UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

WOODCREST MANUFACTURING, INC. DOCKET NO. 5-EPCRA-96-007

Respondent

**ACCELERATED DECISION** 1/

Under consideration is complainant's motion for accelerated decision, filed May 8, 1997. On January 24,1996, Complainant filed an administrative Complaint alleging that Respondent, Woodcrest Manufacturing, Inc., had committed three separate violations of Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11023. These violations were identified by complainant during an inspection of respondent's facility at 217 East Canal Street, Peru, Indiana. The inspection was conducted by a U.S. EPA inspector on June 17, 1992.

The complaint identifies three violations: respondent's failure to file a Form R for three toxic chemicals that respondent "otherwise used" at its Peru, Indiana, facility during calendar year 1990 in amounts above the 10,000 pound reporting threshold set by EPCRA Section 313 (f) (1) (A), 42 U.S.C. § 11023 (f) (1) (A). The complaint alleges that during calendar year 1990 respondent released or "otherwise used" at its facility toxic chemicals in the following amounts: n-butyl alcohol - 21,896 pounds; toluene - 137,097 pounds; xylene - 40,803 pounds. As a consequence of this toxic chemical use, Section 313 of EPCRA required that respondent file three separate calendar year 1990 Form Rs by July 1, 1991 with U.S. EPA or with the State of Indiana. As of the January 24, 1996, the date that the complaint was filed, respondent had not filed the Form Rs either with U.S. EPA or with the State of Indiana.

Respondent's answer, which was filed on February 9, 1996, admitted every general and specific allegation in the complaint, with one exception. Respondent asserted in its answer that it had used 55,496 pounds of toluene during calendar year 1990, rather than the 137,097 pounds of toluene alleged in paragraph 24 of the complaint. However, respondent later conceded when it filed

the calendar year 1990 Form R, on January 30, 1997, that it had "otherwise used" (and had released) the 137,097 pounds of toluene, in 1990, alleged in paragraph 24 of the complaint.

THE RESPONDENT IS LIABLE FOR THE VIOLATIONS ASSERTED IN THE COMPLAINT

All of the findings of fact and conclusions made in this decision are based on stipulations of fact made by the parties. Respondent Woodcrest Manufacturing, Inc. owned and operated during the entire calendar year 1990, the period relevant to the complaint, a facility at 217 East Canal Street, Peru, Indiana. The respondent owned and operated the facility from a date prior to calendar year 1990 to the present. During 1990, respondent employed at the facility the equivalent of at least 10 full-time employees with total paid hours equal to or in excess of 20,000 hours. During 1990, respondent employed at the facility at least 90 people on a full-time basis, and employed at least 150 people on a full-time basis at all of its locations. In 1990, respondent's total sales revenues were at least $8 million and in 1996, the total sales revenues were at least $11 million. Respondent's facility, during 1990, was covered by a primary Standard Industrial Classification Code 2511, which is a Standard Industrial Classification Code within the range of SIC Codes 20 through 29.

During calendar year 1990, respondent's facility "otherwise used" (as defined by 40 C. F. R. § 372.3) toxic chemicals identified by Section 313 (c) of EPCRA and listed at 40 C. F. R. § 372.65, in quantities exceeding the thresholds for reporting set forth at Section 313 (f) (1) of EPCRA and 40 C. F. R. § 372.25 (b). During the calendar year 1990, respondent used at the facility at least 21,878 pounds of n-butyl alcohol, CAS No. 71-36-3. N-butyl alcohol, CAS No. 71-36-3, is a toxic chemical that is listed at 40 C. F. R. § 372.65 and is on the list identified in Section 313 (c) of EPCRA. Respondent did not submit to the U. S. EPA or the State of Indiana a Form R for the n-butyl alcohol for the calendar year 1990 by July 1, 1991. Respondent had not made the filing by January 24, 1996, the date the complaint was issued, and did not make the filing for 1990 until January 30, 1997.

During the calendar year 1990, respondent "otherwise used" at the facility at least 136,491 pounds of toluene, CAS No. 108-88-3. Toluene is a toxic chemical that is listed at 40 C. F. R. § 372.65 and is on the list identified in Section 313 (c) of EPCRA. Respondent did not submit to U.S. EPA, and had not submitted to the State of Indiana, a Form R for toluene for the calendar year 1990 by due date, July 1, 1991. Nor had respondent made the filing by the date of the complaint. Respondent made the filing for 1990 on January 30, 1997. Respondent

stated on the Form R that during 1990 the facility released into the air 136,491 pounds of toluene.

