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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
K-I Chemical U.S.A., INC.,	)	**DOCKET NO. TSCA-09-92-0018**
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S PARTIAL ACCELERATED DECISION IN PART AND RESPONDENT'S PARTIAL ACCELERATED DECISION IN PART

An administrative complaint initiating this proceeding was filed on July 7, 1992, by the United States Environmental Protection Agency, Region 9, (sometimes complainant or EPA), charging K-I Chemical U.S.A., Inc., (K-I or respondent), with violating the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et. seq. The violations alleged in the complaint are set forth in five counts. Counts I-IV each charge respondent with submitting false or misleading information on its 1990 Partial Updating of TSCA Inventory Data Base; Production and Site Report, (hereinafter Inventory Update Rule (IUR)), in violation of §§ 8(a) and 15(3)(B) of TSCA, 15 U.S.C. §§ 2607(a) and 2614(3)(B) and the implementing regulations found at 40 C.F.R. Part 710, Subpart B. For these alleged violations, complainant proposed a $68,000 penalty, $17,000 per count. Count V claims respondent failed to provide a certification statement to the U.S. Customs Service at the port of entry declaring that its imported chemicals were either exempt from TSCA or in compliance with TSCA. This is alleged to be in violation of §§ 13(b) and 15(3)(B) of TSCA, 15 U.S.C. §§ 2612(b) and 2614(3)(B), and the implementing regulations located at 40 C.F.R. Part 707, Subpart B. Only a notice of noncompliance was

requested for this violation.

Respondent served its answer on October 22, 1992, denying the allegations in the complaint and pleading affirmative defenses. Additionally, respondent requested a hearing in this matter.

Complainant filed a motion, pursuant to 40 C.F.R. § 22.20(a), for partial accelerated decision (PAD), dated September 1, 1994[1], on the issue of liability for all counts on the grounds that no genuine issue of material fact exists. On September 14, respondent responded in opposition to complainant's motion, as well as filing its own PAD motion concerning counts III and V. Complainant responded in opposition to respondent's PAD regarding counts III and V on September 26.

Some threshold thoughts are appropriate here. Common garden intelligence dictates that evidentiary hearings are designed for the resolution of material facts. Where the only dispute between the parties involves issues of law, an oral evidentiary hearing is never required.[2] As stated in pertinent part, under § 22.20(a), an accelerated decision is the appropriate device when no genuine issue of material fact exists and the party is entitled to judgment as a matter of law.

With this backdrop, the Administrative Law Judge (ALJ) now turns to the specific motions. Respondent operated a small import

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[1] Unless otherwise indicated, all dates are for the year 1994.

[2] 1 Davis and Pierce, Administrative Law Treatise, § 8.3, (3d ed. 1994). See, e.g., Martin v. Yellow Freight System, Inc., 793 F. Supp. 461, 470 (S.D.N.Y. 1992), aff'd, 983 F.2d 1201 (2d Cir. 1993).

office in Brisbane, California which focused on importing certain agricultural chemicals and chemical intermediates for various uses. In April of 1991, EPA's Case Development Officer obtained the issuance of a subpoena duces tecum and subpoena ad testificandum to respondent's President based upon suspected violations of the IUR. The documents obtained by the above subpoenas form the basis of the violations herein. Counts I-IV concern respondent's 1990 IUR submission, known as a Form U. On its Form U for 1990, the quantities reported on four separate chemicals did not correspond with the totals from respondent's invoices which were subpoenaed. Specifically, the total quantities reported on the Form U were as follows: for count I 220,000 lbs.; for count II 120,000 lbs.; for count III 50,000 lbs.; and for count IV 150,000 lbs. (Complainant's Mot. Ex. B.) However, the invoices established that respondent actually imported the following quantities during the fiscal year of January 1, 1989, to December 31, 1989: for count I 251,431 lbs.[3]; for count II 52,910 lbs.; for count III 5,066 lbs.; and for count IV 269,780 lbs. (Complainant's Mot. Ex. D-G.) Count V involves the listing of an imported registered pesticide on the 1990 Form U without a certification statement to U.S. Customs Service establishing compliance with TSCA. (Complainant's Mot. Ex. H.)

On the issue of liability for counts I-IV, respondent admitted in its answer that its quantities reported for the four chemicals

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[3] After the complaint was issued, respondent located further documents for the chemical in count I which raised the total up to 335,344 pounds.

on its Form U did not correspond with the actual quantities imported during the fiscal year of January 1, 1989, to December 31, 1989. Instead, the crux of respondent's dispute is centered on what information must be reported by the IUR. Respondent disagrees with complainant's interpretation of the regulation, and it intends to show at trial that its interpretation of the IUR and its compliance were correct. (Resp't Mot. in opposition at 5, 7.) For count V, respondent argues that EPA does not have the authority to enforce regulations promulgated by the U.S. Customs Service. Respondent's contention in all counts does not demonstrate the existence of material facts in dispute, but instead, involves the resolution of legal questions concerning the regulations at issue. Accordingly, an accelerated decision is the appropriate mechanism in this matter.

