10/31/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | |
| AMERICAN DESK MANUFACTURING CO., INC., | ) | EPCRA Docket No. VI-4498 |
| | ) | |
| | ) | |
| Respondent | ) | |

**Emergency Planning and Community Right-to-Know Act -- Form R, "Otherwise used" distinguished from "Processed" -- Complainant's motion for partial accelerated decision as to liability was granted where its affidavits and other evidence showed that most of four toxic chemicals was not incorporated in furniture that Respondent manufactured, and thus Respondent should have filed Form Rs reporting the chemicals as "otherwise used"; Respondent's affidavit asserting that a statistically measurable amount of the chemicals was incorporated into the furniture was held insufficient to offset Complainant's evidence.**

## RULING GRANTING COMPLAINANT'S MOTION

## FOR PARTIAL ACCELERATED DECISION

This Ruling grants a motion for partial accelerated decision on liability filed by Complainant--the Director, Air, Pesticides and Toxics Division, Region 6, U.S. Environmental Protection Agency--against Respondent American Desk Manufacturing Company, Inc. This case is conducted under the authority of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 ("EPCRA"), and the regulations promulgated pursuant to EPCRA, 40 C.F.R. Part 372 ("the Regulations"). Respondent is charged with violating Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and Section 372.30 of the Regulations, 40 C.F.R. § 372.30, by failing in 1988 to report its 1987 utilization of four toxic chemicals.

The question is whether Respondent "processed" the four toxic chemicals, or instead "otherwise used" them, as those terms are defined by Section 313 of EPCRA (42 U.S.C. § 11023) and Sections 372.3 and 372.25 of the Regulations (40 C.F.R. §§ 372.3, 372.25). Only if Respondent "otherwise used" them was it required to report

its utilization of them.[1] The answer to the question depends on whether Respondent incorporated the toxic chemicals into a product distributed in commerce.

An earlier Ruling in this case denied a motion by Complainant for partial accelerated decision on liability on the ground that the record left unresolved Respondent's incorporation of the chemicals into commercial products.[2] After the parties tried unsuccessfully to negotiate a settlement, Complainant again moved for partial accelerated decision, supplying new support for its position.

## Discussion

Respondent manufactures furniture at a Taylor, Texas facility. In its manufacturing operations in 1987 it employed at least seven products[3] that contained four toxic chemicals: methyl ethyl ketone, methyl isobutyl ketone, toluene, and xylene (mixed isomers). The seven products were coatings, and the function of these four chemicals in them was to aid their adhesion to the furniture and their consistency.

As noted, this case turns on whether this utilization of these chemicals means that they were "processed" or "otherwise used," and this distinction depends on whether the chemicals were incorporated into the furniture. EPA has explained the distinction as follows.

> 1. Clarification of the terms "process" and "otherwise use".... EPA has made the following basic distinction between processing and use activities.
>
> a. Processing is an incorporative activity. The process definition focuses on the incorporation of a chemical into a product that is distributed in commerce....
>
> b. Otherwise use is a nonincorporative activity. EPA is interpreting otherwise using a covered toxic

---

[1] The reason Respondent had to report only if the four toxic chemicals were "otherwise used" is that the quantity utilized of each was above the threshold amount for reporting such chemicals "otherwise used" (10,000 pounds), but below the higher threshold amount for reporting such chemicals "processed" (in 1987, 75,000 pounds).

[2] Ruling on Complainant's Motion for Partial Accelerated Decision (December 31, 1991).

[3] The seven products were: Lacquer Thinner, Gloss Poly-Hol 4000, Vinyl Varnish, Rel Plaz Sealer (containing 14.2 percent xylene, 7.3 percent MEK, and 24.8 percent toluene), Rel Plaz Sealer (containing 14.5 percent xylene, and 29.4 percent toluene), MEK, and Vinyl Sealer.

