish that there are no factual issues and that it is entitled to judgement as a matter of law.[7] Complainant's arguments, addressed to Colfax's failure to raise the defense earlier and the absence of supporting concrete factual data go really to the asserted lack of credibility of Mr. Dressler's affidavit. The issue of credibility is not one to be decided on a motion for accelerated decision. Further, while procedurally it may have been desirable for Colfax to have raised the issue earlier and in the manner Complainant contends it should have been raised, these considerations should not operate to preclude Colfax from introducing evidence that it does lack the

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[7] Under the rules of practice, Complainant also has the burden at the hearing of showing that the proposed penalty is appropriate. 40 C.F.R. §22.24. This means that Complainant must, at least, produce evidence that Respondent has the financial ability to pay the penalty. Dazzio v. FDIC, 970 F. 2d 71, 77-78 (5th Cir. 1992). It is unnecessary to decide at this juncture whether Complainant's burden is only to make a prima facie case or carries with it the burden of persuasion as well. Cf., Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries, ___U.S.___, 62 U.S.L.W. 4543 (June 20, 1994) (Voiding Agency rule shifting to employer the burden of persuasion that claimant's disability was not work-related.) Whatever Complainant's burden, the probative value of its evidence will be weighed against the countervailing evidence in the record.

ability to pay the penalty.[8]

The other arguments Colfax makes against the proposed penalty raise no factual issues. Colfax criticizes the Agency's counting each unreported chemical as a separate violation. It is reasonable, however, to do so, since the information which the responding agencies need to know for a proper response to an accidental or unplanned exposure to the chemical is specific for each chemical. It is also reasonable to count each year for which an annual report was not filed as a separate violation, because the information filed with the agencies should be kept current.

In short, the statutory obligation to report is reasonably construed as attaching to each chemical that must be reported and each year that a report must be filed and not as imposing some general requirement to report regardless of the number of hazardous chemicals involved or the number of years missed.

Colfax also criticizes Complainant's calculation as unnecessarily cumulative because all violations arise from the same cause, the fact that Colfax was simply unaware of the requirements of EPCRA. Colfax offers no reasonable explanation for its lack of knowledge about EPCRA's requirements. The purpose of the penalty is to ensure compliance by the regulated community as well as deter violations. This purpose would not be served, if a violator was leniently treated simply because it had overlooked or failed to keep itself informed about EPCRA's requirements.

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[8] Bosma v. U.S. Dept. of Agriculture, 754 F. 2d 804, 810 (9th Cir. 1983); Dazzio v. FDIC, 970 F. 2d 71, 77-78 (5th Cir. 1992).

In conclusion, accordingly, it is found that there is no genuine issue of material fact with respect to Colfax's liability for the violations charged and that the facts establish that Colfax has violated EPCRA, §§ 311 and 312, as alleged in the complaint.

A genuine issue of material fact does exist with respect to Colfax's financial ability to pay the penalty, and Complainant's motion for an accelerated decision on this aspect of the case is denied.

If Colfax intends to rely on any documents with respect to its ability or inability to pay the penalty proposed in the complaint and the effect that payment of the proposed penalty will have on its ability to continue to do business, it should make those documents available to Complainant by September 19, 1994. Ordering Colfax to produce these documents will not only expedite the hearing but may also advance settlement.

A document not made available as herein directed and offered into evidence will not be admitted into evidence unless good cause is shown for the failure to make the document available within the time ordered.

This matter is tentatively scheduled for hearing in Providence, RI, during the week of October 24, 1994, and the parties are directed to notify me promptly of their availability

for hearing during that week. The parties will be notified later of the time and the address of the hearing.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: Sep 2 1994

In the Matter of Colfax, Inc., Respondent
Docket No. EPCRA-I-93-1076

Certificate of Service

I certify that the foregoing **Order Granting in Part and Denying in Part Complainant's Motion for an Accelerted Decision**, dated September 2, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Mary Anne Gavin
Acting Regional Hearing Clerk
U.S. EPA
J.F. Kennedy Federal Bldg.
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Copy by Regular Mail to:

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Maria Whiting
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Dated: September 2, 1994