UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
PALM HARBOR HOMES, INC.,	**) Docket No. EPCRA-4-99-54**
	)
Respondent.	**)**

ORDER ON MOTION FOR ACCELERATED DECISION, REQUEST FOR DISMISSAL, AND MOTION TO AMEND ANSWER

I. Procedural Background

The Administrative Complaint initiating this proceeding was filed on September 27, 1999 by the Environmental Protection Agency, Region 4 (Complainant), pursuant to section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045. Subsequently, on October 8, 1999, the Complaint was amended. The Amended Complaint charges Palm Harbor Homes, Inc. (Respondent) in 19 counts with failure to submit a toxic chemical release form (Form R) for diisocyanates, namely methylenebis (phenylisocyanate) ("MDI") and polymeric diphenylmethane diisocyanate ("PDD"), processed at ten of its facilities for calendar years 1994, 1995 and 1996. The Amended Complaint proposes a penalty of $17,000 or $18,000 for each count, resulting in a total proposed penalty of $340,000.

Respondent, through counsel, submitted an Answer to the Amended Complaint on November 9, 1999. In its Answer, Respondent listed several defenses, including three that state that the Amended Complaint (or Counts II through XIX thereof) "should be dismissed, or the Proposed Penalty should be substantially reduced or eliminated" on certain stated grounds. On November 19, 1999, Complainant filed a Response to what it took to be Respondent's Motion to Dismiss, requesting denial of Respondent's requests for dismissal. On December 15, 1999, Respondent submitted a letter to the undersigned, stating that its defenses were not intended, and should not be construed, as a motion to dismiss the Amended Complaint.

The parties agreed to engage in an Alternative Dispute Resolution (ADR) proceeding, which was initiated on December 2, 1999. On February 29, 2000, the parties reported in a status report that they had reached a settlement in principle, and in April, 2000, the ADR proceeding was terminated and the undersigned was designated as Presiding Judge. By Order dated April 25, 2000, the parties were required to file a Consent Agreement and Final Order (CAFO) on or before May 30, 2000, upon which date Complainant requested an extension of time on the basis that the CAFO would include a complicated Supplemental Environmental Project. Thereafter,

Complainant submitted a second request for extension of time, which was also granted, providing until July 18, 2000 for a fully executed CAFO to be filed. On July 18, 2000, instead of filing the CAFO, Complainant filed a "Status Report, Motion for Accelerated Decision, and Alternative Motion to Deny Motion to Dismiss," (Complainant's Motion) reporting that the parties had not finalized a settlement and requesting that the Presiding Judge respond to such motions prior to issuing any prehearing order. Thereafter, Respondent filed a Response to Complainant's Motion for Accelerated Decision (Response), and a Motion to Amend Answer, on August 23, 2000. On August 31, 2000, Complainant filed a Reply in Support of Motion for Accelerated Decision (Reply).

II. Preliminary Procedural Issues

Complainant's failure to file the fully-executed CAFO on or before July 18, 2000, could subject Complainant to a finding of default under 40 C.F.R. § 22.17(a) for failure to comply with an Order of the Presiding Judge. It appears that either the settlement negotiations have broken down and the parties are unable to finalize a settlement until issues raised in the motions are adjudicated, or the Complainant's Motion is filed simply to "buy time" to finalize the settlement, in response to the warning in the Order Granting Second Motion for Extension of Time that "further requests to delay the hearing process due to settlement will not be well received." Filing motions as a delay tactic, as counsel surely are aware, is a violation of an attorney's professional responsibility. Complainant's intent in filing the Motion is not clear, as Respondent asserts in its Motion to Amend Answer (at 2) that Complainant "officially terminated all settlement negotiations in July," but Complainant reported on July 18, 2000 that the "parties are continuing negotiations."[1] The Rules of Practice provide at 40 C.F.R. § 22.5(c)(3) that a "signature [on any filed document] constitutes a representation by the signer that . . . it is not interposed for delay." Complainant's Motion will be presumed, based upon the signature of counsel thereon, and Respondent's report that settlement negotiations have been terminated, to have been filed in good faith as a necessity for the case to proceed to a resolution.

Respondent states in "Defenses" numbered 1, 4 and 5 of its Answer, that the Amended Complaint or certain counts thereof "should be dismissed." Complainant's Motion includes an Alternative Motion to Deny Motions to Dismiss, reiterating its opposition to dismissal as stated in its Response to Motion to Dismiss, and requesting a finding that Defenses numbered 1, 4 and 5 do not constitute motions to dismiss.