> chemical to be activities that support, promote, or contribute to the facility's activities, where the chemical does not intentionally become part of a product distributed in commerce....[4]

(emphasis in original)

**Complainant's Arguments**

To show that Respondent "otherwise used" the four toxic chemicals, Complainant submitted basically two affidavits, and added an argument based on information submitted by Respondent. The first affidavit was executed by the technical director of Akzo Coatings, Inc.[5] According to Complainant, Akzo produces five of the seven coatings at issue utilized by Respondent, and buys one of the four toxic chemicals (which by itself is Respondent's sixth coating) for utilization in its coatings and resale to customers. The seventh coating utilized by Respondent, according to Complainant, is obtained from another supplier.[6] In his affidavit, Akzo's technical director stated as follows.

> The [four toxic chemicals] ... are carrier solvents for the solid portion (resins) of the [five] coatings [produced by Akzo].... A carrier solvent allows the coating to flow so it can be applied to the desired surface. Without the carrier solvents, the coatings could not be applied because the solid portions of the coatings (resins) would be too viscous (thick) to be applied.
>
> [The four toxic chemicals] ... are also volatile organic compounds, which means that they readily evaporate when exposed to air.
>
> Almost all of the solvents [the four toxic chemicals] ... are released from the coatings ... by evaporation at the time of or shortly after the application of the coatings. Any remaining solvent would evaporate at normal temperature and pressure within a few hours after application. The solid portion of the coatings (resins) remain [sic] on the surfaces to which they are applied.
>
> [The one of the four toxic chemicals that is purchased by

---

[4] 53 Federal Register 4,505-6 (February 16, 1988).

[5] Complainant's Second Motion for Accelerated Decision on Liability (June 5, 1992), Exhibit 2, Affidavit of Vernon A. Walls December 16, 1991).

[6] See Complainant's Second Motion, supra note 5, at 6.

> Akzo for utilization and resale] ... evaporates into the atmosphere at the time of or shortly after its use.
>
> The [four toxic chemicals] ... are not incorporated, and are not intended to be incorporated, into the products to which they are applied.[7]

Complainant's second affidavit was prepared by an Agency chemist, who analyzed six of the seven coatings at issue.[8] In his affidavit, he stated that each of these six coatings contained volatile organic compounds, a classification that includes the four toxic chemicals at issue. According to the affidavit, for each coating analyzed, after 24 hours of drying at room temperature, over 95 percent of each coating had been released. In addition, tests on the four toxic chemicals individually in these coatings showed that, for the instances reported, at least 95 percent of the toxic chemical had evaporated when the coatings were dried for five hours at room temperature.

Complainant's final argument was based on information reported by Respondent about chemical utilization at its facility during 1987. The reported information covered three of the four toxic chemicals at issue. For each of these three, on an Agency reporting form, Respondent checked the box for chemicals that were "otherwise used," and did not check the box for chemicals that were "processed." Thus, Complainant contended, Respondent's own completion of these forms shows that the chemicals were "otherwise used."

Moreover, for each of these three chemicals, the amounts reported by Respondent for air emissions plus off-site transfers account for most of the volume of these three chemicals that Respondent reported that it had utilized in 1987. (The figures were: for xylene, the emissions and transfers account for 17,718 pounds out of 17,809 pounds utilized; for methyl isobutyl ketone, 27,371 pounds out of 30,652; and, for toluene, 41,607 pounds out of 46,268.)[9] Consequently, concluded Complainant, Respondent's own figures demonstrate that most of these three chemicals were not incorporated into the furniture.

---

[7] Affidavit, supra note 5, at 3-4.

[8] Complainant's Second Motion, supra note 5, Exhibit 3, Declaration of Dr. Douglas Kendall (June 3, 1992). Apparently only one of the two types of Rel Plaz Sealer was available for testing (the formulation containing 14.5 percent xylene and 29.4 percent toluene). See Complainant's Second Motion, supra note 5, at 3, and Declaration of Kendall, Exhibit D. See supra note 3 for a listing of all seven coatings.

[9] Complainant's Second Motion, supra note 3, at 9.

**Respondent's Argument**

Respondent countered with two affidavits of its own, plus a rejoinder to the argument based on its own reporting. The major affidavit was from a chemistry professor at Southwest Texas State University.[10] His affidavit stated as follows.

