UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
SHEFFIELD STEEL CORPORATION,	)	**DOCKET NO. EPCRA-V-96-017**
	)	
	)	
RESPONDENT	)	

ORDER DENYING MOTIONS TO STRIKE ANSWERS AND TO DISMISS

I. PROCEDURAL BACKGROUND

This action was initiated by the Director of the Waste, Pesticides and Toxics Division of the United States Environmental Protection Agency, Region V (Complainant), pursuant to Section 325(c) of the Emergency Planning and Community Right-To-Know Act (EPCRA) on April 19, 1996, by the filing of a Complaint, Compliance Order and Notice of Opportunity for Hearing charging Respondent, Sheffield Steel (Sheffield) with violations of EPCRA § 313. The complaint is based on the contention that Sheffield's activities at its Joliet, Illinois plant included the processing of toxic chemicals identified by EPCRA and listed at 40 CFR § 372.65 and that Sheffield failed to file the required toxic chemical release forms (Form Rs) for the years 1990 and 1991. Specifically, the complaint alleges that Sheffield processed toxic chemicals, chromium, nickel, and manganese, in excess of threshold quantities without completing and submitting a "Form R" for each of these chemicals for the years of 1990 and 1991. For these alleged violations, Complainant proposes to assess Sheffield a civil penalty of $17,000 for each of six counts for a total of $102,000.

Sheffield filed an answer on July 9, 1996, admitting that at all times relevant to the complaint, it was a corporation incorporated under the laws of the State of Delaware having a place of business in Joliet, Illinois.[(1)] Sheffield admitted

allegations in paragraphs 10, 11 and 12 of the complaint to the effect that it employed ten or more full-time employees and was in Standard Industrial Classification (SIC) Code 3312.

Sheffield answered the allegation in paragraph 9 that it was the owner or operator of a facility as defined in EPCRA § 329(4) and 40 CFR § 372.3 by the assertion that the cited statutory and regulatory provisions speak for themselves and that any interpretation or characterization of these provisions by Complainant were legal conclusions to which no answer was required. Sheffield responded in a similar manner to allegations in paragraph 13 of the Complaint to the effect that during the calendar years 1990 and 1991, it processed or otherwise used toxic chemicals identified in EPCRA § 313(c) and 40 CFR § 372.65 in excess of the thresholds for reporting in EPCRA § 313(f) and 40 CFR § 372.25 and the allegation in paragraph 16 that the threshold for reporting chemicals processed identified in the cited statutory and regulatory provisions for the calendar year 1990 [and subsequent years] was 25,000 pounds. Sheffield answered in a similar fashion allegations that it processed quantities of chromium, nickel, and manganese in specified quantities in excess of the threshold during the calendar years 1990 and 1991 and failed to submit Form Rs. Sheffield denied that its activities at the Joliet plant constituted "processing" of the mentioned chemicals and claimed that it was under no obligation to complete toxic chemical release forms. As affirmative defenses, Sheffield alleged that Complainant's attempted enforcement of EPCRA was arbitrary and capricious in regard to Sheffield, that the relief sought is barred by the applicable statute of limitations, that the relief sought is barred by laches or equitable estoppel, and that any penalty is inappropriate, considering Sheffield's good faith efforts to comply with EPA requirements, the lack of emissions, and the lack of environmental threat.

In accordance with an order of the ALJ, the parties have filed prehearing exchanges by the due date as extended, January 10, 1997. On April 11, 1997, Complainant filed a Motion to Strike Answers and Deem Allegations Admitted (C's Motion). Sheffield filed a memorandum in opposition (Opposition) to the motion on April 28, 1997. On June 3, 1997, Sheffield filed a Motion to Dismiss and a memorandum in support thereof (Sheffield's Motion). Complainant filed a response (Response) to Sheffield's motion on June 27, 1997. For the reasons hereinafter appearing, Complainant's motion to strike and Sheffield's motion to dismiss will be denied.

II. FACTUAL BACKGROUND

Sheffield Steel owns and operates a rolling mill located in Joliet, Illinois, at which it heats steel billets "red hot", runs the billets through a series of rollers to reach particular lengths, cuts the billets into shorter lengths, and ships them to customers (Sheffield's Motion at 2). The billets range in size from approximately 2½" to 5" [in width] and from 10 to 16 feet in length. (Id.). According to Sheffield, its products substantially retain the initial thickness and/or diameter of the steel billets and there are no releases of chromium, nickel, or manganese associated with its operations (Motion at 12).

Complainant contends that the steel "processed" by Sheffield contains quantities of chromium, nickel, and manganese in excess of the 25,000-pound annual threshold established by EPCRA § 313(f) and 40 CFR § 372.25 for the calendar year 1989 and subsequent years and thus were required to be reported. On the other hand, Sheffield argues that by the Agency's own guidance, "processing" involves an incorporative process and because Sheffield does not incorporate chromium, nickel, and manganese into the steel it heats, rolls and cuts, it is not subject to the TCRI reporting requirement (Sheffield's Motion at 3-7). Additionally, Sheffield argues that it is entitled to the "article" exemption set forth at 40 CFR § 372.38(b).

