3/18/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SAN ANTONIO SHOE, INC., CONWAY, ARKANSAS	)	EPCRA Docket No. VI-501-S
	)	
	)	
Respondent	)	

INTERLOCUTORY ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND RESPONDENT'S MOTION TO DISMISS

Complainant, the U.S. Environmental Protection Agency (EPA, Agency or Complainant), has filed a motion for accelerated decision on liability (Complainant's motion). In reply, Respondent, San Antonio Shoe, Inc., Conway, Arkansas (San Antonio Shoe, SAS or Respondent) has filed a motion for accelerated decision or dismissal (Respondent's motion). Each party has filed a response to the other's motion. In addition, Complainant filed a motion to strike a portion of Respondent's brief which had been filed in support of Respondent's motion and Respondent has filed an opposition to the motion to strike to which Complainant has filed a reply.

I. Background

On January 28, 1991, EPA filed a complaint against San Antonio Shoe alleging, in a single count, violations of Section 313(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11023, and 40 C.F.R. § 372.30 by failing to file the

requisite Forms R for acetone to the Administrator of EPA and the State of Arkansas for the calendar years 1987 and 1988. EPA proposed a penalty of $17,000.00 for this alleged violation.

In response to the initial complaint, Respondent, appearing pro se, filed an answer stating that "[t]hese allegations are totally unfounded."

Subsequently, on June 3, 1991, Respondent filed Forms R for 1987, 1988 and 1989. These Forms R estimated that Respondent released 13,000 pounds of acetone in 1987, 17,000 pounds of acetone in 1988 and 15,000 pounds of acetone in 1989 as a result of both processing and otherwise using the chemical.[1]

On August 5, 1991, Respondent filed revised Forms R in which Respondent estimated acetone emissions of 2,100 pounds, 600 pounds and 1,100 pounds for 1987, 1988 and 1989, respectively.[2] Each form was specifically denoted to be a "Voluntary Revision" and each indicated that the chemical was both processed as an article component and otherwise used as a manufacturing aid.

On August 30, 1991, Complainant filed a motion to file an amended complaint, together with the proposed amended complaint. Complainant's motion sought to amend the complaint by adding to the initial count a violation stating that the Respondent failed to

---

[1]Complainant's Prehearing Exchange (June 26, 1991) Exhibits 8, 9 and 10; First Amended Complaint (August 30, 1991); Respondent's Answer to Complainant's First Amended Complaint (April 21, 1992).

[2]Respondent's Prehearing Exchange (August 8, 1991) Exhibits 3, 4 and 5; First Amended Complaint (August 30, 1991) at paragraphs 30, 31 and 32; Respondent's Answer to Complainant's First Amended Complaint (April 21, 1992) at paragraphs 27, 28 and 29.

file a Form R for acetone in 1989 and by adding a second count consisting of three violations alleging that each of the revised Forms R that the Respondent submitted to the State of Arkansas and the EPA were incorrect in that they show significantly lower emissions of acetone than the original reports did. The amended complaint proposes a penalty of $17,000.00 for the additional violation in Count I and $10,000.00 for each of the three alleged violations in Count II, for a total penalty of $64,000.00.

After Complainant's motion to amend the complaint was granted by the undersigned Presiding Officer, Respondent, on April 21, 1992, filed an answer to the amended complaint. In that answer, Respondent admitted that it did not submit Forms R for 1987, 1988 and 1989 to EPA and the State of Arkansas by the required deadlines and, although admitting that it used acetone at its facility, Respondent denied that it was required to submit the forms.

In this answer to the amended complaint, Respondent denied that it otherwise used in excess of 10,000 pounds of acetone in 1987, 1988 and 1989. Respondent admitted that it used 1,960 pounds of acetone in 1987, and that it used a quantity of Flexweld 4442SU and other mixtures in which acetone was present in an amount later learned by Respondent to be 11,012 pounds; that it used 581 pounds of acetone in 1988, and that it used a quantity of Flexweld 4442SU and other mixtures in which acetone was present in an amount later learned by Respondent to be 14,764 pounds; and that it used 528 pounds of acetone in 1989, and that it used a quantity of Flexweld

4442SU and other mixtures in which acetone was present in an amount later learned by Respondent to be 12,501 pounds.

