

8/9/91

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
R.C.A. RUBBER COMPANY	)	
Akron, Ohio	)	Docket No. EPCRA-031-1990
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR  
PARTIAL ACCELERATED DECISION CONCERNING LIABILITY

This proceeding commenced on April 4, 1990, with the filing by Region V, U.S. Environmental Protection Agency (sometimes EPA or complainant), of a complaint against R.C.A. Rubber Company (respondent) alleging, inter alia, violation of section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, (EPCRA), 42 U.S.C. § 11023. Specifically, complainant alleges that respondent violated established reporting thresholds for toxic chemicals mandated by section 313(g) of EPCRA, 42 U.S.C. § 11023(g), by failure to timely submit a Toxic Chemical Release Inventory Form (Form R) for zinc oxide to the Administrator of EPA and to appropriate State officials in Ohio on or before July 1, 1988.<sup>1</sup> Pursuant to section 325(c) of EPCRA, 42 U.S.C. § 11045(c),

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<sup>1</sup> Pursuant to section 313(a) of EPCRA, 42 U.S.C. § 11023(a), submission of Form R is required for owners and operators of facilities covered by the statute. Respondent admits to being an operator of a "facility" as defined by section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 372.3. Respondent's amended answer dated August 15, 1990, at 1.

complainant proposes the assessment of a civil penalty in the amount of \$17,000 against respondent.

Beginning at the beginning, in its answer, respondent denied the allegations contained in the complaint and, asserted further, that it was exempt from EPCRA's reporting requirements. Respondent admits to purchasing and processing 165,000 pounds of zinc oxide during calendar year 1987.<sup>2</sup> It maintains, however, that the substance was used to produce mixtures in which zinc oxide was below one percent of the mixture permitted by 40 C.F.R. § 372.38. Respondent argues it "was not required to consider the quantities of zinc oxide present in said mixtures when determining whether the federally-required threshold for reporting had been met and was exempt from the reporting requirements of 40 C.F.R. § 372.30."<sup>3</sup> In support, respondent relies on the de minimis exemption of 40 C.F.R. § 372.38(a), or in the alternative, the articles exemption of section 372.38.(b). Section 372.38(a) provides in pertinent part:

(a) De minimis concentrations of a toxic chemical in a mixture. If a toxic chemical is present in a mixture of chemicals at a covered facility and the toxic chemical is in a concentration in the mixture which is below 1 percent of the mixture, . . . a person is not required to consider the quantity of the toxic chemical present in such mixture 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 . . . produced the mixture . . . or

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<sup>2</sup> Id. at 2.

<sup>3</sup> Id.

caus[ed] a chemical reaction which resulted in the creation of the toxic chemical in the mixture . . . .

Section 372.38(b) of the regulations provides in pertinent part:

(b) Articles. 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 . . . to be reported under § 372.30. This exemption applies whether the person received the article from another . . . or produced the article.

The operative language contained in both sections of the regulations in question, and which serves to clarify the application of the exemptions, states:

However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), or otherwise used at the covered facility in excess of an applicable threshold quantity set forth in § 372.25, the person is required to report under § 372.30. (emphasis added).

EPA provided further clarification of the de minimis application in the Final Rule where it states:

If a person formulates a mixture by mixing various chemicals together, including a toxic chemical, the person is a processor of the toxic chemical. The person must consider the quantity of the toxic chemical added to the mixture, both for threshold determinations and release reporting, including releases from the formulation activity. 53 Fed. Reg. 4509 (Feb. 16. 1988).

In view of the plain meaning of the above cited regulations, the undersigned Administrative Law Judge (ALJ) is persuaded beyond

peradventure that neither sections 372.38(a) nor (b) provides the relief respondent seeks to urge upon this tribunal.

**Motion for Partial Accelerated Decision**

Continuing with the procedural history in this matter, on December 17, 1990, complainant served a motion for partial accelerated decision (motion) pursuant to 40 C.F.R. § 22.20. In support, complainant asserts that respondent has "admitted every necessary element to prove liability under section 313(b) of EPCRA and 40 C.F.R. § 372.22"<sup>4</sup> and, because no genuine issue of material fact exists, it is entitled to judgment in its favor on the issue of liability as a matter of law.<sup>5</sup>

Respondent urges that the motion be denied, the ground being that genuine issues of material fact do exist in this matter.<sup>6</sup> For example, respondent notes that although "zinc compounds" are listed under 40 C.F.R. § 372.65, "zinc oxide" is not.<sup>7</sup> Respondent questions the fact that although zinc oxide is not specifically listed in the regulations, it is considered a zinc compound when

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<sup>4</sup> Motion at 8.

<sup>5</sup> Section 22.20(a) of the Consolidated Rules of Practice (Rules) provides, in pertinent part, that "The Presiding Officer, upon motion of any party or sua sponte, may . . . render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . ." (emphasis added).

<sup>6</sup> Memorandum in Support of Respondent's Response at 1.

<sup>7</sup> Id. at 2.

the regulations are interpreted and applied by EPA.<sup>8</sup> It is also argued in the amended answer and respondent's opposition that certain constitutional questions regarding the inclusion of zinc oxide on EPA's list of toxic chemicals, and asserts as a defense the following four grounds: (1) The regulation is unconstitutionally vague; (2) the regulation is not rationally related to a legitimate agency goal; (3) EPA acted arbitrarily and capriciously in promulgating the regulations; and (4) the regulation is beyond the scope of the Congressional mandate set forth in EPCRA.