A. Complainant's Motion to Strike

Because Sheffield neither admitted, denied, nor explained the allegations in paragraphs 14, 19, 20, 26, 27, 33, 34, 40, 41, 47, 48, 54, and 55 of the complaint, Complainant contends that the answers to these paragraphs should be struck and that [the absence of proper answers] be construed as admissions pursuant to Rule 22.15(d).[(2)] Complainant asserts that whether a representative of EPA conducted a consensual inspection of Sheffield's facility as alleged in paragraph 14 of the complaint is a matter peculiarly within Sheffield's knowledge (C's Motion at 5). Likewise, Complainant says that whether Sheffield submitted Form Rs for chromium, nickel and manganese for the years 1990 and 1991 as alleged in paragraphs 19, 20, 26, 27, 33, 34, 41, 47, 48, 54, and 55 of the complaint are facts peculiarly within Sheffield's knowledge.

Sheffield points out that Complainant's motion to strike was filed nine months after Sheffield answered the complaint and three months after the parties filed prehearing exchanges. (Opposition at 6). Therefore, Sheffield argues that the motion

is untimely. Additionally, Sheffield asserts that there is no authority for the motion to strike, and that motions to strike are not favored and will not ordinarily be granted in the absence of a showing of prejudice to the moving party, citing United States v. Kramer, 757 F.Supp. 397, 409-10 (D.N.J. 1991) (Opposition at 2, 3). Sheffield argues that its answers are proper responses to allegations grounded in legal conclusions. Lastly, Sheffield asks that it be allowed to amend its answer, if any of its answers are deemed to be inadequate (Opposition at 6).

DISCUSSION

The Rules of Practice applicable here do not expressly authorize motions to strike. Rule 22.16, however, refers to motions without restriction and thus motions to strike have been held to be authorized by the rules. See, e.g., In the Matter of Chem-Trol Chemical Co., Docket No. I.F.& R.-V-001-89 (Order Denying Motion to Strike, November 14, 1989) and In the Matter of Coors Brewing Company, Docket No. RCRA-VIII-90-09 (Order on Motions, January 4, 1991).

Because of their reputation as a dilatory tactic upon the part of the movant and because granting a motion to strike is a drastic remedy, motions to strike are truly and justly disfavored. Moreover, it is well settled that defenses are not appropriate subjects of a motion to strike, if there is any possibility that the defenses could be made out at trial. Coors, supra. Nevertheless, motions to strike have been granted in selected instances. See, e.g., In the Matter of Coleman Trucking, Inc., Docket No. 5-CAA-005 (Order Granting in Part Complainant's Motion to Partially Strike Respondent's Answer, November 6, 1996) (affirmative defense of statute of limitations struck where identical argument had been rejected in a prior order); In the Matter of Wooten Oil Company, Docket No. CAA-94-H001 (Ruling on Complainant's Motion to Dismiss Answer and for Accelerated Decision, January 31, 1996) (answer which contained either a naked denial or a lack of information sufficient to form a belief without elaboration, held to be inadequate under Rule 22.15(b); Respondent was, however, allowed to amend its answer); and In the Matter of Plaza Land Associates, Ltd, Partnership, et al., Docket No.-III-483 (Ruling Granting in Part and Denying in Part Complainant's Motion to Strike Defenses, and Denying Complainant's Motion for Accelerated Decision, October 31, 1995) (striking defense that the complaint failed to state a valid claim).

See also In the Matter of Triton Manufacturing Company, Docket No. 5-EPCRA 97-002 (Order Striking Respondent's Amended Answer and Extending Time for Prehearing Exchange, September 22, 1997) (amended answer, filed without benefit of a motion therefor in accordance with Rule 22.15(e), which for the first time raised defense that Respondent was not required to file Form Rs because it did not "process" toxic chemicals as defined in 40 CFR § 372.25(a), was struck; Respondent was, however, permitted to file a motion to amend its answer).

Turning to the merits of Complainant's motion, Sheffield first addresses paragraph 14 of the complaint which alleges that "[o]n February 24, 1992, a representative of U.S. EPA conducted a consensual inspection of Respondent's facility located at One Industrial Avenue, Joliet, Illinois."[(3)] Sheffield contends that its answer that the allegations of this paragraph were legal conclusions to which no answers were required was proper, because it had no knowledge of the relationship of the "representative" who allegedly inspected its plant and U.S. EPA, that whether a "consensual" inspection comporting with the Fourth Amendment occurred is purely a legal conclusion, and that "facility" is a defined legal term, not only under EPCRA § 329(4), but also under RCRA, and not a mere fact.[(4)] Sheffield points out that this is an element of Complainant's prima facie case which it must prove in order to show a violation of EPCRA § 313.