Respondent maintained that it was not required to factor acetone contained in Flexweld 4442SU into threshold and release calculations for acetone for each year and, thus, did not exceed the threshold for reporting releases for 1987, 1988 and 1989. Respondent insisted that the definition of "otherwise used" in 40 C.F.R. § 372.3 does not apply in this case. Respondent also asserted that under 40 C.F.R. § 372.30(b)(3)(iii) the owner or operator is not required to factor into threshold and release calculations chemicals contained in mixtures or trade name products where the specific chemical identity is known but it does not know the specific concentration of that chemical in the mixture or trade name product; has not been told the upper bound concentration of the chemical in the mixture or trade name product; and has not otherwise developed information on the composition of the chemical in the mixture or trade name product. Respondent additionally argued that under 42 U.S.C. § 11023(c), the Respondent is not required to submit a Form R for any items not on the Section 313 list of toxic chemicals and that neither Flexweld 4442SU nor any "mixtures" appear on the Section 313 list of toxic chemicals.

As for the new count relating to the filing of the revised Forms R, Respondent denied that they were incorrect, contending that they reflect the acetone emissions subject to the threshold determinations for the years involved. Finally, the Respondent stated that the revised Forms R did not need to be submitted at

all, due to the fact that Respondent did not exceed the threshold for reporting releases for 1987, 1988 and 1989.

The parties have filed prehearing exchanges which were last amended in July 1992. Since that time, over a three-month period, the parties filed the motions and responses thereto which are the subject of this order, the last such document having been filed on November 19, 1992.

II. Basic Statutory Requirements

Section 313(a) of EPCRA requires certain facilities to submit annual reports to EPA and to the State on the amounts of toxic chemicals released into the environment.[3] These reporting requirements apply to owners and operators of facilities that: (1) are in Standard Industrial Classification Codes 20 through 39 (i.e., certain basic manufacturing industries); (2) have 10 or more full-time employees; and (3) manufactured, processed, or otherwise

---

[3]Section 313(a) of EPCRA, 42 U.S.C. § 11023(a) provides:

> The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

used certain toxic chemicals in amounts greater than certain threshold quantities.[4]

The thresholds which trigger the reporting requirements for facilities that manufacture or process any of the toxic chemicals are 75,000 pounds in 1987, 50,000 pounds in 1988 and 25,000 pounds in 1989 and subsequent years. The threshold which triggers the reporting requirement for toxic chemicals used (or otherwise used) at a facility is 10,000 pounds in 1987 and in subsequent years.[5]

---

[4]Section 313(b)(1)(A) of EPCRA, 42 U.S.C. § 11023(b)(1)(A), states:

> The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

[5]Section 313(f)(1) of EPCRA, 42 U.S.C. § 11023(f)(1) provides:

> The threshold amounts for purposes of reporting toxic chemicals under this section are as follows:
>
> (A) With respect to a toxic chemical used at a facility, 10,000 pounds of the toxic chemical per year.
>
> (B) With respect to a toxic chemical manufactured or processed at a facility-
>
> (i) For the toxic chemical release form required to be submitted under this section on or before July 1, 1988, 75,000 pounds of the toxic chemical per year.
>
> (ii) For the form required to be submitted on or before July 1,

The differences between "manufacture," and "process" are described in the statute as follows:

> (C) For purposes of this section-
> (i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.
> (ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce-
> (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 so preparing such chemical, or
> (II) as part of an article containing the toxic chemical.[6]

"Use" or "otherwise use" is not defined in EPCRA but its meaning has been explicated in the regulations issued by EPA to implement EPCRA (infra pp. 9-13).

III. Discussion and Findings

San Antonio Shoe manufactures shoes at its facility at Conway, Arkansas. A glue, Flexweld, also known as 4442SU Urethane or 4442SU55, is used to adhere the soles to the shoes.[7] Personnel at

---

Footnote 5 continued:

> 1989, 50,000 pounds of the toxic chemical per year.
> (iii) For the form required to be submitted on or before July 1, 1990, and for each form thereafter, 25,000 pounds of the toxic chemical per year.

[6]Section 313(b)(1)(C), 42 U.S.C. § 11023(b)(1)(C).

