UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CAVCO INDUSTRIES, L.L.C.,	)	DOCKET NO. EPCRA-9-2000-0018
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

The original Complaint[1] filed in this proceeding under Section 325(c) of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. §§ 11001 et seq. alleged that the Respondent violated the provisions of the Act on eight separate occasions. More specifically, the Complaint alleged that, for several years, Respondent failed to timely file certain Form Rs for three of its facilities. Complaint, 2-10.

On February 5, 2001, the Complainant filed a motion for accelerated decision as to liability and penalty, alleging that no material issue of fact remained in dispute and that the penalty was appropriate and calculated in conformity with the Enforcement Response Policy. The Complainant alleged that the Respondent had admitted that it failed in its obligation to report the presence of the toxic chemical diisocyanate at its facilities during the years in question, and that the Respondent's affirmative defense that it was released from its reporting obligation by the "article exemption" set forth in 40 C.F.R. § 372.38(b) is inapplicable. For the reasons which follow, the Complainant's motion for accelerated decision is DENIED.

In its Response to EPA's Motion for Accelerated Decision, Cavco maintains that there is a factual dispute[2] concerning whether the Respondent was exempt from EPCRA reporting requirements under the "article exemption." Cavco relates that it used an environmental consulting firm, SA & B Environmental and Chemical Consultants, ("SA&B"), in determining that the article exemption was applicable. In support of its position, Cavco points to other

[1]In a separate Order, issued today, the Court granted EPA's Motions to Amend the Complaint.

[2]In its Motion, EPA adopted the factual background included with the Respondent's own Motion for Accelerated Decision. An Order pertaining to this Motion of Respondent is being issued separately.

administrative law judge rulings which held that the issue of the applicability of the article exemption presents an issue of material fact, requiring additional proceedings.[3]

Respondent asserts that the genuine issue of material fact concerns "whether the Foamseal product, which is created at Cavco's facilities is an "article" for purposes of EPCRA reporting exemptions."[4] Cavco's Response at 4. It maintains that the releases from its facilities were low enough to qualify for the article exemption to reporting. Respondent states that it needs the forum of a hearing to allow it to present testimony from its environmental consultant in support of the claim that the article exemption is applicable. This would include "testimony relating to [Cavco's] operations and Foamseal specifically." Id.

In its reply EPA reiterates that the essence of the complaint involves the charge that during 1996, 1997 and 1998 Respondent processed, at three separate facilities, diisocyanates in quantities exceeding the established threshold of 25,000 pounds, and as a consequence of that activity, it was required to file Form R's for those years. EPA observes that in its answer to the Complaint, Cavco acknowledged that the diisocyanates at its facilities are combined with other substances.[5] On the basis of these acknowledgments, EPA maintains that Respondent has conceded that, by virtue of this combining, the diisocyanate is processed at its facilities. Given that Section 313 of EPCRA requires completion of a toxic chemical release form for each toxic chemical that is processed in quantities exceeding the threshold, EPA contends that liability has been established.

The Court notes that other administrative law judges have been faced with claims of applicability of the article exemption. In Dempster Industries, Inc. Docket No. EPCRA VII 91-T- 606-E, August 2, 1994, 1994 WL 594783 (E.P.A.), Judge Jon G. Lotis succinctly described the three requirements to qualify for the article exemption: "the item is formed to a specific shape or design during manufacture; its function is dependent on its shape; and during the item's normal processing or use, no toxic chemical is released." Judge Lotis noted that the exemption is lost if the "solid waste, such as shavings and turnings, are disposed of thrown away ...[but] if

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[3]Respondent cites In the Matter of Autosplice, Inc., Docket No. EPCRA-09-91-0003, 1992 WL 1025781 (E.P.A. Oct. 30, 1992) ("Autosplice"), In the Matter of Trinity Indus. Inc., Docket No. EPCRA-6-99-006, 2000 WL 1946740 (E.P.A. Nov. 29, 2000) ("Trinity") and In the Matter of Sheffield Steel Corp., Docket No. EPCRA-V-96-017, 1997 WL 821113 (E.P.A. Nov. 21, 1997) ("Sheffield"). Each of these cases dealt with the applicability of the article exemption.

[4]Cavco's response incorporates its earlier filed statement of facts which includes a description of the Foamseal product which, it avers, is formed entirely within an adhesive 'gun' through mixing in a closed system.

[5]As EPA acknowledges, Cavco did not simply state that the diisocyanates are combined with other substances. Rather it declared that the substances were combined in a closed environment to produce a non-EPRCRA § 313 reportable product which was then used in its manufacturing process.

these wastes are collected and recycled, ... there is no 'release' and the material remains exempt." He also noted that there is an alternative basis for exemption, "if the processing or use of all similar materials results in the release of less than 0.5 pounds of a toxic chemical to any environmental media in a calendar year, [and that in those instances] the EPA will allow the release quantity to be rounded to zero."

In Autosplice, Inc. Docket No. EPCRA 09-01-0003, October 30, 1992, 1992 WL 1025781 (E.P.A.), the respondent raised the article exemption defense, asserting that it met each of the exemptions requirements with respect to its tab terminals in that its process did not result in the release of copper and that all of its brass scrap was recycled. The judge determined there that the "nature of the Respondent's brass stamping operation and whether the nature of that operation meets the criteria for an article exemption" constituted a genuine issue of material fact. The Court notes that, based on the judge's recounting of the evidence, the respondent appeared to offer minimal factual support for its claim of exemption in contesting the Agency's motion for accelerated decision.

