

9/29/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

INITIAL DECISION

In a proceeding under the Emergency Planning and Community Right-To-Know Act for failure to file reports with local and State planning agencies, penalty of \$20,000 per year found excessive and reduced to \$10,000 per year.

Appearances:            Stephen H. Burke  
                              2500 Hospital Trust Tower  
                              Providence, RI 02903

                              Andrea Simpson  
                              Assistant Regional Counsel  
                              EPA, Region I  
                              John F. Kennedy Federal Building, RCE  
                              Boston, MA 02203

OPINION

This is a proceeding for civil penalties brought pursuant to the Emergency Planning and Community Right-To-Know Act ("EPCRA") §325(c), 42 U.S.C. §11045(c). The Complaint 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 are the failure to file MSDS sheets and inventory forms for six hazardous chemicals (two being extremely hazardous chemicals) with specified State and local agencies as required by EPCRA, §§311 and §312, and the applicable regulations.

A penalty of \$86,480, is requested for the violations.

Respondent answered denying the violations and alleging several affirmative defenses.

A hearing was held in Boston, MA, on May 24, 1995. Following the hearing, the parties submitted post-hearing briefs. In its post-hearing brief, Colfax does not dispute the violations and raises only the issue of the appropriateness of the penalty.

This decision is rendered on consideration of the entire record and the briefs. Proposed findings inconsistent with this decision are rejected.

#### The Violations

EPCRA, §§311 and 312, 42 U.S.C. §§11022 and 11023, deal with the obligation of the owner or operator of a facility at which hazardous chemicals are present to file reports about these chemicals with the appropriate local emergency planning committee ("LEPC"), the State emergency response commission ("SERC") and the fire department having jurisdiction over the facility. These three entities collectively are referred to as the "Agencies." The regulations governing reporting are set out at 40 C.F.R. Part 370.

Colfax has a facility located in Pawtucket, RI. The facility was inspected by the EPA on July 2 and September 10, 1992. The purpose of the inspection was to determine Colfax's compliance with EPCRA's reporting and notification requirements.<sup>1</sup> The following violations of those requirements were found during the inspections:

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<sup>1</sup> Government's (Complainant's) Exhibit (hereafter "CX") 1; Transcript of proceedings (hereafter "Tr.") at 11.

During each of the years 1989, 1990 and 1991, Colfax stored two extremely hazardous substances listed in 40 C.F.R. Part 355, sulfuric acid and anhydrous ammonia, in quantities in excess of 500 pounds and four hazardous chemicals, sodium hydroxide, phosphoric acid, hydrogen and nitrogen, in quantities in excess of 10,000 pounds.<sup>2</sup> These quantities are above the threshold levels at which a facility becomes subject to the reporting requirements. 40 C.F.R. §370.20(b).

For each of these six chemicals Colfax was required to prepare or have available a Material Safety Data Sheet ("MSDS") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., and the applicable regulation, 29 C.F.R. §1910.1200(g).<sup>3</sup> The MSDS contains information on the chemical and physical attributes of the chemical, various response types of information, health hazards, first aid measures and similar technical data.<sup>4</sup>

EPCRA, §311, 42 U.S.C. §11021, and the applicable regulation, 40 C.F.R. §370.21, require that an MSDS for each hazardous chemical present at a facility in quantities at or above the threshold level shall be submitted to the Agencies. This requirement became

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<sup>2</sup> CX 1 (Exh. 8).

<sup>3</sup> So alleged in the Complaint, ¶¶8-10, and not denied by Colfax. Colfax's Proposed Finding of Fact No. 1.

<sup>4</sup> The MSDS for the six chemicals collected at Colfax's facility during the inspection are set forth in CX 1 (Exh. 9); see also Tr. 14.

effective October 17, 1987.<sup>5</sup> Although the six chemicals were present in reportable quantities after October 17, 1987, at Colfax's facility, Colfax failed to file an MSDS for each of them with the Agencies within the specified time.<sup>6</sup>

EPCRA, §312, 42 U.S.C. §11022, and the applicable regulation, 40 C.F.R. §370.25, require that beginning with March 1, 1988, an inventory form ("Tier I" or "Tier II") for each of the six chemicals be filed with the Agencies annually on March 1, for the preceding calendar year.

Colfax did not submit this inventory form for 1989, 1990 and 1991.<sup>7</sup>

#### The Appropriate Penalty

EPCRA, §325(c) provides for the assessment of a civil penalty in an amount "not to exceed" \$25,000, for violations of §312, and \$10,000, for violations of §311. The amount of penalty, thus, is not mandated but is left, instead, to the Agency's discretion. Like any discretionary act, it must be warranted by the facts and not based upon an erroneous legal standard.<sup>8</sup>

As to the facts relating to the violation, Colfax first became aware of the reporting requirements under §§ 311 and 312 when they

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<sup>5</sup> 52 Fed. Reg. 38344, 38365 (Oct 15, 1987). The October 17, 1987 date was subsequently changed for the years 1990 and later. See, e.g., 40 C.F.R. §370.20 (1994).