These arguments are plausible, but not particularly persuasive. For example, if Sheffield truly harbored doubts as to whether the inspector in fact represented EPA, a more appropriate answer to the allegation that a representative of EPA conducted an inspection of Sheffield's plant would have been a lack of information sufficient to form a belief. Moreover, whether the inspection was consensual in the sense that someone in authority at Sheffield consented to the inspection is a factual matter peculiarly within Sheffield's knowledge irrespective of whether there may be grounds for questioning the circumstances under which the consent was given under the Fourth Amendment. Although Sheffield's assertion that "facility" is a legal term is accurate, an exposition of facts is necessary to determine whether Sheffield's plant is a facility as defined in the Act. Sheffield admits as much by the assertion that [whether its plant is or was a facility] is an element of the prima facie case Complainant must prove in order to establish a violation of EPCRA § 313.

The foregoing notwithstanding, the present posture of the case is such that there is not much to be said for the motion to strike the answer to paragraph 14. The purpose of pleadings is, of course, to frame the issues. Here the parties have filed prehearing exchanges and there is no indication or allegation that Complainant was mislead or confused in any manner by the substance or form of Sheffield's answer. Moreover, although there is no stated time limit for filing motions in Rule 22.16, the alleged deficiencies in Sheffield's answer should have been apparent to Complainant no later than the time Complainant filed its motion "To Amend Complaint Instanter by Interdelineation", on January 2, 1997.

The Environmental Appeals Board has made it clear that "administrative pleadings are liberally construed and easily amended", In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 EAD 170, 209 at 205 (EAB, August 5, 1992). While these and similar statements are usually made in the context of considering whether an amendment to a complaint is proper, no reason is apparent why the same rule is not applicable to answers. It follows that, if the motion to strike were granted , Sheffield's motion that it be allowed to file an amended answer would also be granted. Under these circumstances, granting the motion to strike would be to elevate form over substance and delay the proceeding for no sound reason. The motion to strike the answer to paragraph 14 will be denied.

Paragraph 19 of the complaint alleged that Respondent failed to submit a Form R for chromium for the calendar year 1990 to the Administrator of the U.S. EPA and the State of Indiana [Illinois] on or before July 1, 1991, and has not submitted said form as of the June 18, 1992 date of inspection. Sheffield's answer asserted that the allegations of paragraph 19 were legal conclusions to which no answers were required. Sheffield expressly denied any obligation to submit a Form R to the State of Indiana, even if the statutory and regulatory provisions cited by Complainant were applicable.[(5)] Sheffield answered in a similar fashion allegations in paragraphs 20, 26, 27, 33, 34, 40, 41, 47, 48, 54 and 55 of the complaint to the effect that it had not submitted Form Rs for chromium, nickel, and manganese to the Administrator and to the State of [Indiana] Illinois by July 1, 1991, or July 1, 1992, as the case may be.

As indicated previously, Complainant contends that whether Sheffield submitted Form Rs for chromium, nickel, and manganese to the Administrator and to the State of Illinois on or before

July 1, 1991, or July 1, 1992, as the case may be, is a factual matter, peculiarly within Sheffield's knowledge. Sheffield, on the other hand, asserts that these allegations are all premised on the legal conclusion that, under EPCRA § 313 and EPA regulations, Sheffield was required to complete and file Form Rs (Opposition at 5). Sheffield says that this is the ultimate question to be resolved in this action and the allegation that it failed to file such forms is a clear expression that it had a legal obligation to do so. Consequently, Sheffield argues that its answers, premised on the notion that the allegations at issue were legal conclusions, were proper (Opposition at 5, 6).

Sheffield's arguments overlook or ignore paragraphs 18, 25, 32, 39, 46, and 53 of the complaint which are to the effect that Sheffield was required to submit Form Rs for chromium, nickel, and manganese to the Administrator and the State of Illinois on or before July 1, 1991, or July 1, 1992, as the case may be. These allegations are clearly legal conclusions and Sheffield's answers to that effect were proper. However, the allegations of paragraphs 19, 26, 33, 40, 47, and 54 to the effect that Sheffield failed to submit Form Rs for chromium, nickel, and manganese to the Administrator and the State of [Indiana] Illinois on or before July 1, 1991, or July 1, 1992, as the case may be, are factual averments and not legal conclusions, repetitious of the allegations in the preceding paragraphs. Whether the Form Rs were submitted is clearly a separate question from whether Sheffield was subject to TCRI reporting requirements. That being said, the motion to strike the answers to these paragraphs will be denied for the same reason the motion to strike the answer to paragraph 14 will be denied, i.e., if the motion were granted, Sheffield would be permitted to amend its answer, which at this juncture would simply delay the proceeding for no sound reason.

B. Sheffield's Motion to Dismiss

Sheffield's motion to dismiss alleges that Complainant has failed to establish a *prima facie* case of a right to relief (Sheffield's Motion at 2). Sheffield advances three grounds for this position.[(6)] First, Sheffield alleges that it does not engage in any "incorporative" activity involving chromium, nickel, or manganese at its plant and thus, does not "process" the mentioned chemicals. Second, Sheffield asserts that, should it be held to have processed the chemicals, its activities of heating, rolling, and cutting steel plates are exempt from EPCRA § 313 reporting under the "article" exemption (40 CFR § 372.38(b)). Finally, Sheffield argues that, irrespective of any

finding of a violation of EPCRA, Complainant cannot now seek to impose a penalty because of ambiguous and vague regulatory standards that do not provide sufficient notice or guidance regarding the conduct they require or permit (Sheffield's Motion at 3).

