

10/7

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
Obron Atlantic Corporation) Docket No. TSCA-V-C-038-93
Respondent)

ORDER DENYING MOTION FOR ACCELERATED DECISION

This is a proceeding on a complaint charging that Respondent, Obron Atlantic Corporation, did not submit timely the report, "Partial Updating of TSCA Inventory Data Base Production and Site Report (Form U)", for five chemicals manufactured or imported in reportable quantities during its latest fiscal year before August 25, 1990.¹ The report should have been filed by February 21, 1991, but was not filed until 62 days later on April 24, 1991.² A penalty of \$30,000 is requested.³

In support of its motion, Complainant has submitted the Form U filed by Obron dated April 22, 1991, showing that Obron had

¹ The report is required pursuant to the Toxic Substances Control Act ("TSCA"), §8(a), 15 U.S.C. §2607(a). The applicable regulations are codified at 40 C.F.R. Part 710, Subpart B (§§ 710.23 - 710.39). The complaint charged a violation with respect to six chemicals, but by stipulation, the number has been reduced to five: Stearic Acid, Isopropyl Alcohol, Mineral Spirits, Solvent Naphtha and Mineral Oil.

² See Complaint ¶10 for extension of reporting date to February 21, 1991.

³ The stipulation reducing the violations to five also reduced the penalty proposed in the complaint to \$30,000.

produced each of the five chemicals in reportable quantities during the reporting period, and a certification from the EPA showing that the report was received on April 24, 1991. Complainant contends that there is no issue of material fact as to either the violations or the appropriateness of the proposed penalty, and that it is entitled to judgement as a matter of law assessing a penalty of \$30,000.

On the issue of liability, the EPA contends that Obron's failure to admit or deny the allegation (Complaint ¶13) that the five chemicals which Obron reported producing were listed in the Master Inventory File constitutes an admission that they were in the File. Obron's actual wording was that the allegation "calls for a legal conclusion which need not be admitted or denied." It is clear that the answer was not intended to be an admission. While the EPA may disagree with characterizing the issue as a legal one, the allegation is not frivolous on its face and the EPA's disagreement does not turn the pleading into an admission.

The EPA's supporting documents, however, establish that there is no genuine factual issue about the chemicals being on the Master Inventory File. Obron has reported producing these chemicals on a form which requires only the reporting of chemicals in the Master Inventory File.⁴ The inference is fairly drawn from the fact that they were so reported, that the chemicals are in the File, and Obron has not come forward with any evidence to show the contrary.

The issue of whether the chemicals were produced in reportable

⁴ 40 C.F.R. §710.25.

quantities, however, presents a different question. Respondent has described the quantities as " estimates at the high end of the scale." It is asserted that the chemicals are components of compounds it buys and the actual quantities can be determined only by analysis which does not yield a consistent result because of variances in product formulations.⁵ The EPA attempts to dismiss the claim as merely an unsubstantiated effort by Obron to show that it was not subject to reporting requirements. It appears to have overlooked that the claim relates to not only liability but also to the appropriateness of the penalty. Obron, accordingly, should not be precluded by a summary determination from presenting its evidence in support of this claim.⁶

Turning to the appropriateness of the \$30,000, proposed penalty, the EPA places its reliance upon EPA's penalty guidelines for TSCA, §8(a) violations.⁷ For purposes of computing the gravity based penalty (penalty before considering adjustments for statutory factors relating specifically to the violator), late reporting violations are classified as a "level 4" violation in

⁵ Brief in Opposition at 23; see also Respondent's prehearing exchange.

⁶ The EPA also argues that Obron's statements as to how the production figures were derived does not satisfy Obron's burden of showing that there is a genuine issue of fact with respect to the reliability of the reported production figures. If the issue only related to liability, the argument would have merit. The claim, however, is also raised with respect to the appropriateness of the penalty. As to Obron's burden in defeating an accelerated decision on this issue, see infra at 5-6.

⁷ Record and Reporting Rules, TSCA Sections 8, 12 and 13, Enforcement Response Policy dated May 15, 1987 (hereafter "ERP"). Complainant's Exhibit 2 to prehearing exchange.

"circumstance" and a "significant" violation in "extent." The penalty set for a violation so classified in the penalty matrix is \$6,000 per violation.⁸ This is precisely the penalty proposed here. No adjustments are allowed for Obron's culpability, history of such violations, ability to pay, ability to continue in business and for such other matters as justice may require, which are factors that must be considered in assessing the penalty.⁹

It would appear from the record before me, that the late report was filed voluntarily. There is no evidence to indicate otherwise, and, presumably, it is not subject to any genuine dispute. The voluntary filing of a late report is a factor, however, to be taken into account in determining the appropriate penalty¹⁰. At what point in time Obron discovered the violation is not disclosed, but bearing on that could be Obron's contention that the chemicals are additives of other products and the quantities are derived from calculations that can only yield estimates that can vary because of variances in product formulations. This can also be relevant to the appropriate penalty, depending on what the facts are.¹¹

⁸ ERP at 8-11. The Policy refers to a Compliance Monitoring Strategy for each rule for definition of late reporting parameters. ERP at 9. No reference is made to any such Strategy by the EPA and, presumably, the EPA does not regard the language as applicable to the violations charged here.

⁹ TSCA, §15(a)(2)(B), 15 U.S.C. §2616(a)(2)(B).

