RECEIVED
EPA
HEARING
1995 JUN 15 PM 4:28

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
K-I CHEMICAL U.S.A., INC.,	)	DOCKET NO. TSCA-09-92-0018
	)	
Respondent	)	

INITIAL DECISION

Pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615, respondent has been found liable for the following four violations of Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B): (1) three violations of 40 C.F.R. Part 710, Subpart B, by submitting a Form U which failed to fully comply with the Partial Updating of the TSCA Inventory Data Base regulation; and (2) one violation of 40 C.F.R. Part 707, Subpart B, for failing to certify to the U.S. Customs Service that its imported chemicals were either exempt or in compliance with TSCA.

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: June 7, 1995

Appearances:

For Complainant:

David M. Jones, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

For Respondent:

Michele B. Corash, Esquire
Sean M. Mahoney, Esquire
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2675

INTRODUCTION

An administrative complaint initiating this proceeding was filed on July 7, 1992, by the United States Environmental Protection Agency, Region 9 (complainant or EPA), pursuant to Section 16 of the Toxic Substances Control Act (TSCA or sometimes Act), 15 U.S.C. § 2615. The complaint alleged five counts against K-I Chemical U.S.A., Inc., (K-I or respondent). The first four counts concerned regulations promulgated under Section 8(a) of TSCA, 15 U.S.C. § 2607(a), and the fifth count involved regulations under Section 13(b) of TSCA, 15 U.S.C. § 2612(b). Specifically, counts I-IV charged respondent with failing to submit the actual quantities of four imported chemicals during its 1989 fiscal year on its Form U, in violation of Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B) and 40 C.F.R. Part 710, Subpart B. For these alleged violations, complainant proposed a $68,000 penalty, $17,000 per count. Count V claimed respondent failed to provide a certification statement to the U.S. Customs Service at the port of entry declaring that its imported chemicals were either exempt from TSCA or in compliance with TSCA, in violation of Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), and 40 C.F.R. Part 707, Subpart B. Only a notice of noncompliance was requested for this violation.

Respondent served its answer on October 22, 1992. Complainant subsequently filed a motion for partial accelerated decision (PAD), dated September 1, 1994[1], on the issue of liability for all counts. On September 14, K-I responded in opposition to complainant's

[1] Unless otherwise indicated, all dates are for the year 1994.

motion, as well as filing its own PAD motion concerning Counts III and V.

The undersigned Administrative Law Judge (ALJ) issued an order on October 14, 1994, granting complainant's PAD motion for Counts I, II, IV and V. In the same order, the ALJ granted respondent's motion to dismiss Count III. At this juncture, the proposed penalty was $51,000. This sum reflected $17,000 for Counts I, II and IV. None was sought for Count V.

On October 20, respondent served a motion requesting the ALJ to certify his order of October 14 to the Environmental Appeals Board (EAB) for an interlocutory appeal, pursuant to 40 C.F.R. § 22.29. This motion was denied in an order dated October 24.

An evidentiary hearing was held October 25-26 to determine only the appropriateness of the $51,000 proposed penalty. Following the hearing, the parties submitted their post-hearing briefs. In its post-hearing brief, complainant sought a 25 percent upward adjustment of the proposed penalty to $63,750 due to testimony during the hearing. Respondent served a post-hearing reply brief; however, complainant elected not to do so.

In light of the ALJ's October 14 order, the sole issue to be resolved here is whether or not $63,750 is an apposite penalty considering the relevant facts and law. In this regard, it must also be determined whether or not the penalty EPA seeks is supported by a preponderance of the evidence.[2] "Preponderance of

---

[2] The applicable section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.24, provides in pertinent part that each matter in controversy shall be determined by a preponderance of the

the evidence" is the degree of relevant evidence which a reasonable mind, evaluating the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the ALJ. Further, it is not required that the ALJ decide every single issue raised in this proceeding. It is sufficient that there be a resolution of only those major questions requisite for a decision.