The IUR requires importers to report current data on the production volume, plant site, and site-limited status during a reporting period. 51 Fed. Reg. 21438 (June 12, 1986). Persons subject to this requirement must submit information once every four years for the specified fiscal year. Under 40 C.F.R. § 710.32, the IUR requires that persons who import any chemical substance in § 710.25 in excess of 10,000 pounds at a single site during a corporate fiscal year described in § 710.28 to submit certain information to EPA. For counts I, II and IV, the invoices subpoenaed revealed imports for qualifying chemicals in excess of 10,000 pounds during a corporate fiscal year for which reporting was required. Thus, it was incumbent upon respondent to comply

with § 710.32 for the three chemicals listed in counts I, II and IV.

Respondent argues that the IUR does not clarify what information must be reported, especially where the latest corporate fiscal year may represent an atypical amount. This argument is without merit as the regulations define clearly what must be reported. For persons who meet the triggering requirements for reporting, § 710.32(c)(7) specifies reporting the total volume in pounds of each qualifying chemical substance imported at each site. The reported figures must be within 10 percent above or below actual volume imported. Section 710.28(b) designates that persons must report the information in § 710.32(c), if at any time during the person's latest complete corporate fiscal year before August 25, 1990, they imported greater than 10,000 pounds of a qualifying chemical substance.

Respondent embarked on a course of compliance that did not meet the guidelines defined in the regulations above. In his declaration, Mr. Hayakawa, K-I's TSCA compliance officer, stated his reporting method consisted of "averaging the annual four-year volume of imports for the four years preceding the reporting period and to adjust that figure if projected future imports indicated import volumes would vary." (Resp't Mot. in opposition Ex. 2 at 3.) His rationale for this computation was to analyze whether the import volumes were constant and thus, representative of potential exposure or whether they were atypical. (Id. at 2.) The issue of not reporting abnormal production data has already been addressed

and rejected in the discussion of major comments, section A, to the final rule. 51 Fed. Reg. 21442 (June 12, 1986). The IUR requires submitting data on actual quantities regardless of whether they represent atypical amounts. Id.

Respondent characterizes its interpretation of the IUR as a good faith attempt at providing a complete picture of its imports. Yet, this interpretation did not satisfy compliance with the regulations. Under § 710.32 respondent had a duty to submit the actual quantities imported for the corporate fiscal year of 1989 to the extent known or reasonably ascertainable. In this duty, respondent was remiss. Failure to fully comply with any provision of the IUR is a violation of § 15 of TSCA and subject to penalties in § 16 of TSCA. 51 Fed. Reg. 21438 (June 12, 1986) (emphasis added). However, respondent's efforts may have relevance as to what constitutes a condign penalty.

For count III, although respondent reported on its Form U that 50,000 pounds were imported, the invoices disclosed that only 5,066 pounds actually were imported. (Complainant's Mot. Ex. G.) The regulations only require reporting of qualifying chemicals imported in excess of 10,000 pounds. As the chemical at issue in count III did not meet this threshold requirement, no reporting was necessary. While complainant acknowledges that under the regulations respondent had no obligation to report this chemical on its 1990 Form U, nonetheless, complainant argues respondent's miscomputation constitutes a deliberate deviation from the regulation and a violation of § 15 of TSCA. Complainant's position

is untenable. Since there no longer exists an underlying basis for liability, dwelling on count III any further would be an arid exercise.

On the issue of liability for count V, complainant's reference to In re Alm Corp., Docket No. II TSCA-IMP 13-86-0121 (November 30, 1989), aff'd, TSCA Appeal No. 90-4 (CJO, October 11, 1991), is persuasive. In Alm, the respondent advanced the same argument which K-I raises here that EPA may not enforce a U.S. Customs Service regulation regarding certification requirements for entry of chemicals into the U.S. It was held that the U.S. Customs Service regulation was issued pursuant to the direction of § 13(b) of TSCA and in consultation with the EPA Administrator. Id. at 6. Accordingly, the Customs Service's regulation fell within the ambit of § 13(a)(1)(A)'s language authorizing the U.S. Treasury to refuse entry of any chemical substance if a shipment "fails to comply with any rule in effect under this chapter." Id. at 5. Thus, the Administrator has the authority to impose civil penalties for violations of rules issued under TSCA, which the regulation at issue was.

It is concluded that respondent committed three violations of § 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), by submitting a Form U which failed to fully comply with the IUR in violation of 40 C.F.R. Part 710, Subpart B. It is also concluded that respondent committed one violation of the aforementioned section of TSCA by failing to certify to the U.S. Customs Service that the chemical imported by respondent was exempt from TSCA as a registered

pesticide in violation of 40 C.F.R. § 707.20. Respondent, however, is afforded a hearing on the issue of the amount of civil penalty to be assessed in this matter.

Based upon the reasons stated above, **IT IS ORDERED** that:

1. Complainant's motion for an accelerated decision, on the issue of liability for counts I, II, IV and V, be **GRANTED**.

2. Complainant's motion for an accelerated decision, on the issue of liability for count III, be **DENIED**.

3. Respondent's motion for dismissal of count III be **GRANTED**.

4. Respondent's motion for a dismissal of count V be **DENIED**.

Frank W. Vanderheyden
Administrative Law Judge

Dated: October 14, 1994

IN THE MATTER OF K-I CHEMICAL U.S.A., Respondent,
Docket No. TSCA-09-92-0018

Certificate of Service

I certify that the foregoing Order, dated 10/14/94, was sent this day in the following manner to the below addressees:

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Dated: Oct. 14, 1994