Although the constitutional issues raised by respondent in its affirmative defense may have merit, they are raised at the wrong time, in the wrong tribunal, for the wrong reasons. Respondent's constitutional questions will not be resolved in this proceeding. Authority with respect to an agency applying substantive rules in administrative proceedings is well settled. See, e.g., Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974). There, the Circuit Court said, in pertinent part:

A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying

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<sup>8</sup> See listing under 40 C.F.R. § 372.65, "Chemicals and chemical categories to which this part applies. Zinc Compounds: Includes any unique chemical substance that contains zinc as part of that chemical's infrastructure."

policy embodied in the rule is not generally subject to challenge before the agency (emphasis added, at 38).

Cf., Frost v. Weinberger, 375 F. Supp 1312 (D.C.N.Y 1974); Finnery v. Cowen, 508 F.2d 979 (2d Cir. 1974). The argument proffered by complainant in its reply that ". . . the Respondent may not challenge, in the administrative forum, the constitutionality of regulations promulgated pursuant to enacted enabling legislation[,]"<sup>9</sup> is a sound one and is amply supported by applicable case law. Complainant's position is correct. As a matter of law the ALJ will not entertain respondent's factual questions and/or defenses which go to the constitutionality of EPA's regulations.

#### Findings of Fact

The respondent is a corporation incorporated under the laws of the State of Ohio with a place of business at 1833 East Market Street, Akron, Ohio, 44301 (the facility). The facility has 200 "full-time employees" as defined by 40 C.F.R. § 372.3. During calendar year 1987, respondent purchased, manufactured, processed or otherwise used zinc oxide, a toxic chemical identified under section 313(c) of EPCRA, 42 U.S.C. § 11023(c), and listed at 40 C.F.R. § 372.65, in amounts that exceed the threshold for

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<sup>9</sup> Complainant's reply to respondent's response, at 3, 4 (citations omitted).

reporting as set forth in section 313(f) of EPCRA, 42 U.S.C. § 11023(f). Respondent failed to submit the required Form R to EPA and to the State of Ohio on or before July 1, 1988.

### Conclusions of Law

The determination of whether or not the subject matter is amenable to an accelerated decision hinges upon an interpretation of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.20, and applicable law. It is rooted in common sense that oral hearings are to be used for the resolution of issues of material fact. The Rules, in part, exemplify this.<sup>10</sup> The concept of the accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The existence of minor factual disputes would not preclude an accelerated decision. To have such an effect, the disputed issue(s) must involve "material facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that "makes a difference in the litigation."<sup>11</sup> Genuine issues involving such facts are absent from this proceeding.

First, is it settled that zinc oxide is a zinc compound.<sup>12</sup> Contrary to the assertions of respondent, from the record in this

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<sup>10</sup> See generally, 3 Davis, Administrative Law Treatise, section 12.2 (2d Ed. 1980).

<sup>11</sup> 26A Words and Phrases, "Material Fact," (West Co. 1953).

<sup>12</sup> See supra note 8. See also, "Summary Review of the Health Effects Associated with Zinc and Zinc Oxide:" EPA/600/8-87/022F, July 1987; Complainant's reply to respondent's response, at 5.

matter the essential facts necessary for resolution are not in contention. Stated otherwise, there exist "no genuine issues of material fact." Essentially, the gravamen of this complaint is not, as framed by respondent, "whether zinc oxide is a toxic chemical so that it is and should be regulated under 40 C.F.R. Part 372."<sup>13</sup> Rather, it is whether respondent's use of zinc oxide during 1987 and its subsequent failure to report such use to EPA and the State of Ohio as mandated by EPA regulations, constitutes a violation of section 313 of EPCRA, 42 U.S.C. § 11023. It is concluded that it does.

**IT IS ORDERED** that:

1. Complainant's motion for an accelerated decision on the issue of liability be **GRANTED**.
2. The parties shall enter forthwith into good faith negotiations concerning the penalty amount in this case.
3. Complainant submit a status report 30 days from the below service date of this order.



Frank W. Vanderheyden  
Administrative Law Judge

Dated

August 9, 1991

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<sup>13</sup> Respondent's response to complainant's motion for partial accelerated decision at 1.

IN THE MATTER OF R.C.A. RUBBER COMPANY, Respondent,  
Docket No. EPCRA-031-1990

Certificate of Service

I certify that the foregoing Order, dated 8/9/91, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Beverly Shorty  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region V  
230 South Dearborn Street  
Chicago, IL 60604

Copy by Regular Mail to:

Attorney for Complainant:

Kenneth Graves, Esquire  
Office of Regional Counsel  
U.S. Environmental Protection  
Agency, Region V (5CA-TUB-3)  
230 South Dearborn Street  
Chicago, IL 60604

Attorney for Respondent:

Jay P. Porter, Esquire  
BROUSE & MCDOWELL  
500 First National Tower  
Akron, OH 44308-1471

Marion I. Walzel  
Marion I. Walzel  
Secretary

Dated: August 9, 1991