

11/20/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
I-CON INDUSTRIES, INC.,) EPCRA Docket No. VI-438S
)
Respondent)

INTERLOCUTORY ORDER FOR PARTIAL ACCELERATED DECISION

Complainant has filed, pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), a Motion for Accelerated Decision in this matter on the grounds that no genuine issue of material fact exists and the Complainant is entitled to judgment as a matter of law as to both the issue of liability and the issue of the amount of the penalty.

Respondent has filed a reply opposing the motion on the grounds that: (1) the evidence produced in support of the motion is legally insufficient to support a motion for a partial accelerated decision as to liability; and (2) substantial genuine issues of material fact exist with regard to the amount of the proposed penalty so as to preclude rendering a penalty without further adjudication.

Upon consideration of the pleadings, the prehearing exchanges filed by the parties, the motion and supporting memorandum filed by the Complainant and the memorandum filed by the Respondent, I conclude the Complainant's motion should be granted as to the issue

of liability but denied as to the issue of the amount of the penalty.

I. The Complaint

An administrative complaint was issued in this matter on December 20, 1989, under Section 325(c) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045(c). On April 9, 1990, Complainant withdrew certain portions of the Complaint with prejudice and reduced the proposed penalty assessments for the remaining alleged violations. As so modified, the complaint alleges that Respondent violated Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and 40 C.F.R. § 372.30 by failing to submit a complete and correct "Form R" to the Administrator of EPA and to the State of Texas by July 1, 1988, for sulfuric acid and dichloromethane (methylene chloride).

II. Discussion, Findings of Fact and Conclusions of Law as to Liability

Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), provides:

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before

July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

Pursuant to subsection (g) of Section 313, EPA has published a Toxic Chemical Release Inventory Reporting Form, known as "Form R,"¹ together with instructions for completing the form.² Pursuant to subsection (c) of Section 313, a specific toxic chemicals list has also been published for the chemicals and chemical categories to which Part 372 applies.³ In Section 313(f), 42 U.S.C. § 11023(f), the threshold quantity for reporting toxic chemicals is listed "[w]ith respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year."

Section 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A), provides:

The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

The regulations implementing the Section provide, at 40 C.F.R. § 372.5 that: "Owners and operators of facilities described in § 372.22 . . . are subject to the requirements of this part."

¹40 C.F.R. § 372.85(a).

²40 C.F.R. § 372.85(b).

³40 C.F.R. § 372.65.

Subpart B of Part 372, 40 C.F.R. § 372.22, describes those facilities in the following terms:

A facility that meets all of the following criteria for a calendar year is a covered facility for that calendar year and must report under [40 C.F.R.] § 372.30.

(a) The facility has 10 or more full-time employees.

(b) The facility is in Standard Industrial Classification Codes 20 through 39 (as in effect on January 1, 1987) by virtue of the fact that it meets one of the following criteria:

(1) The facility is an establishment with a primary SIC code of 20 through 39.

* * * * *

(c) The facility manufactured (including imported), processed, or otherwise used a toxic chemical in excess of the applicable threshold quantity of that chemical set forth in [40 C.F.R.] § 372.25.

The specific reporting requirements and the reporting schedule are set forth in 40 C.F.R. § 372.30:

(a) For each toxic chemical known by the owner or operator to be manufactured (including imported), processed, or otherwise used in excess of an applicable threshold quantity in [40 C.F.R.] § 372.25 at its covered facility described in [40 C.F.R.] § 372.22 for a calendar year, the owner or operator must submit to EPA and to the State in which the facility is located a completed EPA Form R (EPA Form 9350-1) in accordance with the instructions in Subpart E [40 C.F.R. § 372.85].

* * * * *

(d) Each report under this section for activities involving a toxic chemical that occurred during a calendar year at a covered facility must be submitted on or before July 1

of the next year. The first such report for calendar year 1987 activities must be submitted on or before July 1, 1988.

The complaint alleged, in pertinent part, and in its answer Respondent admitted the following:

1. I-Con Industries, Inc. (Respondent) is a corporation incorporated under the laws of the State of Delaware and is authorized to do business in Texas. [Complaint ¶ 6, Answer ¶ 6.]

2. Respondent is a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7). [Complaint ¶ 7, Answer ¶ 7.]

3. Respondent is an owner or operator of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3. [Complaint ¶ 8, Answer ¶ 8.]

4. Respondent's facility has 10 or more "full-time employees" as that term is defined by 40 C.F.R. § 372.3. [Complaint ¶ 9, Answer ¶ 9.]

