UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Troy Chemical Corp.	)	Docket No. II-EPCRA-98-0101
	)	
	)	
Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Emergency Planning, Community Right-To-Know Act (EPCRA) of 1986. By motion dated December 11, 1998, Complainant, United States Environmental Protection Agency (EPA), moved, pursuant to 40 C.F.R. Sec. 22.16(a) and 22.20(a), for accelerated decision in the above-captioned case for alleged violations of the Superfund Amendments and Reauthorization Act, 42 U.S.C. Sec. 1101 et seq. Complainant alleges that it is entitled to judgment as a matter of law on all counts contained in the Complaint. Respondent filed a Brief in Opposition to Complainant's motion on December 24, 1998. Thereafter, Complainant's Motion For Permission to Reply to Respondent's Opposition to EPA's Motion was granted. **Held:** Complainant's Motion For Accelerated Decision is **Granted** with respect to the issue of liability and **Denied** with respect to the issue of penalty.

Before: Stephen J. McGuire Date: January 28, 1999
Administrative Law Judge

Appearances:

For Complainant: Naomi P. Shapiro
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region II
New York, New York 10007-0866

For Respondent: John M. Scagnelli, Esq.
Whitman Breed Abbott & Morgan
One Gateway Center
Newark, New Jersey 07102-5396

I.Introduction

On April 7, 1998, Complainant issued a Complaint and Notice of Opportunity for Hearing to Troy Chemical Corporation under the authority of Section 325(c) of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. Sec. 1101 *et seq*. The Complaint consists of four separate counts and assesses a total civil penalty of $68,000. In Counts 1 and 3, Complainant alleges that the Respondent failed to submit to EPA, in a timely manner, complete and correct Toxic Chemical Release Inventory Forms (Forms R), for the listed toxic chemical Cumene, which Respondent processed at its facility in reportable quantities during calendar years 1992 and 1993.

In Counts 2 and 4, Complainant alleges that the Respondent failed to submit to EPA, in a timely manner, complete and correct Form R's for the listed chemical Xylene (mixed isomers), which Respondent processed at its facility in reportable quantities during calendar years 1992 and 1993. Complainant seeks a $17,000 civil penalty for each of the four counts and asserts that it is entitled to judgment as a matter of law. In the alternative, Complainant seeks an award of penalties in the amount of $61,200.

Respondent, Troy Chemical Corporation, on or about May 4, 1998, submitted an answer to the Complaint denying the allegations therein. On June 22, 1998, the parties held an informal settlement conference. Troy subsequently submitted a proposal to Complainant for a Supplemental Environmental Project (SEP) which is currently under consideration. Respondent further filed a brief in response to Complainant's motion for accelerated decision on December 24, 1998, asserting, *inter alia*, that there remains genuine issues of material fact concerning the appropriateness of the civil penalty and that Complainant is not entitled to judgment as a matter of law. Complainant's motion to file a reply to Respondent's Brief in Opposition was granted on January 5, 1999.

Upon review of the merits of this case and the complexity of the issues raised by the parties, there remain, at least with respect to the issue of penalty, questions of material facts that require a formal evidentiary hearing.

II.Standard For Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes

the Administrative Law Judge (ALJ) to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). See, e.g., In re CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress., 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F. 3rd 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90(November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. V. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. Sec. 22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1979).

III.Discussion

In its motion, Complainant attached the Affidavit of Paula Zevin along with pertinent letters dated July 27, and April 25, 1997, and Form R's for Cumene and Xylene for calendar years 1992 and 1993 (Attached Exhibits 4-10). Complainant asserts *inter alia,* that Respondent has admitted that it processed both chemicals in amounts exceeding the applicable reporting thresholds and stated explicitly that Forms R should be submitted for these uses (Exhibit 6 at 4). Complainant further asserts that Respondent has certified the accuracy of each of the Form R reports which, it argues, implicitly demonstrates that Respondent has admitted having processed both Cumene and Xylene "as a formulation component" for calendar years 1992 in 1993 (Exhibits 7-10).

Complainant further argues that Respondent, in the April 25, and July 29, 1997 letters, admitted that it had processed both chemicals in amounts exceeding the applicable reporting thresholds and stated explicitly that Forms R should be submitted for these uses (Exhibits 5,6).

Complainant submits that in addition to Respondent's admissions, it failed to file with EPA and the State of New Jersey, by July 1, of the succeeding year, Forms R for the toxic chemicals Cumene and Xylene processed during calendar years 1992 and

1993. On April 27, 1997, Complainant asserts that Respondent confirmed for EPA's Paula Zevin that it had failed to file Forms R for the two chemicals and that the forms would be filed forthwith (Exhibit 6). On or about June 25, 1997, Respondent submitted to EPA the requisite Forms R for the 1992 and 1993 reporting years(Exhibit 7-9).

Complainant thus argues that Respondent has admitted all material allegations necessary for a finding of liability under EPCRA Section 313 and has not raised issues of material fact concerning the penalty proposed in the Complaint. As such, Complainant asserts that it is entitled to judgment on its Motion For Accelerated Decision as a matter of law.

