UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Mulberry Farms, Inc. Docket No. EPCRA-IV-95-108

RESPONDENT

ORDER DENYING MOTION FOR
PARTIAL ACCELERATED DECISION

The complaint in this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045, issued on April 11, 1996, charges Respondent, Mulberry Farms, Inc. (Mulberry) in three counts with violations of § 312 of the Act and 40 CFR § 370.25(a) by failing to submit to the State Emergency Response Commission (SERC) a Tier I or Tier II form for liquid nitrogen for the reporting year 1992 by March 1, 1993; for the reporting year 1993 by March 1, 1994; and for the reporting year 1994 by March 1, 1995. Among other things, the complaint alleges that Mulberry owns and operates a beef products plant in Gainesville, Georgia, and that at least 10,000 pounds of liquid nitrogen were present at Mulberry's facility at one time during each of the reporting (calendar) years 1992, 1993, and 1994. For these alleged violations, it was proposed to assess Mulberry a penalty totaling $29,700.

Mulberry answered, denying that it was subject to the reporting requirement identified in the complaint, denying that at least 10,000 pounds of liquid nitrogen were present at its facility at any one time during each of the calendar years 1992, 1993, and 1994, denying any violation of the Act and regulations as alleged in the complaint, and contesting the proposed penalty as unreasonable, confiscatory and contrary to law and regulation. Mulberry requested a hearing. Additionally, Mulberry raised constitutional issues, alleging that the delegation of authority vested in the Administrator by the Act and the redelegation of this authority by the Administrator to the Regional Administrator were illegal, null, void and of no effect and in violation of the

Fifth and Fourteenth Amendments to the U.S. Constitution. Mulberry also alleged that the Act and regulations thereunder created unreasonable classifications having no relation to the public health, safety and welfare and failed to provide Respondent equal protection of the laws and due process. Mulberry moved that the complaint be dismissed.

Under date of November 12, 1996, Complainant filed a motion for a partial accelerated decision, asserting that there was no dispute of material fact but that Respondent was liable [for the violations alleged in the complaint] and that Complainant was entitled to judgment as a matter of law. In support of the motion, Complainant alleges that the following facts are undisputed: Respondent is a Georgia corporation which owns and operates a beef products plant in Gainesville, Georgia, that the plant uses liquid nitrogen for refrigeration purposes, and that it has a tank for liquid nitrogen with a capacity of 30,000 gallons.[1/] Complainant asserts that at least one time during each of the calendar years 1992, 1993, and 1994, there was on site at the facility 65,217 pounds of liquid nitrogen. As support for this assertion, Complainant refers to Section 312 Reporting Information forms for the years 1992 and 1993, dated February 6, 1996, submitted by Mulberry to the Georgia SERC, date stamped as received February 8, 1996, and to the form for 1994, dated July 21, 1995, date stamped as received at the SERC on July 28, 1995.[2/] These forms contain identical information with respect to liquid nitrogen reflecting that the maximum daily amount was 65,217 pounds, that the average daily amount was 8,200 pounds, and that these quantities were on site 365 days during the reporting year.[3/] Complainant says that these documents establish that Mulberry did not submit a chemical inventory reporting form for the years 1992 and 1993 in accordance with EPCRA § 312 until February 6, 1996, and did not submit such a form for the year 1994 until July 21, 1995 (Memorandum in Support of Motion at 2).

Complainant emphasizes that EPCRA § 312(a) and 40 CFR 370.25(a) require an owner or operator of a facility that is required to prepare or have available a MSDS for a "hazardous chemical" under the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 et seq. (OSHA) , and its regulations, to submit a chemical inventory form for the chemical if it is present in at least its threshold quantity at the facility at any one time during calendar year. The threshold quantity for reporting hazardous chemicals is 10,000 pounds (40 CFR § 370.20(b)(1)). The inventory form is required to be submitted by March 1 of the calendar year following the year the threshold quantity is equaled or exceeded (EPCRA § 312(a)(2); 40 CFR § 370.20(b)(2)).

