UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	:::	
Deutsch Company	:::	Docket No. EPCRA-09-95-0008
Respondent	:::	Judge Greene

MEMORANDUM OPINION

Respondent seeks to dismiss this matter as moot on the ground that although the parties were unable to settle, Respondent has paid -- and in the circumstances outlined in the motion does not contest -- the civil penalty sought in the complaint. In opposition Complainant argues that 'the charges must be resolved , i. e. liability determined even if the penalty has been paid, and moved for summary decision on the basis that Respondent had admitted the charges in its answer. Respondent denied having admitted any violations, and argues that Complainant must prove the charges but has failed to do so. For the reasons stated herein Respondent's motion to dismiss is denied; Complainant's motion is granted as to liability only.

Respondent was charged with failure to report its use of 1, 1, 1 - trichloroethane in quantities that exceeded the level at which such use must be reported to both federal and state governments by July 1 of the year following that in which the use occurred. In this case, there is no dispute that reports for 1991 and 1992 were in fact filed some two to three years after the

calendar years to which they pertained. Complainant's position is that Respondent admitted the charges in answer to the complaint by conceding both elements of the violations charged: (1) the use of 1, 1, 1 - trichloro-ethane in amounts exceeding 10,000 pounds; and (2) 1991 and 1992 use reports had not been filed by July 1, 1992, and July 1, 1993, respectively,[1] as required by regulation. In responding to the summary decision motion, Respondent notes that § 313 (g) (2) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023 (g) (2), permits estimates of amounts of chemicals used; consequently, it is argued, reports were not required here because Respondent's initial estimates of quantities of 1, 1, 1 - trichloroethane used had been below the reporting threshold. Subsequently when they were determined to have exceeded it (by only small amounts) appropriate reports were filed. Notably, Respondent reasons that since the reports as filed contained estimates of amounts used as permitted by § 313 (g) (3), rather than *actual* amounts used, by filing estimates Respondent (1) *did not admit use in excess of 10,000 pounds* for either year;[2] and *(2) did not relieve Complainant of the burden of proving that Respondent's actual use did in fact exceed 10,000 pounds* for each year in question. In effect, this means that the government cannot rely upon the accuracy of use reports filed pursuant to § 313 (g) (2) of the Act, and must prove actual use. Complainant's reply concentrates upon demonstrating that Respondent's response to the motion was filed one day

[1]Answer to the complaint at 3-4, ¶ ¶ 9 and 13, wherein Respondent states that it filed the appropriate reports, but not by July 1 of 1992 and 1993.

[2]Response to the motion for summary decision at 2-3.

late, although one sentence does allude to Respondent's point.[3]

The principal issues presented by the parties' determinative motions are, therefore (in order of appearance):

> (a) Whether this matter became moot solely by virtue of Respondent's having paid the proposed penalty;
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> (b) Whether any issues of material fact remain to be decided, viewing Respondent's case in its strongest light;
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> (c) Whether Complainant is entitled to judgment as a matter of law -- specifically:
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> > (i) Whether an erroneous estimate of quantities of toxic chemicals used which results in an estimated use below the reporting threshold [here, the use in question is "otherwise" use, 40 C.F.R. § 372.30 (a) - (b) (l)] constitutes a defense to the charge of failure to report within the time provided, and if so, whether the evidence brings Respondent within the four comers of any such defense;[4]
> >
> > (ii) Whether in order to prevail Complainant must prove that use of the chemical in question did in fact exceed the reporting threshold during 1991 and 1992, despite Respondent having reported use in excess of the reporting threshold for both 1991 and 1992.[5]
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> (d) Whether it is proper or fair to award a civil penalty in the amount proposed by Complainant on the present record in view of the denial of Respondent's motion to dismiss.

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[3]Respondent's response has been accepted despite the probability that it was one day late.

[4]This matter will be considered. Despite it having not been raised as an affirmative defense in the answer or asserted as a ground for dismissal, it is before the court.

[5]If Complainant must prove actual usage at or above the reporting threshold, of course, the motion for summary determination as to liability would fail because of unresolved material factual issues. At the outset, however, what facts Complainant must prove in order to prevail is a legal question. See infra at 6, 7, 8,

The foregoing are considered below.

