UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Multistar Industries, Inc.,	)	Docket No. EPCRA-10-2004-0058
	)	
Respondent	)	

ORDER

This enforcement proceeding is brought by the United States Environmental Protection Agency ("EPA") against Multistar Industries, Inc. ("Multistar"). In an administrative complaint, EPA charges respondent with one violation of Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), and six violations of Section 312(a) of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11022(a). Multistar has filed an answer denying the violations. EPA now seeks summary judgment as to liability only. 40 C.F.R. 22.20(a).[1] EPA's motion for summary judgment is granted as to all seven counts.

I. Facts

Multistar is a corporation doing business in the State of Washington. Ans. ¶¶ 3 & 5. Since at least June 21, 1999, respondent has owned and operated a facility located at 101 West First Street, Othello, Washington. Ans. ¶ 7. Respondent operates this facility primarily as a reseller of the chemical anhydrous ammonia. Resp. Opp. at 2. Anhydrous ammonia is a regulated substance under the Clean Air Act. Section 112(r)(3); 40 C.F.R. 68.130. Also, ammonia is listed as a toxic and hazardous substance under Occupational Safety and Health Administration regulations. *See* 29 C.F.R. 1910.1000, Table Z-1.

II. Discussion

"Summary judgment provides the parties an invaluable opportunity to test the mettle of a case before it ever reaches trial. On a motion for summary judgment, the court assesses all of the proof the parties can bring to bear in order to ascertain whether a genuine need for trial is

---

[1] 40 C.F.R. 22.20(a) in part provides:

> (a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts 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.

present." *United States v. Gulf States Steel, Inc.*, 54 F.Supp.2d 1233, 1236 (N.D. Ala. 1999), *citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

As noted, 40 C.F.R. 22.20(a) provides that summary judgment may be awarded to a party "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." *See BWX Tech., Inc.*, 9 E.A.D. 61, 74 (EAB 2000) (standard for granting summary judgment under 40 C.F.R. 22.20(a) is similar to the standard for summary judgment contained in Rule 56 of the Federal Rules of Civil Procedure). When a party seeks summary judgment, the evidence is to be viewed in the light most favorable to the nonmoving party. Summary judgment is to be granted only when no reasonable decision-maker could find for the nonmoving party. *Consumer Scrap Recycling*, EAB CAA Appeal 02-06 (January 29, 2004) at 21, *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

A party seeking summary judgment has the initial responsibility of identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party, here the complainant, has satisfied this initial burden, Rule 56(e), Fed. R. Civ. P., provides that the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but by affidavits, depositions, answers to interrogatories, and admissions on file, "set forth specific facts showing that there is a genuine issue for trial." *See Celotex*, 477 U.S. at 324.

A. <u>The Clean Air Act Violation</u>

1. <u>The Statute</u>

Section 112(r) of the Clean Air Act is titled, "Prevention of accidental releases." The purpose of this statutory provision is "to prevent the accidental release and to minimize the consequences of any such release" of substances "known to cause or may reasonably be expected to cause death, injury, or serious adverse effects to human health or the environment" or "any other extremely hazardous substance." Sections 112(r)(1) & (3), 42 U.S.C. §§ 7412(r)(1) & (3). Section 112(r)(7)(B)(ii) further provides:

> The regulations under this subparagraph shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment....

42 U.S.C. § 7412(r)(7)(B)(ii).

The regulations implementing Section 112(r) of the Clean Air Act are contained in 40 C.F.R. Part 68. Subpart G of these regulations addresses the subject of a Risk Management Plan ("RMP"). Section 68.150(a) provides, in part, that "[t]he owner or operator shall submit a single RMP that includes the information required by §§ 68.155 through 68.185 for all covered purposes." 40 C.F.R. 68.150(a). Section 68.150(b) further provides the time table for the submission of the RMP. In this case, the date for the filing of any RMP would have been June 21, 1999. *Id.*

2. <u>The Violation</u>

In Count 1, EPA alleges that Multistar violated Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), by failing to submit a Risk Management Plan in accordance with 40 C.F.R. 68.150 for the chemical anhydrous ammonia.

In order to prove a violation of Section 112(r) of the Clean Air Act, EPA must show that respondent owned or operated a stationary source that produced, processed, handled or stored a regulated substance in excess of a minimum threshold amount and that it did not submit an RMP within the prescribed time. EPA has done so.

Multistar admits that it owns an ammonia bulk plant in Othello, Washington, where anhydrous ammonia is sold. Ans. ¶ 7; Resp. Opp. at 2; CX 29 at 1944. Multistar's Othello facility is a "stationary source" under the Clean Air Act. The term "stationary source" is defined, in part, as "any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur." 40 C.F.R. 68.3.

