12/2/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AMERICAN DESK MANUFACTURING CO., INC.,	)	EPCRA Docket No. VI-449S
	)	
	)	
Respondent	)	

RULING ON COMPLAINANT'S MOTION

FOR PARTIAL ACCELERATED DECISION

This Ruling addresses a motion for partial accelerated decision filed by Complainant--the Director, Air, Pesticides and Toxics Division, Region 6, U.S. Environmental Protection Agency--against Respondent American Desk Manufacturing Company, Inc. Complainant initiated this case by issuing a complaint on December 21, 1989 under the authority of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 ("EPCRA"), and the regulations promulgated pursuant to EPCRA, 40 C.F.R. Part 372 ("the Regulations"). The complaint charged that Respondent in 1989 had failed to file required reporting forms for four toxic chemicals, and proposed a $68,000 civil penalty.

Respondent's answer denied that it had been required by EPCRA and the Regulations to file the reporting forms, and Respondent subsequently contested Complainant's motion for partial accelerated decision. Further filings by the parties argued Complainant's motion, and the record is ready for a ruling.

Background

The question presented by Complainant's motion is whether four toxic chemicals utilized at Respondent's Taylor, Texas facility in 1987 were "processed" or "otherwise used," as those terms are defined by Section 313 of EPCRA (42 U.S.C. § 11023) and Sections 372.3 and 372.25 of the Regulations (40 C.F.R. §§ 372.3, 372.25). If they were "processed," as Respondent maintained, Respondent was not required to file the reporting forms under EPCRA and the Regulations; if they were "otherwise used," as Complainant contended, Respondent was subject to that reporting requirement, and defaulted on it.

Respondent manufactures furniture. In this manufacture at its Taylor facility in 1987 it utilized each of four toxic chemicals--methyl ethyl ketone, methyl isobutyl ketone, toluene, and xylene (mixed isomers)--in amounts between 10,000 and 75,000 pounds. If, for any of these four chemicals, this 1987 utilization was an "otherwise use" as opposed to a "process[ing]," such utilization of 10,000 pounds or more was required to be reported in a Form R by July 1, 1988. If, on the other hand, any such utilization was a "process[ing]," it need not have been reported until its utilization reached 75,000 pounds. Hence Respondent violated EPCRA and the Regulations only for any of the four chemicals that it "otherwise used" in 1987.

The situation came to light when EPA inspected Respondent's Taylor facility in February 1989. EPA learned that Respondent had not filed a Form R for any of these four chemicals, and concluded

that Respondent should have because each was "otherwise used." EPA so advised Respondent, which then did file the Form Rs in April 1989. Complainant subsequently initiated this case in December 1989 for Respondent's failure to have filed the Form Rs by July 1, 1988.

Arguments of the Parties

Complainant regarding Definitions

Complainant's argument flowed directly from the definitions in the Regulations. Section 372.3 of the Regulations (40 C.F.R. § 372.3) defines "process" as follows.

> "Process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce:
> (1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance, or
> (2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

(emphasis in original)

After defining "manufacture"--an operation not at issue here--Section 372.3 defines "otherwise use" as follows.

> "Otherwise use" or "use" means any use of a toxic chemical that is not covered by the terms "manufacture" or "process" and includes use of a toxic chemical contained in a mixture or trade name product. Relabeling or redistributing a container of a toxic chemical where no repackaging of the toxic chemical occurs does not constitute use or processing of the toxic chemical.

(emphasis in original)

In its publication of EPCRA's reporting requirement for toxic chemicals utilized during 1987, EPA declared that the difference between "process" and "otherwise use" turns basically on

incorporation (53 Federal Register 4,505-6 (February 16, 1988)). If a chemical is incorporated into a product to be distributed commercially, the chemical is "processed;" if the chemical is not so incorporated, it is "otherwise used."

EPA's publication in the Federal Register stated as follows (id.).

> 1. Clarification of the terms "process" and "otherwise use".... EPA has made the following basic distinction between processing and use activities.
>
> a. Processing is an incorporative activity. The process definition focuses on the incorporation of a chemical into a product that is distributed in commerce. This incorporation can involve reactions that convert the chemical, actions that change the form or physical state of the chemical, the blending or mixing of the chemical with other chemicals, the inclusion of the chemical in an article, or the repackaging of the chemical. Whatever the activity, a listed toxic chemical is processed if (after its manufacture) it is ultimately made part of some material or product distributed in commerce....
>
> b. Otherwise use is a nonincorporative activity. EPA is interpreting otherwise using a covered toxic chemical to be activities that support, promote, or contribute to the facility's activities, where the chemical does not intentionally become part of a product distributed in commerce....

