2/5/96

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
TRA Industries, Inc.,	)	Docket No. EPCRA 1093-11-05-325
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION IN PART

In this case, the United States Environmental Protection Agency ("EPA") has charged TRA Industries, Inc., also known as Huntwood Industries ("Huntwood"), with six counts of violating Section 313(a) of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11023(a). In each of the counts, EPA alleges that Huntwood failed to submit Toxic Chemical Release Inventory Reporting Forms ("Form R's") as required by Section 313(a) of EPCRA. EPA now seeks accelerated decision as to five of the six counts.[1]

For the reasons set forth below, EPA's motion for accelerated decision is granted as to the issue of liability with respect to Counts 1 through 5. By separate order, the penalty phase of Counts 1 through 5, along with Count 6, will be scheduled for hearing.

Section 313(a) requires the owner or operator of a facility subject to the provisions of that section to complete a Form R for toxic chemicals manufactured, processed, or otherwise used at the facility during the preceding calendar year in quantities exceeding a prescribed toxic chemical threshold. The covered toxic chemicals are referenced in Section 313(c) of EPCRA and are listed at 40 C.F.R. § 372.65. The threshold reporting quantities for these chemicals are set forth in EPCRA Section 313(f) and 40 C.F.R. § 372.25. The Form R is to be submitted annually, on July 1, to the Administrator for EPA and to the appropriate State official in the state in which the facility is located.

The crux of EPA's motion for accelerated decision is that with respect to Counts 1 through 5, Huntwood "otherwise used" a toxic chemical in excess of its threshold amount, but failed to

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[1] In EPA's reply, which is accepted for filing, the Agency concedes that a factual issue exists relating to Count 6 of the administrative complaint. Reply at 3. Count 6 involves the 1992 Form R filing requirement for Methyl Isobutyl Ketone. Accordingly, Count 6 cannot be decided by means of an accelerated decision.

submit a Form R within the designated reporting period. In that regard, Count 1 involves the use of Toluene in 1990, with a reporting deadline of July 1, 1991. Counts 2, 3, 4, and 5 respectively, involve the 1991 use of Methanol, Toluene, Xylene, and Methyl Isobutyl Ketone, with a reporting deadline of July 1, 1992. EPA asserts that Huntwood exceeded the 10,000 pound threshold reporting quantity applicable to each of these chemicals for the cited years. EPA further asserts that the company violated Section 313(a) of EPCRA by not submitting Form R's until May 18, 1994, well after the statutory reporting deadline. See Mot. for Acc. Dec. at 3 and EPA Exh. 3.[2]

EPA has established that Huntwood is subject to the provisions of Section 313(a) of EPCRA. Huntwood admits that it has more than 10 full-time employees, that its facility is classified under Standard Industrial Classification Code 2434 (Major Group 24), and as explained below, it exceeded the threshold reporting requirements for the cited toxic chemicals. See 40 C.F.R. § 372.22. Answer ¶¶ 8 & 9. While Huntwood generally denies that it is an owner or operator of a "facility" as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), it offers nothing further to support this assertion. Indeed, respondent's denial that it is a facility subject to EPCRA simply doesn't square with the record, particularly as set forth in the affidavit of its plant manager, John M. Tomzack. Essentially, Mr. Tomzack's affidavit describes Huntwood's efforts to comply with the subject EPCRA reporting requirements. In fact, Huntwood even makes the argument that it has complied with EPCRA's filing requirements for certain toxic chemicals used in 1992. Huntwood Resp. at 3. Accordingly, to the extent that Huntwood is arguing that it is not subject to the provisions of Section 313(a), that argument is rejected.

EPA has established further that Huntwood failed to comply with the Section 313(a)'s reporting requirements as alleged in Counts 1 through 5. The threshold reporting quantity for Toluene (Counts 1 & 3), Methanol (Count 2), Xylene (Count 4), and Methyl Isobutyl Ketone (Count 5) is 10,000 pounds. 40 C.F.R. §§ 272.25 & 65. EPA Exhibit 2 shows that Huntwood "otherwise used" 12,279 pounds of Toluene in 1990 and 41,348 pounds of that chemical in 1991, 14,516 pounds of Methanol in 1991, 29,698 pounds of Xylene in 1991, and 16,282 pounds of Methyl Isobutyl Ketone in 1991. Accordingly, Huntwood was required to submit a Form R for each of

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[2] In paragraph 10 of the administrative complaint, however, EPA asserts that the Form R's involving Counts 1 through 5 were received by the Agency on October 18, 1993. This discrepancy in dates regarding when the Form R's were filed is not important at the liability stage inasmuch as Huntwood's Section 313(a) filings were untimely even using this earlier date.

the toxic chemicals listed in Counts 1 through 5 by July 1 of the succeeding calendar year.

