UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

12/14/95

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IN THE MATTER OF	:	
PATTERSON LABORATORIES, INC.	:	Dkt. No. EPCRA-017-93
	:	Judge Greene
Respondent	:	

ORDER UPON MOTIONS FOR DETERMINATION AS TO LIABILITY

This matter arises under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA" or "the Act"), 42 U.S.C. § 11045, which provides for the assessment of civil penalties for violations of the Act and regulations promulgated pursuant to authority contained in the Act.

The complaint charges Respondent with four counts of failing to submit particular materials in a timely manner to an agency of the State of Michigan, in violation of Section 311 of the Act, and with five counts of failure to file annual inventory reporting forms over a period of five years with the same state

agency, in violation of Section 312(a) of the Act.[1]

Specifically, it is alleged that Respondent was required to, but did not, submit to the Michigan State Emergency Response Commission (Commission) on or before October 17, 1987, a material safety data sheet for each hazardous chemical present at Respondent's facility in certain quantities, or, in the alternative, a list of all such chemicals present at the facility. It is also alleged that Respondent was required to, but did not, file annual inventory reporting forms for the years 1988, 1989, 1990, 1991, and 1992. The regulations provide that the data sheets must be filed for each hazardous chemical present at the facility in quantities equal to or greater than 10,000 pounds. It is provided further that, for each "extremely hazardous substance," the data sheets must be filed if the quantity of such substance reaches or is greater than either 500 pounds or the specific "threshold planning quantity" for the chemical as recited at 40 C.F.R. Part 355, whichever is less. In lieu of the submission of a material safety data sheet for each hazardous chemical and extremely hazardous substance, the owner or operator may submit a list of all such chemicals.

In this case, it is alleged that Respondent "produced, used, or stored" at its facility chlorine, methanol, ammonium hydroxide, and sodium hydroxide in quantities sufficient to

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[1] 42 U.S.C. §§ 11021 and 11022(a). The complaint was amended on July 26, 1993, to include two additional charges and to adjust the amount of the penalty sought.

require submission of data sheets (or a list) and the annual filing of inventory reporting forms. The complaint alleges that chlorine is an "extremely hazardous substance" and that methanol, ammonium hydroxide, and sodium hydroxide are "hazardous chemicals," as defined by Sections 329(3) and 329(5), respectively, of the Act, 42 U.S.C. § 11049(3) and (5).

Respondent takes the position that it was not and is not required to file any of the documents in question because enforcement authority for occupational health and safety standards resides with the state of Michigan, and, consequently, the Michigan Occupational Safety and Health Act (OSHA) governs rather than the federal OSHA. In addition, Respondent contends that methanol and ammonium hydroxide are exempt from the definition of "hazardous chemicals" under Section 311(e)(3) of the Act, that counts I through IV of the complaint allege only one violation, and that the Act is being enforced in a discriminatory manner against Respondent.[2]

The parties filed cross-motions for judgment, and reached stipulations as to most of the facts. Complainant seeks determination only as to Respondent's liability for the alleged violations. The principal issue with respect to liability is

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[2] Respondent's Response to Complainant's Motion for Partial Accelerated Decision and Memorandum in Support of Respondent's Motion for Accelerated Decision at 2-3 [hereinafter Respondent's Response].

whether EPCRA and its regulations require Respondent to file with the state Commission (a) material safety data sheets (or a list of chemicals) and (b) annual inventory reporting forms. Also at issue with respect to liability is whether methanol and ammonium hydroxide are exempt pursuant to 311(e)(3) of the Act. Respondent's two remaining arguments -- that counts I-IV allege only one violation, and that the Act is being enforced in a discriminatory manner against Respondent -- go essentially to the penalty amount, and need not be reached here.[3]

Federal OSHA and Michigan OSHA

Respondent argues that the entire complaint must fail because Sections 311 and 312 of EPCRA require filing only by those owners or operators who are subject to the federal OSHA.[4] Section 311 provides that:

> [t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall submit a material safety data sheet for each such chemical, or a list of such chemicals. . . .

Regulations promulgated pursuant to the Occupational Safety

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[3] It is noted, however, that with regard to the issue of improperly separated counts, Complainant's interpretation of the Act and the relevant penalty policy appear sound.