(emphasis in original)

In that same publication, EPA explained that each chemical utilized in a procedure has to be evaluated individually. The point was illustrated by "the example of a paint that is applied during the manufacture of automobiles ... [in which] [c]ertain toxic chemical components of the paint mixture would become part of the automobile and other toxic chemicals such as the solvents would evaporate as intended" (id. 4,506). EPA stated that the chemical components of the paint mixture that became incorporated into the automobiles were "processed," whereas the solvents were "otherwise

used."

Complainant described Respondent's utilization of the four chemicals at issue as follows.[1]

> [T]hese chemicals are used in such sealers, stains, toners, paints and thinners as solvents and carriers for the pigments and sealants. The purpose of these chemicals is to place the actual pigments and sealants into a state where they may be applied to the furniture manufactured by Respondent. These chemicals then evaporate leaving the pigments and sealants on the furniture in a process commonly referred to as drying.

Complainant then cited EPA's published illustration of painting automobiles for the point that each chemical utilized in an operation must be evaluated individually. From Complainant's description of how Respondent's four chemicals evaporate during drying, Complainant then easily concluded that all four were "otherwise used."

Respondent regarding Definitions

Respondent's defenses relied heavily on a brochure that its Taylor facility received in the mail from EPA in February 1988. The brochure was titled "The Emergency Planning and Community Right-to-Know Act -- Section 313 Release Reporting Requirements."[2] According to Respondent, it reasonably concluded from this brochure that the four chemicals at issue were "processed."

The pertinent part of the brochure states as follows (at 3-5).

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[1] Memorandum in Support of Motion for Partial Accelerated Decision (May 4, 1990) at 7.

[2] Memorandum in Support of the Response of American Desk to EPA's Motion for Partial Accelerated Decision (June 1, 1990), Exhibit 6.

Thresholds

Thresholds are volumes of chemicals that trigger reporting requirements.

If you manufacture or process any of the listed toxic chemicals, the threshold quantity will be:

- 75,000 pounds during calendar year 1987 ....

If you use any listed chemical in any other way (without incorporating it into any product or producing it at the facility), the threshold quantity is:

- 10,000 pounds in calendar year 1987 ....

What is meant by the terms "manufacture," "process," or "otherwise use"?

- Manufacture--....

- Process--in general, includes making mixtures, repackaging, or using a chemical as a feedstock, raw material, or starting material for making another chemical. Processing also includes incorporating a chemical into an article (e.g., using dyes to color fabric [the fabric is the article that the dye is being incorporated into]).

  Examples of processing include:

  - The use of a solvent as a diluent when making a paint or coating;

  - Using a chemical as an intermediate in the manufacture of a pesticide (e.g, using chemical A to make chemical B).

- Otherwise Use--applies to any use of a toxic chemical at a covered facility that is not covered by the terms "manufacture" or "process" and includes use of a toxic chemical contained in a mixture or trade name product.

  Examples include:

  - Using chlorine as biocide in plant cooling water;

  - Using trichlorethylene to degrease tools;

- Using chlorine in waste water treatment.

(emphasis and brackets in original)

Respondent argued that, in this quoted language, the two examples closest to its own operation were those involving "dyes to color fabrics" and "a solvent as a diluent," both of which were listed under "Process." Hence, Respondent contended, it logically decided that its four chemicals were also "processed."

As to Complainant's argument that each chemical in a product has to be evaluated individually, Respondent said that "nothing in the EPA ... [brochure] on §313 reporting obligations ... suggested that listed chemicals in the same product could have different reporting thresholds."[3] As for Complainant's citation of the automobile painting example from the Federal Register, Respondent dismissed it as "an excerpt from the preamble ... [that] is neither a regulation nor a statutory provision".[4] Respondent argued further that painting automobiles differs from Respondent's applying coatings and finishings to furniture because "[t]he lower drying temperatures (ambient air drying or low temperature infrared heating) used in furniture finishing activities allow for the incorporation of solvents into the final furniture product."[5]

Parties regarding Respondent's Operation

As reviewed above, the parties disagreed on how to apply the definitions in the Regulations to what happened in Respondent's

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[3] Memorandum, supra note 2, at 15.

[4] Id. 18.

[5] Id. 19.

operation with the four chemicals. The parties disagreed also on what actually happened in Respondent's operation of finishing furniture to which the definitions are to be applied.

