UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Trinity Industries, Inc.	)	**Docket No. EPCRA-6-99-006**
	)	
Respondent	)	
	)	

ORDER DENYING MOTION TO DISMISS AND FOR PARTIAL ACCELERATED DECISION

On September 10, 1999, Complainant, the United States Environmental Protection Agency ("EPA"), issued a Complaint and Notice of Opportunity for Hearing to Respondent, Trinity Industries, Inc., alleging violations of Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. 11023.[1] The Complaint sought a civil penalty in the amount of $225,183 against Respondent, under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c). Respondent filed its Answer and Request for Hearing on October 8, 1999.

By motion dated June 15, 2000, Respondent moved, pursuant to 40 C.F.R. Section 22.20, to dismiss all counts of the Complaint[2] and for partial accelerated decision on liability in the above-captioned matter. Specifically, the Motion to Dismiss asserts that the Administrator lacks authority to assess and collect a civil penalty against Respondent, and by initiating this

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[1]EPCRA Section 313 provides, *inter alia,* that the owner or operator of a facility must complete a toxic chemical release form for each toxic chemical listed under subsection (c) of this section that was "manufactured, processed, or otherwise used" in quantities exceeding the established threshold during the preceding calendar year at such facility. 42 U.S.C. Section 11023 (a).

[2]The Complaint alleges 15 Counts of violations of Section 313(a) of EPCRA, 42 U.S.C. Section 11023(a), 40 C.F.R. Part 372. In each of the 15 Counts, Complainant alleges that Respondent failed to timely submit toxic chemical release inventory forms ("Forms R").

action, Respondent's procedural due process rights have been violated. Alternatively, Respondent moves for Partial Accelerated Decision on Counts VIII, IX, X, and XI of the Complaint,[3] alleging that it produced less than the threshold amount of cadmium for calendar years 1994 through 1997. Therefore, as to these counts, Respondent claims that it was not required to report releases to EPA under Section 313 of EPCRA. Respondent also moves for Partial Accelerated Decision on Counts XII, XIII, XIV, and XV,[4] alleging that it was entitled to the article exemption found in 40 C.F.R. § 372.3 and 40 C.F.R. § 372.38(b).[5] Complainant

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[3]Counts VIII, IX, X, and XI of the Complaint allege that Respondent failed to report cadmium quantities at the Trinity facility in a timely manner for calendar years 1997, 1996, 1995, and 1994, respectively.

[4]Counts XII, XIII, XIV, and XV of the Complaint allege that Respondent failed to report in a timely manner lead quantities at the Trinity facility for calendar years 1997, 1996, 1995, and 1994, respectively.

[5]40 C.F.R. § 372.3 provides that an article is a manufactured item:

> (1)[w]hich is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments.

40 C.F.R. § 372.38(b), Articles, provides:

> If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25 or determining the amount of release to be reported under § 372.30. This exemption applies whether the person received the article from another person or the person produced the article. However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), processed, or otherwise used at the covered facility other than as part of the article, in excess of an applicable threshold quantity set forth in § 372.25, the person is required to report under § 372.30. Persons potentially subject to this exemption

filed a Response to Respondent's Motion on August 30, 2000. **HELD:** Respondent's Motion to Dismiss and for Partial Accelerated Decision is **DENIED.**

I. MOTION TO DISMISS

A. Standard For Motion to Dismiss

Pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Section 22.26(a), the Administrative Law Judge ("ALJ"), upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

B. Discussion

In its Motion, Respondent argues that the Complaint should be dismissed because the Administrator lacks subject matter jurisdiction over this matter. Respondent asserts that Section 325(c)(4) of EPCRA, 42 U.S.C. Section 11045(c)(4), which states that "[t]he Administrator may assess any civil penalty for which a person is liable...by administrative order or may bring an action to assess and collect the penalty in the United States district court...", denies the Administrator, the ability to formulate such administrative order and assess a civil penalty, by way of administrative action within the EPA. By bringing an administrative proceeding rather than issuing an administrative order, or initiating an action in federal district court, Respondent argues that its due process rights are violated.

In response, EPA cites Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.,

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> should carefully review the definitions of *article* and *release* in § 372.3. If a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of *article.*

467 U.S. 837 (1984), in arguing that Congress' intention in the statute was clear with respect to the administrator's ability to assess a civil penalty, and that the absence of the word "proceedings" from Section 325(c)(4) of EPCRA does not mean that such proceedings were not "contemplated by the statute." Quoting Morton v. Ruiz, 415 U.S. 199,231 (1974), EPA also noted that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." EPA also cites the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et. seq., for the proposition that an agency may determine its own procedures. EPA further notes that Section 551(7) of the APA, 5 U.S.C. § 551(7), defines "adjudication" as the "agency process for the formulation of an order," and concludes that agency proceedings are therefore necessary in determining the content of any such order.