[7]Respondent's Motion and Brief in Support of Accelerated Decision or Dismissal at 1.

the facility knew that acetone was present in Flexweld in 1987.[8] Pure acetone is also used at the plant.[9]

Respondent has admitted that it is a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7); that it is an owner or operator of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 372.3; that its facility has 10 or more "full-time employees" as that term is defined by 40 C.F.R. § 372.3; that the facility is in Standard Industrial Classification Codes 20 through 39 (as in effect January 1, 1987), more specifically, in Standard Industrial Classification Code 3149.[10] Respondent has also admitted that it failed to submit Forms R for acetone by July 1, 1988, by July 1, 1989 and by July 1, 1990.[11]

Thus, Respondent has admitted all elements required to find a violation of Section 313(a) of EPCRA as alleged in Count I but for the allegation that Respondent otherwise used the toxic chemical acetone in amounts greater than the reportable quantity (RQ) in the years involved.[12]

---

[8]Id. at 2; Material Safety Data Sheet (February 4, 1987) Lavigne Affidavit Exhibit 1.

[9]Respondent's Motion and Brief in Support of Accelerated Decision or Dismissal at 5; Complainant's Prehearing Exchange Exhibits 11, 12 and 13.

[10]First Amended Complaint and First Amended Answer, at ¶¶ 6-11.

[11]Id. at ¶¶ 21-23.

[12]The first amended complaint alleges that the toxic chemical was otherwise used. No allegation is made that acetone was manufactured, imported or processed.

Respondent also admits submitting revised Forms R for 1987, 1988 and 1989 as alleged in Count II, admits that the lower amounts reported therein were slight over-estimations of acetone emissions but denies that these Forms R needed to be submitted at all.

A. Count I

The basic issues to be resolved in determining the question of liability for Count I in this case are whether the Respondent otherwise used acetone in amounts equal to or greater than their RQ in the years involved and if so, whether the exemption in 40 C.F.R. § 372.30(b)(3)(iii) should apply to Respondent for any of those years.

1. The Otherwise Use Issue:

Although "use" and "otherwise use" are not defined in EPCRA, the differences among these terms and "manufacture" and "process" are further explained in the regulation issued by EPA to implement the Section 313 reporting requirements:

> "Manufacture" means to produce, prepare, import, or compound a toxic chemical. Manufacture also applies to a toxic chemical that is produced coincidentally during the manufacture, processing, use, or disposal of another chemical or mixture of chemicals, including a toxic chemical that is separated from that other chemical or mixture of chemicals as a byproduct, and a toxic chemical that remains in that other chemical or mixture of chemicals as an impurity.
>
> * * * * * * *
>
> "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.
>
> "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.[13]

EPA published other extensive explanations of the terms. The preamble published with the Proposed Rule in the Federal Register on June 4, 1987, explained in some detail the meaning and application of the terms "manufacture," "process" and "otherwise use."[14] There EPA said that the

> statute does not define the term "otherwise used" and no guidance with respect to this term is provided in the legislative history. EPA proposes to define "otherwise used" as any use of a toxic chemical at a covered facility that is not an action covered by the terms "manufacture" or "process," and includes use of a toxic chemical contained in a mixture or trade name product. For example, a chemical would be otherwise used if it is used as a solvent to aid a chemical process but does not intentionally become part of the product distributed in commerce. Another example would be a chemical used as an aid in manufacturing such as a lubricant or metalworking fluid. Such uses do not fall within the definitions of manufacture or process.

In the same preamble EPA amplified the statutory meaning of "process" as follows:

---

[13]40 C.F.R. § 372.3.

[14]52 Fed. Reg. 21155. [Emphasis added.]

> As defined by the statute, the term "process" means the preparation of a toxic chemical after its manufacture for distribution in commerce-(a) in the same form or physical state as, or in a different form or physical state from, that in which it is received by the person so preparing such substance, or (b) as part of an article containing the toxic chemical.
>
> 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 that impurity.