As quoted above,[6] Complainant stated that the four disputed chemicals "are used ... as solvents and carriers for the pigments and sealants ... [and] [t]hese chemicals then evaporate leaving the pigments and sealants on the furniture." Complainant's basis for this statement was primarily an affidavit from somebody with a technical background in the pertinent field.[7]

Respondent countered with its own affidavit, also from someone with a technical background in the pertinent field, "show[ing] that a portion of the solvents are incorporated into the furniture."[8] Complainant, in argumentation by its counsel, "agree[d] ... that some small, irrelevant amount of solvent may be retained by ... [the furniture's] finish."[9] Respondent replied that argumentation of counsel is not evidence, and that "there exists a genuine issue of material fact as to the extent of ... incorporation" of its solvents into the furniture.[10]

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[6] See text accompanying note 1 supra.

[7] Memorandum, supra note 1, Exhibit 4.

[8] American Desk's Surreply to EPA's Reply to American Desk's Response to EPA's Motion for Partial Accelerated Decision (July 21, 1990) at 5.

[9] Complainant's Reply to Respondent's Response to Motion for Partial Accelerated Decision (July 16, 1990) at 2.

[10] Surreply, supra note 8, at 5.

Ruling

Definitions of "Process" and "Otherwise Use"

For the definitions of "process" and "otherwise use," Complainant's position is persuasive. EPA's Federal Register publication expressly identified incorporation as the key distinction between these definitions, and declared that each chemical utilized in an operation is to be evaluated individually. Consequently, if each of Respondent's four disputed chemicals was not incorporated in the furniture, as maintained by Complainant, each of the four was "otherwise used."

Respondent claimed that its furniture coating and finishing differed from automobile painting because its lower temperatures allowed incorporation of solvents into the furniture. That claimed difference fails to challenge the basic point made by the automobile painting example in the EPA's Federal Register publication: that each chemical utilized in such an operation has to be evaluated individually.

Respondent's characterization of the automobile painting example as neither a statute nor a regulation fails to deprive it of its status as a valid official EPA interpretation of the Regulations. Respondent's additional argument--that its solvents were actually incorporated into the furniture--concerns not so much the definitions of "process" and "otherwise use" as the factual determination of what actually happened in its operation; and that question is treated under the next subheading below.

Respondent's argument based on the EPA brochure mailed to its

Taylor, Texas facility nonetheless merits attention. The pertinent portion of the brochure was quoted above. On the one hand, the sentence stating the threshold quantities for reporting "otherwise used" chemicals does mention the incorporation criterion. On the other hand, of all the subsequent examples listed, the two cited by Respondent--"dyes to color fabrics" and "a solvent as a diluent"--do seem the closest to Respondent's utilization of the four disputed chemicals, and both appear in the brochure under "process."

None of the three examples listed under "otherwise use" seems as similar to Respondent's operation with its furniture. Nor does the brochure say anywhere that each chemical utilized in a procedure is to be evaluated individually for the reporting requirement. Thus Respondent's interpretation of its reporting obligation based on the EPA brochure has some plausibility.

In the situation of any conflict between an EPA regulation and a plausible reading of an EPA brochure, the applicable legal principle is clear. This principle, as established by a series of judicial cases, holds a party to be responsible for complying with a lawfully promulgated regulation, and bars a party from citing a conflicting agency statement to excuse any noncompliance.[11] Thus Respondent bore responsibility for correctly determining, on the basis of the Regulations, whether the four disputed chemicals were

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[11] See U.S. E.P.A. v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990). See also Emery Min. Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984). See generally Cheers v. Secretary of Health, Ed., & Welfare, 610 F.2d 463 (7th Cir. 1979); Flamm v. Ribicoff, 203 F.Supp. 507 (S.D. N.Y. 1961).

"processed" or "otherwise used."

This legal principle denies Respondent its reading of the EPA brochure as an excuse for any noncompliance. According to the logic of this principle, the denial applies even though the brochure was mailed to Respondent by EPA, and even though the brochure lacked a precise citation of the relevant Federal Register publication.[12] Respondent is nonetheless held, per this principle, to a correct understanding and application of the Regulations.

That Respondent's reading of the EPA brochure fails to absolve Respondent of liability for any noncompliance does not mean that the brochure is without significance. If Respondent did violate the reporting requirement, a second important question is the appropriate sanction for the violation. Here Respondent's plausible reading of the EPA brochure would serve to mitigate any civil penalty to be imposed.