The Court concurs with EPA that agency proceedings are proper, if not necessary, in formulating an administrative order. Through administrative proceedings, the parties are allowed an opportunity to be heard and to participate in a hearing on the violation(s) alleged in a complaint before an impartial ALJ. Nothing in the statute prohibits the initiation of agency proceedings in formulating an administrative order, and the case law noted by EPA and the APA supports the view that such action is permissible. Additionally, Respondent's reliance on the excerpts from various Supreme Court cases on page four of its Memorandum in Support of Motion to Dismiss and for Partial Accelerated Decision, is misplaced. Respondent quotes these cases to support the proposition that EPA may not exceed the authority that Congress granted it by assessing and collecting a penalty.

Respondent has failed to show however, that the EPA has exceeded its authority by

initiating administrative proceedings to assess and collect civil penalties. Moreover, the Court notes that the proper time to challenge the validity of regulations delegating the Administrator's authority to issue administrative orders through agency proceedings is prior to promulgation of such regulations. Respondent's arguments on this issue are thus unpersuasive and of little merit.

With respect to Respondent's due process argument for dismissing the Complaint, it is a well-established principle in administrative law that it is inappropriate for ALJs to decide questions of constitutional law regarding statutes and regulations. See Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures...."); In re United States Air Force Tinker Air Force Base, Docket No. UST-6-98-002-AO-1, 1999 WL 362884, at *7 (EPA May 19, 1999)("...questions as to whether or not a provision of a statute or regulation is constitutional cannot be entertained in administrative enforcement proceedings") citing Public Utils. Comm'n Cal. v. United States, 355 U.S. 534,539 (1958)).

For these reasons, and because Respondent has failed to demonstrate that Complainant does not have a right to relief, Respondent's Motion to Dismiss is DENIED.

II. MOTION FOR PARTIAL ACCELERATED DECISION

A. Standard For Accelerated Decision

Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes the ALJ to "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."

A long line of decisions by the EPA's Office of Administrative Law Judges ("OALJ") and the Environmental Appeals Board ("EAB") has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P."). See. e.g., In re CWM Chem. Serv., TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995); In re Harmon Elecs., Inc., RCRA Docket No. VII-91-H-0037, 1993 EPA ALJ LEXIS 247 (Aug. 17, 1993).

The party moving for summary judgment bears the burden of showing no genuine issue of material fact exists. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hosp. Ass'n, 14 F.3rd 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 256 (1986).

Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact exists in a matter. A party responding to a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford. Inc., TSCA Docket No. V-C-052-92, 1994 EPA ALJ LEXIS 16 (Nov. 28, 1994). "[B]are assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp. 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett,

477 U.S. 317,324 (1986); 40 C.F.R. Section.22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See Roberts v. Browning 610 F.2d 528, 536 (8th Cir. 1979).

B. Discussion

Counts VIII, IX, X and XI

In its Motion, Respondent argues that it is entitled to accelerated decision as to Counts VIII, IX, X, and XI of the Complaint because, in its view, Forms R were not required to be filed for cadmium for the period of 1994 through 1997. As set forth in Section 313(f)(l)(B)(iii) of EPCRA, 42 U.S.C. 11023(F)(l)(B)(iii) and 40 C.F.R. Section 372.25(a), the reporting threshold amount for toxic chemicals "manufactured or processed" at a facility on or before July 1, 1990, and for each form thereafter, is 25,000 pounds. The reporting threshold for a toxic chemical "otherwise used" at a facility is 10,000 pounds for the applicable calendar year. 40 C.F.R. §372.25(b). As grounds for its Motion, Respondent argues that cadmium use during the period in question was in fact, "processed" and not "otherwise used" and was thus below the threshold amount for reporting. Respondent therefore maintains it is not liable under these counts and that an accelerated decision should be granted.

In response to these arguments, EPA maintains that Respondent was indeed required to submit Forms R for cadmium use in a timely manner for the years in issue. EPA asserts that Respondent has failed to provide sufficient facts and/or evidence in its pleading to substantiate its position. Conversely, EPA cites considerable evidence to establish that there are, at the very least, genuine issues of material fact as to whether cadmium was "processed" or "otherwise

used" at Respondent's facility during the times in issue. As such, EPA asks that accelerated decision as to Counts VIII, IX, X, and XI of the Complaint be denied.

Subsequent to being notified of an EPA inspection of the Respondent's facility to determine compliance with EPCRA 313 reporting requirements, the Respondent submitted Forms A and Forms R for a number of chemicals, including cadmium for reporting years 1994-1997. (See, Complainant's Prehearing Exchange, Exhibit 13 and 14, Inspection Reports, Attachment A). The Forms R for cadmium, submitted by the Respondent, all identify cadmium as a toxic chemical that was "otherwise used" as described in Section 3.3, page 2 of 5, of each Form R respectively, under "Activities and Uses of the Toxic Chemical at the Facility" (Exhibit 14, Attachment 16). Respondent certified the accuracy of such information. There are no similar certifications attesting that cadmium for the years in question were "processed."