FINDINGS OF FACT

Based upon a review of the evidence the following are the findings of fact.[3] K-I is in the business of distributing agricultural chemicals and chemical intermediates imported from Japan. (CX-2 at 1; Tr. 137.) From 1990 to 1993, K-I's gross annual sales ranged between 14 and 16.5 million. (CX-2 at 2; RX-12[4] at 3, 11.) In 1994, its sales dropped to around 10 million.

---

evidence.

[3] The findings necessarily embrace an evaluation of the credibility of the witnesses testifying on particular issues. This involves more than merely observing the demeanor of a witness. It also encompasses an evaluation of their testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil, § 2586 at 736-37 (1971).

[4] RX-12 is a post-hearing exhibit, representing an independent accounting review of K-I's financial data, by Deloitte Touche Tohmatsu International. During the hearing, respondent requested, and the ALJ granted, admission for this post-hearing exhibit of K-I's recent financial information. (Tr. 204-05.)

(Resp't Initial Br., Attach. 1, Mochizuki Decl. at 3.) Although K-I had high gross sales figures, it had net losses for fiscal years 1990-1993. (RX-12 at 3, 11.)

K-I is a small-sized company consisting of 4 employees, which is the minimum number required for operations. (Tr. 132.) Masato Hayakawa (Hayakawa) was in charge of K-I's sales operations from 1988 until 1993. (Tr. 119-20, 137.) Hayakawa also had responsibility for ensuring K-I's compliance with TSCA. (Tr. 117, 120.) Before arriving in the United States to assume this position, Hayakawa prepared for TSCA compliance by studying analogous Japanese regulations and by reading generally about the Act. (Tr. 120.)

Hayakawa had almost full responsibility for complying with the Partial Updating of the TSCA Inventory Data Base, (hereinafter Inventory Update Rule (IUR)), by completing a Form U. (Tr. 121.) The IUR requires reporting of import volume, once every four years, for certain listed chemicals which are imported and exceed 10,000 pounds during the latest complete corporate fiscal year prior to the reporting period. For K-I, its last complete corporate fiscal year was 1989, and the Form U was due by February 1991. (Tr. 121, 123.) The data generated from the IUR serves several purposes. However, it is principally used as a means to help select which chemicals should be evaluated for their potential risks because they exhibit the greatest concern. (Tr. 107, 177.) These studies can lead to formal rulemaking or other informal actions directed toward chemical regulation. (Tr. 101-02.)

The potential harm of IUR violations is the inability to properly evaluate the risks associated with chemicals when given inaccurate production (import) volume. Production volume is only one of many factors used in the risk assessment process. Other factors include: the potential for the chemical to cause adverse health or ecological effects, its ability to biocumulate or degrade in the environment, the pervasiveness of its use, and the likelihood of exposure or environmental release from commercial application. While each chemical may have a different threshold for triggering a risk review, if the aggregate production volume information is incorrect, then it can affect the decision-making on whether a risk assessment should or should not be initiated. (Tr. 103, 179-80, 183-84.)

In deciding what to report, Hayakawa first read the instructions on the Form U. Next, he was much concerned about filling out the form in a manner that met the purpose of the IUR. (Tr. 121-22.) To effectuate this end, Hayakawa relied almost exclusively on EPA's manual, Instructions for Reporting for the Partial Updating of the TSCA Chemical Inventory Data Base, to guide him. Although he had the applicable Federal Register and Code of Federal Regulations, Hayakawa had problems comprehending the requirements. (Tr. 122.) Moreover, because EPA sent K-I this manual, Hayakawa felt these instructions should be followed, if he had any trouble understanding the IUR. (Tr. 140, 146.)

After reading the Form U instructions, Hayakawa had two different interpretations on what to report for chemical

importations. Hayakawa was unsure whether he should report the amount imported solely in 1989 or a four-year average of imports. In order to ascertain which method was correct, he studied carefully the purpose of the rule from the manual, and concluded that the four-year average was the right approach. (Tr. 124, 189-90.) The purpose of the IUR had overriding importance in influencing his reporting method. (Tr. 144.) In Hayakawa's opinion, the IUR's purpose was to determine the effect of these amounts of chemicals on people and the environment. (Tr. 130.) However, he did not believe the 1989 imports alone gave a true indication of these effects because K-I's imports fluctuated widely over the period of 1987-1990. (RX-5; Tr. 123-28, 156, 193.)