An additional dispute between the parties regarding the definitions concerned Complainant's citation, as supporting its position, of the EPA publication titled "Toxic Chemical Release Reporting Questions and Answers (EPA 560/4-88-006, March 1988)."[13] Respondent challenged the relevance of this publication by claiming that it "is not typically in the hands of the regulated

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[12] The brochure referred simply to publication "in the Federal Register in February 1988" (emphasis in original) (Memorandum, supra note 1, Exhibit 6, at 2); the next year's edition of the brochure improved the reference to "February 16, 1988" (Memorandum, supra note 1, Exhibit 7, at 2).

[13] Memorandum, supra note 1, at 8.

community."[14] Complainant made no reply to that challenge.

This dispute regarding the relevance of this EPA publication is not further pursued here because its outcome would not affect this Ruling. On the one hand, the definitional issue has been resolved in favor of Complainant on the question of liability without the benefit of this publication. On the other hand, reference to this EPA publication would not defeat Respondent's claim, based on the EPA brochure mailed it, to mitigation of any civil penalty imposed on it.

What Happened in Respondent's Operation

In ruling on a motion for partial accelerated decision, this Tribunal must resolve all reasonable factual questions against the moving party. Here it is impossible to say with any certainty, on the basis of the record, whether any of the four disputed chemicals was incorporated into the furniture in Respondent's operation, and, if so, how large was any incorporated portion. Consequently, although the definitional issue above was decided in favor of Complainant as to what theoretically constitutes "otherwise used," the record lacks a sufficient evidentiary foundation for concluding that any of Respondent's four chemicals was in fact "otherwise used" according to that definition. Therefore Complainant's motion must be denied at this point in the proceeding.

The evidentiary record on this question presently consists essentially of the two conflicting affidavits. Complainant's affidavit declared that the four disputed chemicals evaporate, and

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[14] Id. 19.

Respondent's affidavit stated that some unspecified portion is incorporated into the furniture. Complainant in argumentation suggested that such incorporated portion would be insignificant; but argumentation is not evidence, and Complainant supplied no evidence beyond its original affidavit, which said nothing about incorporation of any portion.

Thus the record provides no good way to resolve the conflict between the two affidavits. But it may be possible, short of an evidentiary hearing, to illuminate the record further here.

The Regulations make no provision for a chemical that is partly incorporated. Complainant asserted that any portion of Respondent's four chemicals that was incorporated would have been insignificant. To interpret the Regulations most reasonably, an insignificant incorporation would mean that the chemicals were "otherwise used."

As provided in the following section of this Ruling, the parties will next be given a chance to try to negotiate a settlement. If these negotiations fail, Respondent will be directed to specify whether it will present evidence showing that the portion of the four chemicals incorporated in the furniture was such that the chemicals were "processed" and, if so, what that evidence will be. In this manner, it may become possible to clarify the record further on this point.

Further Procedure

As the next step in resolving this case, the parties will be directed to try to negotiate a settlement. Settlement is

encouraged by Section 22.18 of EPA's Consolidated Rules of Practice (40 C.F.R. § 22.18); and the parties now have a framework within which they can conduct their negotiations.

Pursuant to that framework, if Complainant's version of what happened factually is ultimately sustained by the record, Respondent "otherwise used" the four disputed chemicals. Respondent's argument based on the EPA brochure mailed to it would, however, mitigate somewhat any civil penalty.

Both parties will be directed to report by January 31, 1992 on the status of their settlement negotiations. If the parties then fail to report a settlement, Respondent will be directed to report by February 29, 1992 on whether it intends to present evidence showing that the portion of the four disputed chemicals incorporated in the furniture was such that Respondent "processed" these chemicals, and, if so, what that evidence will be. Respondent may request an extension of that February 29 reporting date if further time for settlement negotiations would be useful.

Order

Complainant's motion for partial accelerated decision is denied. Complainant may, however, request a reconsideration of its motion at any time that the record of this case so warrants.

Both parties are directed to try to negotiate with each other a settlement of this case. Both parties shall report by January 31, 1992 on the status of their negotiations; such reporting may be done individually or jointly, at the parties' discretion.

If the parties fail to report a settlement by January 31,

1992, Respondent shall report by February 29, 1992 as to whether it will present evidence that the portion of the four chemicals incorporated into the furniture was such that it "processed" these four chemicals and, if so, what that evidence will be.

J. Thomas W. Hoya

Thomas W. Hoya
Administrative Law Judge

Dated: December 31, 1991

IN THE MATTER OF AMERICAN DESK MANUFACTURING CO., INC., Respondent,
EPCRA Docket No. VI-4498

Certificate of Service

I certify that the foregoing **Ruling On Complainant's Motion For Partial Accelerated Decision**, dated December 31, 1991, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
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Secretary

Dated: December 31, 1991