1. Whether Sheffield Processes Chromium, Nickel, and Manganese

EPCRA § 313 requires owners or operators of covered facilities to report annually listed toxic chemicals manufactured, processed, or otherwise used at the facility equal to or in excess of threshold quantities. Specific toxic chemical listings are published at 40 CFR § 372.65. The threshold quantity for a listed chemical "otherwise used" at the facility during a calendar year is 10,000 pounds and the threshold quantity for a listed chemical "manufactured or processed" at the facility is 25,000 pounds for the calendar year 1990 and succeeding years (EPCRA § 313(f)); 40 CFR § 372.27(a)).

As indicated previously, Sheffield argues that, because it does not engage in any "incorporative" activity regarding chromium, nickel, or manganese, it does not process these chemicals and accordingly, the TCRI reporting requirement is not applicable (Motion at 3). Sheffield's contention that an incorporative activity is essential to constitute "processing" under the Act and regulation is based in part upon the preamble to the proposed rule, in particular the following:

In general, processing includes making mixtures, repackaging, or use of a chemical as a feedstock, raw material, or starting material for making another chemical. Processing also includes incorporating a chemical into an article.

EPA also interprets the term "process" to apply to the processing of a toxic chemical that is a component of a mixture or other trade name product. This would include processing of a toxic chemical that is an impurity in such product. That is, if a person is processing a chemical or mixture that contains an impurity, then the person is processing the impurity.

53 Fed. Reg. 21152, 21167, at 21155 (June 4, 1987).

Sheffield alleges that there is nothing in the preamble to suggest that EPA intended to require Form R reporting for solid metal alloys such as steel that intentionally contain listed chemicals which are at all times inextricably bound into the steel alloy (Motion at 4). Indeed, Sheffield says that it is

clear from a common-sense reading of the quoted preamble text that to the extent EPA considers the steel billets Sheffield obtains from its suppliers to constitute a "mixture" of various chemicals, including elemental chromium, nickel, and manganese, it is the suppliers, not Sheffield, who process the elemental chromium, nickel, and manganese by "making [a] mixture," i.e., the steel billet.[(7)] This argument finds some support in the instruction to the effect that owners or operators are to report activities that take place at their facilities and not activities that take place at other facilities involving their products (Instructions for Completing EPA Form R (1989), § C, ¶ 3). Sheffield alleges that it does not "repackage" elemental chromium, nickel, or manganese, nor does it "use" those substances as a "feedstock, raw material, or starting material for making another chemical." Moreover, Sheffield maintains that it does not "incorporate" any material into the steel billets and thus, does not engage in any "processing" activity as that term is defined by the Agency for the purposes of EPCRA § 313.

Sheffield asserts that the foregoing understanding of "processing" is confirmed by the preamble to the final TCRI rule, which states that "processing activities are basically those that incorporate a chemical into a product for distribution in commerce."[(8)] See also 53 Fed. Reg. 4506 where the following appears:

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. Examples of the processing of chemicals include chemicals used as raw materials in the manufacture of other chemicals, the formulation of mixtures or other products where the incorporation of the chemical imparts some desired property to the product (e.g., a pigment, surfactant, or solvent), the preparation of a chemical for distribution in commerce in a desirable form, state, and/or quantity (e.g., repackaging), and incorporating the chemical into an article for industrial, trade, or consumer use.

Sheffield says that its activities simply do not fall within any of these descriptions of "processing" with respect to the toxic

chemicals which are the subject of the complaint, i.e., elemental chromium, nickel, and manganese (Motion at 5). Sheffield emphasizes that its heating, rolling, and cutting operations do not involve any reactions that convert the metals contained in the steel billets, nor do these operations change the physical state of the metals. The constituent chemicals at issue, chromium, nickel, and manganese, at all times remain unchanged in a solid state, bound into the crystalline lattice that comprises the steel billets (Motion at 6). Moreover, Sheffield says that its operations do not involve any blending, mixing, or other inclusion of elemental chromium, nickel, or manganese with other materials, nor does it use the individually listed metals as a raw material in the manufacture of other chemicals. These metals are already incorporated into the billets before the billets arrive at Sheffield's plant and its operations do not add or remove any elemental chromium, nickel, or manganese from the billets. Sheffield denies engaging in any repackaging of elemental chromium, nickel, or manganese and states that simply put, its operations do not involve any incorporation of any listed chemical into a product which imparts some desired property to the product (Motion at 6). Sheffield asserts that it heats, rolls, and cuts the steel billets, no more, no less and, that in the final analysis, it does little more than redistribute in commerce elemental metals already incorporated into the steel billets it obtains from its suppliers.

Complainant, on the other hand, argues that under the plain language of the statute and the regulations Sheffield was required to report quantities of chromium, nickel, and manganese in the steel billets, because it processed these toxic chemicals when it altered the form of the billets (Response at 5).

EPCRA § 313(b) entitled "Covered owners and operators of facilities" provides in pertinent part: (1)(C) For purposes of this section-

(ii) The term "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."