¹⁰ ERP at 14.

¹¹ For example, the Policy allows for reductions based upon when the disclosure is made after discovery under the statutory requirement that the EPA must take into account such other matters

The EPA dismisses Obron's allegations with respect to how the reported figures were derived as no more than a promise to produce evidence which is not sufficient to defeat a motion for an accelerated decision, citing cases under F.R.C.P., §56, dealing with summary judgement.

The EPA's argument is flawed in two respects.

First, while the Federal Rules are useful guides in ruling on motions for accelerated decisions, they are not wholly apposite, because the Federal Rules allow for much more liberal discovery than is available under our rules. In our cases the parties must rely upon the pleadings and the prehearing exchanges, unless good cause is shown for further discovery.¹² The report filed by Obron, on which the EPA relies, in no way controverts Obron's statement in its prehearing exchange as to how the reported figures were derived. It is clearly a matter which Oberon is competent to testify to. This is sufficient to show that Oberon has raised a genuine issue, the materiality of which will depend upon the facts.

Second, the cases relied upon by the EPA deal with the burden on the party opposing summary judgement with respect to issues on which it has the burden of proof. They appear to hold that on such issues the nonmovant cannot rest on allegations in its pleadings but must produce evidence showing that it has raised genuine

as justice may require. See ERP at 14. There may be other factors which should also be considered under this requirement.

¹² See 40 C.F.R. §22.19(f).

factual issues.¹³ Both the Statute and the rules place the burden on the EPA to show that the penalty is appropriate taking into account all the statutory factors.¹⁴ On the motion for an accelerated decision, the burden on the EPA is to show either that there is no genuine factual issue with respect to the appropriateness of the penalty or that the penalty is appropriate, notwithstanding the truth of Obron's allegations. I find, however, that there is a genuine factual issue with respect to what kind of figures were reported by Obron, estimates or actual pounds, and how they were derived. I also find that the record is not complete with respect to the circumstances under which the report was filed late, and that the EPA has not satisfied its burden in this respect either.

Obron also claims that the late reporting posed no actual or potential threat to human health or the environment. Contrary to what the EPA argues this claim cannot be dismissed out-of-hand as irrelevant.¹⁵ As the precedents show, whether the potential for harm merits an adjustment in a penalty prescribed by a penalty

¹³ Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1985); Garside v. Osco Drug, Inc., 895 F. 2d 46, 48 (1st Cir. 1990).

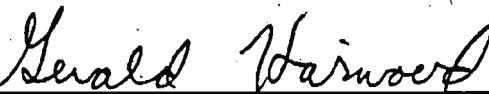
¹⁴ TSCA, §16(a)(2)(B), 15 U.S.C. §2615(a)(2)(B); 40 C.F.R. §22.24. See New Waterbury, Ltd., TSCA Appeal No. 93-2 (Remand Order October 20, 1994) at 11.

¹⁵ See Mobil Oil Corp., EPCRA Appeal No. 94-2 (1994) at 32. ("[S]ome flexibility can and should be utilized in assessing a civil penalty to more closely approximate the actual threat posed by the violation."); see also James C. Lin et al., FIFRA Appeal No. 94-2 (1994) at 5, 9-11 (Penalty reduced where it was found that penalty policy overstated gravity component.)

policy depends on the regulatory provision involved and the facts specific to each case.

Because the EPA has the burden to show that the penalty is appropriate, it cannot rest on any asserted failure by Mobil to produce evidence to support its claim that the late reporting did not threaten any harm to human health or the environment as grounds for a summary determination in its favor. A summary determination on whether the asserted lack of harm warrants any mitigation in the penalty set by the penalty policy would be proper only if it is assumed that the facts alleged by Obron to show lack of harm are true.¹⁶ It is not clear at this point that this is the position the EPA wants to take.

Accordingly, for the reasons stated, the EPA's motion for an accelerated decision is denied.¹⁷



Gerald Harwood
Senior Administrative Law Judge

Dated: December 7, 1994

¹⁶ See Garside v. Osco Drug, Inc., 895 F. 2d 46, 48 (1st Cir. 1990) (In reviewing summary judgement, the court takes the record in the light most "amiable" to the nonmovants and indulges all reasonable inferences most favorable to them.)

¹⁷ Obron in its prehearing exchange has indicated that it will seek subpoenas from EPA individuals. No request for a subpoena will be entertained, however, except upon a showing that the parties have conferred on a stipulation of facts, and the subpoena is sought to obtain information that relates to facts not stipulated to and meets the other requirements of 40 C.F.R. §22.19(f).

In the Matter of Obron Atlantic Corporation, Respondent
Docket No. TSCA-V-C-038-93

Certificate of Service

I certify that the foregoing Order Denying Motion For Accelerated Decision, dated December 7, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Michele Anthony
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by Regular Mail to:

Attorney for Complainant:

Susan M. Tennenbaum, Esquire
Assistant Regional Counsel
U.S. EPA
77 West Jackson Boulevard
Chicago, IL 60604-3590

Attorney for Respondent:

James F. McDonough, Esquire
Fitzpatrick & Israels
400 Plaza Drive
P.O. Box 3159
Secaucus, NJ 07096

Maria Whiting
Maria Whiting
Legal Staff Assistant

Dated: December 7, 1994