6/28/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C.

IN RE	:	
Kaw Valley Inc.	:	Docket Number EPCRA-VII-89-T-356
Respondent	:	

ORDER UPON MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

This matter arises under section 325 of the Emergency Planning and Community Right to Know Act of 1986 (hereafter "EPCRA" or "the Act"), 42 U.S.C. section 11045, and regulations promulgated pursuant to authority contained therein, 42 U.S.C. section 11048, EPCRA section 328, 53 Federal Register 4500 et seq., February 16, 1988.

The complaint charges respondent with three reporting violations: failure to report in a timely manner, pursuant to section 313(a) of EPCRA, 42 U.S.C. section 11023(a), 40 CFR section 372.22, that it had manufactured or "processed," as that term is defined at 40 CFR section 372.3, the chemicals dichlorvos, trichlorfon, and 1, 1, 1- trichloroethane in excess of 75,000 pounds during the year 1987. The Act and regulations require that the quantity of each toxic chemical[1] manufactured or "processed"

---

[1] Dichlorvos, Chemical Asbstract Services Number 62-73-7; trichlorfon, Chemical Asbstract Services number 52-68-6; and 1, 1, 1-trichloroethane are listed as toxic chemicals at § 313 of the Act, 42 USC § 11023(c).

during each calendar year must be reported to the Administrator of the U. S. Environmental Protection Agency by means of a toxic chemical release form [EPA "Form R," promulgated pursuant to 42 U.S.C. section 11023(g); see 40 CFR section 372.85], no later than July 1 of the following year. In this case, the forms for calendar year 1987 for each chemical "processed" were to be filed by July 1, 1988. [Section 313(f) of the Act, 42 U.S.C. section 11023(f); 40 CFR Section 372.25.]

The charges in the complaint are based upon an inspection of respondent's facility conducted by an EPA representative on January 10, 1989. [2] The complaint alleges that respondent had ten or more "full-time employees" as defined at 40 CFR section 372.3, falls within Standard Industrial Codes 20-39, owns or operates a "facility," as that term is defined at section 329(4) of the Act, 42 U.S.C. section 11049, manufactured or "processed" the three toxic chemicals in quantities in excess of 75,000 pounds for the year 1987, and, finally, that the required Form R inventories were not filed by July 1, 1988. It is clear that the complaint states a cause of action under section 325 of EPCRA, 42 U.S.C. Section 11045.[3]

---

[2] Complaint at 2-3, ¶ 7, 16, 17, 22, 23.

[3] In its answer to the complaint, respondent asserted as its "First Defense" that the complaint did not "state a claim pursuant to 42 USC § 11045 and applicable regulations, but did not elaborate. (Answer of Respondent, at 1, ¶ 1).

Complainant moved for "accelerated decision" as to respondent's liability herein pursuant to 40 CFR section 22.20, stating that no material issue of fact exists and that complainant is entitled to judgment as a matter of law.[4] Respondent did not respond to this motion.

Based upon the moving papers, the complaint and answer, and pretrial exchange filed by the parties, it appears that two issues are presented for resolution by the motion for judgment as to liability: (1) whether or not the required toxic chemical release reporting Form R was filed for 1, 1, 1-trichloroethane by July 1, 1988, for amounts of the chemical processed in calendar year 1987; and (2) whether or not respondent employs ten or more full-time employees. In its answer to the complaint, respondent denied that a Form R for 1, 1, 1-trichloroethane was not filed timely, although the answer admits that Form R's for dichlorvos and trichlorfon were not filed by July 1, 1988. [5] Respondent also denied the allegation that ten or more persons are employed at its facility full-time. [6]

---

[4] 40 CFR §22.20(a) provides that an "accelerated decision may be rendered "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding." "Accelerated decision" is analogous to summary judgment under Federal Rule or Civil Procedure 56(c), which provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

[5] Answer of Respondent, at 1, ¶5.

[6] Id.