In an "Executive Summary," dated a February 6, 2004, in which Multistar outlined its accidental release prevention and emergency response program, respondent described its operation in a manner which satisfies the regulatory definition of "stationary source." [2] In that regard, Multistar stated that its Othello facility included a "rail spur, off-loading dock, warehouse, shop with service facilities, administrative building, two private residences and [an] equipment parking yard." CX 29 at 1944. Furthermore, in describing its "ammonia packaging and ammonia bulk distribution" operation, Multistar states that it "buys anhydrous ammonia in railcar quantities, which the Columbia Railroad delivers to its sidings," after which it is off-loaded either into "bulk trucks" for delivery, or to "stationary ammonia storage tanks." *Id.* The anhydrous ammonia eventually is sold as both a refrigerant and fertilizer. *Id.* In addition, Multistar filed a "Tier II Report" on August 10, 2003, identifying its operation under one

---

[2] This Executive Summary apparently is part of the Risk Management Plan that respondent ultimately submitted to EPA. Inasmuch as the Executive Summary was prepared by Multistar, for purposes of the present summary judgment motion, respondent's description of the operation of its Othello facility is accepted as fact.

standard industrial code, *i.e.*, "SIC 42269." CX 18.[3] These admissions by respondent establish that its Othello facility is a stationary source.

Multistar, however, argues that its Othello facility is not a stationary source because the ammonia at the site is stored at the site only "incident to transportation" and thus exempt from regulatory coverage. Ans. ¶ 64; Resp. Opp. at 5. Respondent is correct that Section 68.3's definition of "stationary source" specifically excludes regulated substances, or other extremely hazardous substances, that are stored incident to transportation. 40 C.F.R. 68.3. Respondent, however, fails to show that such is the case here. Indeed, the evidence is to the contrary.

First, Multistar does not cite to (or provide) any evidence to establish its "storage incident to transportation" exemption defense. It simply argues that such is the case here. Second, the "Executive Summary" that was provided to EPA by Multistar actually establishes the converse. This Executive Summary details a stationary storage operation and not storage of anhydrous ammonia "incident to transportation" as Multistar claims is the case. *See* CX 29.

Next, for purposes of EPA's summary judgment motion, it is an important consideration that anhydrous ammonia is identified at 40 C.F.R. 68.130, Table A, as a "Regulated Toxic Substance" with a "Threshold Quantit[y] For Accidental Release Prevention" of 10,000 lbs. Again, respondent admits to satisfying this threshold amount. In a letter to the EPA Administrator, dated September 4, 2002, Jiri Vanourek, the Owner and General Manager of Multistar, stated, " I can however responsibly and accurately attest that its levels fluctuate between 40,000-360,000 pounds - well above the threshold level of 10,000# within the span of every month on the calendar since June 1999." CX 14 at 1802; *see* CX 13.

Accordingly, as set forth above, EPA has shown that Multistar was required to file a Risk Management Plan and that its submission was due no later than June 21, 1999. 40 C.F.R. 68.150(a) & (b). Multistar failed to submit the RMP as required by Section 68.150(a), thereby violating Section 112(r) of the Clean Air Act. EPA is therefore entitled to summary judgment as to Count 1.

B. <u>The EPCRA Violations</u>

1. <u>The Statute</u>

Section 312 of the Emergency Planning and Community Right-To-Know Act is titled, "Emergency and hazardous chemical inventory forms." 42 U.S.C. §11022. Section 312(a) in part provides:

---

[3] Respondent likewise attaches this Tier Two document to its opposition to EPA's motion for summary judgment. *See* Exhibit 2A.

(1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C. § 651 *et seq.*] and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form ... to each of the following:

(A) The appropriate local emergency planning committee.

(B) The State emergency response commission.

(C) The fire department with jurisdiction over the facility.

42 U.S.C. § 11022(a)(1). These "inventory forms" are to be filed annually on March 1 and "shall contain data with respect to the preceding calendar year." Section 312(a)(2), 42 U.S.C. § 11022(a)(2).[4] In addition, pursuant to Section 312(b), EPA has established reporting threshold amounts for hazardous and extremely hazardous chemicals present at a facility. These reporting threshold levels are set forth at 40 C.F.R. Part 355, Appendices A and B.

