

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

CLARKSBURG CASKET CO.,

DKT. No. EPCRA-III-165

Respondent

ORDER CONCERNING MOTION FOR ACCELERATED DECISION

The Complainant has filed a Motion for Accelerated Decision as to liability on each of the six counts of the Complaint. The Respondent has opposed such Motion. After consideration, it is determined that decision on the Motion will be **STAYED** until completion of the prehearing exchange, for the reasons set forth below:

This action arises under Emergency Planning and Community Right to Know Act of 1986 ("EPCRA") , 42 U.S.C. §§11001-11050. The issue is the Respondent's admitted failure to file toxic chemical release forms (Form R) for two chemicals, Toluene and Xylene, for years 1991-1993. The Respondent has admitted all elements of the causes of action except for whether it, in fact, "otherwise used" more than 10,000 pounds of those chemicals in those years and thus, was required to file the Form R's.

The Complainant asserts that there is no "genuine issue of material fact" as to whether the Respondent's usage of Toluene and Xylene exceeded 10,000 pounds in 1991, 1992 and 1993 based upon: (a) the results of an inspection conducted in May 1995; and (b) a letter from the Respondent unequivocally representing its usage exceeded the threshold in those years. The Complainant's Inspector acknowledges in his Affidavit, however, that his conclusion of Respondent's usage in years 1991 and 1992 were based on extrapolations from 1993 invoices because invoices for the other years were not available.¹

On the other hand, the Respondent counters asserting that it is still an open question as to the volume of its usage in 1991, 1992 and 1993 because: (a) allegedly, despite its request, the Complainant has not yet provided it with a

complete set of the calculations upon which the Inspector's usage findings were based; and (b) based upon its own still "preliminary" calculations, it does not now believe that it actually exceeded the 10,000 pound usage threshold.

In light of Respondent's repeated representations during the course of the investigation acknowledging that its usage exceeded the threshold and its failure to definitely state even at this point in time what its actual usage allegedly was and how it calculated such usage, it is not clear that the Respondent has raised a "genuine" issue of material fact.² However, it appears prudent to allow the parties to complete their prehearing exchange prior to ruling on the Motion for Accelerated Decision.

Therefore, the parties are ORDERED as follows:

(A) As part of its initial prehearing exchange, the Complainant shall submit:
(1) a detailed narrative statement explaining how the Inspector calculated the usage totals for the two chemicals, Toluene and Xylene, for years 1991, 1992 and 1993; and (2) copies of all documents reflecting the Inspector's calculations regarding usage, such as worksheets, as well as any and all documents which the Complainant believes supports the calculations finding that the Respondent exceeded the usage threshold. In addition, the Complainant shall make the originals of the documents available for review by the Respondent at its offices upon reasonable notice.

(B) As part of its initial prehearing exchange, the Respondent shall submit:
(1) a definitive statement as to what its final calculations reveal as to its usage of the chemicals Toluene and Xylene in 1991, 1992 and 1993 and a detailed narrative statement explaining how such usage totals were calculated; (2) copies of any and all documents reflecting its usage of the chemicals Toluene and Xylene during years 1991, 1992 and 1993, regardless of whether such documents were used in reaching its final calculations; and (3) a response to the Complainant's calculations regarding Respondent's usage indicating points of contention.

(C) As part of its rebuttal prehearing exchange, the Complainant shall submit a response to the Respondent's final calculations indicating any points of contention.

(D) On or before March 1, 1997 the parties may submit supplementary Memoranda regarding the Motion for Accelerated Decision.

Susan L. Biro
Administrative Law Judge

Dated: December 17, 1996
Washington, D.C.

IN THE MATTER OF CLARKSBURG CASKET CO., Respondent

Docket No. EPCRA-III-165

CERTIFICATE OF SERVICE

I certify that the foregoing Order Concerning Motion for Accelerated Decision, dated December 17, 1996, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA, Region III
841 Chestnut Bldg.
Phila. PA 19107

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

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Aurora M. Jennings
Legal Staff Assistant
Office of Administrative Law Judges
Environmental Protection Agency

Dated: December 17, 1996

¹ The Inspector indicates in his Affidavit that the Respondent had failed to prepare usage summaries with supporting documentation for each of the relevant years prior to the inspection, although the Complainant had requested the Respondent to do so, in writing, approximately a month prior to the inspection. Further, after the Inspector's calculations were completed on site, the Respondent signed the Inspector's worksheet which clearly reflected calculations of usage over the 10, 000 pound threshold for each chemical during each year.

² Conspicuously absent from the Respondent's Opposition to the Motion for Accelerated Decision, which it filed in November 1996, is any explanation why 18 months after the inspection was completed, and 3-5 years since the chemical usage occurred, the Respondent still is unable to finalize its calculations as to what its chemical usage actually was during the relevant years. By its own admission the records which would document its true usage are its own.