The definition in the regulation, 40 CFR § 372.3, is identical except for the addition of a sentence to clause (2): "Process

also applies to the processing of a toxic chemical contained in a mixture or trade name product."

Complainant asserts that under the statute and regulations Sheffield's toxic chemicals are "processed" and subject to reporting, if (1) the toxic chemical is prepared (2), after its manufacture (3), for distribution in commerce (4), in a different form or physical state from which it was received by the person preparing such substance (Response at 6). Because Sheffield's operations as described by it meet these requirements, Complainant argues that Sheffield is "processing" toxic chemicals within the meaning of the statute and the regulations and is subject to EPCRA reporting requirements.

Complainant points out that under the facts as admitted by Sheffield, it receives steel billets containing chromium, nickel, and manganese from an outside supplier, heats and rolls the billets into smaller, and therefore, different dimensions, and then cuts the billets to new lengths (Opposition at 7). Complainant says that the billets leave Sheffield's plant in a different form than in which the billets arrive, i.e., the billets have different dimensions. Complainant alleges that Sheffield's assertion that the steel substantially retains its initial thickness and/or diameter is disingenuous, because the fact that the steel is being heated, rolled, and then cut, necessarily requires a change in dimensions. The re-shaped billets enter commerce when shipped to Sheffield's customers. Therefore, Complainant maintains that Sheffield processes chromium, nickel, and manganese within the meaning of the statute and regulations (Opposition at 7).

DISCUSSION

Prima facie, the language of the statute favors Complainant's position, because "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce-(ii)(I) 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 preparing such chemical, or (II) as part of an article containing the toxic chemical. (EPCRA § 313(b)(1)(C)). As indicated (supra note 7), steel is a mixture because the individual chemicals, chromium, nickel, and manganese, retain their identity. Accordingly, when Sheffield receives steel billets from its suppliers and heats, rolls and cuts the billets, it is preparing toxic chemicals, i.e., chromium, nickel, and manganese, in a different form or physical state from which the chemicals were received and thus is "processing"

the chemicals.[(9)] Moreover, Sheffield's activities would seem to fit squarely within the second part of the definition as the preparation of a toxic chemical, after its manufacture, for distribution in commerce as "(II) as part of an article containing the toxic chemical."

It is true that the preamble to the final regulation, 53 Fed. Reg. 4506, quoted supra, emphasizes that "processing" is an incorporative activity. This is done, however, to distinguish processing from "otherwise use" as a non-incorporative activity, i.e., the chemical is not intended to become part of a product distributed in commerce. In any event, even the portion of the preamble to the proposed regulation quoted by Sheffield makes it clear that processing is not limited to activities which "incorporate" a toxic chemical into a product which is distributed in commerce, but includes "processing" of a toxic chemical that is a component of a mixture or other trade name product (52 Fed. Reg. 21155). To the same effect, the preamble to the final regulation states in part that: "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." (53 Fed. Reg. 4506).

In view of the foregoing, Sheffield's argument that it is entitled to dismissal of the complaint, because it does not process toxic chemical components of the steel billets, i.e., chromium, nickel, and manganese is rejected.

2. Whether Sheffield is Entitled to the Article Exemption

Sheffield alleges that its operations do not result in any releases of elemental metals and argues that it is entitled to the "article" exemption set forth in 40 CFR § 372.38(b) (Motion at 7). The exemption appears to be based in part upon the definition of a hazardous chemical in EPCRA § 311(e) which states that the term "hazardous chemical" has the meaning given such term by section 1910.1200(c) of Title 29 of the Code of Federal Regulations, with an exclusion for substances present in manufactured items to the extent exposure to the substance does not occur under normal conditions of use.[(10)]

The regulation, 40 CFR § 372.3, defines an article:

Article means a manufactured item: (1) Which is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic

chemical under normal conditions of processing or use of that item at the facility or establishments.

Section 372.38(b) entitled "Articles" provides:

If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25 or determining the amount of the release to be reported under § 372.30. This exemption applies whether the person received the article or the person produced the article. However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), processed, or otherwise used at the covered facility other than as part of an article in excess of an applicable threshold quantity set forth in § 372.25, the person is required to report under § 372.30. Persons potentially subject to this exemption should carefully review the definition of article and release in § 372.3. If a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article.

In addition, release is defined:

Release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles) of any toxic chemical. (40 CFR § 372.3).

According to Sheffield, the article description clearly applies to the elemental chromium, nickel, and manganese contained in the steel billets purchased by Sheffield. Sheffield attempts to bolster its case by quoting from the preamble to the final EPCRA §§ 311 and 312 rules.[(11)] These rules, however, refer to MSDS requirements under OSHA and are not applicable to the § 313 toxic chemical release forms at issue here.

Sheffield asserts that under normal operating conditions, its activities do not result in any releases from the steel billets to the environment of elemental chromium, nickel, and manganese. Sheffield avers that Complainant has not and cannot allege otherwise. Moreover, Sheffield says that any scrap alloy containing elemental chromium, nickel, or manganese that may be produced during its normal operations is collected and sent off-

site for recycling. Additionally, all water used to cool the rollers is allegedly recaptured, recycled, and reused in a closed-loop system.