When the Final Rule was published in the Federal Register on February 16, 1988, EPA further clarified the terms "process" and "otherwise use" as follows:

> 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 or intermediates 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 (i.e. repackaging), and incorporating the chemical into an article for industrial, trade, or consumer use.
>
> 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. Examples would be a chemical processing aid such as a catalyst, solvent, or reaction terminator. These chemicals may be integral parts of a reaction but do not become part of a product. Other examples would be manufacturing aids such as lubricants, refrigerants, or metalworking fluids, or chemicals used for other purposes at the facility such as cleaners, degreasers, or fuels.[15]

In discussing the interpretive distinction between process and use in the preamble to the final rule, EPA emphasized "that a nonincorporative use of a solvent in chemical processing should be classified as otherwise using it . . . . because it is necessary and appropriate to distinguish processing from otherwise using based on the thrust of the process definition (i.e., whether the toxic chemical in question becomes part of some product distributed in commerce). EPA went on to describe "the example of a paint that is applied during the manufacture of automobiles. Certain 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. Is the mixture processed, used, or both? EPA's interpretation is that the activity of each relevant component of the mixture would have to be evaluated. The solvents

---

[15]53 Fed. Reg. 4506. [Emphasis added.]

would be 'used.' Therefore, they would be subject to the 10,000 pound threshold. The other components of the mixture such as the pigments, would be 'processed' because they are incorporated into the article. Therefore, those mixture components would be subject to reporting based on the process threshold."[16]

In an affidavit submitted by Complainant, the Technical Director for Imperial Adhesives, Inc., the manufacturer of the adhesive Flexweld or 4442SU Urethane, swore to the following:

> The 4442SU Urethane adhesive consists of a synthetic polymeric adhesive dissolved in two solvents, acetone and toluene. The acetone and the toluene are carrier solvents for the adhesive. A carrier solvent allows the adhesive to flow so it can be applied to the desired surface. Without the carrier solvent, the adhesive could not be applied because it would become a solid. Acetone and toluene are also volatile organic compounds, which means that they readily evaporate when exposed to air.
>
> * * * * * * *
>
> Almost all of the solvents (acetone and toluene) are released from the adhesive at the time of the application of the adhesive. Any remaining solvent would evaporate at normal temperature and pressure within a few minutes after application. The solid portion of the adhesive remains on the bonded surfaces.
>
> The acetone and toluene are not incorporated, and are not intended to be incorporated, into the product to which the adhesive is applied.[17]

It is clear that the acetone which is present in Flexweld is not incorporated into the product to which the Flexweld is applied by SAS, i.e., the shoes. Instead, the acetone is a chemical

---

[16]Id.

[17]Affidavit of David Crisp (August 21, 1991).

processing aid, namely a carrier solvent, almost all of which is released through evaporation. This is a classic example of a toxic chemical which is used (or otherwise used). Indeed, it is quite analogous to the example of using solvents in the painting of automobiles. Thus, the 10,000 pound threshold applies to Respondent's use of acetone in each of the years involved.

2. Applicability of 40 C.F.R. § 372.30(b)(3)(iii).

The reporting requirements and the schedule for reporting which are relevant to this matter are explicated in 40 C.F.R. § 372.30:

> (a) For each toxic chemical known by the owner or operator to be manufactured (including imported), processed, or otherwise used in excess of an applicable threshold quantity in § 372.25 at its covered facility described in § 372.22 for a calendar year, the owner or operator must submit to EPA and to the State in which the facility is located a completed EPA Form R (EPA Form 9350-1) in accordance with the instructions referred to in subpart E of this part.
>
> (b)(1) The owner or operator of a covered facility is required to report as described in paragraph (a) of this section on a toxic chemical that the owner or operator knows is present as a component of a mixture or trade name product which the owner or operator receives from another person, if that chemical is imported, processed, or otherwise used by the owner or operator in excess of an applicable threshold quantity in § 372.25 at the facility as part of that mixture or trade name product.
>
> (2) The owner or operator knows that a toxic chemical is present as a component of a mixture or trade name product (i) if the owner or operator knows or has been told the chemical identity or Chemical Abstracts Service Registry Number of the chemical and the identity or Number corresponds to an identity or Number in § 372.65, or (ii) if the