In January of 1991, K-I submitted the Form U based upon its four-year average of imports. (Tr. 121, 123-24.) The quantities reported on its Form U were as follows: chemical A 220,000 lbs. (Count I), chemical B 120,000 lbs. (Count II), and chemical D 150,000 lbs. (Count IV). However, the actual quantities imported for K-I's 1989 fiscal year were: chemical A 335,344 lbs., chemical B 52,910 lbs., and chemical D 269,780 lbs. (RX-5.) At the time of filing, Hayakawa believed his four-year average reporting was complying with the requirements of the IUR. (Tr. 147, 190.) Therefore, Hayakawa did not find it necessary to contact EPA and clarify his confusion over the Form U requirements because in his mind the Form U was completed correctly. (Tr. 139.)

On February 12, 1988, EPA initiated an inspection of K-I. (CX-1 at 1.) Sometime in December 1990, Wendy Weygandt (Weygandt),

a core TSCA program manager in Region 9, reviewed the inspection report to determine if there were any violations. (Tr. 59, 133.) After examining the report, Weygandt requested information on K-I's sales and chemical imports for 1988. In January of 1991, K-I answered this request. Sometime later, Weygandt telephoned K-I for additional information. Hayakawa instructed his secretary to mail the information sought. No further information requests followed Weygandt's call. (Tr. 133-34.)

After receiving K-I's answers to her information requests, Weygandt issued a subpoena for K-I's import invoices because she considered K-I's responses inadequate. (Tr. 23, 61.) A comparison of K-I's invoices and the amount reported on the Form U established discrepancies greater than allowed by the regulations. However, these errors were less than an order of magnitude.[5] (Tr. 27.) Thus, Weygandt drafted a complaint and proposed penalty which were later approved by the division directors at EPA Headquarters. (Tr. 32.)

APPROPRIATENESS OF PENALTY

Having already concluded in the October 14 order that respondent is liable for the violations alleged, it now must be determined what constitutes an appropriate penalty. Section

---

[5] An order of magnitude means a factor of ten. Thus, for a number to be less than an order of magnitude, it would have to fall within a range established by a factor of ten in both directions of the correct number. For example, if the correct number to be reported is 100, then the acceptable range of error would be 10-1000. (Tr. 45.)

16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), declares in pertinent part that any person who violates a provision of Section 2614 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. In determining the amount of penalty, Section 16(a)(2)(B) provides that:

> [T]he Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B).

Under the Rules, the ALJ is also required to consider any civil penalty guidelines issued under the respective Act when calculating a penalty. 40 C.F.R. § 22.27(b). The penalty policies serve important functions. They supply a uniform application of the statutory factors in a fair manner, allowing for adjustments on an individual case basis. However, they do not rise to the level of regulations. In re Great Lakes Division of National Steel Corp., EPCRA Appeal No. 93-3 at 23-24 (EAB, June 29, 1994)(citations omitted). Section 22.27(b) only requires the ALJ to consider the applicable penalty guidelines (emphasis added). Once this policy is considered, the ALJ has full discretion to assess a penalty different from any calculated according to the policy, provided the reason for departure is explained adequately. Id.; In re A.Y. McDonald Industries, Inc., RCRA (3008) Appeal No. 86-2 at 18-19 (CJO, July 23, 1987).