> [The four toxic chemicals at issue] are within the class of chemicals known as "volatile organic compounds" or "VOCs."
>
> ....
>
> [T]he VOCs are used as diluents, which, in fact, become incorporated into the finish of the manufactured furniture products and aid the adhesion and consistency of the finishes, coatings, and other applications.[11]

The earlier Ruling in this case declared that if the portions of the four toxic chemicals incorporated into the furniture were "insignificant," these chemicals would have been "otherwise used." Accordingly, Respondent's affidavit asserted as follows.

> The term "significant" from a scientific, chemistry perspective means statistically significant, important or likely to have influence or effect.
>
> ... The portion of the ... [four chemicals at issue] incorporated into furniture surfaces by absorption, by adsorption, by entrapment beneath the surface of the coating or finish and/or by entrapment in the molecular lattice structure of the final product is statistically significant in that it can be reproducibly measured. The incorporated portion is also important and likely to have an effect with respect to the quality of the indoor air where the furniture is placed into service.
>
> ....
>
> A number of different studies have shown that manufactured furniture products may emit VOCs such as ... [these four chemicals] over extended periods of time. Some such materials have been shown to emit constant levels of these chemicals for at least seven (7) years. This documented evidence establishes that

---

[10] Response of American Desk to EPA's Second Motion for Accelerated Decision on Liability (December 31, 1992), Affidavit of Doctor Patrick E. Cassidy 2 (April 11, 1992).

[11] Affidavit of Cassidy, supra note 10, at 2, 5.

> significant portions of the diluents like ... [these four chemicals] are incorporated into the produced goods during the manufacturing process and small, yet significant, portions of those chemicals are slowly emitted into the ambient air over a period of years.[12]

Respondent's second affidavit, executed by one of its officials, attacked the relevance of Complainant's affidavits.[13] According to Respondent's affidavit, the 1991-92 coatings represented in Complainant's affidavits differed from the coatings utilized by Respondent in 1987.

> [F]urniture coatings ... are continuously changing over time.... [T]he products utilized by American Desk in 1987 are unlikely to be identical to the products provided by a product-supplier in 1991 or 1992.
>
> ....
>
> I have compared the MSDSs [Material Safety Data Sheets] for the products described ... [in Complainant's affidavits] to the MSDSs for the products that were utilized by American Desk in calendar year 1987. My comparison ... led to the conclusion that numerous product differences are reflected in the MSDSs for the products....[14]

As to the reporting forms in which Respondent checked the "otherwise used" box for three of the chemicals, Respondent denied that they have any significance. Respondent said that, after a 1989 inspection of its facility by an Agency representative, it simply filed the forms as instructed by the representative in an effort to be cooperative. Respondent disclaimed any intention that the filing was meant as an agreement on its part that the chemicals were "otherwise used."

**Complainant's Reply**

Complainant in reply made several points. It criticized the affidavit of the chemistry professor for, among other matters, failing to be based on a specific analysis of any of Respondent's seven coatings that are involved in this case. As to the affidavit of Respondent's official, Complainant attacked it in two ways. First, Complainant criticized it for offering the

---

[12] Id. at 2-4.

[13] Response of American Desk, supra note 10, Affidavit of James R. Bettinger.

[14] Id. at 2.

conclusion regarding "numerous product differences" without identifying any of the differences or attaching the MSDSs to allow for a review of the conclusion.

Second, Complainant submitted another affidavit from the Akzo technical director.[15] This affidavit acknowledged that "[o]ver the years, Akzo Coatings Inc. has made minor changes in the formulation of the coatings."[16] Notwithstanding these changes, however, "[a]lmost all of the solvents [i.e., the chemicals at issue in this case] ... are released from the coatings ... by evaporation at the time of or shortly after the application of the coatings."[17]

**Ruling**

Procedure for this case is governed by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22. Section 22.20 of these Rules, 40 C.F.R. § 22.20, applying to accelerated decisions, provides in pertinent part as follows.

> 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.

Complainant's affidavits are sufficient to eliminate "any genuine issue of material fact" and to demonstrate its entitlement to an accelerated decision on liability. The statements by the Akzo technical director and the Agency chemist show that the overwhelming preponderance of each of the four toxic chemicals at issue evaporates after application of the coating in which it is contained. In the affidavit of the Agency chemist, the portion evaporating was said to be at least 95 percent for each of the four; and, in the second affidavit of the Akzo technical director, it was said to be "almost all." These statements justify a ruling that the four chemicals were not incorporated into Respondent's furniture.