(a) Whether payment of the proposed penalty renders this action moot.

This enforcement proceeding is not rendered moot by payment of the penalty proposed in the complaint. The doctrine of mootness is applied when there is nothing of a legal nature, or nothing having a legal effect, to be decided in an action. It goes to questions that have no legal effect upon an existing controversy. Here a controversy exists, with legal and possibly factual issues not yet either settled or decided; when such issues are resolved, legal consequences will ensue for one or both parties. Payment of the requested penalty has no effect upon this proceeding except perhaps to settle the penalty issue (appropriateness of the requested penalty); the charges that Respondent violated the Act are still "live," given Complainant's enforcement responsibilities. Likewise, a proceeding would not be moot if a defendant announced that future practice regarding use reports would be elaborately careful so that no failures to report could reoccur. In short, legal and factual issues are not resolved upon payment of a proposed penalty, or cessation of prohibited practices, unless the parties agree (settle) on such terms.[6]

[6]"In general, an action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic or dead . . . a case is moot when a judgment, if rendered, will have no practical legal effect upon the existing controversy." Sigma Chi Fraternity v. The Regents of the University of Colorado, 258 F. Supp. 515, 523 D.C. Dist. Col., 1996); " . . . . a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome,'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) quoting Powell v. McCormack, 395 U.S 486, 496 (1969). The court continued, "It would seem clear that under this general rule [the] claim to pretrial bail was moot once [defendant] was convicted." Geraghty is a clear example of a moot issue. Here, however, the issue of whether Respondent violated the Act is still "live," and Complainant has a "legally cognizable interest in the outcome," given its enforcement objectives, despite payment of the penalty.

If the parties cannot agree upon terms of settlement, such legal and/or factual issues as remain unresolved in an enforcement action must be decided by the court. The parties are entitled to decision by the court on the unresolved issues. The court cannot require one party to *settle* on the terms demanded by another party although. of course, if appropriate, judgment may be rendered consistent with the proposals of one of the parties. Here the enforcement action is punitive in nature, and has objectives rooted in obtaining the widest possible compliance with requirements intended to protect communities from any disagreeable consequences of toxic chemical use. These objectives go well beyond the mere collection of revenue. Accordingly, the matter is not mooted by payment of the proposed penalty, and the motion to dismiss must be denied.

(b) Whether any material issue of fact remains to be decided; and
(c) Whether Complainant is entitled to judgment as a matter of law.

Count I charged specifically that "Respondent was required to submit . . . [but] failed to submit a Form R for 1, 1, 1 - trichloroethane for calendar year 1991 to the EPA and to the State . . . on or before July 1, 1992, and thus violated section 313 of EPCRA and 40 C. F. R. Part 372."[7] Identical charges are set forth in Count II of the complaint with respect to the use of 1, 1, 1 - trichloroethane for 1992, in that it is alleged Respondent was required to, but did not, submit a report to the proper authorities by July 1, 1993. The facts necessary to establish such violations are (1) use of the chemical in the amount of 10,000 pounds or more per year, and (2) failure to file the reports required by the Act in a timely manner.

[7] Complaint at 2, ¶¶ 8-9; and see § 313 (c) EPCRA, 42 U.S.C. § 11023(c), and 40 C.F.R. § 372.25.

As noted above, there is no dispute that the forms were not filed within six months of the end of each year in question,[8] and that they reveal use in excess of 10,000 pounds for each year. However, since Respondent did ultimately report, and these reports show use in excess of 10,000 pounds, a legal issue is raised by Respondent as to whether Complainant must prove nevertheless that Respondent's use did in fact exceed 10,000 pounds despite the amounts shown on the reports. Respondent asserts in its response to Complainant's motion for summary decision that Complainant "has not proven that the Respondent actually used more than 10,000 pounds of 1, 1, 1 - trichloroethane [9] in 1991 or 1992,"[10] and further that Complainant's motion "does not purport to modify, change, add to, replace, supersede or contradict the estimates contained in the Form R reports."[11] Although Respondent does not deny actual use of over 10,000 pounds, if actual use must be proven, Complainant is not entitled to judgment at this point in the proceeding. Complainant replies that EPA is entitled to rely upon what Respondent filed as to amounts used. Respondent insists that

> . . . . the fact that Congress expressly permitted owners and operators use estimates in filling out the forms, of course, does not mean that the Agency can merely use the estimates to prove a violation of the statute . . . (T)he statute clearly distinguishes between amounts "used," that EPA must prove to establish a violation, and "estimated" that an owner

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[8] "Respondent admits that it did not submit such form on or before July 1, 1992 " [Answer to the complaint at 3, ¶ 9], and ". . . admits that it did not submit such form on or before July 1, 1993 ." [Answer to the complaint at 4, ¶ 13].

