In the Matter of	:	
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Deutsch Company	:	Docket No. EPCRA-09-95-008
	:	Judge Greene
	:	
Respondent	:	
	:	

ORDER UPON RECONSIDERATION

Respondent moved to set aside an Order which awarded summary decision as to liability herein to Complainant. In addition, Respondent seeks "recognition" of certain facts which, it is asserted, are undisputed and if recognized as such will "facilitate resolution" of this proceeding.[1] It is

[1]*Supplement to Respondent's Motion to Set Aside Order Granting Motion for Partial Summary Determination* (hereafter "*Supplement*"), December 14, 1999, at 1. The decision (*Memorandum Opinion*) on Complainant's motion for "accelerated" decision is attached hereto and made a part hereof as *Appendix*. Complainant's motion was denied as to the issue of penalty, on the ground that Respondent had not addressed that issue fully. See *Appendix*, at 11-12.

determined that Respondent's filing should be treated as a motion for reconsideration and for certain additional findings.

Complainant notes in response that the rules of practice do not provide for reconsideration, and that the facts which Respondent seeks to have recognized as undisputed are, in Complainant's view, by no means undisputed.

Despite the silence of the Consolidated Rules of Practice (40 CFR Part 22) on the matter of reconsideration, if a party raises an issue not heretofore addressed with particularity – and where there is no suggestion that the motion has been made for purposes of delay – it is reasonable and fair to take up the matter. This is true especially where substantial monetary penalties are sought and/or the allegations have been vigorously disputed.

40 C.F.R. §22.04(c)(10) provides, in setting forth the "(P)owers and duties of . . . the presiding officer," that he or she

> . . . . shall conduct a fair and impartial proceeding, assure that the facts are fully elicited . . . [and] shall have authority to . . . (R)ule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders; [and] . . . (D)o all other acts and take all measures necessary for the . . . fair and impartial adjudication of issues arising in proceedings governed by these rules.

Respondent's motion clarifies its defense as previously set forth in the response to Complainant's motion. Reconsideration could conceivably produce additional findings and conclusions; and it may well be that, in the current posture of the case, certain additional findings could aid settlement. Accordingly,

it is determined that, on this record, and in an abundance of caution, reconsideration of the Order as to liability is warranted, and that such reconsideration falls within the taking of all measures necessary for the fair adjudication of issues that arose in this proceeding.

The Order which granted partial summary decision has been reconsidered at length. Certain additional findings have been made as to facts not in dispute. Additional conclusions have been drawn which pertain to the clarification of Respondent's defense.

BACKGROUND SUMMARY.

Respondent was found liable for the violations charged in the complaint based upon findings that its facility had "otherwise used" amounts of a "listed toxic chemical" (1,1,1-trichloroethane, or "trichloroethane") in excess of 10,000 pounds per year but had failed to report such use in a timely manner as required by Section 313 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. §11001, et seq. ["EPCRA", or "the Act"] The reports as ultimately filed, two to three years after the dates on which they were due,[2] revealed the use of trichloroethane in excess of 10,000 pounds per year. These reports were taken as admissions of such use in granting summary decision as to liability to Complainant. However, in the filing under consideration here, Respondent

[2]The dates on which the reports were filed are not in dispute.

makes clear its position that the violations were not admitted despite the contents of the sworn, dated forms which on their face show the use of reportable quantities of trichloroethane.[3] The reasoning is as follows:

(1) the regulations allow the use of estimates for purposes of preparing the report forms; (2) Respondent estimated its "otherwise use" of trichloroethane at below 10,000 pounds for both years at issue; (3) Respondent was not required to submit forms pursuant to the regulations, and did not do so, because its usage was estimated at below 10,000 pounds; (4) the amounts of trichloroethane set forth on the forms are estimates, as well, as allowed by the Act; consequently the reporting of use above 10,000 pounds is not an admission of such use; and (5) in view of (4) above, reports of use above 10,000 pounds do not relieve Complainant of the burden of proving that Respondent's use did *in fact* exceed that amount for the years in question in order to prevail in this action. Moreover, even if the amounts reported on the forms were accurate – again, this is not admitted – , the differences between the early estimates and the later reported use are small.

REVIEW OF APPLICABLE AUTHORITY.

42 U.S.C. 11023(a), Section 313(a) of the Act, ("Basic requirement") provides that the owner or operator of a facility subject to the requirements of this

[3] *Supplement* at 3, n. 4.

section, as Respondent is (this fact is undisputed),

> 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 . . . [4] during the preceding year at such facility. Such form shall be submitted to the Administrator and to an official . . . of the State designated by the Governor . . . annually after July 1, 1988] on July 1 and *shall contain data reflecting releases* during the preceding calendar year. (Emphasis added).

It is noted that the "(B)asic requirement" is clearly set forth: the reports to be filed must reflect releases of toxic chemicals at a facility during the preceding year. If they are to do this, the reports must contain essentially factual and reliable information.

At subsection (g) "Form," (1)(B) "Information required" of Section 313, it is stated that owners and operators "shall provide the information required under this subsection

> . . . [including] an appropriate certification, signed by a senior official with management responsibility for the person or persons completing the report, regarding the *accuracy and completeness of the report*. (Emphasis added)

Subsection (g)(1) (C) provides for the submission of certain information for each listed toxic chemical known to be present at an affected facility including, at (i),

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[4] Here, "threshold amounts for purposes of reporting toxic chemicals under this section are . . . (A) with respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year." Section 313(f)(1)(A) of the Act, 42 U.S.C. §11023(f)(1)(A).

