8/31/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AGRI-FINE CORPORATION,	)	DOCKET NO. EPCRA-V-019-92
	)	
RESPONDENT	)	

ORDER GRANTING IN PART MOTION
FOR ACCELERATED DECISION

This action under Section 325(c) of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11001 et seq., was commenced on May 1, 1992, by the issuance of a complaint charging Respondent, Agri-Fine Corporation, with three counts of failing to file "Form Rs" showing quantities of sulfuric acid processed during the years 1987, 1988, and 1989. The forms were required to be filed with the Administrator and the State of Illinois on or before July 1 of the following year, i.e., July 1, 1988, July 1, 1989, and July 1, 1990. For these alleged violations, it was proposed to assess Respondent a penalty of $17,000 for each count for a total of $51,000.

In a letter-answer, dated May 26, 1992, Respondent acknowledged processing quantities of sulfuric acid as alleged in the complaint for the years identified therein, admitted that it had not filed "Form Rs" for those years and alleged that it had no knowledge of "Form Rs." Respondent asserted that it should not be penalized, because it had no knowledge or record of the forms ever being received, that it first learned of the requirement upon receipt of a phone call, apparently from EPA, in mid-1990, and that

the required forms had since been filed. Additionally, Respondent alleged that it was a small, family-owned business engaged in the production of animal feed, that it was financed in part by the SBA and encouraged to locate on vacated property on the southeast side of Chicago, bringing 20 badly needed jobs to the area. Respondent alleged that imposition of a penalty of the magnitude sought would almost certainly cause it to go out of business, doing an injustice to its employees and the community. Respondent requested a hearing.

Complainant filed prehearing information as directed by the ALJ on October 16, 1992. Although Respondent moved for and was granted an extension of time to submit prehearing information, its submission, dated November 13, 1992, stated that other than the fact it was unaware of EPCRA § 313, it had no defense to the action. Additionally, Respondent stated that it had neither potential witnesses nor exhibits to offer at that time.

Under date of August 2, 1993, Complainant filed a motion to amend the complaint to reduce the penalty claimed to $42,532 based on application of the Enforcement Response Policy (ERP) for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act (August 10, 1992). Complainant moved for an accelerated decision as to liability based on the admissions in Respondent's answer and, as to the amount of the penalty, contending that it was reasonable in relation to penalties that had been assessed in similar cases. By an order, dated September 22, 1993, the motion to amend the complaint was granted and Respondent was granted an

extension until the due date of its answer to the amended complaint in which to respond to the motion for an accelerated decision.

Thereafter, Respondent retained counsel, who, under date of October 28, 1993, filed an amended answer and a response to Complainant's motion for an accelerated decision. Respondent admitted that from time to time it barely had "10 or more full-time employees" and denied that it was in SIC Code 2076 as alleged in the complaint. The amended answer neither admitted nor denied that Respondent had "processed" the quantities of sulfuric acid during the years 1987, 1988, and 1989, alleged in the complaint, and demanded strict proof thereof. Respondent raised several issues concerning the amount and appropriateness of the proposed penalty, including the fact that "non-aerosol" forms of sulfuric acid have been proposed for delisting (56 Fed. Reg. 34158, July 26, 1991), and requested a hearing.

Responding to the motion for an accelerated decision, Agri-Fine alleges that the documents relied upon by Complainant do not show that it "processed" sulfuric acid, that it is not now and never has been in SIC Code 2076, and that, although it may have had 17 or more full-time employees at the time of the EPA inspection in September of 1990 or at the time the amended complaint was filed, this was not the case during the years 1987, 1988, and 1989 referred to in the complaint. Accordingly, Respondent contends that there are material issues of fact as to its liability, making summary judgment inappropriate. As to the penalty, Respondent contends that there are material issues of fact regarding the risks

[of its alleged noncompliance], and denies that the 1992 ERP is the appropriate penalty policy or that the penalty was properly determined. For these reasons, Agri-Fine urges that the motion for summary judgment be denied.