According to Complainant, liquid nitrogen is clearly a "hazardous chemical" within the meaning of OSHA regulations which def ine the term as "any chemical which is a physical or health hazard" (29 CFR § 1910. 1200 (c)) (Memorandum at 5) . Complainant points out that liquid nitrogen is cryogenic, and as such, it may cause frostbite and freezing burns on the skin and eyes (Id.). If released as a gas, Complainant states that it is odorless, colorless and tasteless and may threaten life as an asphyxiant if levels are so high as to reduce oxygen levels below 18%. Complainant supports this assertion by reference to an excerpt from the Handbook of Toxic and Hazardous Chemicals and Carcinogens (Third Ed. 1991) (Exh.4). Additionally, Complainant says that a typical Material Safety Data Sheet (MSDS) for liquid nitrogen states "CAN CAUSE RAPID SUFFOCATION" and "CAN CAUSE SEVERE FROSTBITE" (Exh.5).

The OSHA regulation defines "health hazard" as including "... agents which act on the hematopoietic system and agents which damage the lungs, skin, eyes or mucous membranes" (29 CFR § 1910. 1200 (c)). Appendix A to 29 CFR § 1910. 1200 provides, inter alia, that any chemicals which meet any of the following definitions as determined by the criteria set forth in Appendix B are "health hazards". Definitions of the term include ¶ 7.d.: "Agents which act on the blood or hematopoietic system: Decrease hemoglobin function; deprive body tissues of oxygen."

In view of the foregoing, Complainant asserts that liquid nitrogen is a hazardous chemical for which Mulberry was required to prepare or have available a MSDS in accordance with OSHA and the regulations thereunder (29 CFR § 1910.l200), that in accordance with 40 CFR § 370.20(b) the threshold quantity for this chemical is 10,000 pounds, that the inventory forms belatedly submitted by Mulberry for the reporting (calendar) years 1992, 1993, and 1994, establish that Mulberry had on hand at one time during each of the mentioned years quantities of liquid nitrogen in excess of the threshold quantity and that in accordance with EPCRA § 312 and 40 CFR § 370.25(a) Mulberry was obligated to submit inventory reporting forms for liquid nitrogen for the preceding years to the SERC by March 1 of the years 1993, 1994, and 1995. According to Complainant, there is no dispute of material fact that Mulberry failed to accomplish the required submissions in a timely manner. Therefore, Complainant says that it is entitled to judgment as to liability as a matter of law and that its motion should be granted.

Complainant's motion for an accelerated decision was accompanied by a motion to strike Mulberry's constitutional defenses upon the ground that these issues were not cognizable in an enforcement proceeding. The memorandum in support of

the motion cites several decisions for the proposition that departments and agencies lack the power to nullify congressional enactments, e.g., In re Coors Brewing Companv, Docket No. RCRA-VIII-90-09, Order on Motions (January 4, 1991), and cases there cited (Memorandum at 3). Additionally, Complainant alleges that Mulberry's claim that the EPCRA regulations at issue here are unconstitutional simply cannot be entertained in this forum and that challenges to the facial validity of EPA regulations are rarely, if ever, entertained in an enforcement proceeding (Memorandum at 4). In support, Complainant cites, among others, In re Virginia Department of Emergency Services, Docket No. TSCA-III-579, Order Granting in Part and Denying in Part Complainant's Motion for an Accelerated Decision (March 3, 1993) and In re Charleston Correctional Facility, Department of Corrections, State of Maine, Order Denying Motion to Dismiss and Setting Proceeding for Hearing (January 25, 1996) . For these reasons, Complainant moves that Mulberry's constitutional defenses be stricken from its answer.

