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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In The Matter Of	)	
	)	
E.I. du Pont de Nemours & Co. (Wilmington, DE Facility),	)	Docket No. TSCA-III-540
	)	
Respondent	)	

ORDER GRANTING MOTION TO DISMISS

This action arises out of a complaint filed on October 15, 1990, alleging that Respondent (Du Pont) violated the Preliminary Assessment Information Rule (PAIR), 40 C.F.R. § 712.30, and Sections 8(a) and 15(3) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2607(a), 2614(3), by failing to correctly report the amounts of cyclohexane imported in 1984 on its 1986 PAIR form submitted to EPA on February 17, 1986.[1/] Complainant seeks a penalty of $34,189 for this alleged violation. In an answer, filed on November 7, 1990, Du Pont denied the alleged violation, asserted that it had complied with the PAIR, contested the amount of the proposed penalty and requested a hearing.

By motion filed with its answer, Du Pont sought an order dismissing the complaint with prejudice on the ground that the complaint failed to state a claim upon which relief could be granted. Du Pont alleged that it had fully complied with the PAIR in reporting the amount of cyclohexane imported in 1984 and that

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[1/] The name of the chemical in question was deleted as CBI in the complaint. Du Pont, however, expressly waived claims for confidentiality as to chemical identity and volume in a letter, dated November 7, 1990, accompanying its answer.

inaccurate reporting is not a violation of PAIR or TSCA, because the PAIR does not require any specific range of accuracy. Complainant failed to respond to the motion within the 15-day period specified by the Rules of Practice -- ten-day response time allowed by Rule 22.16(b)[2/] plus five additional days allowed by Rule 22.07(c) because Du Pont's motion was served by mail.[3/] Complainant was therefore required to file its response to the motion not later than November 22, 1990. Noting this failure, Du Pont, by letter dated January 1, 1991, requested that its Motion to Dismiss with prejudice be granted.

[2/] The rule (40 C.F.R. § 22.16(b)) provides:

> (b) Response to motions. A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

[3/] Rule 22.07(c) provides:

> (c) Service by mail. Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

In a response, filed January 10, 1991,[4/] Complainant in effect acknowledged that it was negligent in failing to request additional time to respond prior to the expiration of the ten-day period for responding to motions provided by section 22.16(b) of the Consolidated Rules of Practice. It pointed out, however, that the rule did not mandate dismissal because of such failures and asserted erroneously that nothing in the Consolidated Rules required that motions for extensions of time be filed at any particular time.[5/] Complainant emphasized the permissive nature of the sanction for failure to timely respond to motions, i.e., "may be deemed to have waived any objection to granting the motion," asserted that the interests of justice would be served by

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[4/] Although Complainant's written response to the motion is dated January 10, 1991, and the certificate of service states that it was filed with the Regional Hearing Clerk on that date, Complainant found it expedient to fax its response to the motion to the ALJ on January 16, 1991.

[5/] Section 22.07(b) of the Rules of Practice provides:

> (b) Extensions of time. The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

allowing Complainant additional time in which to respond to the motion and urged that its response be considered.

By a letter, dated January 28, 1991, Du Pont filed a reply, asserting that it did not receive Complainant's response to its motion to dismiss until January 21, 1991. Du Pont pointed out that Complainant was in default in failing to timely respond to its motion and that absolutely no excuse therefor had been proffered. Du Pont renewed its motion that the complaint be dismissed with prejudice.

Du Pont points out that under section 22.07(b) (supra note 5), a motion for an extension of time must be made prior to the due date for such pleading or document, unless the failure was the result of "excusable neglect." It cites decisions holding that compliance with filing deadlines established by the Rules of Practice is required, e.g., Weed Heights Development Co., et al., TSCA-09-84-0010, Order Granting Motions To Dismiss (July 5, 1984) (failure to respond in a timely fashion to a motion to dismiss is ground for granting the motion) and Robert Ross & Sons, Inc., TSCA Appeal No. 82-4 (January 28, 1985) (denying motion for leave to file appeal out of time). Noting that the Agency hasn't even attempted to explain its delay, Du Pont points out that Rule 6(b), of the Federal Rules Civil Procedure, also requires a showing of excusable neglect for failing to comply with a time limitation on a motion.

Under date of February 1, 1991, Complainant filed a motion for leave to file a reply to Du Pont's submission of January 28, 1991.

Recognizing that the Rules of Practice do not contemplate such a reply, Complainant asserted that Du Pont had raised certain issues warranting a response. Complainant contended that the ALJ was empowered to grant a motion for an extension and consider its response even though its request for an extension was not timely. Complainant alleged for the first time that the failure to timely respond to Du Pont's motion to dismiss or to move for an extension of time therefor was due to counsel's protracted absences from work in the last three months of 1990, caused by illness and the necessity to care for his wife following a difficult child birth.

Du Pont received Complainant's motion on February 12, 1991, and filed a reply on February 20, 1991. Du Pont asserted that Complainant's claim of "inadvertent oversight" was an admission of negligence not excusable neglect and urged that the motion for leave to file a reply be denied. Du Pont stated that Complainant's other arguments added nothing to its case and argued that as currently charged it was not on fair notice of the infraction for which the Agency seeks sanctions. Once more, Du Pont moved that its motion to dismiss be granted.

D I S C U S S I O N

There can be little doubt that granting Du Pont's motion to dismiss because of Complainant's failure to timely respond to the motion would be proper under the Rules of Practice. In addition to decisions previously cited, see Asbestos Specialties, Inc., TSCA-ASB-VIII-92-01, Order On Motion To Dismiss (February 13, 1992)

(motion to dismiss with prejudice granted where Complainant only belatedly responded thereto, arguing, apparently because the motion was considered to be without merit, that no response was necessary) and St. Agnes Hospital, Inc., Docket No. TSCA-III-464, Order Denying Complainant's Motion For Leave To Respond Out Of Time, etc. (February 21, 1990) (motion for leave to file out of time denied where no proper showing of excusable neglect for failure to timely request an extension to respond to a motion was made).