2. <u>The Violations</u>

The complaint in this case alleges six violations of EPCRA Section 312. EPA is awarded summary judgment as to all six counts. First, insofar as the EPCRA violations are concerned, it is significant that respondent admits to all the critical factual allegations set forth in the complaint.[5] With the exception of the EPCRA affirmative defenses discussed, *infra*, Multistar admits to the violations as charged. The charges and admissions are as follows.

In Count 2, EPA charges that respondent violated Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), by not submitting to the State Emergency Response Commission ("SERC") a completed Emergency and Hazardous Chemical Inventory Form for ammonia by March 1, 2002, for calendar year 2001. Compl. ¶¶ 27. Multistar admits this factual allegation. Ans. ¶ 27.

---

[4] The reporting entity can submit either a "Tier I" or a "Tier II" inventory form. Tier I forms are to include estimates, in ranges, of the maximum amount of hazardous chemicals in each category present at the facility, the average daily amount of hazardous chemicals in each category, and the general location of hazardous chemicals in each category. Tier II forms are to include this information, as well as the chemical name or common name of the chemical as provided on the material safety data sheet, a brief description of the manner of storage of the hazardous chemical, and whether the owner seeks to withhold the location information from the public. 42 U.S.C. §§ 11022(d)(1) & (d)(2).

[5] At the time that Multistar submitted its answer to the complaint respondent was represented by counsel. Respondent is now appearing *pro se*.

In Count 3, EPA charges that respondent violated Section 312(a) of EPCRA by not submitting to the SERC a completed Emergency and Hazardous Chemical Inventory Form for ammonia by March 1, 2003, for calendar year 2002. Compl. ¶¶ 30 & 31. Multistar admits this factual allegation. Ans. ¶ 30.

In Count 4, EPA charges that respondent violated Section 312(a) of EPCRA by not submitting to the Local Emergency Planning Committee ("LEPC") a completed Emergency and Hazardous Chemical Inventory Form for ammonia by March 1, 2002, for calendar year 2001. Compl. ¶¶ 33 & 34. Multistar admits this factual allegation (Ans. ¶ 33).[6]

In Count 5, EPA charges that respondent violated Section 312(a) of EPCRA by not submitting to the LEPC a completed Emergency and Hazardous Chemical Inventory Form for ammonia by March 1, 2003, for calendar year 2002. Compl. ¶¶ 36 & 37. Multistar admits this factual allegation. Ans. ¶ 36.

In Count 6, EPA charges that respondent violated Section 312(a) of EPCRA by not submitting to the Adams County Fire District No. 5 a completed Emergency and Hazardous Chemical Inventory Form for ammonia by March 1, 2002, for calendar year 2001. Compl. ¶¶ 39 & 40. Multistar admits this factual allegation. Ans. ¶ 39.

In Count 7, EPA charges that respondent violated Section 312(a) of EPCRA by not submitting to the Adams County Fire District No. 5 a completed Emergency and Hazardous Chemical Inventory Form by March 1, 2003, for calendar year 2002. Compl. ¶¶ 42 & 43. Multistar admits this factual allegation. Ans. ¶ 42.

In addition to respondent's admissions, EPA has submitted declarations from four individuals involved with EPCRA record keeping which provide even more support for the above findings of violation. The first declaration is from Jay Weise, the Adams County Emergency Management Coordinator for the LEPC in Adams County, Washington. Mr. Weise declared, "My review of the Adams County LEPC records revealed that as of July 7, 2003, the Adams County LEPC had never, at any time, received an emergency and hazardous chemical inventory (Tier II) report from Multistar Industries, Inc., of Othello, Washington." CX 5.

The second declaration is from Sadie Whitener, who is responsible for managing the EPCRA Tier II reporting activities for the State of Washington, *i.e.*, the SERC. Ms. Whitener declared, "My review of the WDOE ["Washington State Department of Ecology"] Community

---

[6] Despite this admission, in its opposition to EPA's motion for summary judgment, Multistar states that the "LEPC was not in existence in Adams County by March 1, 2002." Resp. Opp. at 4. Respondent, however, offers no support for this assertion; nor does respondent explain how this assertion is consistent with its admission in paragraph 33 of its answer, or why it failed to raise this defense along with the other affirmative defenses that it did raise in its answer.

Right-to-Know Unit records revealed that prior to August 19, 2003, the WDOE had never, at any time, received an Emergency and Hazardous Chemical Inventory (Tier II) form from Multistar Industries, Inc. of Othello, Washington, for any reporting period." CX 6.