A.Liability

In its Brief in Opposition to Complainant's Motion, Respondent argues that at all times, Troy had a program in place to comply with its EPCRA Section 313 obligations. It further states that it bases its EPCRA Section 313 threshold determinations on production numbers, inventory and purchases. Edward J. Capasso, who prepared the Forms R for the 1992 and 1993 reporting years determined that Troy exceeded the applicable threshold reporting levels for 5 chemicals for 1992 and six chemicals for 1993 and prepared and submitted Forms R for such chemicals in a timely manner (Exhibit 3 at paragraph 10).

Troy however, determined that both Cumene and Xylene which were contained in a mixture known a "Modsol", as a formulation component, did not exceed threshold reporting levels for the 1992 and 1993 reporting years, based on erroneous volume percentages of such chemicals in Modsol which were processed at Troy's facility.

Following a request by EPA on March 14, 1997, Troy recalculated its threshold determinations for Cumene and Xylene for the 1992 and 1993 reporting years (Exhibit 3, paragraph 13; Exhibit 5 at 4). During the recalculation of the threshold determinations, it was determined that the volume percentages of Cumene and Xylene in Modsol were higher than originally understood. Mr. Capasso recalculated the amounts of Cumene and Xylene processed at Troy's facility using the correct volume percentages and determined that the amounts of such chemicals in fact, exceeded the applicable reporting threshold level for the 1992 and 1993 reporting years (Exhibit 3, paragraph 13). As a result, on April 25, 1997, Mr. Capasso informed EPA that new Forms R would be submitted, which was done on June 25, 1997 (Exhibit 3, paragraph 14).

Troy's documentary admissions clearly establish that Troy failed to timely file Forms R for threshold quantities of Cumene and Xylene for the 1992 and 1993 reporting years. As such, Respondent has admitted all material allegations for a finding of liability as it has not raised genuine issues of material fact. Such admissions thus provide the foundation for the granting of Complainant's motion as to liability. See, In re Colonial Processing, Inc., Docket No. II EPCRA-89-0114 (Interlocutory Order granting in part EPA motion for accelerated decision, 1990); In re J F and M Company, Docket No. TSCA III-057 (Initial Decision, 1985). See, also, Donovan v. Carls Drug Co., Inc., 703 F. 2d 650 (2d Cir. 1983).

A Respondent's challenge to admissions made in filed Forms R can, in certain instances, constitute material questions of fact for an evidentiary hearing, See, In the Matter of U.S. Aluminum, Inc., Docket No. II-EPCRA-89-0124 (Ruling denying EPA's motion for accelerated decision, 1991)(Respondent's challenge to admissions made in filed Forms R constituted question of fact for hearing); In the Matter of Pitt-Des Moines, Inc., Docket EPCRA-VIII-89-06 (Initial Decision, 1991)(Respondent allowed to rebut figures admitted in Filed Forms R). However, in the instant case, Troy has asserted no such challenge. Nor has Troy offered any evidence which would raise genuine issues of material fact on the issue of liability for which an evidentiary hearing would be required. As such, Complainant is entitled to judgment on liability as a matter of law. To this extent, Complainant's motion is **Granted.**

B. Penalty

With respect to the issue of the appropriateness of the proposed penalty,

Complainant has *not* met its burden that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Respondent, in its Brief in Opposition to Complainant's Motion, has raised legitimate questions regarding EPA's calculation of the proposed penalty. Specifically, Respondent has asserted that EPA did not adequately consider, in the Gravity-Based Penalty Matrix, facts demonstrating limited threshold exceedences.

The assessment of civil and administrative penalties for violations of the reporting requirements of EPCRA Section 313 is governed by EPCRA Section 325(c)(1), 42 U.S.C. Section 11045(c)(1). That subsection simply provides that a person who violates Section 313 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Subsection (4) then provides that the penalty may be assessed by administrative order or an action in federal district court. The statute does not enumerate any factors for consideration by the Administrator or Court in determining an appropriate civil penalty for violations of the Section 313 reporting requirements.

However, prior EPA administrative decisions on penalties for violations of EPCRA Section 313 have looked to the preceding enforcement subsections, EPCRA Section 325(b)(1)(C) and 325(b)(2), 42 U.S.C. Sections 11045(b)(1)(C) and 11045(b)(2), for guidance. See, In re Apex Microtechnology, Inc., 1993 EPCRA LEXIS 79,pp.6-8 (Initial Decision, 1993); In re TRA Industries, Inc., 1996 EPCRA LEXIS 1, p. 6 (Initial Decision, 1996). Those subsections govern the assessment of civil penalties for Class I and Class II violations of EPCRA's emergency notification requirements.

In determining the amount of a penalty, EPCRA Section 325(b)(1)(C) requires the Administrator to consider "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." EPCRA Section 325 (b)(2) incorporates by reference the penalty assessment procedures and provisions in the Toxic Substances Control Act (TSCA) Section 16, 15 U.S.C. Section 2615.