[1]As a general matter, and particularly where extensions of time to file a CAFO already have been granted, it is incumbent upon the parties to inform the Presiding Judge *promptly* if settlement negotiations have broken down, so that the prehearing exchange can be scheduled, enabling the case to proceed efficiently to a resolution, in accordance with Executive Order 12988, 61 Fed. Reg. 4729 (February 5, 1996) and the Administrative Procedure Act, 5 U.S.C. §555(b).

The Rules of Practice provide certain criteria for motions, namely that they must: (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief sought; and (4) be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon. 40 C.F.R. § 22.16(a). The first and third criteria are met by the Respondent's pleading. However, the first defense asserts that Respondent was entitled to file a certification statement in lieu of a Form R, but the Answer is not accompanied by a certification statement or any other evidence relied upon by Respondent in support of that defense. The fourth defense claims that EPA failed to notify Respondent of the EPCRA reporting requirements and of their applicability to Respondent, but the Answer does not state such grounds with particularity or include any affidavit, evidence or legal memorandum in support. The fifth defense, which claims that all but one of the alleged violations were discovered and voluntarily self-corrected by Respondent, also does not state the grounds with particularity or include any affidavit, evidence or legal memorandum in support. Therefore, and considering Respondent's written intention that these defenses were not motions to dismiss, it is concluded that Respondent's Answer did not include any motion to dismiss.

III. Motion to Amend Answer

As to Respondent's Motion to Amend its Answer, the fifteen-day time period set forth in 40 C.F.R. § 22.16(d) for responses to motions has elapsed, and Complainant has not opposed the Motion to Amend. Therefore, under the Rules of Practice, Complainant "waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b).

As pointed out by Respondent, leave to amend an answer "shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a). Respondent seeks to add another defense, namely that Complainant is without authority to bring EPCRA claims on behalf of other EPA Regions, and that Counts X through XIX of the Amended Complaint involve alleged violations that occurred outside of EPA Region 4. In ruling on motions to amend pleadings, the Environmental Appeals Board has relied on the factors set forth by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962). *Lazarus, Inc.*, 7 E.A.D. 318, 331-32 (EAB 1997). These factors are "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party, . . . [or] futility of amendment." *Foman,* 371 U.S. at 182.

Because a prehearing exchange has not yet been scheduled in this case, and Complainant has not opposed the Motion to Amend Answer, there is no claimed or apparent prejudice to Complainant resulting from the proposed amendment. The only other factor which is pertinent to this case is undue delay. Respondent did not raise the defense until nine months after the Answer was filed. However, as explained by Respondent, the parties were attempting in good faith to settle for over seven months, most of which was in an ADR proceeding. In these circumstances, the Motion to Amend Answer will be granted.

Respondent did not attach a proposed Amended Answer to its Motion to Amend. As stated in the Order, *infra,* Respondent is required to file an Amended Answer for the record.

IV. Regulatory and Factual Background

Respondent is charged with violating section 313 of EPCRA, which provides, in pertinent part as follows:

> The owner or operator of a facility subject to the requirements of this section shall 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 toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official . . . of the State . . . annually . . . on July 1 and shall contain data reflecting releases during the preceding calendar year. [2]

Facilities subject to section 313 of EPCRA have ten or more full-time employees, are in Standard Industrial Classification (SIC) Codes 20 through 39, and manufacture, process or otherwise used more than a threshold amount of a listed toxic chemical during the particular calendar year. EPCRA § 313(b)(1)(A); 40 C.F.R. §372.22. The toxic chemicals referenced in Section 313 are listed in 40 C.F.R. § 372.65. *See,* 40 C.F.R. § 372.3. Effective January 1, 1995, methylenebis (phenylisocyanate) ("MDI") and polymeric diphenylmethane diisocyanate ("PDD") are each listed under the diisocyanates chemical category at 40 C.F.R. 372.65(c). MDI is also listed in 40 C.F.R. § 372.65(a) and (b), effective since January 1, 1987. Under section 313(f) of EPCRA and 40 C.F.R. § 372.25, the applicable threshold quantity of a toxic chemical processed by a facility during a calendar year is 25,000 pounds, unless EPA establishes a different threshold. The toxic chemical release form, Form R, must be filed for each toxic chemical processed in excess of the threshold during a calendar year. 40 C.F.R. § 372.30. However, if certain requirements are met, a certification statement (Form A) may be filed in lieu of a Form R, in accordance with 40 C.F.R. § 372.27.