5. The Standard Industrial Classification (SIC) Code for Respondent's facility is included in SIC numbers 20-39. [Complaint ¶ 10, Answer ¶ 10.]

6. During the calendar year 1987, toxic chemicals at Respondent's facility were "used" or "otherwise used," as those terms are defined by 40 C.F.R. § 372.3. [Complaint ¶ 11, Answer ¶ 11.]

7. According to Section 313(f) of EPCRA, 42 U.S.C. § 11023(f) and 40 C.F.R. § 372.25, the threshold amount for reporting under Section 313 of EPCRA, 42 U.S.C. § 11023(b) and

40 C.F.R. § 372.30 is 10,000 pounds of the toxic chemical used for the applicable calendar year. [Complaint ¶ 12, Answer ¶ 12.]

8. Toxic chemicals used or otherwise used, include the following toxic chemicals listed under Section 313(c) of EPCRA, 42 U.S.C. § 11023(c) and 40 C.F.R. § 372.65: Sulfuric Acid and Dichloromethane (Methylene Chloride). [Complaint ¶ 13, Answer ¶ 13.]

9. During the calendar year 1987, Respondent "otherwise used" in excess of 10,000 pounds of Sulfuric Acid. [Complaint ¶ 14, Answer ¶ 14.]

10. During the calendar year 1987, Respondent "otherwise used" in excess of 10,000 pounds of Dichloromethane (Methylene Chloride). [Complaint ¶ 15, Answer ¶ 15.]

11. Respondent failed to submit to the Administrator of EPA and to the State of Texas, a "Form R" for Sulfuric Acid by July 1, 1988. [Complaint ¶ 20, Answer ¶ 20.]

12. Respondent failed to submit to the Administrator of EPA and to the State of Texas, a "Form R" for Dichloromethane (Methylene Chloride) by July 1, 1988. [Complaint ¶ 21, Answer ¶ 21.]

Thus, as Complainant points out and I so conclude, Respondent has clearly admitted every necessary element to establish its liability under Section 313(a) of EPCRA and 40 C.F.R. § 372.22:

A) the Respondent is a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7);

B) the Respondent is the owner or operator

C) of a "facility" [as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 372.3];

D) that has ten (10) or more "full time employees" (as defined by 40 C.F.R. § 372.3);

E) that is in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985);

F) Respondent "manufactures" or "processes" in excess of 75,000 pounds (threshold amounts for calendar year 1987), or "otherwise uses" in excess of 10,000 pounds, toxic chemicals set forth under Section 313(c) of EPCRA, 42 U.S.C. § 11023(c) and 40 C.F.R. § 372.65, during calendar year 1987; and

G) Respondent failed to file a "Form R" for each toxic chemical manufactured, processed, or otherwise used during calendar year 1987 in excess of the threshold amounts with the EPA and the State of Texas by July 1, 1988.

Nevertheless, Respondent argues that Complainant is not entitled to a partial accelerated decision on the issue of liability because such a motion is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and Complainant has failed to introduce such evidentiary affidavits as would be required under that rule. Respondent contends that the complaint and answer cannot be used to provide a factual basis for a partial accelerated decision because they do not meet the evidentiary requirements of Fed. R. Civ. P. 56. Moreover, Respondent argues that the answer cannot be considered to represent admissions because the answer

does not contain "the requisite language for verification" and "fails to establish the competency of the signing officer."

The short answer to Respondent's contentions is that this proceeding is governed by the Consolidated Rules of Practice of the United States Environmental Protection Agency, 40 C.F.R. Part 22. The Fed. R. Civ. P. do not govern procedures in administrative agencies which enjoy "wide latitude" to fashion their own rules of procedure.⁴

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. § 22.20(a):

The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

Thus, none of the requirements which Respondent contends should apply under Rule 56 of the Fed. R. Civ. P. have been incorporated into the rules which apply to a motion for an accelerated decision. No limited additional evidence, such as affidavits, is required unless I determine, for good cause, that such affidavits are required. I "may at any time render an accelerated decision . . .

⁴In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985), citing Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356, n. 3 (E.D.N.Y. 1982). See also, South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n, 570 F. Supp. 227, 232 (D.C. La. 1983), aff'd 744 F.2d 1107 (5th Cir. 1984) and Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

as to all or any part of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." [Emphasis added.]