[9] *Response of Respondent. . . to Region IX's Motion for Accelerated Decision* at 2, ¶ 2.

[10] Emphasis original.

[11] Response of Respondent to the motion for accelerated decision, at 2, ¶ 4.

. . . may use in filling out a form R.[12]

This remarkable proposition would render the filing of the forms meaningless; the information set forth in them would then serve no useful purpose whatever in government efforts at various levels to carry out the purposes of the Act. Members of the regulated community could make precautionary filings consisting of "estimates," with no attendant liability for failure to get the information right, and in effect be immune both to a charge of failure to file and to allegations that the information filed was incomplete, false, or fraudulent.[13]

The principles of statutory construction are nothing if not clear that frankly ludicrous results are to be avoided in ascertaining the meaning of statutory or regulatory provisions, and this is especially true where the legislative purpose would be entirely vitiated pursuant to a proposed construction. There is no question that the government is entitled to rely upon the truth of information filed in a statutorily required report, and it may be assumed, accordingly, that when a member of the regulated community files a report on which usage of a toxic chemical is estimated, i. e. reported, to be in excess of 10,000 pounds, the federal government, the state government, the community authorities charged with the responsibility of dealing with spills and emergencies arising from the local use of toxic chemicals are *all entitled to rely upon it for the purposes for which it was filed.* Whatever section 313 (g) (2) does do, it does not authorize the filing of information so approximate that the stated level of use of a toxic chemical, and hence the usefulness of the information, is totally open to question. Quite clearly, § 313 (g) (2)

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[12] Response to Complainant's motion for summary decision, at 6-7.

[13] Not under consideration here are questions of civil or criminal liability under various federal statutes for filing false information.

provides simply that monitoring and measurement of quantities of chemicals are not required *merely for the purpose of filing a Form R,* and that available information - it is anticipated that a member of the regulated community will have purchase or use records, even if not data "readily available" as a result of compliance with "other provisions of law" - may be used in making "reasonable estimates . . . in order to provide the information required under this section."[14] The word "reasonable," broad though it is, in this statutory context does not include the notion that use may or may not have exceeded 10,000 pounds if a report has been filed which "estimates" use at over 10,000 pounds. In order to spare the regulated community a monitoring requirement and associated economic burdens, Congress has allowed the use of estimates - thereby not requiring specific monitoring for the purpose of providing the required information. It is assumed, however, as it is in other areas of federal activity where reports are mandated - the Internal Revenue Service leaps to mind - that "estimates" will be essentially accurate. When not accurate, consequences of the inaccuracies will fall upon the reporting party. They will be inaccurate to any significant degree at the reporting party's peril. Any other interpretation renders § 313 (g) (2) meaningless.[15]

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[14] Section 313 (g) (2) provides in relevant part that:

> In order to provide the information required under this section, the owner or operator of a facility may use readily available data (including monitoring data) collected pursuant to other provisions of law, or, where such dam are not readily available, reasonable estimates of the amounts involved. Nothing in this section requires the monitoring or measurement of the quantities . . . of any toxic chemical released into the environment beyond that monitoring and measurement required under other provisions of law or regulation . . . .

[15] However, the smaller the inaccuracy, the greater the possibility that modification of any penalty imposed for late reporting could be considered.

Finally, it is noted that § 313 (g) (2), when read literally, permits reasonable estimates to be used "in order to provide *information required under this section.* "[16] It does not provide in so many words that estimates may be made by the facility owner or operator in determining *whether* the reporting threshold for a particular toxic chemical has been reached or crossed.