I. Civil Penalty Guidelines and Enforcement Response Policy

The considerations listed in Section 16 of TSCA have been explained further and amplified upon in EPA's Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA (Guidelines). 45 Fed. Reg. 59770 (September 10, 1980). The Guidelines set forth a general penalty assessment policy which is designed to establish standardized definitions and applications of the factors listed in Section 16(a)(2)(B) of TSCA. For violations of the IUR, the Guidelines are supplemented by the Enforcement Response Policy (ERP) for Recordkeeping and Reporting Rules under Sections 8, 12 and 13 of TSCA, dated May 15, 1987.[6]

The ERP is to be used to calculate all penalties for violations of regulations promulgated under the aforementioned sections of TSCA. The ERP computes penalties in two stages. First, a gravity-based penalty (GBP) is determined from a matrix which accounts for the "nature, circumstances and extent" of each violation. The matrix plots the "extent" of the violation on a horizontal axis, and the "circumstances" of the violation on a vertical axis. The "nature" of the violation has already been incorporated into GBP matrix. Second, the ERP lists specific adjustment factors, if applicable, to the GBP.

---

[6] Although this is an official document, the ERP was admitted as an exhibit for respondent (RX-8). For convenience it will hereinafter be cited as (RX-8).

II. Application of ERP and Guidelines

A. Gravity-Based Penalty

1. Circumstances

The "circumstance" factor reflects the probability that harm will result from a particular violation. The harm for the violations here is that EPA's regulatory program for controlling health and environmental risk may be adversely affected. (RX-8 at 16; Tr. 102-03, 179-80, 184.) EPA assigned the violations a "circumstance level 1" because the ERP listed incorrect reporting as falling within this category. (RX-8 at 9; Tr. 26.)

Complainant also investigated the possibility of classifying the violations "circumstance level 2." The ERP describes a "circumstance level 2" as the failure to report in a manner that meets the standard required by the rule. The difference between this level and "level 1" is that the former does not negatively impact EPA's regulatory program in such a way as to mislead the Agency. One example given of a "level 2" violation is "a small error in reporting production volume less than an order of magnitude (a factor of ten)." (RX-8 at 18.) All of K-I's reporting "errors" were calculated to be less than an order of magnitude. Nevertheless, EPA determined that respondent still did not qualify for a "level 2" because respondent's Form U reporting was not an "error" but a deliberate misreporting of its import volume. (Tr. 30, 32, 36-37.) In order to be an "error," there must be an absence of deliberateness. (Tr. 46, 49-50.)

Respondent disputes EPA's analysis and argues that its violations fall within the example mentioned for a "circumstance level 2." K-I correctly asserts that whether or not its "errors" were deliberate is not a proper consideration under the "circumstance" evaluation. This factor is taken into account after the GBP calculation under the adjustment factors relating to the violator. See In re 3M (Minnesota, Mining and Manufacturing) Co., TSCA Appeal No. 90-3 at 15-16 (CJO, February 28, 1992)(respondent's intent at time of violations is not a factor to be considered in the circumstances stage of GBP analysis), rev'd on other grounds, 17 F.3d 1453 (D.C. Cir. 1994). Further, respondent is also correct in noting that the ERP makes no distinction between deliberate or inadvertent errors in its example. (Resp't Initial Br. at 8.)

Viewed on the whole, the record reflects that complainant overestimated the probability of harm that would result from the violations. Weygandt conceded that the example discussed above can be read as referring only to the size of the discrepancy. (Tr. 51.) It is undisputed that the size of K-I's errors fall within this example. Given this fact, K-I's reporting errors do not mislead EPA's risk assessment the way falsified information under "level 1" would. As such, the probability of harm from K-I's reporting discrepancy is more accurately embraced by this level. It is concluded that the violations are a "circumstance level 2."

2. Extent

The "extent" factor incorporates the potential harm caused to EPA's hazard or risk assessment process. (RX-8 at 20.) The harm for IUR reporting violations is the potential to hinder proper action on the overall decision process for setting priorities and rulemaking on chemical exposure. (RX-8 at 22.) Complainant classified the violations as being of "significant extent."

Following the ERP chart, all IUR violations are listed in the "significant extent" category except "circumstance level 2 or 6." All "circumstance level 2 or 6" violations are listed in the "major extent" category. (RX-8 at 11; Tr. 26.) Under the GBP matrix, a "circumstance level 2" and a "major extent" violation yields a GBP of $20,000. Whereas, a "circumstance level 1" and a "significant extent" violation produces a GBP of $17,000. (RX-8 at 8.) Although Weygandt considered a "circumstance level 2" and "major extent" GBP, EPA Headquarters dismissed this route due to its concern with precedent of the policy. (Tr. 27-28.)