EPA calculated its proposed penalty by following the guidelines contained in the Enforcement Response Policy (ERP), for Section 313 of EPCRA. EPA's application of the ERP to the facts of this case is similar to the application of the ERP In the Matter of Hall Signs,Inc., Docket No. 5-EPCRA-96-026 (Initial Decision, 1997). There, ALJ Pearlstein held that in EPA's determination of the "extent level" of the violation:

> the EPR in effect, considers the size of the violator's business as at least as significant a factor as the amount of chemical involved in the violation. The ERP expressly assigns the same extent level for violations involving more than ten times the threshold reporting amount, as it would for violations involving amounts only slightly more than the threshold, if the violator had sales below $10 million or fewer than 50 employees....This is hardly consistent with considering the amount of unreported chemical as the "primary factor" in determining the extent of violation and assessing a penalty... I find the ERP's automatic consideration of the size of a violator's business as a major factor in determining the violation's extent level and gravity based penalty, as applied in this case, arbitrary and unauthorized by the statute, EPCRA (Ibid).

Judge Pearlstein's reasoning in Hall Signs, is pertinent to the arguments asserted in the instant case. Here, the size of Troy's business increases the gravity-based penalty over three times, with little discussion regarding the amount of unreported EPCRA Section 313 chemicals. Nor does the ERP adequately explain how the size of one's business relates to the gravity of the violation. As concluded in Hall Signs, there is nothing in EPCRA that indicates that the size of the business of the violator should be a "primary factor" in determining the extent of the violation. The ERP states only that "the deterrent effect of a smaller penalty upon a small company is likely to be equal to that of a larger penalty upon a large company" (ERP at 10).

In addition, Respondent has raised genuine issues regarding its cooperation and compliance and the appropriateness of any downward adjustments to the gravity-based penalty which it may be entitled. Although EPA has allowed a 10% downward adjustment for Respondent's "attitude", Troy has offered evidence that might entitle it to as much as a 30% downward adjustment. As such, further evidence is required to determine the appropriateness of the proposed penalty and to determine whether EPA ignored relevant facts which may warrant a further downward adjustment. See, In the Matter of Bollman Hat Company, Docket No. EPCRA-III-182(Initial Decision, 1998).

Despite Complainant's defense of the appropriateness of EPA's application of the EPR in EPCRA penalty calculations, Rule 27(b) of the Consolidated Rules of Practice states that an ALJ is to assess a civil penalty "in accordance with any criteria set forth in the Act" Although the Judge must "consider" any civil penalty guidelines or policies issued by the agency, any penalty assessed must reflect "a reasonable application of the statutory penalty criteria to the facts of the particular violations" In re Predex Corporation, FIFRA Appeal No. 97-8, 1998 EPA App. LEXIS 84 (Final Decision, May 8, 1998 at 15), citing In re Employer's Ins. Of Wausau, TSCA Appeal No. 95-6, 6 E.A.D. 735,758, 1997 EPA App. LEXIS 1 (Order Affirming Initial Decision, in Part and Vacating and Remanding in Part (February 11, 1997).

Upon review of the record, Respondent has introduced evidence which contests EPA's proposed penalty and raises numerous questions of fact for an adjudicatory hearing. For these reasons, Complainant's Motion, as it pertains to the issue of penalty is **Denied**.

IV. Conclusions of Law

1. Respondent, Troy Chemical Corporation, is a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. Section 11049(7);

2. Respondent is the "owner" or "operator" of a "facility" as these terms are defined by Section 329(4) of EPCRA, 42 U.S.C. Section 11049(4);

3. Respondent has ten or more "full time employees" as defined by 40 C.F.R. Section 372.3;

4. Respondent's facility is in Standard Industrial Codes 20 through 39 (as in effect on July 1, 1985);

5. Respondent "manufactures" or "processes" in excess of the threshold reporting amounts for the calendar years 1992 and 1993 or "otherwise uses" in excess of 10,000 pounds, toxic chemicals set forth under Section 313(c) of EPCRA, 42 U.S.C. Section 11023(c) and 40 C.F.R. Section 372.65, during the calendar years 1992 or 1993.

6. Respondent failed to file Forms R for each toxic chemical manufactured, processed or otherwise used during calendar years 1992 and 1993 in excess of the threshold amounts with EPA and the designated state agency under Section 313(a)(b)(c), 42 U.S.C. Section 11023(a)(b)(c).

7. Respondent is therefore liable for violations of EPCRA Section 313, with regard to Respondent's failure to have reported to EPA and the State of New Jersey, by the statutory deadline, its processing, in amounts exceeding the reporting threshold, of listed toxic chemicals during calendar years 1992 and 1993.

8. Complainant has failed to meet its burden that it is entitled to judgment as a matter of law on the issue of penalty, as genuine issues of material fact exists which requires further development at an evidentiary hearing.

V. Order

Complainant's Motion for Accelerated Decision is therefore **Granted** with respect to the issue of liability, and **Denied**, with respect to penalty.

By separate order this case will be SET FOR EVIDENTIARY HEARING on the issue of the appropriateness of the proposed civil penalty. _____
Stephen J. McGuire
Administrative Law Judge

Washington, D.C.