UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
LG Chemical America, Inc.,	)	**Docket No. TSCA 02-2004-9143**
	)	
Respondent	)	

Order on Respondent's Motion for Accelerated Decision on Threshold Legal Issue

Introduction

This case involves alleged violations of the Inventory Reporting Regulations (also referred to as the Inventory Update Rule, or "IUR") (40 C.F.R. Part 710) and consequent violation of TSCA Section 15 (3)(B), 15 U.S.C. § 2614(3)(B), by the Respondent, LG Chemical America, Inc., ("LG"). Under the IUR regulations, manufacturers and importers meeting the criteria described at 40 C.F.R. § 710.28 are to periodically submit the "Form U" listing any chemical identified in the "Master Inventory File" (40 C.F.R. § 710.45). Both the Respondent's Forms U for 1998 and for 2002 were submitted on or about December 13, 2002.[1] The Complaint relates that on or about August 20, 2003, the Respondent submitted revised 2002 Forms U for the years in issue.[2] EPA alleges that the Respondent, in submitting its Forms U for the years 1998 and 2002, provided a total import volume for each chemical listed in the Complaint with volumes that were not within 10 % of the actual volume, and that this discrepancy constituted violations of 40 C.F.R. § 710.32 (c)(7). EPA seeks a total civil penalty of $257,400 for these alleged violations. On June 29, 2005, LG filed the instant Motion for Accelerated Decision on Threshold Legal Issue ("Motion"), which is the subject of this Order. For the reasons which

[1] The significance of this, though not revealed within the Complaint, will be discussed later.

[2] As with the submission of the original Form U filings, the Complaint does not offer any explanation of the shared date for the revised filings.

follow, the Court finds, on the narrow issue presented in the Respondent's Motion, that "for purposes of IUR reporting, 'importer' ***may*** include the consignee listed on the bill of lading for the import shipment at issue." Respondent's Motion at 2. (emphasis added).

Respondent's Motion

LG contends that the critical issue in this proceeding is the "proper scope of the term 'importer' for purposes of IUR reporting." While LG acknowledges that under the IUR there are reporting obligations pertaining to certain listed chemicals which are manufactured or imported into the United States, it asserts that this case does not concern whether it accurately reported the total amounts of chemical substances imported into the U.S. from its parent company in Korea, "LG Korea". Rather, LG asserts that the issue is whether it was permissible for LG to be considered the "importer" for reporting the chemical volumes or whether others should have reported those volumes. LG's central contention is that a consignee listed on the bill of lading can be considered as an "importer" under the IUR. Alternatively, LG maintains that even if it is determined that an importer only encompasses the parties listed as the importers of record or the consignee listed on Customs Form 7501, it had no fair notice of such a narrow interpretation and consequently, as a matter of due process, no civil penalty may be imposed in this proceeding. Motion at 2.

LG looks to the plain language of the IUR regulations, EPA's interpretive statements in the preamble to those regulations' final rule, and to the Agency's subsequent interpretative guidance to support its assertion that the term "importer" is broad, encompasses multiple entities, and includes the consignee on the bill of lading for a shipment. Motion at 8. It notes that the IUR regulations provide that the term "Importer" is not limited to entities listed on a particular Customs form but also includes "as appropriate: (i) the consignee," as well as other persons such as, under certain conditions, the transferee. 40 C.F.R. § 704.3. LG states that this provision allows for "at least six (6) different categories of persons that *can* meet the definition." *Id.* at 9. (emphasis added). It notes that in the preamble to the 1986 Final Rule for the Partial Updating of TSCA Inventory Data Base; Production and Site Reports, EPA intentionally left the definition of "importer" as a broad term and that it left "to the parties to the transaction to determine which will report." *Id.*, citing 51 Fed. Reg. at 21445. LG observes that the IUR provides, at 40 C.F.R. §710.35(b), that where more than one person meets the definition of "importer" those parties may decide among themselves who will file the report with EPA and LG suggests this makes sense, as the agency's concern is with accurate reporting of the imported chemicals, not with prioritizing which party should file the information. *Id*. Appropriately, EPA's concern is that at least one importer take responsibility for submitting the IUR report. Not only is the term "importer," on its face, broad but LG also notes that "consignee" is not limited to a subgroup of that term as, for example, there is no language in the regulations providing that a consignee means those persons listed on Custom's Form 7501. LG asserts that consequences flow from this broad regulatory language, as EPA cannot simply claim that the term "importer" is limited in

a manner not suggested by the words used in the regulations. Because the regulations contemplate that more than one entity can be considered an "importer" LG concedes that its customer, GJ Chemical Co. ("GJ"), also fits within that definition but contends that this does not operate to diminish that LG, as the consignee on a bill of lading, equally fits within the definition. *Id*. at 10.