Respondent contests a mechanical application of the ERP which always groups a "circumstance level 2" violation with "major extent." It further asserts that this automatic classification renders the ERP inconsistent for two reasons. First, the GBP matrix lists a penalty amount for a "level 2" violation of "significant extent." (RX-8 at 8.) However, if "level 2" violations are always "major extent" violations, then it is not necessary to list penalty amounts for a "level 2" violation of "significant extent." Second, a "level 2" violation, with a lesser

probability for harm, results in a larger GBP than a "level 1" violation by always receiving a "major extent" partner.

Respondent accurately argues that the ERP need not be adhered to where application would produce an arbitrary, unreasonable penalty or penalty incommensurate with the facts. (Resp't Initial Br. at 10.) The penalty policies, as stated earlier, aid in assessing an appropriate penalty in a fair and uniform manner. However, each case must be evaluated on its own in deciding the proper penalty. The formalistic constraints of a penalty policy should be avoided where in the interests of justice the policy fails to adapt to the factual situation presented by the case at bar. In re Pacific Refining Co., EPCRA Appeal No. 94-1 at 21 (EAB, December 6, 1994)(dissenting opinion).

In this matter, an automatic reflex of "major extent" given to "circumstance level 2" IUR violations is not crystal clear. Weygandt was unknowing as to why a GBP was listed for "circumstance level 2" and "significant extent" violations if all "level 2" violations were considered to be "major extent." (Tr. 56.) This uncertainty raises the possibility that the ERP does not always react to "level 2" violations with a knee jerk of "major extent." Additionally, when explaining in more depth the "extent" factor, the ERP explicitly states that violations of the IUR are designated as "significant." No language is mentioned here establishing a different "extent" for "circumstance level 2" IUR violations. (RX-8 at 22.) This express statement could be viewed as trumping the ambiguity of the ERP's chart and GBP matrix.

Whatever the ERP's intended result, the situation here does not present the potential for harm associated with a "major extent" violation. "Major extent" is listed as involving violations which directly interfere with EPA's ability to address potential imminent hazards, unreasonable risks or substantial endangerment to human health or the environment. (RX-8 at 21.) On the other hand, violations of the IUR are not described as warranting the same serious and immediate attention. The IUR data provides an aid for determining which chemicals should be selected for risk assessment. However, unlike most "major extent" violations, the IUR data does not primarily contain information on known risks to human health and the environment. (RX-8 at 22.) Thus, it is irrational to robotically bump the violations here up to a "major extent," when the same potential for harm is not attendant, simply because it represents a "circumstance level 2" violation. It is concluded that the violations are of "significant extent."

In sum, it has been determined that the violations in Counts I, II and IV are appropriately classified as "circumstance level 2" and "significant extent." On the GBP matrix, this gives rise to a GBP of $13,000 per count, for a total of $39,000. Next, it must be determined if the GBP should be adjusted upward or downward based upon certain criteria relating to the respondent.

B. Adjustment Factors

Section 16(a)(2)(B) of TSCA, lists several factors concerning the violator that the Administrator shall consider when assessing

a penalty: culpability, history of prior such violations, ability to pay, ability to continue in business, and such other factors as justice may require. The Guidelines expound upon the application of these statutory adjustment factors.[7]

1. Culpability

Complainant assigned respondent a "level II culpability." Under "level II," the respondent is deemed to have had either sufficient knowledge to recognize the hazard created by its conduct or significant control over the situation to avoid committing the violation. 45 Fed. Reg. at 59773. Weygandt determined that, because K-I filled out the Form U, it had significant control over its actions to prevent the IUR violations. (Tr. 28.) For this level, there is no adjustment to the GBP. Id. Complainant now seeks a "level I culpability." This new level is based upon Weygandt's reflection that, if she were to recalculate the proposed penalty, she would assess a "level I culpability" due to subsequently submitted information which she perceived to establish respondent's misreporting as deliberate. (Tr. 30-32.)