The two chemicals which Respondent "otherwise used" are included on the list of chemicals to which Part 372 applies. I have found that during the calendar year 1987, Respondent otherwise used toxic chemicals so listed in quantities exceeding the established threshold of 10,000 pounds per year. That threshold is published at 40 C.F.R. § 372.25(b). The Respondent is the owner and operator of the facility in question. The facility had 10 or more full-time employees during 1987. The facility is an establishment with a primary SIC code between 20 through 39. Therefore, Respondent was required to submit the Form R for each of the two chemicals by July 1, 1988. Respondent failed to do so.

Under Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.30, Respondent was required to submit by, and no later than July 1, 1988, a complete and correct Form R for sulfuric acid for the calendar year 1987 to the Administrator of EPA and to the State of Texas.

Under Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.30, Respondent was required to submit by, and no later than July 1, 1988, a complete and correct Form R for dichloromethane (methylene chloride) for the calendar year 1987 to the Administrator of EPA and to the State of Texas.

Respondent's failure to submit in a timely manner a complete and correct Form R for sulfuric acid constitutes a failure or refusal to comply with Section 313 of EPCRA, 42 U.S.C. § 11023, and with 40 C.F.R. § 372.30.

Respondent's failure to submit in a timely manner a complete and correct Form R for dichloromethane (methylene chloride) constitutes a failure or refusal to comply with Section 313 of EPCRA, 42 U.S.C. § 11023, and with 40 C.F.R. § 372.30.

Therefore, I conclude that no genuine issue of material fact exists as to the question of liability, that no additional evidence, such as affidavits, is required, and that Complainant is entitled to judgment as a matter of law. I find that Respondent, I-Con Industries, Inc., has violated Section 313 of EPCRA, 42 U.S.C. § 11023, as alleged in the Complaint.

III. Discussion and Conclusions as to Complainant's Motion for an Accelerated Decision on the Issue of the Penalty

The Complainant also seeks an accelerated decision on the issue of the amount of penalty, contending that the proposed penalty was correctly calculated according to the Enforcement Response Policy for Section 313 of EPCRA, and there are no genuine issues of material fact to prevent this Court from entering an accelerated decision on the amount of penalty.

Under Section 22.24 of the Consolidated Rules of Procedure "the complainant has the burden of going forward with and of proving . . . that the proposed civil penalty . . . is appropriate." Under Section 22.27(b) of the Rules,

. . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.


Complainant seeks a \$5,000 recommended civil penalty for each chemical, or a total \$10,000 penalty in the case based upon its calculations under civil penalty guidelines for Section 313 of EPCRA.

Respondent argues that Complainant is not entitled to an accelerated decision on the issue of the amount of the penalty because Complainant is essentially arguing that the Presiding Officer "is bound by its formula for calculation of civil penalties." Respondent maintains that as the Presiding Officer, I should use my discretion to lower the penalty given the fact that it took an excessive period of time for the government to bring its complaint after discovering that a potential violation existed. Respondent contends that if EPA's findings had been promptly disclosed, I-Con could have reported within 180 days of the original reporting date and, hence, would have been subject to a penalty of no more than \$3,000 per chemical. At a hearing Respondent would offer evidence as to company finances ability to pay, to give further explanation as to why the reports were not timely made and as to what steps have been taken to reduce the

environmental emissions from the plant in mitigation of any proposed penalty. Also, Respondent disputes Complainant's position that no adjustment to the gravity base penalty amount should be made under the adjustment factors, including other factors as justice may require and Respondent is prepared to offer evidence as to why such adjustments are appropriate.

Based upon these differences between the parties I conclude that genuine issues of material fact exist as to the proper calculation of a recommended penalty in this matter. Therefore, Complainant's motion for an accelerated decision on the issue of the amount of the penalty should be, and hereby is, DENIED. A partial accelerated decision on the issue of liability on both counts alleged in the complaint should be, and is hereby, rendered for Complainant. Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that the issue of the amount, if any, of the civil penalty, which appropriately should be addressed for the violations found herein, remains controverted and the hearing requested shall proceed for the purpose of deciding that issue.

So ORDERED.


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: November 20, 1990
Washington, DC

IN THE MATTER OF I-CON INDUSTRIES, INC., Respondent,
EPCRA Docket No. VI-438S

Certificate of Service

I hereby certify that this Interlocutory Order for Partial Accelerated Decision, dated NOV 20 1990, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

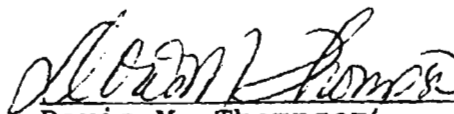
Copy by Certified Mail,
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Doris M. Thompson
Secretary

Dated: _____

NOV 20 1990