With the permission of the ALJ, Complainant filed a reply to Agri-Fine's response to its motion for accelerated decision. Complainant asserts that the amended answer does not establish that there are any material facts at issue regarding either liability or the amount of the penalty. Although the amended answer was intended to supersede the original answer, Complainant says that it intends to offer the original answer into evidence as evidence of Respondent's liability. Moreover, Complainant argues that, because the initial answer is part of the record, judicial [official] notice may be taken thereof. Apart from the pleadings, Complainant cites a letter from Respondent, dated September 4, 1990, attached to the inspection report, which reflects that Respondent processed quantities of sulfuric acid for the years 1987, 1988, and 1989 as alleged in the complaint. As to Agri-Fine's contention that it is not in SIC Code 2076, Complainant points out that Respondent admitted this allegation in its initial answer to the complaint and alleges that Respondent is listed in SIC Code 2076 in the 1991 Illinois Manufacturers Directory.[1/] Moreover, even if, as Respondent contends, it is included within SIC Code 2048,

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[1/] Although, as Complainant alleges, the inspection report states that Respondent is in SIC Code 2076, the source of this information is not stated.

Complainant says it would still be within SIC Codes 20 through 39 and thus within the scope of EPCRA § 313. Complainant asserts that Respondent admitted that it had ten or more "full-time employees" in its answers to the initial and amended complaints.[2/] Accordingly, Complainant argues that there are no material issues of fact as to Respondent's liability and that it is entitled to judgment as a matter of law. Concerning the penalty, Complainant avers that Respondent's contentions as to the availability, accuracy, and timeliness of the TRI database and the purposes of EPCRA are legal and policy arguments not relevant to the determination of a penalty, and that its arguments as to, inter alia, its good faith and for "set-off" of sums expended for equipment and facility modification to reduce the likelihood of releases are not a bar to, nor a basis for mitigation of, the penalty.

DISCUSSION

It is concluded that there is no dispute as to material fact that Respondent was included within the EPCRA § 313 reporting requirements during the calendar years 1987, 1988, and 1989, and that it failed to file "Form Rs" with the Administrator and the State of Illinois by July 1, 1988, and July 1 of the following years as required by EPCRA § 313(a). As support for the assertion

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[2/] "Full-time employee" means 2,000 hours per year of equivalent full-time employment (40 CFR § 373.3). The number is determined by dividing the total number of hours worked by all employees during the calendar year by 2,000. This approach has been upheld as based upon a permissible construction of the statute, Kaw Valley, Inc. v. U.S. EPA, 844 Fed. Supp. 705 (D.C. Kan. 1994).

that Respondent processed 2,321,671 pounds of sulfuric acid in 1987, 1,257,042 pounds in 1988, and 1,437,501 pounds in 1989, as alleged in the complaint, Complainant relies in part on Agri-Fine's initial answer. Respondent has, however, filed an amended answer and the general rule is that, once an amended pleading is filed, the original pleading no longer serves any function in the case. 6 **Wright, Miller & Kane, Federal Practice & Procedure,** § 1476. Complainant says that it intends to offer the initial answer in evidence as an admission by Respondent. While this appears to be a permissible procedure if there is a trial, the rule is that an admission in a superseded pleading may not be relied upon to support summary judgment. Contractor Utility Sales Co., Inc. v. Certain-teed Products Corporation, 638 F.2d 1061 (7th Cir. 1981).

It is concluded, however, that evidence apart from the initial answer amply supports the determination that during the years 1987, 1988, and 1989 Respondent processed the quantities of sulfuric acid alleged in the complaint. This evidence consists of the letter from Agri-Fine, dated September 4, 1990, signed by its plant manager, and documents on Agri-Fine letterhead which apparently state the quantities of sulfuric acid purchased by Respondent on a monthly basis from its supplier, Rowell Chemical Corporation, during the years at issue (C's Preh. Exhs. 7, 8, & 9). Although these documents are undated and unsigned and their origin is unclear, yearly totals equal those shown in the letter, dated September 4, 1990, and there appears to be no reason to doubt the authenticity of the documents. These totals greatly exceed the

reporting thresholds for manufactured or processed chemicals of 75,000 pounds, 50,000 pounds and 25,000 pounds for the years 1987, 1988, and 1989, respectively, set forth in EPCRA § 313(f).