As to the question of whether or not a Form R was filed for the 1987 manufacturing or "processing" of 1, 1, 1-trichloroethane, respondent's pretrial exchange contains a Form R for this chemical [respondent's exhibit 1 for identification]. This document is dated June 29, 1989, three days short of one year after the form was due. Respondent's pretrial exchange contains no indication that any evidence to support its denial of failure to file a Form R for 1, 1, 1-trichloroethane in a timely manner is to be offered. Copies of Form R's for dichlorvos and trichlorfon, also dated June 29, 1989, are included in respondent's pretrial exchange. Accordingly, since respondent's pretrial exchange contains probative evidence to support the proposition that the Form R for 1, 1, 1-trichloroethane was filed on or about June 29, 1989, and since no information to the contrary appears, this issue must be resolved against respondent. The mere denial in respondent's answer to the complaint is inadequate to overcome complainant's motion, Cowdry v. City of Eastborough, Kansas, 730 F. 2d 1376, 1379 (10th Cir. 1984).

As to the issue of whether respondent employs ten or more persons at its facility full-time, the following are considered in connection therewith:

1. 40 CFR section 372.3, published as part of a final rule in the Federal Register on February 16, 1988, defines "full-time employees" as follows:

> 'Full-time employee' means 2,000 hours per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totalling the hours worked during the calendar

year by all employees, including contract employees, and dividing that total by 2,000 hours.

2. Respondent asserts that its understanding of the term "full-time employee" differs from the regulation, and is based upon information [EPA Publication 560-4-87-001, dated September, 1987, and Right to Know Compliance Seminar notebook, December 1, 1987 (respondent's pretrial exhibits 3, 4)] obtained at a seminar attended by certain of respondent's employees in December, 1987. Respondent's pretrial exchange indicates that the testimony of at least one employee as well as testimony from several other attendees at the seminar will be offered to establish the understanding they received of the term "full-time employees" based upon the seminar. In addition, a copy of the EPA report of inspection of the facility on January 10, 1989 (respondent's pretrial exhibit 6), and an attached statement signed by both respondent's president and the inspector is to be offered. In the signed statement, respondent's president concedes that respondent's records show over 20,000 paid hours worked during 1987, but disagrees that 20,000 hours indicates ten full-time employees. Nothing further on the issue of full-time employees appears in respondent's pretrial exchange. Neither the testimony nor respondent's view of the significance of 20,000 paid work hours is sufficient to overcome the clear language of 40 CFR section 372.3, which respondent is obligated to observe even though it was not in place when the seminar was conducted.

3. Complainant urges that respondent is bound by the February, 1988, definition which was published after the seminar

respondent's employees attended (December, 1987), but before the date on which respondent's Form R's were due (July 1, 1988) for the three chemicals processed during 1987.

4. Complainant's pretrial exhibits 1 and 2 indicate that the EPA inspector, together with respondent's Director of Regulatory Affairs, examined respondent's time records and Form W-2 Wage and Tax Statements, on January 10, 1989. The inspection report states that 28,479.09 hours were worked [7] during calendar year 1987 by respondent's employees. Seven employees worked at least 2,000 hours each, one employee worked 1904.25 hours, another worked 1,841 hours, a tenth employee worked 1421.75 hours, and an eleventh employee worked 1,357.75 hours. Sixteen employees worked between 1,026.50 and 17 hours during the year. Based upon these records, complainant asserts, respondent had 14.2 employees during 1987.[8]

5. Respondent did not respond to the motion for judgment as to liability.

There is no question that respondent is indeed charged with knowledge of and is bound by the 40 CFR section 372.3 definition of "full-time employee" as published in the Federal Register in February, 1988. Such evidence as appears in the parties' pretrial exchange contains probative evidence which clearly indicates that respondent's employees worked more than 28,000 hours during 1987.

---

[7] The figure does not include paid sick leave and vacation time, according to the report (complainant's pretrial exhibit 1, p. 3).

[8] Memorandum in Support of Complainant's Motion for Partial Accelerated Decision, August 13, 1990.

That figure, divided by 2,000 as provided by 40 CFR section 372.3, results in respondent having more than ten "full-time employees" as defined by that section.