In Sheffield Steel Corporation, Docket No. EPCRA V-96-017, November 21, 1997, 1997 WL 82113 (E.P.A.) Judge Spencer T. Nissen recounted that the respondent, in addition to challenging the assertion that it processed certain chemicals, asserted that its activities of heating, rolling, and cutting steel plates were exempt under the article exemption.[6] In addressing the article exemption, the judge expressed the view that the exemption was based in part upon EPCRA Section 311's definition of a hazardous chemical and its reference to excluding substances in manufactured items where there is no exposure to the substance under normal conditions of use. This exemption applies whether the person receives or produces the article. The respondent asserted that its activities did not result in releases of chromium, nickel or manganese from the steel billets and that any scrap alloy produced with those elements during its normal operations was collected and re-used or sent off-site for recycling. Although EPA argued that, because the respondent changed the shape or dimension of the billets, the article exemption did not apply, the court concluded that because of factual uncertainties and EPA policy papers that seemed to allow the exemption if the article's basic dimensional characteristics were maintained, and the presumption that the respondent would be prepared to substantiate its claims, it would be prudent to have the record contain a "thorough evidentiary presentation of [the respondent's] operations..."

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[6]The judge rejected the respondent's assertion that because it did not engage in "incorporative" activity, no processing was involved. The rejection was based on the finding that after the respondent received steel billets from suppliers, the billets were heated, rolled and cut and that such activity, resulting in a different form or state, constituted processing of the chemicals. While acknowledging that processing is an incorporative activity, the judge held that processing is more inclusive than incorporating and includes situations where a toxic chemical that is a component of a mixture or other trade name product "is ultimately made part of some material or product distributed in commerce."

Finally, in Tillamook County Creamery Assoc. Docket No. EPCRA 1094-03-01-325, September 18, 1995, 1995 WL 605788 (E.P.A.), the court dealt with the respondent's claim that its processing of ammonia was exempted under the article exemption. EPA asserted that the exemption did not apply because the ammonia was not present in the article when the respondent used it and because excess ammonia may be released at the time of its application to the starter medium. The court expressed the view that the rationale behind the article exemption is that the end uses of the articles do not result in release of chemicals. Accordingly it determined that there was no need to report the presence of toxic chemicals which are already present in the finished products that a manufacturer then incorporates into its own product. Thus, it held that chemicals that are merely present when they arrive at a facility and that then leave the facility incorporated in the same or another article do not present the same risk of release as chemicals that are manufactured, processed or otherwise used on site. In contrast, when chemicals are processed to make articles, the exemption does not apply. Finding that the ammonia was processed into the respondent's cheese product, the court found that the exemption did not apply.

These cases reflect caution on the part of judges who have reviewed the article exemption in the context of motions for accelerated decision. With this observation in mind, it is noted that a court may deny a motion for accelerated decision, in the exercise of sound judicial policy and discretion, even if it appears technically proper for the motion to be granted, in order to allow the case to be developed fully at trial. In the Matter of Trinity Industries, Inc. Respondent, Docket No. EPCRA 6-99-006, Nov. 29, 2000, 2000 WL 1946740 (E.P.A.), Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979) Although the Court has doubts[7] as to whether the Respondent will be able to demonstrate that the article exemption applies, it exercises this discretion and accordingly, EPA's Motion is DENIED.

However, the Court reminds the Respondent that, by asserting this claim, it has raised an affirmative defense, and consequently it bears the burden of proof. See Wozniak Industries, Inc. Docket No. 5 EPCRA-97-051, February 4, 1998, 1998 WL 220081 (E.P.A.), in which Judge Stephen J. McGuire, in denying EPA's motion to strike Respondent's post-answer assertion of the de minimis and article exemption, determined that where a respondent claims such exemption under 40 C.F.R. §§ 372.38(a) and (b), it bears the burden of proof. Accordingly, the judge held that the respondent bears the burden of production and persuasion under the de minimus and article exemptions. The Court agrees with Judge McGuire's analysis.

The Court has also decided that, in resolving the applicability of the article exemption in this case, it may be useful for the record to include any current policy statements the Agency has

[7]These doubts stem from the requirements that the "article" be "formed to a specific shape or design during manufacture" and the required showing that the article have "end use functions dependent in whole or part upon its shape or design during end use." 40 C.F.R. § 372.3, defintion of "Article."

issued, interpreting the exemptions claimed by the Respondent. Therefore the Court directs EPA Counsel to inquire within the Agency, including the Washington D.C. headquarters, and to ascertain all such current[8] policy statements or interpretations regarding this issue and thereafter to forward copies of such documents to the Court, Counsel for Respondent and the Regional Hearing Clerk, for inclusion in the record in this proceeding. For example, unless revoked, such documents should include EPA's Toxic Chemical Release Inventory Questions and Answers (Revised 1989 version) and the Section 313 Interpretive Guidance System, both of which have been referenced in prior administrative law judge decisions. Any such information discovered and an accompanying statement of the efforts made to determine their existence, shall be provided by July 25, 2001.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: July 2, 2001

[8]By "current" the Court refers to such statements issued on or before the time of the events alleged to constitute the violations charged here.

In the Matter of Cavco Industries, L.L.C
Respondent
Docket No. EPCRA-9-2000-0018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION**, dated July 2, 2001, was sent this day in the following manner to the addressees listed below:

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