LG also points out that, recognizing that more than one entity could qualify as an importer, EPA has advised in "Q & A" guidance provided for 1998 and 2002 IUR reporting that where a broker and an importer are involved in an import, the party *who controls the transaction* should report. *Id*. at 11. So too, the EPA's instructions for those IUR forms reference that the site of importation is defined at 40 C.F.R. § 710.28(c) as the site of the operating unit which is directly responsible for importing the substance and which controls the import transaction and it advises this could be the headquarters, a specific plant, or a broker. Further, those EPA instructions note that, while more than one person may meet the defined criteria, in §§ 704.3 and 710.3(d), only one should report. LG then notes that in the draft "Q & A" guidance for the 2006 IUR reporting, EPA has stated that "[c]ontrol of the import transaction includes such actions as placing the order or contracting to import a chemical substance, acknowledging receipt ... signing for delivery ... paying tariff duties ... or physically receiving the ... imported chemical ..." and, given that draft guidance language, LG asserts that a consignee on a bill of lading may meet such criteria. LG finds further support in the same draft "Q & A" for 2006 by the Agency's response to the situation where a chemical company imports a chemical directly to the consumer site without handling the substance. The draft answer repeats the EPA view that the party who controls the transaction is the one responsible for reporting the chemical under the IUR, where that company controls the financial and transportation transactions. Thus, LG appears to accept that whether one is deemed to be an importer may, using at least one measure, be determined by whether that person controlled the transaction. Applying that measure, LG states that a consignee on a bill of lading receives title to the goods and can be the person in control of the transaction and the one directly responsible for the goods' importation. *Id.* at 12-13. LG also observes that neither the text of the IUR nor the guidance documents restrict those qualifying as an importer to those identified on a particular Customs form. Having tied its regulatory definition of an importer to those that control the import transaction, LG asserts that EPA cannot now simply present a new interpretation in an enforcement action.[3] LG concludes its motion by asking the Court to rule whether "for purposes of IUR reporting, an 'importer' *may* include the consignee identified on the bill of lading for the import shipment."[4] *Id*. at 14. (emphasis added).

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[3]In this context, as to the issue of whether an agency can offer a new interpretation in the context of litigation, LG asserts that EPA could only change its interpretation of its regulation through notice and comment rulemaking. This claim, regarding whether a change in an agency's interpretation of its rules can only come about through such rulemaking, is not necessary to resolve in this motion and consequently the Court does not address it.

[4]LG's alternative position is that if the Court's ruling determines that an importer only includes parties listed as the importer of record or only a consignee that is listed on Customs

EPA's "Reply[5] to Respondent's Motion for Accelerated Decision on Threshold Legal Issue"

EPA notes that the Respondent submitted two differing versions of its Form U submissions for 1998 and for 2002, yet certified that each year's submissions were true. Since the differences between the two submissions for 1998, as well as those for 2002, were more than 10 percent, EPA filed the Complaint presently before the Court. EPA declares that, as LG certified each report as accurate, despite huge variations for the same reporting year, "clearly both reports cannot be correct." EPA Reply at 2. In these submissions LG *over reported* the amount of chemicals imported by more than 6 million pounds. On that basis EPA disagrees with LG's characterization that these alleged violations were minor and its contends that over reporting, false reporting or misleading reporting all may "adversely affect the ability of EPA[] ... to assess the potential risks of chemical substances .... [and that] over reporting by a major chemical importer [such as LG] would significantly undermine the regulatory scheme for accurate and true reporting." *Id.* Thus, EPA asserts that LG's "core legal issue" is nothing more than an attempt to obscure its violations by filing inaccurate reports which over-reported the amount of chemicals it imported.

In fact, EPA concedes that "a consignee on a bill of lading may be an importer." *Id*. at 20. As such, EPA maintains that the key issue involves a "factual inquiry into the degree of control LG exerted over each import transaction." *Id.* at 2. Accordingly, EPA asserts that resolving LG's core issue, as well as its fair notice defense, hinge upon the particular factual determinations surrounding these imports and on that basis urges that LG's Motion be denied.

EPA acknowledges that "the choice of deciding who will report imports of chemical substances covered by the [IUR] regulation[s] has been left to the discretion of the parties." EPA also concedes that "the term 'importer' includes 'as appropriate' the consignee," and agrees that the term "importer" includes "as appropriate" the consignee and that the "importer" is "defined at 40 C.F.R. § 710.3, as 'any person who imports any chemical substance' and includes the 'person primarily liable for any duties' or 'an authorized agent,' as defined in the Customs regulations at

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From 7501, there was no fair notice of the agency's interpretation, either through the language of the regulations themselves or through interpretative statements it has issued, and consequently due process prevents EPA from assessing a civil penalty in this litigation. LG Motion at 14-16. Having determined LG's first question in its favor, it is unnecessary to reach the second question at this juncture.