It is clear that on a motion for summary judgment, the moving party must demonstrate that there is no "genuine issue of any material fact... (T)he pleadings and other documentary evidence must be construed in favor of the party opposing the motion," Cowdrey, at 1379, quoting Otteson v. United States, 622 F. 2d 516, 519 (10th Cir. 1980). Further, "(I)f the movant presents documents which demonstrate the absence of a genuine issue, the opposing party must produce evidience sufficient to withstand the motion," Cowdry at 1379 quoting Brown v. Ford Motor Co., 494 F. 2d 418, 420 (10th Cir. 1974). However, if the moving party's papers do not establish the absence of a genuine issue of fact beyond a reasonable doubt, summary judgment is not proper even if no opposing evidentiary matter is presented, Cowdry at 1379 citing Fed. R. Civ. P. 56(e); and Luckett v. Bethlehem Steel Corp. 618 F. 2d 1373, 1382-83 (10th Cir. 1980).

Here, complainant and respondent have presented documents which demonstrate the absence of a genuine issue of fact, and no probative evidence to overcome the motion has been produced by respondent.

Accordingly, it will be found that complainant is entitled to judgment as to respondent's liability for the violations alleged in the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "person," as that term is defined at section 329(7) of EPCRA, 42 U.S.C. section 11049(7); is the owner or operator of a "facility," as defined at section 329(4) of EPCRA; falls within Standard Industrial Classification 20-39; and manufactured, or "processed," as that term is defined at 40 CFR section 372.3, the chemicals dichlorvos, trichlorfon, and 1, 1, 1-trichloroethane in excess of 75,000 pounds each for calendar year 1987 [Respondent's Answer, at 1, ¶ 2]. Respondent is subject to the Act.

2. Dichlorvos, trichlorfon, and 1, 1, 1-trichloroethane are toxic chemicals listed at section 313(c) of EPCRA and 40 CFR section 372.65, and must be reported to the EPA Administrator and appropriate authorities in the state in which respondent's facility is located when, as here, they are manufactured or "processed" in quantities exceeding 75,000 pounds during a calendar year.

3. The pleadings and pretrial exchange having been viewed in the light most favorable to respondent, although respondent did not oppose the motion, it is found that no genuine issue exists as to any material fact, and that complainant is entitled to judgment as to respondent's liability for the violations alleged in the complaint.

4. Respondent did not submit the required chemical release reporting form, i.e. EPA Form R, by July 1, 1988, for each of the three chemicals [respondent's answer, at 1, ¶ 2, of July 10, 1989; respondent's exhibit 1 for identification, filed on May 7, 1990].

5. Respondent employs ten or more "full-time employees", as that term is defined at 40 CFR section 372.3, based upon probative evidence (complainant's pretrial exhibits 1-2).

6. Respondent violated section 313 of EPCRA, 42 U.S.C. section 11023, and 40 CFR section 372.30, by failing to submit a toxic chemical release form (EPA Form R) by July 1, 1988, for each of the three chemicals to the EPA Administrator and to appropriate authorites of the State of Kansas.

ORDER

Respondent having been found liable for violations of the Act and duly promulgated regulations, it is hereby ORDERED that the parties shall meet, no later than June 21, 1991, to consider whether the remaining issue herein can be settled without resort to trial. And it is FURTHER ORDERED that complainant shall file with this office, no later than June 14, 1991, and make available to respondent at the same time a detailed and complete statement of how the proposed penalty herein was calculated with respect to each charge of the complaint. In doing so, complainant shall not fail to note recent decisions as to penalties such as CBI Services, Inc. Docket No. EPCRA-05-1990, decided April 30, 1991, and cases cited therein including Riverside Furniture, Docket No. EPCRA-88-H-VI-406S (September 28, 1989), Pease and Curren, Inc., Docket No. EPCRA-I-90-1008 (March 13, 1991).

And it is FURTHER ORDERED that the parties shall report upon the status of their effort during the week ending June 28, 1991.

J. F. Greene
Administrative Law Judge

Dated: June 7, 1991

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the Original of this **Order Upon Motion for Summary Judgment as to Liability** was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 7, 1991.

Shirley Smith
Secretary to Judge J. F. Greene

Ms. Venessa Cobbs
Regional Hearing Clerk
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

Becky Ingrum Dolph, Esq.
Office of Regional Counsel
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

John Tillotson, Esq.
Murray, Tillotson & Van Parys
P. O. Box 10
Leavenworth, Kansas 66048