A "level I culpability" requires that the violation be willful by the violator, intentionally committing an act known to be a violation or hazardous to human health or the environment. 45 Fed. Reg. at 59773. "Level I" assessments merit an upward adjustment of

---

[7] The ERP also lists adjustment factors to consider when assessing a penalty. However, none is applicable to this matter.

the GBP by 25 percent. Id. Complainant's reclassification is not found to be supported by the record. On the contrary, the record documents respondent's infraction as being an inadvertent misunderstanding of what the IUR actually required. Hayakawa did not know that the IUR required only 1989 imports to be reported, and then intentionally decided to report K-I's four-year average of imports. Rather, the record is replete with respondent's Form U completion based upon Hayakawa's misunderstanding of what was required. (Tr. 124, 130, 139, 144, 147-48, 156, 189-90, 198.) Additionally, Weygandt was unable to state affirmatively that Hayakawa knew his method to be hazardous to human health or the environment. (Tr. 81.) This absence of intentionality is sufficient to show that the violations were not willful. Thus, respondent's "culpability" would not come under "level I." Nevertheless, the record also demonstrates that K-I certainly had adequate knowledge of the IUR requirement to prevent the violation as evidenced by Hayakawa's preparation and desire to fill out the Form U correctly. (Tr. 121-22, 124, 130-31.) Accordingly, it is concluded that a "level II culpability" is proper in this instance, which results in no adjustment to the GBP of $39,000.

While a "level II" classification does not by itself warrant an adjustment to the GBP, the Guidelines state that for "level II" assessments an upward or downward adjustment of up to 15 percent may be made based upon the "attitude" of the violator. 45 Fed. Reg. at 59773. In evaluating "attitude," the Guidelines suggest consideration of: good faith efforts to comply, promptness of

corrective actions, and assistance given to EPA to minimize any harm to the environment caused by the violation. Both respondent's statements and actions are to be taken into account.

Respondent asserts that it is entitled to a 25 percent downward adjustment based upon its "attitude." K-I's concern to comply with the IUR requirement is evident from the actions it ultimately, albeit incorrectly, chose. The reason K-I selected a four-year average in completing its Form U was to allow EPA to better evaluate the risks posed by its imports. Respondent was not attempting to hide its actual number of 1989 imports. Instead, respondent was troubled that compliance with the IUR would not be achieved if its fluctuating import levels were not provided. Hayakawa stated repeatedly that he was motivated to complete the Form U in a manner that met the purpose of the IUR as he understood it. (Tr. 122, 130-31, 144, 147-48, 156, 189-90.) Respondent's fault lies not in providing too little information but in supplying too much. These actions demonstrate sincere good faith efforts to comply.

K-I also promptly refiled its Form U after it was decided by the ALJ that its reporting method was incorrect. (Tr. 132.) In addition, K-I was cooperative and courteous during meetings with EPA. (Tr. 89.) On the other hand, the information EPA received from K-I was also described as being inadequate. Notwithstanding this conflicting portrayal of K-I, the exact inadequacies of K-I's responses could not be recalled. (Tr. 60-61, 89-91.) Further, the record is deficient of any repeated requests or warnings by EPA to

K-I on the failure to supply information. After anatomizing the record, respondent's "attitude" justifies a 15 percent downward adjustment of the GBP. This reduces the GBP by $5850 for a new total GBP of $33,150.

2. History of Prior Such Violations

This adjustment factor is used only to increase the GBP where violators have exhibited a similar history of encroachments. 45 Fed. Reg. at 59773. No adjustment was made to the GBP because there was no evidence of any prior violations. (Tr. 83.)