Sheffield points to "applicable EPA guidance" to the effect that: "If waste containing a listed toxic chemical is 100% recycled or reused, on-site or off-site, then article status is maintained." OTS Section 313 Reporting Issue Paper-Clarification and Guidance for the Metal Fabrication Industry (EPA-560/4-90-012, January 1990) at 11. Wastes containing toxic chemicals are not reportable under section 313 if the waste is reused or recycled, on-site or off-site.(12)

Sheffield alleges that the main thrust of the article exemption was to ensure that companies examine their activities only with respect to "exposure-causing items", thereby reducing the reporting burden on industry, citing the preamble to the final regulation, 53 Fed. Reg. at 4507 (Motion at 10). The cited preamble makes it clear, however, that the regulatory definition of article was also intended to reduce or eliminate the likelihood that "exposure-causing items" would be considered articles.(13) In this regard, Sheffield emphasizes that the Agency has stressed the first two prongs of the definition, i.e., that to qualify as an article, an item must be (1) formed to a specific shape or design during manufacture, and (2) have end use functions dependent in whole or in part upon this shape or design.

According to Sheffield, the steel billets involved in its activities are square so that the billets can be rolled and cut at Sheffield's plant. Allegedly, the billets retain their square shape after being rolled and cut. Therefore, Sheffield asserts that the billets are items which are (1) formed to a specific shape or design by Sheffield's suppliers and (2) have end use function dependent in whole or in part upon this shape or design. Sheffield says that the final shape and form of the steel billets is dependent in whole or in part upon the needs and specifications of the end users, Sheffield's customers. While Sheffield acknowledges that approximately 5% of its production involves special orders that may result in round or other non-square products, Sheffield maintains that this fact does not remove the vast majority of its operations from the coverage of the article exemption (Motion at 12, note 7).

Sheffield argues that under applicable EPA guidance the billets, when received by Sheffield and when exiting Sheffield's operations for distribution to customers, retain their exempted

"article" status. Guidance relied upon includes the Section 313 Reporting Issue Paper, supra which, inter alia, provides that "If, as a result of processing or otherwise use, an item retains its initial thickness or diameter, in whole or in part, then it meets the first part of the [article] definition...However, cutting a manufactured item into pieces which are recognizable as the article does not change the original exemption as long as the thickness of the item remains the same and no release of the toxic chemical occurs." (Id. 10). The Paper goes on to explain that an important aspect of the article exemption is the criteria for what constitutes a release of a toxic chemical and that any processing or use of an article which results in generation of a waste containing the toxic chemical is [ordinarily] considered a release which negates the exemption. However, if the resulting waste containing a listed toxic chemical is 100 percent recycled or reused, on-site or off-site, then the article exempt status is maintained. (Id. 11).

Complainant maintains that Sheffield does not qualify for the article exemption, because by its own admission the billets are heated and rolled, thereby of necessity reaching a different length, thickness and/or width than that in which the billets were received (Response at 12-14). Additionally, after the completion of these processes, Sheffield cuts the billets into lengths desired by its customers. Because of these alterations to the billets, Complainant argues that Sheffield cannot meet the first prong of the article test, i.e., that there be no change in the shape or dimension of the item between the time it arrives from the manufacturer at the regulated facility and the time it leaves the regulated facility after processing or use. Complainant asserts that Sheffield's attempted expansion of the article exemption to qualify as long as alterations made do not "substantially or totally alter the shape of the billets" is unsupported and appears to have been pulled from thin air (Response at 14). This assertion overlooks or ignores the Section 313 Reporting Issue Paper, which indicates, inter alia, that an item which retains its initial thickness or diameter, in whole or in part, meets the first part of the article exemption.[(14)]

Complainant cites the 1990 Q & A Document No. 210 (supra note 12), which indicates that in order for the article exemption to be retained, there must be no change in the thickness of metal sheets cut to size. Complainant also quotes Q & A No. 212, which specifies that a facility which extrudes copper bars or rods into wire cannot qualify for the article exemption, because an article has end use functions dependent in whole or in part upon

its shape or design during end use. Complainant argues that both of these examples make it clear that by changing the shape or dimensions of the billets it receives, Sheffield engages in a process which disqualifies it from the article exemption (Response at 15).

Discussion

It is concluded that whether Sheffield is entitled to the article exemption should not and cannot be decided on this record. For example, there is no evidence or allegation of the specific end use functions of the billets so as to comply with the requirement that an article have end use functions dependent in whole or in part upon its shape or design during end use. Moreover, although Sheffield's actions in heating and rolling the billets would seem to necessarily change their thickness and width, there is no evidence of the extent of these changes. Although the Q & A Document (No. 210 supra note 12) indicates that any change in the thickness of an item would negate the article exemption, this stringent interpretation appears not to be supported by the OTS Section 313 Reporting Issue Paper which implies that only a total alteration in basic dimensional characteristics would obviate the exemption (note 14 and accompanying text). See also Q & A No. 211 which provides that bar stock is an article if its basic dimensional characteristics are maintained in whole or in part in the finished product and zero releases occur during processing.[(15)] For all that appears, this bar stock example is more closely analogous to Sheffield's operations concerning steel billets than are the examples of extruding wire or rods from lead ingots, cited in the Section 313 Reporting Issue Paper, or extruding wire from copper bars or rods cited by Complainant. For these reasons, a thorough evidentiary presentation of Sheffield's operations is in order, including the dimensions and shapes of the billets when received by Sheffield and their dimensions and shapes when shipped to Sheffield's customers.