Respondent "otherwise used" at the facility, during 1990, at least 40,965 pounds of xylene, CAS No. 1330- 20-7. Xylene, CAS No. 1330-20-7, is a toxic chemical that is listed at 40 C. F. R. § 372.65 and is on the list identified in Section 313 (c) of EPCRA. Respondent did not submit to U.S. EPA, and had not submitted to the State of Indiana, a Form R for xylene for the calendar year 1990 by the due date, July 1, 1991. Nor had Respondent made the filing by the date of the complaint. Respondent stated on the Form R that during 1990 the facility released into the air 40, 465 pounds of xylene.

During the calendar year 1988, respondent "otherwise used" at the facility more than 10,000 pounds of each of the toxic chemicals n-butyl alcohol, xylene, and toluene. Respondent never filed Form Rs for the calendar year 1988, but U. S. EPA did not issue a complaint for respondent's failure to submit Form Rs for calendar year 1988. Respondent should have filed Form Rs in 1989 for the toxic chemicals n-butyl alcohol, xylene, and toluene, but it did not.

Respondent did not derive any significant economic benefit from its failure to submit Form Rs for the toxic chemicals n-butyl alcohol, xylene, and toluene.

Based on the stipulated facts, the complainant urges that the three violations of EPCRA Section 313 warrant assessing a $27,000 civil penalty against the respondent. Respondent filed a response to complainant's motion for accelerated decision but the filing does not address the stipulations of fact on which complainant relies. Respondent's response does not dispute the request or oppose the merits of the arguments made. The stipulations establish liability for each of the three counts stated in the complaint.

THE $27,000 PENALTY SOUGHT BY THE COMPLAINANT IS APPROPRIATE

In justifying the penalty sought in this proceeding, the complainant submitted with its rehearing exchange the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (August 10, 1992) (EDP). Complainant points out that the reporting requirement which respondent violated has two purposes: one is to notify Federal and state governments of the location and amount of toxic chemicals it "otherwise used" so that they can plan for, and react to, emergencies when they occur and to inform the public about toxic chemicals that are present at the facility and released in the community. Complainant is required by statute, pursuant Section 313 (j) of

EPCRA, 42 U. S. C. § 11023 (j) to compile the data reported on the Form Rs into a national data base which is made available to the public on the Internet. Complainant argues that respondent's failure to report its use and release into the atmosphere of substantial amounts of the toxic chemicals n-butyl alcohol, xylene, and toluene frustrated the goals of EPCRA. Complainant states that respondent's failure to report the release of toxic chemicals resulted in "significant actual harm" to the statutory requirements of EPCRA. Complainant believes that the failure to report created a major potential for harm and that violations in this case were of the most serious type and, therefore, give rise to Circumstance I of EDP.

EDP states that the size of the penalty should relate to the quantity of toxic chemicals that are used and/or released above the reporting threshold of 10,000 pounds by a facility when it is not reported within the required time. Complainant also considered, pursuant to EDP, the number of employees and total corporate sales in determining whether the size of the penalty would deter the respondent from further violations. The underlying rationale of EDP is that it takes a large penalty to deter a large company from violating the toxic chemical reporting requirement while a small company might feel a sufficient impact from a much smaller penalty. The amount of toxic chemicals released and the size of the violator are assigned a rating of A, B, or C. Level A violations involve the use or release of toxic chemicals that exceed ten times the reporting threshold at a facility that have more than 50 employees with corporate sales of more than $10 million.

The n-butyl alcohol "otherwise used" or released by the respondent in 1990 was two times higher than the reporting threshold, the toluene was 13 times higher than the reporting threshold, and the xylene released was four times the reporting threshold. Respondent employs 90 full-time employees at the facility and 150 employees total. It had corporate sales of $8 million in 1990. Under these facts, the gravity assigned by the complainant to the release of the toluene is level B, the xylene and n-butyl alcohol is level C. Based on the gravity assessment and respondent's four-year late filing, complainant requests that respondent's failure to report that it "otherwise used" and released toluene warrants a $17,000 penalty, and a $5,000 penalty each for its failure to report that it "otherwise used" and released xylene and n-butyl alcohol. Complainant urges that the penalty sought is lenient since it could have sought under EPCRA's penalty provision, a similar amount for each day of the four year period that respondent failed to file the 1990 report.