As noted above, Complainant has in effect conceded that it was negligent in failing to request an extension of time in which to respond to Du Pont's motion and that concession is in no way contradicted by the record. Protracted absences from work due to illness and the necessity to care for counsel's wife, if seasonably raised and if the precise periods of absences were documented or alleged might well constitute "excusable neglect." Here, this excuse was first raised in Complainant's submittal of February 1, 1991, asking for leave to reply to Du Pont's reply, dated January 28, 1991, and no attempt has been made to set forth specific periods of absence. A somewhat similar excuse was offered in Michael C. Sadd, d/b/a Sadd Laundry and Dry Cleaning Services, Docket No. RCRA-09-90-0002 (Order, August 29, 1991) (excusable neglect not shown where maternity leave by respondent's counsel was scheduled in advance of filing due date and there was no showing why timely motion for an extension could not have been filed by co-counsel). Complainant clearly has not made a showing of excusable neglect.

Notwithstanding the foregoing, I am permitted, but not required, to grant the motion to dismiss. In Michael C. Sadd, supra, Judge Frazier, although finding no excusable neglect, cited the rule favoring resolution of cases on their merits and as a matter of discretion granted respondent's tardy motion for an extension of time, which was filed two days after the due date for filing prehearing exchanges. Respondent's two-day tardiness in filing for an extension in that case bears little resemblance to Complainant's 49-day delinquency here.

While I could as a matter of discretion accept Complainant's late filing, brief consideration of the merits of the complaint shows no sound reason for doing so. The preamble to the regulation makes it clear that the Agency intended to reduce the burden of the reporting requirement at issue here and there is no requirement that information "known to or reasonably ascertainable" by the person reporting as provided in TSCA section 8(a) be submitted.[6/]

[6/] 47 Fed. Reg. 26992-27000, June 22, 1982. The preamble at 26994 provides in part:

> A. Readily Obtainable Data
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> TSCA section 8(a) authorizes EPA to require information that is "known to or reasonably ascertainable by" the respondent. This is defined at § 712.3(g) as "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know, or could obtain without unreasonable burden." For purposes of this section 8 rule, the Administrator has determined that a lesser standard should apply.
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> The rule requires persons to report data that are readily obtainable by management and supervisory employees responsible for manufacturing, processing,

(continued...)

Instead, the standard is "best estimates from readily obtainable data" (supra note 6).

An estimate is a "valuing or rating by the mind without actually weighing, measuring or the like" or "a rough or approximate calculation only."[7/] In view thereof, inclusion of the word "best" before "estimates" in the preamble to the regulation and in the instructions to the PAIR form adds little or nothing to the meaning of the regulation. Moreover, in some contexts, the

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[6/](...continued)
distribution, technical services, marketing, and other related activities. These knowledgeable people are responsible for providing estimates and associated accuracy levels for the data elements on the form. The comments supported this standard.

B. Accuracy for Reporting

The proposal discussed options for the accuracy to be required for reporting quantities of a chemical under the rule. As the proposal stated, exact numbers will not be required. We consider that permitting estimates to be reported will provide data sufficient for the purposes of this rule and will make the reporting easier. Comment was requested on various options for the required accuracy. These were: accuracy of ±50 percent for all quantities; accuracy of ±10 percent or ±20 percent on a person's own activities and ±50 percent on others' activities; or allowing respondents to specify the accuracy. We have decided that the accuracy should be related to the activity reported. For most of Part A of the form, dealing with a manufacturer's own activities, estimates must be the best estimates from readily obtainable data, but no specific accuracy range will be required. For items 3b, 3c, and 3d relating to losses during manufacture, accuracy must be specified by the respondent. For Part B of the form, dealing with processor-customers' activities, quantities must be reported with ±50 percent.

[7/] Black's Law Dictionary, 6th Ed. (1990).

word "estimate" has been held to mean a rough opinion from impliedly imperfect data. Words and Phrases, Estimate.

Among the definitions of "readily" are "with facility" or "easily" and "obtain" means to "hold on to or possess."[8/] Accordingly, "readily obtainable data" means "easily available data" and because no specific accuracy range is required and the regulation provides that extensive file searches are not required,[9/] a good faith estimate or approximation is seemingly all that the regulation requires. Accordingly, while there may well be circumstances under which the accuracy standard in the regulation "best estimates from readily obtainable data" would be violated, I reject Complainant's contention that the mere fact Du Pont's actual imports of cyclohexane in 1984 exceeded that reported on the PAIR form by 300 percent prima facie shows such a violation.

[8/] Websters Third New International Dictionary (1986).

[9/] The regulation (40 C.F.R. § 712.7) provides:

> § 712.7 Report of readily obtainable information for Subparts B and C.
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> TSCA section 8(a) authorizes EPA to require persons to report information that is known to or reasonably ascertainable by them. For purposes of Subparts B and C, however, a lesser standard applies. Companies must report information that is readily obtainable by management and supervisory employees responsible for manufacturing, processing, distributing, technical services, and marketing. Extensive file searches are not required.

It being highly unlikely that Complainant can prevail in this case on the facts alleged, I decline to accept its late filing and will dismiss the complaint.

O R D E R

The complaint is dismissed with prejudice.

Dated this 25th day of June 1992.

Spencer T. Nissen
Administrative Law Judge