Finally, Sheffield alleges that its operations do not result in any releases to the environment from the steel billets and that all scrap alloy containing elemental chromium, nickel, and manganese is sent off-site for recycling. Presumably, Sheffield is prepared to substantiate these allegations. Sheffield has been silent, however, as to the disposition of emissions, if any, resulting from the heating of the steel billets and its evidence of zero releases to the environment must cover this aspect of its operations as well. In view thereof, a decision on Sheffield's entitlement to the article exemption from EPCRA §

313 reporting will await presentation of the evidence at a hearing.

C. Whether the Regulations and EPA Guidance Provide Fair Notice of the Conduct Required or Prohibited

Sheffield emphasizes the apparent conflict between the Q & A guidance, quoted supra, to the effect that cutting a manufactured item into pieces does not negate the article exemption as long as the diameter and thickness of the item remains the same and no release of the toxic chemical occurs and the OTS Section 313 Reporting Issue Paper, which implies that only a total alteration in basic dimensional characteristics would negate the exemption (Motion at 11). Sheffield alleges that its products substantially retain the initial thickness and/or diameter of the steel billets and that no releases of any elemental metals occur during its rolling and cutting operations. (Id. 12). Sheffield avers that Complainant has never specifically alleged that Sheffield was not entitled to the article exemption or provided Sheffield any indication of Complainant's views as to the applicable guidance. Sheffield argues that, because Complainant has not provided sufficient notice as to the alterations in an item which will negate article status, any contention by Complainant that Sheffield is not entitled to the article exemption because of alterations in shape or design of the billets, should be rejected on due process grounds. Sheffield cites familiar precedent, e.g., General Electric Co. v. U.S. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995); Rollins Environmental Services, Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991) and In re CWM Chemical Services, Inc., TSCA Appeal No. 93-1 (EAB, May 15, 1995), to the effect that a monetary penalty may not be exacted where a regulation fails to give fair notice of the conduct required or prohibited.

Complainant asserts that Sheffield cannot legitimately claim a lack of notice, because, inter alia, the Q & A documents, quoted supra, clearly provide that changes in the shape or dimensions of an item being processed disqualify the item from the article exemption (Response at 16-18). Complainant argues that the example of an item not qualifying for the article exemption, i.e., the cold extrusion of lead ingots into wire or rods, is analogous to Sheffield's operation of hot rolling steel billets into new shapes and dimensions, which are then cut, and that Sheffield has no basis for claiming lack of adequate notice of the scope of the article exemption (Id. 19).

DISCUSSION

As noted previously, evidence is lacking as to the extent of the changes in shape and/or dimensions of the billets normally effected by Sheffield prior to shipping the billets to its customers. In this regard, Sheffield acknowledges that as to approximately five percent of its production involving special orders, alterations to the shape of the billets may be such as to preclude applicability of the article exemption. Accordingly, it is concluded that a complete evidentiary presentation of Sheffield's operations with respect to the billets is necessary prior to any ruling on whether the Agency has provided fair notice of the scope of the article exemption.

Complainant has overlooked or ignored the OTS Section 313 Reporting Issue Paper, which as indicated supra, provides that, if as a result of processing or otherwise use, an item retains its "initial thickness or diameter, in whole or in part", the item meets the first part of the article exemption. Additionally, as noted above, the Paper implies that only a total alteration in an item's "basic dimensional characteristics" would negate the exemption. The terms "initial thickness or diameter, in whole or in part" and "basic dimensional characteristics" are elastic, offering room for interpretation as to their meaning. As Sheffield points out, the Agency has not provided any guidance as to the meaning of these terms. It is concluded that, in addition to evidence as to Sheffield's operations, evidence as to the Agency's interpretation and application of the Section 313 Reporting Issue Paper should be adduced prior to any ruling on Sheffield's due process-fair notice arguments.

Sheffield's contention that the Agency has failed to provide fair notice of the scope of the article exemption will be denied at this time.

Order

Complainant's motion to strike Sheffield's answer and Sheffield's motion to dismiss are denied.

Dated this 21st day of November 1997.

original signed by undersigned

_____

Spencer T. Nissen

Administrative Law Judge

1. Rule 22.15(a) (40 CFR Part 22) requires that an answer to the complaint be filed with the Regional Hearing Clerk within 20 days after the complaint is served. There is no evidence in the record as to when Sheffield received the complaint. Under Rule 22.07(c) service of the complaint by mail is complete when the return receipt is signed.

2. C's Motion at 1, 2. Rule 22.15(b) entitled "Contents of the answer" provides in pertinent part: "The answer shall clearly and directly admit, deny, or explain each factual allegation in the complaint with regard to which respondent has any knowledge." Additionally, paragraph 22.15(d) entitled "Failure to admit, deny or explain" provides: "Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint, constitutes an admission of the allegation."