It is concluded that Complainant need not prove actual use of 1, 1, 1 - trichloroethane at or above 10,000 pounds in this matter in view of *signed reports* subsequently submitted by Respondent which corrected the inaccurate estimates, and reveal use in excess of 10,000 pounds of chemical for each of the two years in question. Accordingly, the elements of the violations charged here remain (a) the requirement to report upon "otherwise use" in excess of 10,000 pounds per year, and (b) failure to file the required reports by July 1 of each year following the year in which the usage occurred. On this basis, Respondent's use of 1, 1, 1 - trichloroethane in amounts above the reporting threshold is taken as admitted with the filing of the reports; and the record discloses that the reports were not submitted in a timely manner. It is concluded, therefore, that the material issues of fact herein have been resolved, and that none remain.

Respondent raised no affirmative defenses in answer to the complaint, and its motion to dismiss was based solely upon the proposed civil penalty having been paid. In response to Complainant's motion for summary decision, however, an argument was raised to the effect that § 313 (g) (2) permits estimates to be utilized in determining whether the reporting level has been reached, as well as in reporting "otherwise use" of a toxic chemical in excess of 10,000 pounds. Respondent had estimated use to be less than the threshold amount for both 1991 and 1992. Consequently, reports were not filed for those years. In making this argument, Respondent states

[16] Emphasis added.

that it "does not know the precise quantities of 1, 1, 1 - trichloroethane otherwise used"[17] at its facility in 1991 and 1992, but that efforts to reduce the amounts were being made. Further, the reasonableness of the estimates, and the consequent decisions not to report, is confirmed in Respondent's view by the fact that when the reports were finally made to EPA and to California, the amounts shown ("estimated") exceeded the threshold by what Respondent regards as very small quantities. These amounts were so small, it is suggested, that no liability should attach to Respondent's failure to file the reports in a timely manner.

In the absence of information which demonstrates that the amount by which such use exceeded the reporting level was very small, and/or that reliance upon data otherwise required under other provisions of law or regulation was reasonable and a good faith basis for under-estimating the quantity "otherwise used," or even evidence as to how the "reasonable estimate" was made, or, finally, that the estimate was in fact "reasonable" on some basis other than that in Respondent's view the amount was small, Respondent's invocation of the "reasonable estimate" language of § 313 (g) (2) of the Act is not adequate to shift the burden of going forward to Complainant. Despite Respondent's view that 2000 pounds (8 barrels) is a small amount of 1, 1, 1 - trichloroethane, nowhere has it been shown that this amount is so small as to warrant consideration of a defense of virtual compliance with § 312 (g) (2) and the regulations, nor has Respondent produced evidence to the effect that even indisputably small amounts of trichloroethane let loose in an unprepared community (unprepared because the "estimate" was below 10,000 pounds and no report was filed) would negligibly affect people and the

[17] Answer to the complaint at 2,4.

environment.[18] Accordingly, it is held that if such a defense is available in connection with the charges here, Respondent has not established critical factual elements of it; as noted above, the legal argument for such a defense has been rejected.[19]

d) Whether it is proper to grant summary judgment as to penalty on this record.[20]

Respondent apparently having paid the proposed penalty in anticipation of its motion for dismissal being granted on that basis, it is fair to enquire further into Respondent's objection to the amount of the civil penalty sought by Complainant. That Respondent does not consider the amount appropriate is clear from the response to Complainant's motion, although no specific request for consideration of the amount was made.

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[18]Whether or not the amount by which use exceeded the original estimate could be considered in mitigation of the penalty will be taken up if and when the issue is raised.

[19]Section 313 (g) (2) of the statute does not authorize mere guesses as to amounts of chemical "otherwise used," and it is tempting to conclude that this is particularly so where a guess results in non-filing. The provisions allow the use of "available data," i. e. that which is "readily available. . . (including monitoring data) collected pursuant to other provisions of law. . . ." Where such data is not available, "reasonable estimates of the amounts involved" may be made. Respondent has not shown that four barrels of 1, 1, l - trichloroethane constitutes so small an amount as to bring failure to file a Form R within a "reasonable estimate" defense - if there is one - to the filing requirement, and the Court cannot take judicial notice that four barrels is a very small or negligible amount in these circumstances. Moreover, Respondent has not provided information upon which a finding could be based that its "estimate" of amounts "otherwise used" was in fact "reasonable." Respondent's assertion that it "does not know" how much 1, 1, 1 - trichloroethane was "otherwise used" in 1991 and 1992 [Respondent's answer at 2, ¶ 7, and 4 at ¶ 11] may suggest that inadequate reference to existing records was had before the estimate was reached. This is certainly not the "reasonable estimate" envisioned by ¶ 313 (g) (2).