> owner or operator has been told by the supplier of the mixture or trade name product that the mixture or trade name product contains a toxic chemical subject to section 313 of the Act or this part.
>
> (3) To determine whether a toxic chemical which is a component of a mixture or trade name product has been imported, processed, or otherwise used in excess of an applicable threshold in § 372.25 at the facility, the owner or operator shall consider only the portion of the mixture or trade name product that consists of the toxic chemical and that is imported, processed, or otherwise used at the facility, together with any other amounts of the same toxic chemical that the owner or operator manufactures, imports, processes, or otherwise uses at the facility as follows:
>
> * * * * * * *
>
> (iii) If the owner or operator knows the specific chemical identity of the toxic chemical, does not know the specific concentration at which the chemical is present in the mixture or trade name product, has not been told the upper bound concentration of the chemical in the mixture or trade name product, and has not otherwise developed information on the composition of the chemical in the mixture or trade name product, then the owner or operator is not required to factor that chemical in that mixture or trade name product into threshold and release calculations for that chemical.

Respondent contends that Section 372.30(b)(3)(iii) excludes from the EPCRA reporting requirement those toxic chemicals contained in mixtures when the owner/operator does not know the specific concentration of the toxic chemical in the mixture or its upper bound concentration. Respondent maintains that it was not required to factor in the acetone in Flexweld in reporting years 1987 and 1988 in calculating the total amount of acetone used.[18]

---

[18]See Amended Answer, ¶¶ 38 and 39; Respondent's Response to Complainant's Motion for Accelerated Decision on Liability at 12.

As a result, it claims that its usage of acetone was too low in those reporting years to require submissions of Forms R.

In an affidavit dated September 26, 1991, Ms. Virginia A. Lavigne states that she is responsible for maintaining records and Material Safety Data Sheets (MSDS's) and making reports for toxic chemicals used or processed at the Conway facility of SAS. She goes on to state that at the time of the EPA inspection (February 13, 1990), "our facility personnel knew that acetone was present in an adhesive product called 'Flexweld 4442SU' used at the facility in the manufacture of shoes, but did not know the specific concentration at which acetone was present in the product. We had not been told the upper bound concentration of acetone in 'Flexweld 4442SU' nor had we otherwise developed information on the composition of acetone in the product."

Consequently, Respondent insists that it was not required to factor the acetone in the Flexweld into the threshold and release calculations for that chemical for 1987 and 1988.

Complainant contends that Respondent knew or should have known the percentage of acetone in the Flexweld and points to several provisions in the preamble to the proposed rule (Part 372) in support of its contention that SAS had a duty to inquire of the supplier to secure that information.[19] Reliance upon those provisions[20] is somewhat misleading, if not disingenuous.

---

[19]52 Fed. Reg. 21152, et seq. (June 4, 1987).

[20]Id. at 21152, 21156.

In the preamble to the final rule[21] EPA abandoned the "proposed . . . detailed approach for users to make a reasonable determination of the presence of section 313 chemicals in products they use."[22] The Agency went on to explain that it

> has carefully considered the implications of a detailed user determination requirement versus a supplier notification requirement. EPA has determined that the most effective and least burdensome approach is a supplier notification requirement.
>
> * * * * * * *
>
> Therefore, the supplier notification requirement does not take effect until the first shipment of a product in 1989 . . . . Until the supplier notification goes into effect, users and processors of mixtures are only required to use readily available data regarding such mixtures.
>
> * * * * * * *
>
> All reporting by persons who import, process, or use mixtures or trade name products containing toxic chemicals is predicated on those persons knowing that toxic chemicals are present in the mixture or trade name product.
>
> * * * * * * *
>
> In the event that the person does not know the specific concentration or the upper bound concentration then the person is not required to further estimate or otherwise factor that chemical in that mixture or product into threshold or release calculations.[23]

Under 40 C.F.R. § 372.30(b)(3)(iii) Respondent clearly was not required to include the acetone in the Flexweld in its threshold and release calculations since it did not know the specific concentration at which acetone was present in the Flexweld, had not

---

[21] 53 Fed. Reg. 4500 (February 16, 1988).

[22] Id. at 4509.

[23] Id. at 4510-4511.

been told the upper bound concentration of the acetone in the Flexweld or had not otherwise developed information in the composition of the acetone in the Flexweld.