Respondent is a corporation, organized under the laws of the State of Florida, with a principal place of business in Texas, which markets multi-section manufactured homes. Respondent owns and conducts operations at the ten facilities referenced in the Amended Complaint. Answer ¶¶ 3-12. At the times referenced therein, its ten facilities had ten or more full-time employees and were within SIC Codes 20 through 39. Answer ¶¶ 20, 21.

V. Arguments of the Parties on Motion for Accelerated Decision

Complainant asserts that no genuine issues of material fact exist, and that it is entitled to

[2] For calendar years 1995 and 1996, EPA extended the July 1 deadline to August 1, 1996 and September 8, 1997, respectively. 61 Fed. Reg. 2722, 62 Fed. Reg. 39797.

judgment as a matter of law, on the issue of Respondent's liability for each of the nineteen counts set forth in the Amended Complaint. Complainant points out that Respondent admitted many allegations in the Amended Complaint, including the allegation that it processed greater than 25,000 pounds of MDI and/or PDD during the years referenced in the Amended Complaint. Complainant presents documentation which it believes establishes beyond dispute the remaining allegations as to liability.

Specifically, by letter to EPA, dated July 7, 1998, Respondent admitted that it did not timely file a Form R or a Form A for diisocyanates processed at the ten facilities in years 1994, 1995 and 1996, and did not submit the Form A reports for those years until June 1998. Complainant's Motion, Attachment A. Complainant presents a letter dated February 1, 2000, enclosing a copy of a receipt showing that Respondent mailed Form As to EPA on June 11, 1998. Complainant's Motion, Attachment B. Complainant asserts that it is undisputed that Respondent did not submit the required Form R reports, and that the alternative reporting option excuses compliance with Form R reporting only if the requirements of 40 C.F.R. § 372.27 are actually complied with, including the requirement to file by July 1 of the following year. Complainant argues that Respondent does not claim that it actually complied with those requirements, and therefore the first defense cannot defeat Complainant's Motion.

Respondent's fourth defense states that EPA failed to notify Respondent of the reporting requirements and their applicability to Respondent. Complainant's response to this assertion points out that the Form R and alternative (Form A) reporting requirements were published in the Federal Register as final rules, and codified in the Code of Federal Regulations. Respondent has not alleged any ambiguity in the regulations or asserted its own interpretation of the regulations.

As to the fifth defense, alleging that Respondent discovered and voluntarily self-corrected all but one of the alleged violations, Complainant asserts that these facts are relevant to mitigation of a penalty rather than to liability, referring to both the EPCRA Enforcement Response Policy and EPA's Self-Disclosure Policy at 60 Fed Reg. 66076.

In response, Respondent states that it "does not dispute that it violated EPCRA section 313 by failing to file either a Form A or a Form R as set forth in Complainant's Amended Complaint." Response at 3. However, Respondent believes that Complainant's Motion should be denied, "and that the claims set forth in Complainant's Amended Complaint should be dismissed, because: (1) Complainant does not have the authority to bring an action for EPCRA violations that occurred outside of EPA Region IV, and (2) Complainant failed to give Palm Harbor fair notice of applicable EPCRA regulations, in violation of Palm Harbor's right to due process." *Id.*

As to the first argument, Respondent asserts that the authority of a particular EPA Regional Office extends only to those states that are included in that region, citing to 40 C.F.R. § 1.61, which provides that Regional Office Administrators "are responsible to the Administrator, within the boundaries of their Regions, for the execution of the Regional Programs of the Agency . . . ." Therefore, Respondent urges that Counts X through XIX, which allege violations in states

outside Region 4, should be dismissed.

As to the second argument, Respondent asserts that Complainant's admissions show that the EPCRA regulations regarding diisocyanate reporting are unclear. At a "show cause" meeting called by Region 4, Respondent states, "Complainant admitted that almost half of the mobile home facilities investigated by Region IV in the State of Alabama had failed to file Form Rs for diisocyanates," which is evidence that the diisocyanate reporting requirements were unclear to manufacturers, according to Respondent. Response at 5-6. Further, Respondent asserts out that EPA was unable to decipher the EPCRA regulations at the time EPA filed the original Complaint in this proceeding, as EPA was apparently unaware that diisocyanates was not even listed as a chemical category until 1995.[3] Therefore, Respondent urges, Counts I through IX should also be dismissed.