[5]While EPA denominates its document as its "Reply" to the Respondent's Motion, the Consolidated Rules of Practice provide that the document is to be listed as the "Response." *See* 40 C.F.R. § 22.16(b). While the Respondent properly described its document to the EPA filing as its "Reply," in order to avoid further confusion, the Court will have to refer to the EPA Response as its "Reply."

19 C.F.R. § 1.11." *Id*. at 14,16-17. While EPA concedes that one who is a "consignee on a bill of lading" *could* be an importer, that designation does make one an importer as a matter of law. Rather, it contends that the particular facts must be examined to determine if the consignee had the "requisite degree of control to be construed as an importer." *Id.* at 17. Thus EPA contends that LG's status as a "consignee on bills of lading who could properly file IUR reports would not be determinative of its status as an 'importer' unless other material facts supported that conclusion." *Id*. at 13. EPA states that LG has failed to provide such facts in its motion to demonstrate that it controlled the import transaction. As the Respondent has failed to show that there are no genuine issues of material fact on this issue, its motion for accelerated decision must be denied. *Id*. at 18-19.

As with the significance of LG's status as a consignee on a bill of lading, EPA contends that LG's alternative claim that it was deprived of fair notice is also a fact based determination. EPA asserts that the term "importer," as a technical term of art, should be defined "more appropriately by reference to a particular industry usage than by the usual tools of statutory construction." *Id*. at 19. EPA suggests that if the definition in the regulation left LG with genuine doubt about the term "consignee," it "had numerous potential sources of information to resolve ambiguity about the term." EPA apparently believes these "sources" would come from "importers, their customers and their customs brokers" and these sources would impart their understanding of the term. *Id.* EPA also contends that the "fair notice" defense has to be "considered in the factual context of its status as an experienced importer engaged in international trade," and suggests it is "unlikely that LG could not comprehend such commonly used mercantile terms as importer and consignee." Despite these perspectives, EPA then proceeds to assert that its definition has never been defined in a manner different from the regulation's plain meaning and, in any event, the regulation is clear and simple enough for one to interpret its meaning "using standard tools of legal interpretation *without looking at agency guidance*."[6] *Id*. at 20 (emphasis added).

LG's Reply

In its Reply, LG contends that because EPA conceded, (in its *Reply*), that LG would qualify as an importer if it exercised "control" over those chemicals, the Complaint should be dismissed for failure to set forth a *prima facie* case. LG Reply at 1. It points out that EPA, in its Reply, agrees that a consignee on a bill of lading for an import shipment may qualify as an "importer" if it is shown that the consignee controlled the importation of the chemical substances. Thus, LG argues that EPA has acknowledged that it is the issue of control that is critical, not whether LG was listed as the importer of record or the consignee on a U.S. Customs form. *Id*. LG contends that, when EPA filed the Complaint, it was based on a narrow reading of

[6]In reasoning that is difficult to follow, EPA then states that the *rule* "clearly and simply articulates the agency's *interpretation* of the reporting obligations of multiple parties engaged in the same chemical import transaction." EPA Reply at 20.

the term "importer" under the IUR. This narrow reading, it asserts, led EPA to file the Complaint without ascertaining whether LG had control of the cited imports.

LG asserts that the Complaint was initiated based on EPA's belief that Customs Form 7501 was the source for determining the importer of chemicals involved here. On that basis EPA originally looked to the fact that LG's customer, "GJ," was listed as the importer and the consignee, on a Customs form (Form 7501) for imports originating from LG's parent company, LG Korea. Thus, EPA originally believed that the party listed on Customs Form 7501 was the party required to submit the IUR chemical report but now, recognizing that the term "importer" is a broad term which can include multiple entities for a single import transaction, EPA realizes that relying solely on the Form 7501 listing was erroneous.

LG also argues that EPA's second basis for bringing the complaint is flawed. It notes that EPA has argued that, as LG filed dual submissions for its 1998 IUR report and again for its 2002 IUR report, both cannot be correct, since the listed amounts for each year reflected more than a 10% variation, and on that basis it asserts that demonstrates violations occurred for those years' reports. LG responds that this does not tell the whole story, as its revised reports for those years were submitted only because EPA insisted that, based on GJ's listing as the importer on Customs Form 7501, only GJ could be deemed the importer. LG had no choice but to submit revised IUR reports once GJ decided to acquiesce with EPA's stance.