<sup>6</sup> Tr. 23.

<sup>7</sup> Tr. 23.

<sup>8</sup> United States v. Ekco Housewares, Inc., No. 94-3268, slip op. 13 (6th Cir. August 16, 1995)

were called to its attention by the EPA inspection.<sup>9</sup> Once told of the requirements, Colfax appears to have brought itself into compliance in a satisfactory manner.<sup>10</sup> In mitigation of the penalty, Colfax also brought out that in 1988, Colfax had submitted to the local fire department a list of the hazardous chemicals at its plant and that the local fire department had made annual inspections of its plant.<sup>11</sup> This information, of course, did not comply with the EPCRA reporting requirements.<sup>12</sup> It does show, however, that at least one of the Agencies had some of the information required by EPCRA.<sup>13</sup>

The proposed penalty of \$86,480, has been calculated according to the Final Penalty Policy for Sections 302, 303, 304, 311 and 312 of the Emergency Planning and Community Right to Know Act and

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<sup>9</sup> Tr. 145, 169; CX 1, Exhibit 7. In contrast to its non-reporting under EPCRA §§ 311 and 312, Colfax apparently did comply with the requirements for reporting toxic releases under EPCRA, §313. Tr. 46; CX 1. Colfax apparently also attended a seminar given by the EPA for reporting under EPCRA, §313. Tr. 46,70-71. Complainant's witness indicates that Colfax would have been informed at this seminar of reporting under §§ 311 and 312. Tr. 71. But the testimony is unpersuasive insofar as it would attribute any disposition by Colfax to ignore or neglect any reporting obligations that it knew about. See also CX 19, ¶9, indicating that Colfax had complied with the Rhode Island Right-to-Know requirements.

<sup>10</sup> Tr. 64, 146, 169; see also CX 1, Exhibit 11.

<sup>11</sup> Tr. 54; RX 1.

<sup>12</sup> CX 19. ¶9.

<sup>13</sup> The Lieutenant of the Pawtucket, Rhode Island Fire Department discounts the significance of the list of chemicals in any emergency planning done by it. CX 19, ¶9. Still, presumably, the information was furnished to the Fire Department for some purpose in responding to a fire at the facility if for no other reason.

Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, OSWER DIR. #9841.2 (June 13, 1990) (hereafter "EPCRA Penalty Policy").<sup>14</sup>

Following the guidelines set by the EPCRA Penalty Policy for determining the correct amount, the Agency has calculated a penalty based on the number of chemicals involved, the amount of each chemical involved, the toxicity of the chemicals involved and the length of time the information went unreported.<sup>15</sup> For the failure to file the annual inventory forms, Complainant proposes a penalty of \$20,000 per year. For the failure to submit an MSDS, Complainant proposes a penalty of \$8,000, for each of the two extremely hazardous chemicals, and a lesser penalty of \$5,280 for each of the four hazardous chemicals.<sup>16</sup>

The EPCRA Penalty Policy also requires that consideration be given to Colfax's ability to pay the penalty.<sup>17</sup> The EPA has made a thorough study of Colfax's financial condition and there is no question that Colfax has the financial means to pay a penalty of

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<sup>14</sup> CX 5. This is an internal document issued for guidance of the enforcement staff by the EPA's Offices of Solid Waste and Emergency Response, Office of Waste Program Enforcement and Office of Enforcement.

<sup>15</sup> Tr. 21-32. Complainant also for its consideration of the "circumstances" of the violation selected the lower and not the higher of the two amounts prescribed by the Penalty Policy for violations falling within the matrix cell that was determined to be applicable to the violations. Tr. 35.

<sup>16</sup> CX 3 contains the calculation worksheet. The amounts are taken from the Policy's matrix, CX 5, p. 20.

<sup>17</sup> CX 5, p.12.

this size.<sup>18</sup> Colfax's President, Mr. Dressler, testified about the possible loss of income from a cogeneration power plant on real property owned by Colfax if Rhode Island deregulates utility rates.<sup>19</sup> The cogeneration contract is mentioned in the combined financial statements for the Colfax Corporate Group.<sup>20</sup> The contingency that Colfax may lose the income from the cogeneration power plant is not mentioned. Mr. Dressler understandably may be concerned about the prospects of losing income from what appears to be a profitable contractual arrangement. It does not appear, however, that there is going to be any immediate effect upon Colfax's ability to pay the penalty and the consequences to the company should it lose this income in the future are too speculative to be taken into account.<sup>21</sup> In short, inability to pay is not a limiting factor here in determining the appropriateness of the proposed amount.