3. Ability to Pay

The Guidelines treat the statutory criteria of "ability to pay" and "effect on ability to continue to do business" as one factor. 45 Fed. Reg. at 59775. Complainant and respondent presented documentation for K-I's gross sales in the range between $14-16.5 million. The most recent evidence shows gross sales of $10 million for 1994. Despite these large figures, respondent argues that over the last three years its net income was negative. As a result, the proposed penalty would prove to be an undue burden.

The Guidelines provide that four percent of gross sales serves as the baseline for determining whether or not a person has the "ability to pay" the proposed penalty. 45 Fed. Reg. at 59775. In this case, the proposed penalty is clearly less than four percent of respondent's gross sales, numbering in the tens of millions of

dollars during the last four years. It is also important to emphasize that respondent has not alleged an inability to pay the proposed penalty. Respondent merely states that the proposed penalty would seriously hamper its operations and might force layoffs given recent negative profits. (Tr. 131-32.)

The Guidelines have already contemplated and rejected respondent's argument. The Guidelines state:

> Even where the net income is negative, four percent of gross sales should still be used as the 'ability to pay' guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses.

45 Fed. Reg. at 59775. Despite this language, K-I cites Empire Ace Insulation Manufacturing Corp., Docket No. TSCA ASB-8a-85-0216 (Initial Decision, August 11, 1986), for the proposition that the "four percent" rule is not appropriate in situations like respondent's. K-I's reliance on Empire is misplaced. Empire accepted the four percent rule, and held that the respondent there had the ability to pay the proposed penalty under this measure. Empire's reductions, due to the proposed penalty's effect on the respondent's business, occurred under the "other factors that justice may require" criterion, which will be discussed infra. Moreover, as complainant points out, respondent's last retained earnings statement for 1993 was $260,960. (RX-12 at 11.) Thus, the Guideline's rationale is right on point here as K-I has more than adequate cash to pay the proposed penalty even though its net income has been negative.

4. Other Factors That Justice May Require

The last adjustment element to be considered is "such other factors as justice may require." While the proposed penalty will not put respondent out of business, it could create an undue strain on an already struggling small company. Also, respondent is now operating at minimum support levels; however, the proposed penalty could force indispensable layoffs. Nevertheless, respondent's misinterpretation of the IUR, which resulted in noncompliance, cannot simply be excused. As a regulated business entity under TSCA, it had a duty to comply as required, and in this duty it failed. K-I could have avoided being a trivial subject under EPA's prosecutorial microscope by contacting EPA and asking for clarification on the IUR requirements. Notwithstanding its neglect, this respondent was the antithesis of an egregious violator. K-I exhibited a sincere good faith effort to meet the dictates of the IUR. This aim led it to submit too much rather than too little information. Moreover, K-I's noncompliance did not result in any serious potential for harm to human health or the environment because it filed a Form U for EPA to include in its risk assessment, and the discrepancy in reporting was not of such a size as to mislead EPA's analysis. Lastly, no economic gain was derived from its infraction. Based upon the totality of the evidence and adjustment factors, a condign penalty in this matter is $15,000.

IT IS ORDERED[8] that:

1. A civil penalty in the amount of $15,000 be assessed against respondent, K-I Chemical U.S.A., Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check payable to Treasurer, United States of America, and mailed to:

EPA Region 9
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

Frank W. Vanderheyden
Administrative Law Judge

Dated: June 7, 1995

[8] Unless appealed pursuant to 40 C.F.R. § 22.30, or the EAB elects to review the same, sua sponte, as provided therein, this decision shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of	)	Docket No. TSCA-09-92-0018
	)	
K-I Chemical U.S.A.	)	CERTIFICATE OF SERVICE
	)	
	)	
	)	
Respondent	)	
	)	

Copy hand delivered:

David M. Jones, Esq.
Office of Regional Counsel (RC-2-1)
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Certified mail:
P 842 770 851

Michele B. Corash, Esq.
Sean M. Mahoney, Esq.
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2675

I certify that the following "**INITIAL DECISION**" was sent to the following persons, in the manner specified, on the 14th of June, 1995.

Dated: June 14, 1995

Danielle E. Carr
Danielle E. Carr
Administrative Assistant