Respondent then asserts that EPA has no evidence to offer on the issue of the extent of control LG had over the importation of the chemicals in issue and the remainder of its Reply sets forth LG's view of the facts to show that, in fact, LG did control the imports.

Subsequent filings.

Instead of consulting the procedural rules and, pursuant to them, seeking permission to file a Reply to the Respondent's Reply, EPA submitted a "letter" to the Court in response.[7] Except to the extent noted here, the Court does not consider this filing from EPA.[8] This is because the Consolidated Rules of Practice, 40 CFR Part 22, contemplate only a response and a reply to a motion. As the Rules provide, "[a]ny additional responsive documents shall be

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[7]The Court refers EPA's Counsel to EPA's procedural rules, 40 C.F.R.Part 22, and advises counsel to become familiar with the Agency's own rules. *See also*, n. 5. These rules, which EPA counsel cites in its letter, apply to *both* parties, not simply to respondents in litigation with EPA.

[8]This does not prevent the Court from independently assessing Respondent's Reply and, as expressed *infra*, the Court did in fact discern the same problems identified in EPA's letter, but the Court recognized these problems *before* receiving EPA's letter.

permitted only by order of the Presiding Officer... ." 40 CFR § 22.16**.** EPA did not seek permission to file an additional response, and labeling the document as a "letter" does not excuse the requirement for permission to file an additional response nor does it hide the fact that the letter was such an additional response. One item in the EPA "letter" which the Court does make a comment is EPA Counsel's limp remark that it "reaffirm[s] its previously stated willingness to settle this case without the need for motion practice or a hearing." More egregious is EPA's next remark that "at no time has Respondent made a reasonable settlement offer" and, again limply, suggesting that the parties engage in mediation with *EPA's mediation people in EPA's Office of General Counsel*. EPA letter at 2. Understandably, Counsel for the Respondent objected to EPA Counsel's reference to, and characterization of, settlement discussions. EPA Counsel should have known better than to make such references. Respondent is assured by the Court that it completely ignores EPA's improper allusions to the settlement discussions.

Discussion

As with so many responses to questions about the law, the question as to whether a particular consignee is an importer, must be met with the reply that "it depends." Both parties seem to accept that the key to resolving the question as to whether a particular consignee can be an importer for purposes of IUR reporting, depends upon determining who controls the transaction, and that one cannot, as a blanket statement, assert that a "consignee on a bill of lading" is an importer merely because of that designation. Beyond the parties' consensus, the regulation itself recognizes that the particular facts surrounding the transaction will inform which person (or persons) may appropriately fit within the ambit of the term "importer." The regulation does this by listing several potential entities within the term "Importer," but qualifies those potential importers with the limiting phrase "as appropriate." Both the parties and the Court agree that to determine the appropriateness of including a particular entity as an importer one must examine the particular facts in a given case. Thus, on the narrow issue presented in the Respondent's Motion, the Court determines that for purposes of IUR reporting, an "importer" ***may*** include the consignee listed on the bill of lading for the import shipment at issue.

Although LG has asserted in its Reply that, based on the contention that EPA initiated its complaint on an erroneous reading of those who may be deemed an importer for IUR purposes, EPA no longer has a "case in chief on which to go forward," the Court does not subscribe to that claim. *See* Respondent's Reply at 7. The test is whether EPA has alleged sufficient elements in the Complaint to set forth alleged violations of the IUR. Thus, aside from the fact that this claim is, in effect, a new motion, and therefore was raised after the cut-off date for filing motions, the Court rejects LG's claim that EPA has "failed to put forth a *prima facie* case."[9]

[9]A claim that EPA failed to establish a *prima facie* case can be raised by a respondent, at the conclusion of the EPA's case, prior to the presentation of respondent's evidence.

Accordingly, the case will now proceed to hearing in order for the Court to make findings of fact regarding, among other issues, the entity or entities that may properly be designated as an importer for the transactions identified in the Complaint.[10]

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William B. Moran
United States Administrative Law Judge

September 9, 2005
Washington, D.C.

[10]The effect of answering the initial question posed by the Respondent's Motion for Accelerated Decision in the affirmative is to moot the second question, which question would only have to be resolved if the Court had answered the Respondent's first question in the negative. The Court does not consider the new issues raised in the Respondent's Reply, as those issues go beyond those raised in the initial motion and were presented after the deadline for filing motions. Beyond that, as noted, the Court observes that, in any event, the Respondent is incorrect in asserting that EPA has failed to establish a *prima facie* case. The Complaint adequately sets forth allegations of violation of the cited regulations. Whether EPA will be able to survive a motion to dismiss for failure to establish a *prima facie* case can only be assessed at the conclusion of EPA's evidence.