In responding to EPA's motion for accelerated decision, Huntwood does not challenge the Agency's assertion that the chemicals cited in Counts 1 through 5 are toxic chemicals with a 10,000 pound reporting threshold. Nor does respondent argue that it did not exceed the threshold quantities as alleged. Rather, Huntwood defends on the ground that it was unaware of its Form R filing obligation because of limited information provided to it by its suppliers and because the chemical amounts involved were too small to put it on notice that the threshold limits were exceeded. As additional defenses, Huntwood also cites its good faith effort to comply with the EPA inspection which led to the issuance of the present complaint, as well as alleged representations by the EPA inspector (which the inspector denies) that the inspector was pleased with the company's compliance efforts and that no citations or penalties should issue.

Section 22.20 of the Consolidated Rules, 40 C.F.R. § 22.20 allows for the issuance of an accelerated decision "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law...." In this case, there is no dispute as to the fact that Huntwood was required to file the Form R's as alleged by EPA, and that it failed to do so. The question, therefore, is whether EPA is entitled to judgment as a matter of law. EPA has shown that it is so entitled.

The five counts at issue here involve the years 1990 and 1991. By its own admission, Huntwood took no action to determine whether it was required to file Form R's for toxic chemicals used during those years until after being notified by EPA in August, 1993, that its facility would be inspected. See Affidavits of David Somers and John M. Tomzack. Only then did respondent contact its suppliers with respect to the quantities of chemicals provided for the years 1990 and 1991. Resp. to Mot. for Acc. Dec. at 2. This belated inquiry by Huntwood does not constitute compliance with Section 313(a) of EPCRA.

Pursuant to Section 313(a), Huntwood clearly had the statutory obligation to timely submit the Form R's referenced in Counts 1 through 5. Huntwood cannot avoid liability by claiming ignorance of that statutory obligation or by assessing blame on its suppliers for allegedly not providing it with necessary information regarding the subject toxic chemicals. See Apex Microtechnology, Inc., EPCRA-09-92-00-07 (May 7, 1993) at 14 (Respondent is charged with knowledge of the United States Code and Rules).

Moreover, as the EPA points out, as early as February 1, 1991, Huntwood received a Material Safety Data Sheet apparently prepared by a chemical supplier stating that the listed

"Hazardous Ingredients" were subject to the reporting requirements of Section 313(a). See EPA Exh. 2, Attachment D. Accordingly, aside from the statutory provisions of Section 313(a), respondent was additionally put on notice as to the existence of the EPCRA filing requirements prior to the reporting deadlines in each of the five counts involved here.[3]

Next, Huntwood's arguments that it acted in good faith in cooperating with the EPA investigation and that it detrimentally relied upon the statements of the EPA inspector likewise must fail. First, this "good faith" argument has no bearing on the issue of liability. It is more appropriately raised in the penalty portion of this case. Second, Huntwood cannot show how statements purportedly made by an EPA inspector in 1993 adversely affected its ability to meet the subject Section 313(a) reporting deadlines of July 1, 1991, and July 1, 1992.[4]

Finally, the EPA additionally seeks accelerated decision in this case on the proposed civil penalty for Counts 1 through 5. The EPA's motion in this regard is denied. The pleadings submitted by Huntwood are sufficient to place the appropriate civil penalty assessment at issue.

ORDER

Accordingly, the motion for accelerated decision filed by the United States Environmental Protection Agency is granted with respect only to the liability issue in Counts 1 through 5. As to each of those five counts, it is held that Huntwood Industries (also known as TRA Industries, Inc.) violated Section 313(a) of EPCRA. A hearing will be scheduled to determine the appropriate civil penalty for these five violations, as well as to resolve the liability and penalty issues presented in Count 6.

Carl C. Charneski
Administrative Law Judge

Issued: February 5, 1996
Washington, D.C.

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[3] Also, EPA Exhibit 11 (Affidavit of John M. Davis), generally sets forth a history of "EPA's efforts to notify the regulated community of EPCRA's reporting requirements."

[4] For this reason, Huntwood's argument that it was prejudiced by EPA's canceling of a May 8, 1993, EPA Region 10 Workshop for Industry, scheduled for Spokane, Washington, likewise has no merit with respect to Counts 1 through 5.

IN THE MATTER OF TRA INDUSTRIES, INC. Respondent
Docket No. EPCRA 1093-11-05-325

Certificate of Service

I certify that the foregoing Order Granting Motion for Accelerated Decision in Part, dated 2/5/96, was sent this day in the following manner to the below addressees.

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