The third and fourth declarations involve Multistar's failure to file a list of hazardous substances, copies of Material Safety Data Sheets, or an emergency and hazardous chemical inventory form (*i.e.*, a Tier II report) with the local fire department. One of the declarations is from Lieutenant Gary Byers of the Adams County Fire District No. 5. He declared that as of July 7, 2003, respondent made no such EPCRA submissions to Fire District No. 5. CX 7. The other declaration is from Debbie Kudrna, the City Clerk of the City of Othello, Washington, to the effect that as of June 17, 2004, respondent likewise made no EPCRA submissions either to the City's Building Department or to its Fire Department. CX 8.

3. <u>Multistar's Affirmative Defenses</u>

Multistar raises two affirmative defenses with respect to the EPCRA violations, both of which fail. First, respondent argues that it is exempt from EPCRA coverage in this case because the anhydrous ammonia is stored at the Othello facility "incident to transportation." Ans. ¶ 66. Thus, respondent submits that its activities fall within the exemption of EPCRA Section 327. 42 U.S.C. § 11047. Section 327 states:

> Except as provided in section 11004 of this title, this chapter does not apply to the transportation, including the storage incident to such transportation, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas.

42 U.S.C. § 11047.

As explained earlier with respect to Count 1, the Clean Air Act violation, the facts of this case do not support Multistar's assertion that the anhydrous ammonia was being stored incident to transportation. Indeed, the facts show otherwise. They show that substantial amounts of anhydrous ammonia were delivered to respondent where the regulated substance was stored until Multistar could find a buyer. Clearly, the manner in which respondent handled its bulk sales of anhydrous ammonia does not fit within the customary interpretation of "storage incident to transportation."

Furthermore, Congress explained the narrow scope of this exemption as it applies to EPCRA. Congress stated, "[t]he exemption relating to storage is limited to the storage of materials which are still moving under active shipping papers and which have not reached the ultimate consignee." H.R. CONF. REP. No. 99-962, 99th Cong., 2d Sess. 311 (1986), reprinted in 1986 U.S.C.A.N. 3276, 3404 (Oct. 3, 1986). Such is not the case here.

Second, Multistar submits that it is not subject to the EPCRA filing requirements as a result of the statute's agricultural exemption. In that regard, the term "hazardous chemical" does not include "[a]ny substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer." Section 311(e)(5), 42 U.S.C. § 11021(e)(5). Ans. ¶ 67; Resp. Opp. at 7.

Despite this affirmative defense, in its opposition to complainant's motion for summary judgment, Multistar admits that at least some (EPA claims all) of the anhydrous ammonia is sold for a purpose other than an agricultural one. Multistar states:

> Having had to start practically from scratch ... with aging equipment, rapidly deteriorating buildings and with only hand-to-mouth operating capital, I found the capital intensive farm market limited while a sudden interest was uncovered from end-users of the same anhydrous ammonia as a commercial refrigerant. At least initially, I too found that my delivery equipment could be deployed in that direction while I was severely handicapped to penetrate the farm market for lack of expensive application equipment. I continued to sell into the ag-market where I knew many prospects, and where a limited number of growers owned their own application equipment, *but the "bills", with increasing frequency, were paid with sales of ammonia as refrigerant.*

Resp. Opp. at 2 (emphasis added).

Thus, by respondent's own admission, at least some of the anhydrous ammonia that was handled and stored at the Othello facility would not fall under the agricultural exemption of Section 311(e)(5). Accordingly, Multistar's affirmative defense must fail. The civil penalty to be assessed for the EPCRA violations may be adjusted downward, however, proportionate to the extent that Multistar can show that any of the anhydrous ammonia was sold for agricultural use.[7]

[7] Finally, respondent states that it can not be found liable under either the Clean Air Act or EPCRA because it "reasonably relied on representations by employees of the Environmental Protection Agency that recklessly, negligently and carelessly misled [it] into believing that a business employing ten or fewer persons was exempt from the requirements of those sections." Ans. ¶ 68. Respondent has failed to satisfy the high burden of proof establishing that the government should be estopped from bringing the present action. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (EAB 1997), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999), *vacated pursuant to settlement*, 200 F.3d 1222 (9th Cir. 2000).

III. Order

EPA's motion for summary judgment is **granted**. Multistar is found to have violated Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), as alleged in Count 1, and Section 312(a) of the Emergency Planning Community Right-To-Know Act, 42 U.S.C. § 11022(a), as alleged in Counts 2 through 7. A hearing in this matter will be scheduled for the purpose of determining the appropriate civil penalty. 42 U.S.C. § 7413(d) & 42 U.S.C. § 11045.

_____

Carl C. Charneski
Administrative Law Judge

Issued: June 13, 2005
Washington, D.C.