UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
ICC INDUSTRIES, INC.,	)	Docket No. II
	)	TSCA-8(a)-90-0212
Respondent	)	

Order Granting Motion for Partial Accelerated Decision and Denying Discovery

The complaint in this case, issued on May 5, 1990, charges Respondent, ICC Industries, Inc., with a violation of the Toxic Substances Control Act ("TSCA"), Section 15(3)(B), 15 U.S.C. 2614 (3)(B), by failing to file the Preliminary Assessment Information Manufacturer's Report ("Form 7710-35") required by regulation (40 CFR 712.20). A penalty of $34,189, is proposed. Respondent answered and denied the violation.

Pending before me is Respondent's request for the production of documents and Complainant's motion for a partial accelerated decision on liability.

The importation by Respondent of a chemical substance in Respondent's fiscal year 1986, which was required to be reported by February 12, 1987, is not denied.[1]

Respondent's facility was inspected by the EPA on February 22, 1989, when the importation of the chemical substance was

[1] The chemical substance, for which confidentiality is not claimed, was 2-propanol, CAS RN 67-63-0. Respondent admits to importing in excess of 1100 lbs. of this chemical in its fiscal year 1986. Answer, Par. 9. By regulation, 40 CFR 712.30(t), this had to be reported by February 12, 1987.

discovered. Respondent's Controller, Joseph Bliss, who represented Respondent at the investigation, had no knowledge of this being reported to the EPA and Respondent's files contained no record of any report being filed.[2]

In its answer, Respondent denied that the absence of any record of the report being filed revealed with any degree of certainty that Respondent had not reported the importation. Respondent further alleged as an affirmative defense that the employee who had knowledge of the paperwork for the importation suffered a massive heart attack on or about April 20, 1986, at which time he became hospitalized and never returned to work, and subsequently passed away. Owing to the absence of this "key employee" and of any other individual with knowledge of the paperwork for the importation, Respondent has been unable to determine whether a report was filed. Respondent also asserted that the EPA investigator advised Mr. Bliss that based upon the EPA's records, the investigator was also uncertain as to whether Respondent had timely filed a report form.[3]

For a second affirmative defense, Respondent asserted that a completed report was filed in February 1989, and that the delay was a technical error which resulted in no loss of information to the EPA.[4]

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[2]. Complainant's prehearing exchange (hereafter "CPHE"), Exhibits, 1, 2 and 7.

[3]. Answer, Pars. 12-19

[4]. Answer, Pars. 20-21.

The answer concluded with a request for the following documents:

> [A]ll records demonstrating the filing or absence of filing of EPA Form 7710-35, results of the investigation of Mr. Bious [the EPA's investigator] at Respondent's offices in February 1989, and any notes or records relating thereto, including internal communications or correspondence pertaining to the facts of this case and the basis for the assessment of a penalty herein, and any other related documents or records in the possession of the EPA.

Following the answer, the parties, at the direction of the Administrative Law Judge, exchanged their lists of witnesses and of documents and exhibits they intended to introduce into evidence.

The EPA has now moved for a partial accelerated decision with regard to Respondent's liability on the basis of the pleadings and the prehearing exchange. It also opposes Respondent's discovery, asserting that all relevant documents have been provided in the prehearing exchange. Documents which have not been provided are protected either by the attorney-client or the work-product privileges.

The only factual issue raised by Respondent with respect to its liability is whether Respondent filed the report. To demonstrate that there is no genuine dispute about this fact, the EPA has submitted the certified statement of Linda Travers in which she states that she is the Director of the Information Management

Division that is responsible for compiling data from reports submitted pursuant to 40 CFR 712 Subpart B-Manufacturers Reporting --Preliminary Assessment Information Rule, and that no report was filed by Respondent for the chemical substance at issue. Respondent in opposing the accelerated decision argues that this certification is insufficient to demonstrate that a report was not actually filed and contends that it should be given the opportunity to cross-examine Ms. Travers on her certification and that it should also be granted the discovery it has requested.

Respondent's request for "all documents demonstrating the absence of filing of EPA Form 7710-35" seems extremely broad even if it is limited it to all documents that would bear upon Ms. Traver's certification that Respondent filed no report. In any event, before such a request can be granted, it must first be shown that it is likely to lead to information that will have significant probative value.[5] Respondent has simply not demonstrated that to be the case here.

In opposition to Ms. Travers statement, Respondent has offered only the allegations in its pleadings that the employee who presumably had knowledge of whether the report was filed is no longer available and that the EPA's investigator said he could not tell from the EPA's records whether a report was filed. I find this most unpersuasive as grounds indicating that a report may have been filed.

It is most difficult to believe that Respondent does not keep

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[5]. 40 CFR 22.19(f).

records of its business operations but relies on the memories of its employees. If, however, this was the case with respect to reports required by TSCA, Respondent has offered no explanation as to why this was so. Moreover, if Respondent was so casual about its recordkeeping with respect to compliance with TSCA's reporting requirements, it could have been casual about compliance as well. All of this points to the fact that Respondent seeks discovery on the remote possibility that it will uncover evidence favorable to its position that a report was filed and has no reasonable basis for assuming that one may have been filed.

The speculative nature of Respondent's discovery is also borne out by Ms. Travers' statement. While it is not clear as to how competent the EPA's investigator was to testify about the EPA's records, it is clear that Ms. Travers is competent to do so. Corroborating her statement that no report was filed is the fact that these reports are an important part in the enforcement of TSCA.[6] It is most likely that the EPA would be careful in its recordkeeping with respect to the reports and that mistakes would be rare. Indeed, to assume otherwise would be contrary to the presumption of administrative regularity to which the EPA is entitled.[7]

I am aware that summary judgement, and by analogy accelerated decisions, should not be decided on affidavits where the issue is

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[6]. See the enforcement and response policy for TSCA, Sections 8, 12 and 13, CPHE, Exhibit 6 at 16.

[7]. See Federal Trade Commission v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 975 (D.C. Cir. 1980).

likely to be one of credibility. But it is at least incumbent upon Respondent to show that a genuine issue of fact exists on whether it has filed the report.[8] This it has not done.

In sum, Respondent's discovery is not likely to produce any evidence of significant probative value and it is denied.[9] I also find that there is no genuine dispute over the fact that the report was not filed. The fact that Respondent may have inadequate records is not credible evidence that a report may have been filed.

The violation in this case is made out by the facts showing that Respondent imported a chemical substance which by regulation should have been reported but was not. The EPA's motion for a partial accelerated decision on liability is granted.

Gerald Harwood
Senior Administrative Law Judge

Dated: JUL 02 1991

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[8]. 6-Pt.2 Moores Federal Practice para. 56.15[4] at 56-287 - 56-289.

[9]. Respondent also seeks discovery on the assessment of the penalty. Here, also, Respondent has failed to show that the discovery will lead to evidence of significant probative value on any material fact in issue. Chautauqua Hardware Corp., EPCRA Appeal No. 91-1 (Order on Interlocutory Review) (Jun 24, 1991).