The purpose of the EPCRA Penalty Policy is stated to achieve uniformity, but in doing so it has largely written out the fact

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<sup>18</sup> CX 20 and testimony of Mary K. Giglio, Tr. 80-136.

<sup>19</sup> Tr. 149-153.

<sup>20</sup> CX 16 and 22, Note T, p.11.

<sup>21</sup> To summarize Colfax's financial condition, Colfax had taxable income of \$522,279 in 1991, of \$579,654 in 1992 and \$611,577, before subtracting a net operating loss deduction carried over from 1989. There is no evidence that the company's sales of its products and the profits from them are declining. Ms. Giglio, the EPA's accountant, also analyzed the cash flow to show that Colfax had ample cash to pay the penalty. It does not appear either that the company would be reduced to firing employees to pay the penalty or that the ability of the company to meet its current obligations would be adversely affected by the payment. CX 20, 22; Tr. 135-136.

that there can be gradations in the circumstances and in a respondent's conduct in a particular case that justify treating one respondent differently from another, even though both, for example, were equally late in complying. Here, for example, Complainant has given no weight to the fact that the Fire Department was furnished with a list of the chemicals. Yet this list does provide some of the information required in the EPCRA reports. Possession of this information should lessen the potential for harm created by the violation, at least so far as responding to fires at the facility is concerned. Whether the Fire Department would actually make use of the information is beside the point. I am unwilling to assume that the list was a useless act and ignored by the Fire Department any more than I can assume that the Fire Department would ignore the EPCRA information furnished to it.

I find that a penalty of \$60,000 for failure to file the inventory forms for three years is unnecessarily punitive. Colfax, to be sure, is at fault for not knowing of the reporting requirements, but its general attitude has been to comply with the law. I see no reason why a penalty of one-half that amount, or \$10,000 per year, would not be sufficient to accomplish the Agency's goals of fair and equitable enforcement and swift resolution of the problem. The Penalty Policy does not really provide any enlightenment on this point. I do not question the reasonableness of the Agency's classifications of the violations in its matrix for purposes of determining the amount of the penalty. But the facts explaining why the particular amounts were selected



and why the failure to assess them in every case that does not squarely fit within the Policy will undermine enforcement of the law are not really given.<sup>22</sup>

The penalty for the failure to file inventory forms, accordingly, is reduced to \$30,000. In all other respects, Complainant's proposed penalty is adopted. It may well be true, that a penalty of \$56,480, is not necessary to deter future violations by Colfax. Nevertheless, consideration must be given not only to the deterrence effect on Colfax, but also on the regulated community as a whole.<sup>23</sup>

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<sup>22</sup> The Penalty Policy does state that the amounts were established so that a worst-case scenario violation could result in the statutory maximum penalty being assessed. CX 5, p. 7. The EPA's witness, Mr. Mackie, indicated that this case could represent a worst-case scenario, since no reports had been filed, but he selected the lower penalty at the highest level in the penalty matrix because he apparently considered that the maximum penalty would be unreasonable given the number of violations. Tr. 35. Assuming Mr. Mackie is correct in his interpretation of the Policy, it would still be helpful to the presiding officer who must pass upon the reasonableness of the penalty, if there were an explanation of why such a large penalty for not filing the inventory forms was required here and why compliance with the law would be compromised if the penalty were assessed at a lower amount. Civil penalties, after all, are for the purpose of ensuring compliance and not to punish the offender.

<sup>23</sup> United States v. Ecko Housewares, Inc., No. 94-3268, slip op. 17 (6th Cir. August 16, 1995).

Accordingly, a penalty of \$56,480 is hereby assessed against Colfax for the violations found herein.

ORDER<sup>24</sup>

Pursuant to the Emergency Planning and Community Right-To-Know Act, §325(c), 42 U.S.C. §11045(c), a civil penalty of \$56,480, is assessed against Colfax, Inc., 38 Colfax Street, Pawtucket, RI 02860. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, to the following address:

EPA - Region 1  
(Regional hearing Clerk)  
P. O. Box 360197M  
Pittsburgh, PA 15251



Gerald Harwood  
Senior Administrative Law Judge

Dated: September 29, 1995

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<sup>24</sup> Unless an appeal is taken pursuant to 40 C.F.R. §22.30, or the Environmental Appeals Board elects, sua sponte, to review this decision, this decision shall become the final order of the Agency. 40 C.F.R. §22.27(c).