

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
VALIMET, INC.,) Docket No. EPCRA-09-2007-0021
)
Respondent.)

ORDER DENYING RESPONDENT'S MOTION TO SUPPLEMENT
PREHEARING EXCHANGE

On November 7, 2008, Respondent submitted a Motion to Supplement Valimet's Prehearing Information Exchange ("Motion"), seeking to add as an exhibit a document marked as RX 25, which is a printout from the EPA's Enforcement Compliance History Online database showing the five highest penalties assessed by EPA for violations of Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Respondent explains that it failed to include this document in its Prehearing Exchange because it believed that these five highest penalties were already included in its Prehearing Exchange exhibits marked RX 3 and RX 4, but upon closer examination, Respondent found that they were not included.

Respondent acknowledges that EPA moved to exclude the category of information contained in RX 25, and that if the motion is granted, "Respondent understands that RX 25 would similarly be stricken." Motion n. 1. Respondent also states that this Tribunal should be able to take judicial notice of RX 25 as it is within the scope of documents that may be judicially noticed under Federal Rule of Evidence 201(b), *i.e.*, "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

On November 6, 2008, EPA's Motion *in Limine* was granted with respect to adjudications or settlements of other EPCRA § 313 cases, including documents marked RX 3 and RX 4. As stated in the Order granting the motion,

... the EAB expressed that its jurisprudence on the question of comparing other penalty assessments "militates strongly against" the position that "previous cases involving the same statute should demarcate the size of a penalty in a current proceeding," and that the EAB "had not found a circumstance in which separate cases were sufficiently identical to justify such an analysis." *Ronald Hunt*, TSCA Appeal No. 05-01, 2006 WL 2847228 (EAB 2006).

While courts may, in determining a penalty or sanction in some contexts, consider penalties and sanctions imposed in similar cases, the EAB and other administrative tribunals do not do so because penalty policies function to ensure that penalties are assessed uniformly for cases with similar basic facts, because the complexity of the additional facts considered and weighed in each penalty assessment is unique to each case, and because consideration of such additional facts in other cases would require additional time and effort on the part of parties and the tribunal which is inconsistent with the purpose of efficiency in administrative proceedings. *See, Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48 at * 20-21 (Settlements and decisions in other EPCRA § 313 cases cannot be used to prove a fact bearing on the issue of the appropriateness of the proposed penalty, “nor can other EPCRA cases be used to show that the penalty is inappropriate because it is more severe than penalties imposed in similar EPCRA cases.”); *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182 (1973) (“the employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.”).

The document marked RX 25 includes penalty amounts agreed to in settlement, and is not relevant to assessment of a penalty in the present case.

For the same reason, a request that the document marked as RX 25 be included in Respondent’s Prehearing Exchange on the basis that it may be officially noticed under 40 C.F.R. 22.22(f) has no merit.

Accordingly, Respondent’s Motion to Supplement Valimet’s Prehearing Information Exchange is **DENIED**.



Susan L. Biro
Chief Administrative Law Judge

Dated: November 20, 2008
Washington, D.C.

In the Matter of Valimet, Inc., Respondent
Docket No. EPCRA-09-2007-0021

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion To Supplement Prehearing Exchange**, dated November 20, 2008, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: November 20, 2008

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