9/19/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Neles-Jamesbury, Inc.	)	Docket No. EPCRA-I-93-1018
	)	
Respondent.	)	

Order On Complainant's Motion to Strike and Respondent's Motion to Supplement Prehearing Exchange

Respondent in this case is charged with failing to file toxic chemical release forms ("Form R") for several toxic chemicals as required by the Emergency Planning and Community-Right-to-Know Act of 1986 ("EPCRA"), section 313, 42 U.S.C. §11023, and the regulations thereunder, 40 C.F.R. Part 372. The complaint is one for civil penalties brought pursuant to EPCRA, section 325(c), 42 U.S.C. §11045(c).

Complainant's motion to strike is addressed to documents Respondent has submitted in making the prehearing exchange ordered by the administrative law judge then presiding. Complainant has moved to strike several of these documents on the grounds that they are either improper or irrelevant or both to this proceeding. Complainant states that its motion is made pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, which deals with striking from any pleading, any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

These proceedings are governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22. The Federal Rules of Civil Procedure

are useful interpretive guides but they are no more than that.

Complainant's motion is misdescribed. In effect, Complainant is asking for a determination in limine upon the admissibility of these documents rather than waiting until they are actually offered into evidence. Admissibility is governed by 40 C.F.R. 22.22, making admissibile "all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value...."

The complaint alleges a failure by Respondent to file Form R for its manufacture, processing or otherwise using the toxic chemicals, chromium, nickel and copper at two facilities operated by it in Massachusetts during the calendar years 1987, 1988, 1989 and 1990.

The facts as stated in the complaint and answer show that Respondent owns and operates facilities that use a stainless steel alloy containing nickel and chromium, and brass, an alloy containing copper, in processing and assembling metal valves and related components. Respondent admits that the aggregate quantity of nickel, copper and chromium in the metal alloys used during the years in question exceed the established threshold quantities for these chemicals but raises the issue of whether its processing of chromium, nickel and copper as part of an article is not exempt pursuant to 40 C.F.R. section 372.38(b). That rule states in pertinent part as follows:

> 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.... This exemption applies whether a 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.

"Article" is defined in 40 C.F.R. section 372.3 as follows:

> Article means a manufactured item: (1) Which 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 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.

Complainant points out that it was and is the EPA's position that chromium, nickel and copper when contained in stainless steel and other alloys do not come under the Articles exemption and that the EPA in 1993, denied petitions to exempt reporting of these three chemicals contained in metal alloys.[1] The appropriateness of assessing a penalty, however, is determined not only by whether the EPA's interpretation of its regulation is a permissible one, but also by whether the EPA's regulation gives fair notice to the regulated community that the substances are not exempt articles. General Electric Co. v. United States Environmental Protection Agency, 53 F 3d 1324, 1330-1331 (D.C. Cir. 1995). Respondent's Exhibits 10 and 13 would appear to be relevant to this latter issue. Complainant has not really addressed this issue in its motion to strike these documents.[2]

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[1] 58 Fed. Reg. 34738 (Jun 29, 1993).

[2] Complainant claims that Respondent has included its Exhibit 10 in its prehearing exchange to show that the EPA has targeted Respondent for enforcement. Respondent denies this and states that document was included to show the confusion that exists within the EPA and the regulated community regarding what facilities had to

If it is shown that the rule does give adequate notice, review of the merits of the EPA's decision to not exempt the substances from reporting would probably be outside the jurisdiction of this civil penalty proceeding. But that does not mean that the documents would still not be relevant to determining the appropriate penalty.

Complainant argues that neither the statute nor the Enforcement Response Policy for EPCRA section 313, allow for a penalty reduction based upon the relative toxicity of the listed chemical. This may be true, but the exemption under the regulation does take into account whether the substances when processed as components of alloys are potentially harmful to humans or the environment. EPCRA, section 325(c) provides for a civil penalty in an amount not to exceed $25,000 for each violation. The amount of the penalty is, thus, a discretionary determination and certainly subject to the test of reasonableness. The Policy, while entitled to weight, is not controlling.[3] The facts specific to each case must also be considered. I am not prepared, accordingly, to rule at this point in the proceeding that documents bearing upon the toxicity of listed substances in the alloys, such as Respondent's Exhibits 19 and 20, cannot be relevant to determining the amount of the proposed penalty.

Two of respondent's documents (Exhibits 21 and 23) are included in order to meet claims that Respondent anticipates Complainant may make in justification of its proposed penalty.

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file Form Rs for the substances at issue.

[3] 40 C.F.R. §22.27 (b).

Complainant disclaims any present intention to make such claims but reserves the right to do so if evidence is discovered relating thereto. If the claims are made, the exhibits are relevant. Accordingly, the motion to strike is denied. The admissibility of these exhibits will be determined at the time they are offered into evidence and not on the assumption that certain events will not occur.

Respondent's Exhibit 22 shows how Respondent ascertained the quantities of the metals at issue in 1992. Respondent says the document is relevant to its calculations for the years at issue and that it will lay a proper foundation for the document at the hearing. The document is found to be sufficiently relevant so as not to be subject to a motion to strike at this time.

Complainant's objection to Respondent's Exhibit 12, however, is well taken. That document refers to Respondent's offer to meet with Complainant to discuss settlement. Respondent's explanation for the document does not show its relevancy, since I do not understand Complainant to be alleging that Respondent did not meet with Complainant to discuss settlement.

Complainant's motion to strike Respondent's Exhibit 12 is granted. Complainant's motion to strike the other information submitted in Respondent's prehearing exchange is denied. I express no opinion on the actual merits of Respondent's defenses. This is

a matter to be determined after all the evidence is in.

Respondent's motion to supplement its January 19, 1994, prehearing exchange is granted.

Gerald Harwood
Gerald Harwood
Senior Administrative Law judge

Dated: September 19, 1995

IN THE MATTER OF NELES-JAMESBURY, INC., Respondent
Docket No. EPCRA-I-93-1018

Certificate of Service

I certify that the foregoing Order, dated September 19, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Ms. Mary Anne Gavin
Regional Hearing Clerk
U.S. EPA, Region I
J. F. Kennedy Federal Building
Boston, MA 02203-2211

Copy by Regular Mail to:

Attorney for Complainant:

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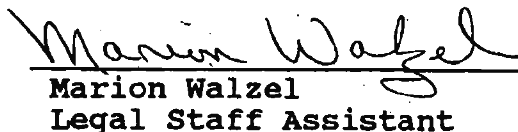

Marion Walzel
Legal Staff Assistant

Dated: September 19, 1995