[4] Respondent's Response at 3-6.

and Health Act of 1970 provide in pertinent part as follows:

> (g) Material safety data sheets. (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.[3]

Respondent maintains that it is not subject to federal OSHA because of an agreement between the State of Michigan and the federal government under Section 18(e) of OSHA, 29 U.S.C. § 667(e),[6] whereby it is provided that federal enforcement of occupational safety and health standards "will not be initiated" where the Michigan standards are "in effect or operational."[7]

The requirement that members of the regulated community must prepare or have available material safety data sheets is covered by 29 C.F.R. Part 1910, and is one of the areas left to State

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[3] 29 C.F.R. § 1910.1200(g) (1995).

[4] Id.

[5] This agreement provides in pertinent part as follows:

> In accordance with the Assistant Secretary's finding that the State has achieved operational status, under Section 18(e) of the Act, *Federal enforcement authority will not be initiated* with regard to Federal occupational safety and health standards with respect to the issues covered under 29 CFR Parts 1910 and 1926 where State standards are in effect and operational, except as provided in 8.b. and 8.c. below. [Emphasis supplied]

Agreement Under Section 18(e) of the Occupational Safety and Health Act of 1970 (January 6, 1977) at 1.

enforcement under the Section 18(e) agreement. The Michigan OSHA contains a provision identical to 29 C.F.R. Part 1910 concerning the preparation and availability of such data sheets. See Mich. Comp. Laws § 408.1014a (1993). Respondent argues that because of the agreement between the State and the federal government, it is subject only to the Michigan OSHA -- not the federal OSHA. Consequently, it is argued, Respondent is not subject to the requirements Section 311 or 312 of EPCRA, which Respondent avers are tied solely to the federal OSHA requirement but not to the identical state requirement.

Complainant counters that Respondent is subject to EPCRA because the Michigan OSHA is itself a regulation promulgated pursuant to the federal OSHA.[8] EPCRA Sections 311 and 312 state that the filing requirements of those sections apply to:

> [t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act. . . .

If the Michigan OSHA is a regulation promulgated pursuant to the federal OSHA, Complainant argues, then Respondent is subject to EPCRA Sections 311 and 312.[9]

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[8] Complainant's Reply to Respondent's Motion for Accelerated Decision, Response to Complainant's Motion for Partial Accelerated Decision and Memorandum in Support of Respondent's Motion for Accelerated Decision (March 23, 1995) at 3.

[9] Id. at 4.

Complainant's view on this point might well be persuasive, and would be examined carefully but for the fact that Respondent's argument will be rejected on different grounds. Accordingly, Complainant's argument need not be reached.

It is noted that the agreement between Michigan and the federal government pursuant to Section 18(e) of OSHA[10] does not (and could not effectively) provide that members of the regulated community *are not subject* to federal OSHA -- merely that federal authorities will not initiate action pursuant to federal OSHA under particular circumstances. In fact, as it relates to the issue here, the agreement between Michigan and federal authorities speaks solely to the limited matter of *which* authority will undertake what enforcement. If the regulated community were not ultimately bound by federal OSHA requirements, there would be no need for an agreement to govern which authority would enforce what provisions. In any case, an agreement as to the undertaking of enforcement action cannot by any stretch of the imagination be mistaken for, much less interpreted as constituting the superseding of, federal authority. Respondent was, and remains, subject to the federal OSHA regardless of whether the state initiates enforcement under requirements identical to federal OSHA, or whether the federal government proceeds under federal OSHA.

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[10] See note 7, supra.