Complainant argues that there should be no adjustment downward in the $27,000 penalty. To support this contention in the face of no opposition, complainant points out that respondent stipulated that it is able to pay the penalty. The record reflects that respondent's $8 million in corporate sales increased nearly 30 percent between 1992 and 1996 to $11 million. At the same time, complainant does not seek any upward adjustment of the penalty sought at the time of the complaint on the basis of an economic benefit that might have been realized by the respondent from non-compliance. Complainant also points out that respondent has no prior history of a finding of non-compliance, although respondent stipulated that it should have filed, and did not file, Form R reports for the same toxic chemicals in 1988 and 1989. 2/

Complainant concedes that respondent was cooperative during the 1992 inspection. But complainant urges that respondent has not been diligent in pursuing settlement discussions. Complainant's argument, in this regard, is supported by the observations of the presiding officer. At an off-the-record conference on May 23, 1997, the presiding officer offered respondent another opportunity to reach an acceptable settlement before this motion was considered. Respondent reported on May 27, 1997, in another off-the-record conference, that it believed it had no obligation to settle. Following that conference, respondent was provided with additional time, until June 10, 1997, to effectuate a settlement before this motion would be considered. There is no evidence that respondent made any effort to settle, despite the fact that it had stipulated to every material fact alleged in the complaint. Complainant also notes that respondent did not come into compliance until four years after the inspection.

Complainant points out that respondent has argued, although not in response to this motion, that it would like to present testimony that the inspector did not ask respondent to file the Form Rs for 1988, 1989, or 1990 or inform it about its legal obligation to do so. Complainant urges that the testimony is irrelevant to respondent's degree of culpability. Complainant points out that reports were long overdue at the time of the inspection and were not even filed until a year after the complaint in this proceeding was issued. Complainant notes that there is no obligation on the part of the inspector to apprise the respondent of its obligations under the EPCRA and the rules implementing EPCRA. The complainant explains that the respondent did not voluntarily report the violations; they were uncovered by the inspector. Respondent has not asserted any factors to be considered in assessing the penalty.

The respondent has not provided any arguments for lowering the penalty. The complainant has fully justified the penalty assessed in the complaint with reference to the statutory criteria. For the unopposed reasons asserted by the complainant, a penalty of $27,000 will be assessed against the respondent for the three violations of the reporting requirements of Section 313 of EPCRA.

ACCORDINGLY IT IS ORDERED that the motion for accelerated decision IS GRANTED because, in light of the stipulations of fact and respondent's lack of opposition, there is no genuine issue of material fact.

IT IS FURTHER ORDERED that the motion in limine, filed May 9,1997 IS GRANTED.

IT IS FURTHER ORDERED that the respondent's motion to disqualify complainant counsel Jacqueline Kline IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that respondent's motion for production of documents IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that because respondent committed three separate violations of Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11023, respondent, Woodcrest Manufacturing, Inc., is assessed a penalty of $27,000 as follows: $5,000 each for Counts I and III and $17,000 for Count II.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

The First National Bank of Chicago

EPA Region V

(Regional Hearing Clerk)

P.O. Box 70753

Chicago, IL 60673

A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

Failure by respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties and amicus curiae within twenty (20) days after the initial decision or accelerated decision is served upon the parties.

Edward J. Kuhlmann

Administrative Law Judge

June 13, 1997

Washington, D. C.

[1/]The complainant was represented in this proceeding by Jacqueline S. Kline, Esq. The respondent was represented by Mark Woodhams, Vice President of Sales for respondent until May 23, 1997 and, thereafter, by Richard S. VanRheenen, Esq.

2/ Respondent in its prehearing exchange stated that it would present testimony from Howard Holdsclaw who would testify that complainant's counsel told Holdsclaw that respondent need not file a Form R for 1988 and 1989. Complaint has moved to exclude that testimony because it is not relevant to the issue presented by the complaint, namely, whether respondent filed its Form R for 1990. Complainant's motion to exclude Holdsclaw's testimony on that ground is meritorious. What complainant's counsel may have said to respondent does not excuse its failure to file the Form Rs for 1988 and 1989. The Form Rs were due on July 1 of year following the reporting period. The filing dates for 1988 and 1989 preceded the inspection in 1992, which precipitated the complaint in this proceeding. There is no allegation that complainant's counsel had any contact with respondent in 1989 or 1990. Moreover, advice by agency personnel which is contrary to law cannot be relied on by a respondent as an excuse for noncompliance.