Moreover, the affidavit of David West, dated June 15, 2000, which was submitted by Respondent in support of its motion, fails to sufficiently address whether cadmium usage at the facility was "processed" or "otherwise used" (Respondent's Memorandum, Appendix A). The amounts noted by Mr. West, only reflect the amount of cadmium contained in zinc dross and zinc skimmings for the years 1994, 1995, 1996 and 1997; not the amount actually released at the facility.[6] Rather, the amount of cadmium for each respective year is set forth in an August 23, 1999, letter from Mr. West to EPA official Rajen Patel, wherein cadmium amounts "used" were duly noted as follows:

1994-cadmium=12,577 lbs=threshold

1995-cadmium=13,304.11 lbs=threshold

[6] Mr. West's affidavit states "[a]lthough my August 6, 1999 letter uses the phrase "cadmium released" the amounts of cadmium set forth therein were not released. Those amounts reflect the cadmium at the Facility for each respective year."

1996-cadmium=13,124.65 lbs=threshold

1997-cadmium=14,026.84 lbs=threshold

(Respondent's Pre-Hearing Exchange, Exhibit 7; Attachment B). The above amounts clearly demonstrate that the cadmium in question exceeded the threshold amounts for reporting toxic chemicals which are "otherwise used."

Based on the foregoing arguments and evidence, the Court finds that Respondent has not met its burden of demonstrating that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. In that a material factual dispute exists as to this issue, Respondent's motion for accelerated decision as to Counts VIII, IX, X, and XI is **DENIED.**

Counts XII. XIII. XIV and XV

Additionally, Respondent seeks accelerated decision as to Counts XII, XIII, XIV, and XV of the Complaint, arguing that it was not required to submit Forms R for lead for the calendar years 1994 through 1997. Respondent contends that it was not required to report lead quantities because the lead from its facility falls within the scope of the "article exemption" found in 40 C.F.R. § 372.3 and 40 C.F.R. § 372.38(b).[7]

In its Response, Complainant maintains that the lead from Respondent's facility is not covered by the article exemption. Complainant takes issue with Respondent's characterization of lead as an "article." Complainant contends that Respondent knew it was not entitled to the article exemption for lead, as Respondent submitted a Form R after the July 1 deadline and had received a prior determination from EPA that the lead would not be exempt under this provision.

As was the case with cadmium, Respondent submitted Forms R for lead for reporting years 1994 through 1997, on August 26, 1998 (Complainant's Pre-Hearing Exchange, Exhibits

[7] *See supra note 5.*

13 and 14). In each Form R respectively, under "Activities and Uses of the Toxic Chemical at the Facility", subsection 3.3, page 2 of 5, Respondent described its use of lead as "otherwise used." Respondent made this election even though it could have described its use of lead as "processed as an article component" under subsection 3.2.

The regulations at 40 C.F.R. Section 372.38(b) provide an exemption for manufacturing items generally referred to as articles. If a toxic chemical is present in a manufactured item meeting the definition of an article, a regulated facility is not required to consider the quantity of toxic chemical present in such article for the purposes of threshold determination and release reporting.

By the time Respondent had submitted its Forms R on August 26, 1998, however, it had already been advised by EPA headquarters in Washington, D.C., on January 15, 1998, that from the description provided, EPA believed that "the lead does not qualify for the article exemption." (See Respondent's Memorandum of Support, Appendix A, Exhibit B, EPA Response to December 22, 1997, letter from Scott Spear of Trinity Industries by Maria J. Doa, Ph.D., Chief of Toxic Release Inventory Branch). There is no indication in the record that Respondent objected to this opinion prior to the filing of its Answer on October 8, 1999.

The record does not contain any certifications attesting that the lead at the Respondent's facility for the years in question was "processed." Nor does the affidavit of David West sufficiently address the issue of how Respondent's lead usage fits within the article exemption (Respondent's Memorandum, Attachment A). Finally, Respondent has failed to offer sufficient evidence under 40 C.F.R. Section 372.3 criteria, regarding the physical characteristics of an article; i.e., the specific shape or design of the article during manufacture; the end use functions of the purported article; and the disposition of emissions under conditions of processing.

In light of the above evidence, there exists a genuine issue of material fact as to whether Respondent was entitled to the "article exemption" and thus not required to submit a Form R for lead for the calendar years 1994 through 1997. Accordingly, Respondent's Motion for Accelerated Decision as to Counts XII, XIII, XIV, and XV of the Complaint, is **DENIED.**

Stephen J. McGuire
Administrative Law Judge

November 29, 2000
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this **ORDER DENYING MOTION TO DISMISS AND FOR PARTIAL ACCELERATED DECISION,** dated November 29, 2000, **IN RE: TRINITY INDUSTRIES, INC., DOCKET NO. EPCRA-6-99-006,** was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).

Rachele D. Jackson
Legal Staff Assistant

Date: November 29, 2000

ADDRESSEES:

Frederick W. Addison, III, Esq.,
Locke Liddell & Sapp, LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776

Gary Smith, Esq.,
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. VI
1445 Ross Avenue, Suite 2200
Dallas, TX 75202-2733

Ms. Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733