In its Reply, Complainant asserts that 40 C.F.R. § 1.61 does not prohibit a delegated official from initiating an inter-Regional case. Complainant presents copies of the delegation of authority from the Administrator of EPA to the Regional Administrators to file complaints, and the delegations from the Regional Administrators to the division directors of EPA Regions 4, 6, and 9, and relevant delegations in Region 10. Reply, Exhibits 1-6. Complainant asserts that nothing in the delegations proscribe a geographical limitation of authority. Further, Complainant presents copies of concurrence letters from Regions 6, 9 and 10, approving of Region 4 taking the lead in the violations alleged concerning facilities in those Regions. Reply, Exhibits 7, 8, 9.

As to the fair notice issue, Complainant argues that Respondent admitted that MDI and PDD are "toxic chemicals" under 40 C.F.R. § 372.3, in paragraphs 17 and 19 of the Answer. Complainant points out that the Federal Register notice accompanying the listing of the diisocyanates category made clear that the reporting requirement for diisocyanates took effect beginning in the 1995 calendar year, and specified that MDI and PDD are included in the diisocyanates category. 59 Fed. Reg. 61432, 61454, 61484 (Nov. 30, 1994). Complainant asserts that widespread non-compliance is not evidence of ambiguity in regulations. Complainant explains that the Amended Complaint served merely to provide greater detail concerning the listing of MDI and PDD. Complainant asserts that Respondent has not identified any ambiguity or contradictory statements in EPA publications, and characterizes Respondent's arguments as "bare assertions, allegations, or suspicions," insufficient to defeat a motion for summary judgment. Reply at 8.

VI. Discussion

In the response and reply to the Complainant's Motion for Accelerated Decision, the

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[3] The original Complaint in this proceeding alleged in Count I the failure to file a Form R for diisocyanates. The Amended Complaint alleges in Count I the failure to file Form R for MDI.

parties have narrowed the issues pertaining to liability to two: (1) whether Respondent had fair notice of the reporting requirements for diisocyanates, and (2) whether EPA Region 4 has authority to bring an action for alleged violations of EPCRA reporting requirements concerning facilities outside of Region 4.

In its Response, Respondent does not make any arguments in support of the first and fifth defenses, and indeed concedes that it failed to file a Form R or a Form A as set forth in the Amended Complaint. Respondent states in a footnote that the challenge in Complainant's Motion to Respondent's fourth defense leaves Respondent with no choice but to make all arguments concerning that defense in its Response, but that it reserves its arguments concerning the proposed penalty. Response, n. 1. Complainant's Motion also challenges the first and fifth defenses, however. It appears that Respondent's first and fifth defenses will be supported only with respect to mitigation of any penalty. Those defenses are thus deemed abandoned in regard to the issues of liability. *See, Pantry, Inc. v. Stop-N-Go Foods, Inc.,* 796 F.Supp. 1164 (S.D. Ind. 1992)(when a party moves for summary judgment on the issue of liability, the non-movant is placed on notice that all arguments and evidence opposing a finding of liability must be properly presented and supported); *United Mine Workers of America 1974 Pension v. Pittston Co.,* 984 F.2d 469, 478 (D.C. Cir. 1993)(as a general rule, the failure to raise affirmative defenses in opposition to a motion for summary judgment constitutes abandonment); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)(on motion for summary judgment, where non-movant bears the burden of proof on an issue, the non-moving party must go beyond the pleadings to designate specific facts showing there is an issue for trial).

As to the authority of EPA Region 4 to include alleged violations concerning facilities outside of Region 4, Respondent has not cited to any authority which limits the jurisdiction in enforcement actions of a Region to facilities within the Region's boundaries. The regulations which concern the organization of EPA, at 40 C.F.R. Part 1, do not include any such limitations. The provision cited by Respondent, 40 C.F.R. § 1.61, states that

> Regional Administrators are responsible to the Administrator, within the boundaries of their Regions, for the execution of the Regional Programs of the Agency and such other responsibilities as may be assigned. * * * * Regional Administrators are responsible for . . . [c]onducting effective Regional enforcement and compliance programs * * * *.

As a whole, the provision indicates some flexibility, and does not set forth or imply a rigid confinement of enforcement actions to activities occurring within the Region. The delegation to the Regional Administrators, Assistant Administrator for Solid Waste and Emergency Response, and Assistant Administrator for Enforcement and Compliance Assurance, to take administrative enforcement action under EPCRA, does not include any limitations with regard to confining activities to each Region. It merely requires Regional Administrators to consult with the Assistant Administrator for Enforcement and Compliance Assurance or his designee prior to exercising their authority. Reply, Exhibit 1. The Delegations Manual includes a policy that, "[g]enerally, Regional Administrators and other Field Officials will exercise delegated authorities

only within the geographic boundaries of their respective Regions . . . ." Reply, Exhibit 10. However, none of these documents prohibits a multi-regional enforcement action being initiated by one Regional Office. The approval letters from Regions 4, 9 and 10 confirm the support of those Regional Offices in such action. Reply Exhibits 7, 8, 9.