"Whether the toxic chemical at the facility is manufactured, processed, or otherwise used and the general category . . . of use of the chemical." At (ii), an "estimate of the maximum amounts (in ranges) of the toxic chemical present at the facility at any time during the preceding calendar year." Thus, it is clear that the information submitted regarding "otherwise use" provides for "appropriate certification as to accuracy and completeness. At this point, estimates are not specifically provided for with respect to "otherwise use," but only for maximum amounts in ranges of the toxic chemical present at the facility.

At section 313(g)(2), the Act permits the owner or operator of a facility to "use . . . available data . . . (including monitoring data)" as well as "data collected pursuant to other provisions of law" for purposes of submitting the required information; "where such data are not readily available, reasonable estimates of the amounts involved" may be used. Then, in order to make plain that no measuring or monitoring need be carried out specifically for purposes of submitting the toxic chemical release forms, the section states that:

> (N)othing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into environment beyond that monitoring and measurement required under other provisions of law or regulation.

DISCUSSION.

Respondent asserts that its estimates placed the use of trichloroethane below the reporting level in 1991 and 1992, and, that as a consequence, no report pursuant to section 313(a) was required. It is also stated that the reports themselves, as later submitted by Respondent for those years, contained only estimates. By then, however, the estimates had reached and exceeded the threshold reporting level of 10,000 pounds.

As used in section 313(g)(2) above, the word "reasonable," while broad, cannot be so expansively construed as to embrace the taking of a quick guess, unless it is a very well informed guess – or the use of an initial reaction ("oh, we couldn't have used 10,000 pounds of the stuff"). This is true especially where, based upon such sketchy doings, the reporting requirement is averted. Information filed by affected facilities is useless (or worse) if not substantially accurate; and if not substantially accurate it is incapable of "reflecting releases during the preceding calendar year" as the "basic requirement" prescribes at section 313(a). Subsection (g)(2) mentions the use of estimates in order to make clear that no special monitoring is required, not so that calculations may be casual or that reporting, even where estimates exceed reportable quantities, can be the product of conjecture or anything else short of substantial accuracy. Included in the words "reasonable estimate" is the "basic requirement" that the toxic chemical release form submitted to federal and state officials shall contain data that reflects releases during the preceding calendar year, and the accuracy of the information must be certified, §3134(g)(1)(B). In short, members of the

regulated community are free to determine how to add up their toxic chemical releases, and they have leave[5] to use estimates (actual monitoring and measurement are not required) in doing so. Whatever method is used, if the result is a decision not to file a report, or if the reported amounts are not substantially accurate, the use of estimates – or any other means of calculation – is not a defense. Accordingly, estimates may be utilized but, as with any other method, mistakes may be actionable.

ADDITIONAL FINDINGS AND CONCLUSIONS ARE MADE AS FOLLOWS:

Members of the regulated community may use estimates in preparing Form R reporting forms, and are not required to monitor or measure their toxic chemical use in complying with §§3l3(a) and (g)(1)(B). Estimates are expressly permitted in order to make clear that monitoring/measuring is not required for the reports, not to grant immunity in the event that estimates turn out to be wrong and result in non-reporting or inaccurate reporting. Provision for the use of estimates does not thereby require enforcement authorities to prove actual use in connection with alleged violations of the regulations.

Amounts reported on Form Rs must be substantially accurate, and must reflect usage during the reporting period, whether or not estimates are used in calculating such amounts.

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[5] See §313(g)(2).

In the absence of evidence that the Form R amounts are not substantially accurate and do not reflect "otherwise use," Complainant is entitled to rely upon Respondent's sworn statements as to amounts reported. Respondent declines to admit the accuracy of the amounts reported because the amounts reported are estimates. Statements to the effect that the reported amounts are estimates do not demonstrate that such amounts are not substantially accurate, as they are required to be. (The alternative would be that Respondent ***knowingly*** made and reported estimates that were not substantially accurate – a situation that, presumably, a member of the regulated community would not wish to be found in – or that Respondent knows specifically why the reported amounts are not substantially accurate but has not revealed this).

Consequently, governmental authorities are entitled to rely upon information contained in the Form Rs as filed; such reports constitute admissions that the amounts reported were "otherwise used" during the reporting period. Respondent's Form Rs as filed for the years at issue here constitute admissions as to amounts of l, l, l, trichloroethane "otherwise used" at the facility.

There has been no showing that the differences between the original estimates, which resulted in failure to submit Form Rs, and the amounts

ultimately reported, are "small" or insignificant in any way that is relevant or meaningful herein.[6] Accordingly, it is concluded that the earlier (unreported) estimates, which formed the basis of the failure to report on time were not substantially accurate and did not accurately reflect Respondent's usage during the years at issue.

Dictionary definitions of the words "use," "used," and "estimate" as cited by Respondent[7] are not inconsistent with conclusions drawn herein that substantial accuracy is required in complying with the information provisions of the Act, i. e. 313 (a) and (g)(2) reports of "otherwise use".

ORDER

It is hereby ordered that:

1. Respondent's motion for reconsideration is hereby denied.

2. Respondent's motion for findings that certain facts are not in dispute is granted only to the extent set forth above.

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[6]Nicholas declaration, *Respondent's Motion to Dismiss this Proceeding as Moot*, at 2.

[7]Respondent's *Request for Judicial Notice*, at 2-3.

3. The parties shall have thirty days in which to settle the outstanding penalty issue herein, and shall repot upon their progress during the week ending January 11, 2002.

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J. F. Greene
Administrative Law Judge

December 20, 2001
Washington, D. C.

APPENDIX

Consisting of Memorandum Opinion previously filed.