In its amended answer, Respondent has denied that it is covered by SIC Code 2076. As support for the contention that there is no issue of material fact in this respect, Complainant relies on an admission in the initial answer and the allegation that Respondent informed the inspector that it was covered by SIC Code 2076 at the time of the September 5 inspection. Reliance on the initial answer is misplaced for the reason previously stated and, although the inspection report states that Respondent was in SIC Code 2076, the source of this information is not given. In its amended answer, Respondent alleges that since 1985 it has, with good cause, classified its facility under SIC Code 2048, "Prepared Feeds and Feed Ingredients for Animals and Fowls, Except Dogs and Cats." Assuming this allegation is true or can be substantiated, Agri-Fine would, nevertheless, be within SIC Codes 20 through 39 as listed in EPCRA § 313(b) and thus within a classification for which reporting is required. Although this would require an amendment of the complaint, amendments to conform to the proof are readily granted and it is concluded that there is no genuine issue of material fact that Respondent was within either SIC Code 2076 or 2048 during the years in question and thus within a classification for which reporting was required.

Complainant relies on the initial and amended answers to support its contention that there is no genuine issue of material

fact that Respondent had ten or more "full-time employees" during the years 1987 through 1989. As indicated above the alleged admission in the initial answer may not be relied upon to support summary judgment and the alleged admission in the amended answer is merely that "from time to time, Respondent has barely had '10 or more' full-time employees" as alleged in para. 9 of the amended complaint. This is not an admission that Respondent had ten or more "full-time employees" as defined in 40 CFR § 372.3 during each of the years at issue. Respondent admitted in its prehearing exchange, however, that, other than the fact it was unaware of EPCRA § 313, it had no defense to the action. Respondent is presumably well aware of the number of its employees and there is no injustice in recognizing this admission. Respondent has not carried its burden of demonstrating that there is a genuine issue of material fact as to liability and Complainant's motion for an accelerated decision in this respect will be granted.

A different conclusion is required as to the motion for summary judgment for the amount of the penalty. Firstly, determining the amount of a penalty on a motion for accelerated decision, no less than determining damages on summary judgment, is seldom, if ever, appropriate. See, e.g., In re The Monte Vista Cooperative, Docket No. I.F.& R.-VIII-91-296C (Order, June 10, 1992). This is especially true where, as here, and as permitted by Rule 22.15(a) of the Rules of Practice, Respondent has contested the appropriateness of the proposed penalty and requested a hearing. Secondly, matters such as the extent and gravity of the

violation, the degree of culpability, and ability to pay are inherently factual, and, in cases of dispute, not appropriate for resolution on summary judgment.[3/] Moreover, contrary to Complainant's contention, it has been held that Supplemental Environmental Projects (SEPs) may appropriately be considered by the ALJ under the statutory rubric of "other factors as justice may require" to reduce the amount of a proposed penalty. In re Spang and Company, Docket No. EPCRA-III-037 & 048 (Initial Decision, March 10, 1994), presently on appeal to the EAB. While Complainant says that the penalty was computed under the 1990 ERP, because it was allegedly beneficial to Respondent, it should be noted that I am required to consider, but am not bound by, any penalty guidelines issued under the Act (Rule 22.27(b)). Complainant's motion for judgment for the amount of the penalty claimed will be denied.

ORDER

Complainant's motion for an accelerated decision that Respondent violated EPCRA § 313 as alleged in the complaint is granted. The motion for judgment for the amount of the penalty claimed is denied. The amount of the penalty remains at issue and

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[3/] Although EPCRA § 325(1)(c), providing penalties for violations of EPCRA §§ 312 and 313, does not expressly incorporate the criteria for determining penalties set forth in EPCRA § 325(b)(1) or (b)(2), it is reasonable to consider the criteria in the latter sections applicable to determining penalties for violations of EPCRA § 313.

will be determined after further proceedings, including a hearing, if necessary.[4/]

Dated this 31st day of August 1995.

Spencer T. Nissen
Administrative Law Judge

4/ A ruling on Respondent's motion for discovery will be forthcoming.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION**, dated August 31, 1995, in re: AGRI-FINE CORPORATION, Dkt. No. EPCRA-V-019-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: August 31, 1995

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