Indeed, if separate complaints for the same type of violation had been simultaneously issued by those various Regional Offices against this Respondent, they would have been subject to consolidation under 40 C.F.R. § 22.12(a) in an effort to expedite the proceedings and conserve judicial resources.[4]

Accordingly, it is concluded that Region 4 has authority to bring an enforcement action for the alleged violations of EPCRA concerning facilities located beyond the boundaries of Region 4.

Turning to the issue of fair notice, Complainant's points are well-taken that Respondent has not identified any ambiguous language or source of ambiguity, and that the final rule adding the category "diisocyanates" to the list of toxic chemicals subject to EPCRA § 313 reporting was published in the Federal Register on November 30, 1994. 59 Fed. Reg. 61432. The final rule as published in the Federal Register specified that methylenebis(phenylisocyanate) (MDI) and polymeric diphenylmethane diisocyanate (PDD) are included within that category. 59 Fed. Reg. at 61454. Publication in the Federal Register is sufficient notice to satisfy any due process claims. *Lyng v. Payne*, 476 U.S. 926, 942-3 (1986). In addition, since 1988, the Code of Federal Regulations specifically has included MDI, CAS number 101-68-8, in the alphabetical listing of toxic chemicals at 40 C.F.R. § 372.65(a) and in the CAS number listing at 40 C.F.R. § 372.65(b). Since 1995, the Code of Federal Regulations also has listed the category "diisocyanates," and specifically has listed polymeric diphenylmethane diisocyanate and MDI under that category, in the toxic chemical listing of chemical categories at 40 C.F.R. § 372.65(c). The plain meaning of the term "diisocyanates" is set forth in section 372.65(c) in the list of specific substances under the term, which is followed by the following parenthetical: "This category includes only those chemicals listed below." Thus, Respondent cannot claim that the term "diisocyanates" is ambiguous, or that it does not clearly include MDI or PDD. *Cf., Commonwealth of Massachusetts v. Blackstone Valley Electric Co.,* 67 F.3d 981 (1st Cir. 1995)(where broad category "cyanides" was listed as hazardous substance under CERCLA, but ferric ferrocyanide ("FFC") was not specifically named in any statutory of regulatory lists of substances, "FCC" was not within the plain meaning of "cyanides").

There is no authority presented by Respondent or otherwise found which excuses a finding of liability on the basis of widespread similar non-compliance. Respondent does not

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[4] It is observed that the Form A documents submitted by Respondent, dated June 11, 1998, for the facilities referenced in the Amended Complaint appear to be all signed and certified by Allen McKemie, Vice President of Manufacturing, and mailed from Respondent's office in Dallas, Texas. Complainant's Motion Exhibits 14-26 and Attachment B.

claim that there is anything unique to the mobile home manufacturing industry which would render the regulations ambiguous with respect to their operations and reporting obligations.

The reference to "diisocyanates" in the original Complaint filed in this matter does not indicate any misconception or struggle on the part of EPA in interpreting the regulations. In drafting Count I, which alleges failure to file a Form R for diisocyanates processed in 1994, Complainant apparently had failed to refer to the 1995 effective date of the listing of the diisocyanates category. However, because MDI was identified in the original Complaint as a diisocyanate *and* MDI was listed in 40 C.F.R. § 372.65(a) and (b) since 1988, Complainant correctly identified in Count I a violation of EPCRA § 313 for the year 1994.

It is concluded that there are no genuine issues of material fact concerning Respondent's liability for the violations alleged in the Amended Complaint, and that Complainant is entitled to judgment as a matter of law as to Respondent's liability for each of the nineteen counts alleged in the Amended Complaint. The amount of penalty to assess for the violations remains at issue for further proceedings.

ORDER

1. Complainant's Motion for a ruling that the requests for dismissal set forth in the Answer are not motions is **GRANTED.**

2. Respondent's Motion to Amend Answer is **GRANTED.** Respondent shall file an Amended Answer **on or before October 20 , 2000.**

3. Complainant's Motion for Accelerated Decision on Liability is **GRANTED.**

4. The parties shall continue in good faith to attempt to reach a settlement of this matter. Counsel for Complainant shall report on the status of settlement of this matter **on October 27, 2000.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 3, 2000
Washington, D.C.