While the argument advanced by Respondent may appeal to those enamoured of casuistry, the fact is that the regulatory *schema* of EPCRA, and the public interest asserted therein, can not be vitiated by adoption this argument. The language and requirements are clear on their face, and there is no question that Respondent has, since the effective date of the regulation in question, been on notice of the need to observe its requirements. Respondent admits that pursuant to the Michigan OSHA it was and is subject to exactly the same requirements as those set forth in the federal OSHA, i. e. to "obtain or develop a material safety data sheet for each hazardous chemical they produce or import"[11] since Michigan merely adopted that portion of the federal OSHA. Even if it could reasonably be argued that Respondent is not subject to the federal OSHA, it is as a direct consequence of the federal OSHA that Respondent was required to have or prepare material safety data sheets by the state OSHA. Respondent would have this tribunal hold that it is entitled to summary judgment despite its failure to comply with the requirements of Section 311 of EPCRA, based upon the purely technical argument that, although language identical to that of the federal OSHA was adopted in the Michigan OSHA, this language should be ignored. Exalting form over substance in an enforcement proceeding pursuant to EPCRA would severely limit

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[11] 29 C.F.R. § 1910.1200(g) (1995).

enforcement of a statute designed to permit the public to be informed as to the presence of certain chemical substances. In order to give substance to Respondent's argument, preliminary findings would have to be made that Respondent had no notice of the requirement to have or prepare material safety data sheets, and that the federal agreement under OSHA invalidated federal enforcement of EPCRA in a proceeding of this sort. In the circumstances here, such findings, and the result they would lead to, would be ludicrous.

Accordingly, it is held that Respondent is subject to the federal OSHA as well as the Michigan OSHA, and hence is subject to the requirements of Sections 311 and 312 of EPCRA; it is further held that, since the Michigan OSHA -- itself a result of and identical to federal OSHA -- requires Respondent to have or prepare material safety data sheets for each chemical, Respondent is on that account as well subject to the provisions of EPCRA.

Exemption of Methanol and Ammonium Hydroxide under 311(e)(3)

Pursuant to Section 311(e)(3) of the Act, 42 U.S.C. § 11021(e)(3), a substance may be exempt from the Act's definition of a "hazardous chemical" if "it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public." Here, Respondent argues that the methanol

and ammonium hydroxide stored at its facility are in the same form and concentration as can be found packaged for sale to the general public. Respondent's Response at 6-7. To support this assertion, Respondent exhibits products which are available to the general public and which, it maintains, are of the same "concentration" and "form" as the substances at issue in the complaint:

> The concentration of the substance is 100% methanol, exactly like the methanol received by Patterson at its facility. The form of the substance is liquid, which is the same form as the substance received by Patterson. Thus, the methanol about which the EPA complains in this case is in the same form (liquid) and the same concentration (100%) as a product packaged for sale to the general public.[12]

As a result, Respondent argues, methanol is exempt under Section 311(e)(3).[13]

As Complainant correctly argues, however, Respondent misconstrues the the term "form" as used in Section 311(e)(3). Complainant's Reply at 5. Regulations promulgated pursuant to the Act make clear that the term "form" refers to the packaging rather that the physical state of the substance:

> [s]everal commentors disagreed with EPA's proposed interpretation that the term "form" refer to the packaging, rather than the physical state, of the substance. One commenter argued that the packaging

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[12] Id. at 7.

[13] Respondent makes an identical argument with respect to ammonium hydroxide.

> of a product does not usually affect its hazardous properties. EPA disagrees; the packaging of the product not only may affect the hazard presented by a particular substance but also will affect the degree to which the public will be generally familiar with the substance, its hazards, and its likely locations. . . . As a result, EPA has retained the proposed interpretation of the consumer product exemption . . . .

52 Fed. Reg. 38348 (1987).

Respondent failed to establish that the packaging (as distinct from the physical state) of methanol and ammonium hydroxide at its facility is the same as a product for sale to the public. As a result, those substances are not exempt from the Act's definition of "hazardous chemicals."

It is held that no material facts remain at issue herein, and that Complainant is entitled to judgment as to liability on the legal issues.

ORDER

Accordingly, it is ORDERED that Complainant's motion shall be, and it is hereby, granted.

And it is FURTHER ORDERED that Respondent's cross-motion shall be, and it is hereby, denied.

And it is FURTHER ORDERED that the parties shall resume their efforts to reach a settlement with respect to the issue

remaining herein, that of the penalty, and shall report upon the progress of their effort **during the week ending January 19, 1996**.

J. F. Greene
Administrative Law Judge

Washington, DC
December 14, 1995

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on December 14, 1995.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF CASE: Patterson Laboratories, Inc.
DOCKET NUMBER: EPCRA-017-93

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