Mulberry's Opposition

Opposing Complainant's motions, Mulberry admits that its plant is a facility that falls within the ambit of EPCRA definitions, and is required to have an MSDS reflecting its use of liquid nitrogen to comply with OSHA regulations (Memorandum in Opposition to Motions to Strike and for Partial Accelerated Decision, "Opposition", dated November 25, 1996). Mulberry also admits that it filed chemical inventory forms [for the years in question] in response to Complainant's demands (Id.). Mulberry asserts, however, that the mentioned filings in no way constitute admission of the material issue in this case, i.e., whether Mulberry complied with EPCRA by informing the SERC of its use of liquid nitrogen. Contrary to Complainant's assumption, Mulberry says that there is a dispute [of material fact] as to whether Mulberry substantially complied with the statute by informing the SERC of its ongoing use of liquid nitrogen.

Mulberry maintains that it has no burden to produce contrary evidence to avoid summary adjudication, because Complainant's evidence fails to "pierce Respondent's denial of noncompliance." Mulberry argues that the matter is not susceptible to summary adjudication under Rule 56 of the FRCP and that it is entitled to a hearing on all issues raised by the complaint, including whether the SERC was informed of the presence of liquid nitrogen at its plant during the years in question. Additionally, Mulberry argues that the hearing should address the question of whether administrative regulations carrying out the statutory mandate of 42 U.S. C. § 11022 (a,) as applied, bear a reasonable relationship to the valid governmental interest in public health and

environmental protection. Acknowledging that the ALJ lacks power to declare a congressional enactment unconstitutional, Mulberry asserts that an administrative hearing is an appropriate forum for consideration of constitutional issues concerning the effect of administrative regulations as applied in specific cases.

For the foregoing reasons, Mulberry says Complainant's motions for an accelerated decision and to strike should be denied and that a hearing should be conducted on all issues raised by the pleadings in this case.

Complainant has filed a reply to Mulberry's response, Mulberry filed a response to EPA's reply, and Complainant, under date of December 17,1996, filed a surreply to an alleged "new issue" raised by Mulberry. These additional pleadings are not authorized by the applicable rules of practice and will not be considered.[4/]

DISCUSSION

Complainant correctly sets forth the applicable standard for considering motions for an accelerated decision under Rule 22.20 (40 CFR Part 22), that is, no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. Complainant also correctly notes that Rule 22.20 parallels FRCP Rule 56 concerning summary judgment for which the standard is "a proper showing of a lack of a genuine, triable issue of material fact" (Celotex Corp. v Catrett,. 477 U.S. 317, 327 (1986) A "material fact" is one which might affect the outcome of the litigation and a genuine issue of material fact exists, precluding summary judgment, when a reasonable trier of fact, viewing all of the evidence, could reasonably find in favor of the nonmoving party in light of the burden of proof placed on such party (Acernese v. KDF Fluid Treatment, Inc., 1995 U.S. Dist. LEXIS 14992 (E.D. Pa. 1995) and cases cited). Here, the controlling issue is whether Mulberry filed Tier I chemical inventory forms or State forms containing equivalent information with the SERC by March 1 of the years 1993, 1994, and 1995, reporting liquid nitrogen on hand during the preceding calendar years. Mulberry has denied the alleged noncompliance and the only evidence to the contrary is the forms filed by Mulberry in July 1995 and February 1996, which Mulberry alleges it was "badgered" into filing by EPA. The filing of forms by a regulated entity upon demand from a government agency does not necessarily prove that the company was obligated by law to submit (or resubmit) the forms, nor does such filing reflect an admission that the documents were not previously filed, and possibly lost by the SERC, as Respondent alleges. Complainant bears the initial burden of presenting evidence

to establish that Respondent failed to timely file the required forms.[5/] In the absence of documentation for the basis of its conclusion, such as an affidavit from the custodian of the records or some other official at SERC that no such filings by Mulberry for the years in question have been received or located, Complainant's mere allegation that the forms were never timely filed does not establish liability and, therefore, does not warrant judgment in its favor. As stated by Mulberry, "... Complainant's evidence fails to pierce [R]espondent's denial of noncompliance and Mulberry assumes no burden to produce contrary evidence in order to avoid summary adjudication" (Opposition). It follows that Complainant's motion for an accelerated decision must and will be denied.