---

[15] Complainant's Reply Brief in Support of Complainant's Second Motion for Accelerated Decision on Liability (January 14, 1993), Exhibit 2, Second Affidavit of Vernon A. Walls (January 7, 1993).

[16] Id. at 2.

[17] Id.

The essential objection by Respondent to these affidavits was that they addressed 1991-92 coatings whose composition differed from the coatings utilized by Respondent in 1987. This objection was satisfactorily answered, however, by Complainant's second affidavit from the Akzo technical director, which acknowledged some differences in composition, but nonetheless asserted that "almost all" of the chemicals evaporates after application of the coatings to the furniture. In addition, the force of Respondent's objection was diminished by its failure to identify or document any of the claimed differences in composition of the coatings.

Respondent's own major affidavit can establish only that some statistically measurable portion of the four chemicals remains in the furniture, for up to seven years. Complainant objected that the affidavit lacked any basis in an analysis involving the four specific chemicals at issue. But even if the affidavit is accorded full credibility, its maximum claim is this statistically measurable remainder in the furniture. Nothing is said in the affidavit, however, about the size of this remaining portion in the furniture, other than that it is statistically measurable and thus significant from a certain scientific perspective. Respondent's affidavit therefore leaves essentially unchallenged the statements in Complainant's affidavits that at least 95 percent or "almost all" of the four chemicals at issue evaporates after application.

These statements that the overwhelming preponderance of the four chemicals evaporates is enough to make Complainant's case that these four chemicals are not incorporated into the furniture. As noted, the claim by Respondent's affidavit that some statistically measurable amount, which apparently could be minute, still remains in the furniture fails to undo the force of these statements for Complainant's case.

As to Complainant's argument based on information reported by Respondent, the boxes checked and not checked on reporting forms are accorded no weight at all. These reporting forms, like pre-litigation admissions generally, are simply pieces of evidence to be considered along with all the other evidence. Respondent is perfectly free to explain or dispute them.[18] Here Respondent has supplied an entirely believable reason as to why it checked the boxes as it did--that it just wanted to cooperate with the Agency by following the instructions of the Agency's inspector. Such efforts to cooperate should be encouraged, not penalized in a subsequent enforcement action.

The amounts of each of the three chemicals reported by

---

[18] In the Matter of U.S Aluminum Inc., Docket No. II-EPCRA-89-0124, Ruling on Motion for Partial Accelerated Decision (November 26, 1991).

Respondent as being emitted into the air and transferred off-site, on the other hand, do legitimately support Complainant's argument. Respondent offered no alternative explanation for these reported amounts, and they do buttress the conclusion that the chemicals were "otherwise used."

In sum, the record establishes that "no genuine issue of material fact exists" as to Complainant's allegation that the four toxic chemicals under review were not incorporated into Respondent's furniture within the meaning of the relevant regulatory provisions. Therefore these chemicals were "otherwise used" under these provisions, and Complainant is entitled to judgment on its motion for accelerated decision on liability.

## Order

Complainant's motion for partial accelerated decision on liability is granted. Accordingly, Respondent is declared to have violated Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), and Section 372.30 of the Regulations, 40 C.F.R. § 372.30, as alleged in the complaint.

Thomas W. Hoya
Administrative Law Judge

Dated: October 31, 1995

**IN THE MATTER OF AMERICAN DESK MANUFACTURING CO., INC.**, Respondent,
**EPCRA Docket No. VI-449S**

## Certificate of Service

I certify that the foregoing **Ruling Granting Complainant's Motion For Partial Accelerated Decision**, dated October 31, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

Counsel for Complainant:

Sherry Brown Wilson, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VI
1445 Ross Avenue
Dallas, TX 75202-2733

Counsel for Respondent:

Mr. James R. Bettinger
American Desk Manufacturing Co.
P.O. Box 6107
Temple, TX 76503-6107

Maria Whiting
Legal Staff Assistant

Dated: October 31, 1995