[20] *In the Matter of Jenny Rose, Inc.*, Dkt. IFR III 395-C, *In re Swing-A- Way Mfg. Co.*, Dkt. EPCRA-VII-91T-650E (Order Denying Motion for Accelerated Decision as to Penalty), and cases cited therein.

Although it can be argued that Respondent did address the issue in responding to the motion, it is held that assessment of the penalty will not be made until the parties have had an additional opportunity to be heard on the fairness of the penalty proposal.[21]

Findings and Conclusions.

Respondent "otherwise used" amounts of 1, 1, 1 - trichloroethane which exceeded 10,000 pounds during the years 1991 and 1992, and was required to report such use no later than July 1 of 1992 and 1993, respectively, to the U. S. Environmental Protection Agency and to the State of California pursuant to § 313 (2) (f) and (g) of the Act, § 11023 (2) (f) and (g). Respondent did not report such use for the year 1991 by July 1, 1992, and did not report such use for the year 1992 by July 1, 1993. Accordingly, Respondent failed to observe the requirements of these sections, and is liable for a civil penalty pursuant to § 325 of the Act, 42 U.S.C. § 11045 for such violations.

This enforcement action is not mooted by payment of the penalty, in view the existence of unresolved legal issues which remained to be decided despite the payment.

The amount of actual "otherwise use" of a toxic chemical need not be shown in order to prove a violation of the reporting requirements where a member of the regulated community reports use at or in excess of the reporting threshold pursuant to § 313 of the Act, even if the reports are based upon "reasonable estimates." Governmental authorities are entitled to rely upon such reports for the purposes for which they were filed. By providing that "reasonable estimates"

[21] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545,562 (1965).

may be made for purposes of reporting pursuant to § 313 (2) (f) and (g) of the Act, Congress sought to make the burden of compliance easier for members of the regulated community, and did not thereby create a distinction between "actual" use and "reasonable estimate."

It has not been demonstrated that a defense to a charge of untimely filing of such reports can be made on the basis that the "reasonable estimates of the amounts involved" permitted by § 313 (2) (g) resulted in a failure to file in a timely manner. In any case, elements of such a defense have not been established and are not supported by the record.

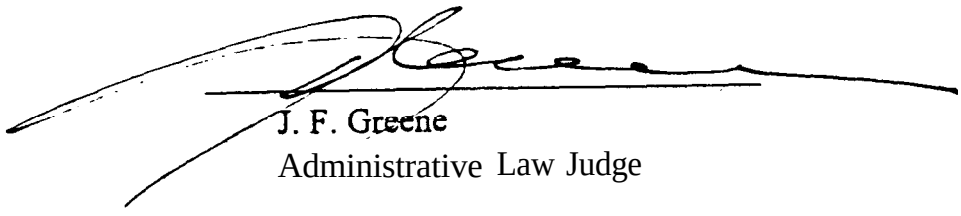
Taking Respondent's case in its strongest light, no issue of material fact remains to be decided; Complainant is entitled to judgment as a matter of law as to questions of liability for the violations charged. However, Respondent must be given a further opportunity to be heard on the penalty issue before a monetary civil penalty may be assessed.

ORDER

Respondent's motion to dismiss this proceeding is denied for the reasons stated above. Complainant's motion for summary determination is granted as to liability for the violations charged herein, and is denied with respect to the amount of monetary penalty sought.

And it is **further ordered** that the parties shall resume efforts to settle the issue of appropriate civil penalty herein, and shall report upon their progress during the

week ending June 25, 1999.



J. F. Greene
Administrative Law Judge

May 26, 1999
Franklin Court Building
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Memorandum Opinion, copies were sent to the counsel for the complainant and counsel for the respondent on May 28, 1999.

Shirley A. Smith
Legal Staff Assistant
To Judge J. F. Greene

Name of Respondent: Deutsch Company
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