3. It appears that the actual date of the inspection was February 24, 1993 (infra note 5).

4. Opposition at 4. "Facility" is not defined in RCRA. This term is, however, defined in the regulation, 40 CFR § 260.10.

5. Paragraphs 19, 26, and 33 of the complaint incorrectly alleged that Sheffield was required to submit a Form R to the State of Indiana. Additionally, paragraph 19 of the complaint referred to the inspection of Respondent's facility as being conducted on June 18, 1992, and paragraphs 14, 26, and 33 of the complaint incorrectly alleged that the inspection was conducted on February 24, 1992, rather than February 24, 1993. Complainant moved for and was granted permission to amend the complaint to correct these typographical errors (Order Granting Motion to Amend Complaint, January 6, 1997). The order expressly stated that no additional answer was required.

6. Rule 22.20(a) provides in pertinent part that the ALJ, "... upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

7. A mixture is distinguished from a compound by the fact that the individual [chemical] components retain their identity,

while in a compound the identities of the reactant chemicals are lost. 1989 Q & A Document (Revised Version) at 16, Question No. 87. Thus steel is a mixture.

8. 53 Fed. Reg. 4500, 4525 (February 16, 1988) at 4501. That "process" implies incorporation is confirmed by the Toxic Chemical Release Inventory Reporting Package for 1990, EPA 560/4-91-001 (January 1991), Revised Version 1990 Q & A Document at 24, Question No. 135: "Process" implies incorporation; the chemical added is intended to become part of a product distributed in commerce. To the same effect, see the Toxic Chemical Release Inventory Reporting Package for 1989, EPA 560/4-90-001 (January 1990), Revised Version 1989 Q & A Document at 22, Question No. 118.

9. Pitt-Des Moines, Inc., Docket No. EPCRA-VIII-89-06 (Initial Decision, July 24, 1991), cited by Complainant, contains a finding that PDM processed stainless steel at the Provo facility when it took large sheets of such product, changed their shapes and sizes and placed such product into the stream of commerce (Id. 28). To the same effect, see CBI Services, Inc., Docket No. EPCRA-05-1990 (Order Granting in Part Complainant's Motion for Accelerated Decision, February 28, 1991). Sheffield correctly notes that these decisions are not controlling, because the issue was not whether the respondents were engaged in processing toxic chemicals, but the determination of threshold quantities, that is, whether the entire weight of the stainless steel must be considered and not just the portion subject to cutting, welding, grinding, or burning.

10. EPCRA § 312(c), 42 U.S.C. § 11022, entitled "Emergency and hazardous chemical inventory forms", provides that "A hazardous chemical subject to the requirements of this section is any hazardous chemical for which a material safety data sheet or listing is required under section 11021 [EPCRA § 311] of this title." EPCRA § 311(a)(2) in turn refers to the list of hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health Act [29 U.S.C. § 651 et seq.] and regulations promulgated thereunder. Among exclusions to the definition of a hazardous chemical (EPCRA § 311(e)) is: "(2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use."

11. Motion at 9. Sheffield quotes from the preamble to the final EPCRA § 311-312 rules which state in part: Steel and other similar non-reactive solids are generally exempt from MSDS

requirements under OSHA (and thus from sections 311 and 312) when they are articles shaped during manufacture whose end use depends upon that shape....Even if subject to OSHA MSDS requirements, steel and other manufactured solids are excluded from sections 311 and 312 reporting under section 311(e)(2). 52 Fed. Reg. 38344, 38349 (Oct. 15, 1987).

12. Sheffield cites, inter alia, the 1990 [1989] Q & A Document, at 32, No. 181, postulating a metal fabrication facility, SIC Code 34, which cuts metal sheets and sends the shavings off-site for reuse. The answer to the question of whether the sheets can be considered articles is that: if the shavings that are formed during the cutting are the sole releases, and all shavings are sent off-site for reuse, and the thickness of the metal sheets does not change during processing, the metal sheets are still considered articles and are exempt. To the same effect, see the 1990 Q & A Document, at 36, 37, No. 210.

13. The preamble to the final regulation (53 Fed. Reg. 4507) reflects that EPA adopted the HCS OSHA definition of article with some modifications at the suggestion of a commenter who asserted that the HCS OAHA definition would prevent some exposure-causing items from being considered articles.

14. In addition to that part of the Issue Paper quoted in the text, the Paper provides: If the item's basic dimensional characteristics are totally altered during processing or otherwise use, the item would not meet the first part of the definition. (Id. 10). An example of items that do not meet the definition would be items which are cold extruded such as lead ingots formed into wire or rods.

15. Question No. 211 asked whether bar stock used to make precision tuned parts was an article and thus exempt from section 313 reporting. Facts presented were that the bar stock was processed to produce parts that in whole or in part retain the basic dimensional characteristics of the bar stock and that production of the part itself is dependent upon the specific shape and dimensions of the bar stock. The answer was that quoted in the text and included the statement that if the end product is totally different in diameter or thickness, then the bar stock would not be an article.