Complainant's motion to strike Mulberry's constitutional defenses will also be denied. It is, of course, true that the ALJ may not invalidate statutes and regulations on constitutional grounds. It is also true that issues such as whether the regulations implementing the statutory mandate of Section 312, as applied, bear a reasonable relationship to public health and environmental protection are more appropriately addressed in a rulemaking proceeding rather than in this action as argued by Mulberry. Nevertheless, it is well settled that whether, for example, a regulation as applied gives fair notice of what is prohibited or required and thus affords Respondent "due process" is an issue well within the jurisdiction and competence of administrative agencies. See, e.g., CWM Chemical Services, Chemical Waste Management and Waste Management, Inc., TSCA Appeal No. 93-1 (EAB, May 15, 1995) (decision upholding dismissal of complaint, based in part on due process grounds). See also In re K. O. Manufacturing, Inc., EPCRA Appeal No. 93-1 (EAB, April 13, 1995) (EAB disagreement with ALJ that regulation failed to give fair notice of requirements, rather than that the ALJ lacked authority to grant relief). Although Mulberry has not "fleshed out" the respects in which the regulations at issue and as applied here allegedly violate its due process rights, Mulberry will be given an opportunity to do so based upon the entire record. Accordingly, the motion to strike will be denied.

ORDER

Complainant's motions for an accelerated decision and to strike are denied.[6/]

Dated this 23rd day of December, 1996

Spencer T. Nissen

Administrative Law Judge

IN THE MATTER OF MULBERRY FARMS, INC., Respondent

Docket No. EPCRA-IV-95-108

CERTIFICATE OF SERVICE

I certify that the foregoing order Denying Motion for Partial Accelerated Decision, dated December 23, 1996, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Julia Mooney
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 4
Atlanta Federal Center
100 Alabama Street, S.W.
Atlanta, Georgia 30303

Copies by Certified Mail, Return Receipt Requested to:

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Stacey Hyde-Eason
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Administrative Law Judges

U.S. Environmental Protection Agency, Mail Code 1900
401 M Street, S.W.
Washington, DC 20460

Dated: December 24, 1996
Washington, D.C.

[1/] While it may be assumed that liquid nitrogen would require a tank or tanks for storage, the complaint is silent as to the existence, let alone the capacity, of any such tank or tanks. Copies of the Section 312 reports prepared by Mulberry attached to the motion indicate that Storage Method A (above ground tank) applies. No document in the record before me, however, appears to specifically refer to the capacity of the tank.

[2/] Although the forms appear to require submission of the identical information, the forms do not precisely track the Tier I or Tier II forms in the regulation (40 CFR §§ 370.40 and 370.41). The form described as being for the reporting year 1994 indicates that it is for the reporting year 1995. This, however, is an obvious typographical error, because the reporting year 1995 was not over when the form was dated and signed.

[3/] The forms indicate that nitrogen is in EPA hazard category "D". Instructions for completing Section 312 Georgia Emergency and Hazardous Chemical Inventory Form reflect that hazard category "D" covers chemicals which are under pressure.

[4/] The Environmental Appeals Board (EAB) has ruled that in the absence of a motion therefor, made [and supported] in advance, replies to responses to motions will normally be struck as unauthorized by the rules. In re Hardin County, RCRA (3008), Appeal No. 92-1, Order Denying Reconsideration (February 4, 1993) . I simply do not agree that Mulberry's response, if it were to be considered, raises a "new issue" and, in any event, the additional pleadings do not alter the conclusion herein that, on this record, Complainant hasn't shown that it is entitled to judgment in its favor.

5/ Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any,' which it believes demonstrate the absence of a genuine issue of material fact") (quoting FRCP 56(c)).

[6/] In the near future, I will be in telephonic contact with counsel for the purpose of establishing a date and location for the hearing.