Complainant raises additional arguments to support Count I. EPA avers that all MSDS sheets sent to SAS by Imperial Adhesives after August 11, 1988, should have contained the percentage of solvents in the Flexweld. This claim is based upon a second affidavit of the Technical Director of Imperial Adhesives in which he states that "all MSDS sheets sent to SAS after August 11, 1988 should have contained the percentage of solvents in the 4442SU Urethane."[24] That affidavit goes on to list several approximate dates on which "we <u>believe</u> MSDSs for 4442SU Urethane (which <u>should have contained</u> the percentage of solvents in the 4442SU Urethane) were generated for . . . SAS facilities . . . ."[25] The earliest date shown after the August 11th date is August 26, 1988. Complainant argues that because Respondent should have received an MSDS sheet with the concentration of acetone as early as August 26, 1988, Respondent's defense based upon 40 C.F.R. § 372.30(b)(3)(iii) should not apply to the 1988 reporting year.

San Antonio Shoe responds that EPA has not proved that Imperial Adhesives actually mailed or that SAS actually received MSDSs showing the percentage concentration of acetone in the Flexweld prior to 1990. In support, Respondent cites an affidavit

---

[24]Supplemental Affidavit of David Crisp (April 21, 1992) at 2.

[25]<u>Id</u>. [Emphasis added.]

of Ms. Virginia Lavigne dated September 10, 1992,[26] in which she stated that as of the date of the EPA inspection, February 13, 1990, the MSDS for Flexweld in SAS's possession at the Conway facility did not disclose the percent concentration of acetone contained in the Flexweld. A "true and correct copy of that MSDS" was attached to the affidavit; it shows 2/04/87 as the last revision date and an order date of 4/24/87 and it does not reflect the percentage of acetone in Flexweld.[27]

Moreover, Respondent has submitted a third affidavit of the Technical Director for Imperial Adhesives, Inc. in which he stated that:

> Imperial Adhesives does not maintain a record of the actual transmittal or mailing of MSDSs to the purchasers of its products. The computerized records discussed in my Supplemental Affidavit of April 21, 1992 are the records maintained by Imperial Adhesives of the generation of MSDSs and not of the actual transmittal of such MSDSs to the customer. I have no personal knowledge that the MSDSs referred to in my Supplemental Affidavit dated April 21, 1992 were placed in envelopes with the proper address visible on the exterior of the envelopes, that proper postage was affixed to such envelopes or that the MSDSs were actually placed in the United States Mail.
>
> Prior to August 12, 1988, the percentage of acetone and toluene in 4442 SU Flexweld was

---

[26]Respondent's Exhibit AD-1.

[27]Complainant argues that Ms. Lavigne's affidavit showing a lack of knowledge concerning the concentration of acetone in Flexweld is insufficient to be used on behalf of the entire corporation. However, Complainant offers no evidence to establish that the corporation possessed such knowledge prior to some time immediately after the inspection (February/March 1990).

not printed on the MSDSs generated for this product.[28]

Proof that mail has been properly addressed, stamped and deposited in an appropriate receptacle has long been accepted as evidence of delivery to the addressee.[29] If this has been shown, there is a strong but rebuttable presumption that if it cannot be located thereafter, the MSDSs were delivered in due course in the mails and that they were lost or misdirected or misfiled after reaching their destination.[30]

The burden of showing that the form was properly mailed here is upon Complainant. Complainant has not met that burden. The only evidence offered to support its claim that Respondent should have received MSDSs showing the percentage of acetone in the Flexweld is the second or supplemental affidavit of the Technical Director at Imperial Adhesives and that affidavit does not establish that the MSDSs were properly addressed, stamped and deposited in the U.S. Mail. Furthermore, the third affidavit of the Technical Director specifically disavows any knowledge that these acts were accomplished. Therefore, I must conclude that the MSDS showing the percentage of acetone in Flexweld was not received by Respondent until after the date of the EPA inspection (February 13, 1990). Under these circumstances Respondent was

---

[28]Third Affidavit of David B. Crisp (September 10, 1992) at 2.

[29]In the Matter of Thoro Products Company, Docket No. EPCRA VIII-90-04, Initial Decision (May 19, 1992) slip op. at 29-30.

[30]Legille v. Dann, 544 F.2d 1, 4-5, (D.C. Cir. 1976) and cases cited therein.

relieved of the responsibility to factor the acetone in the Flexweld into the threshold and release calculations for 1987 and 1988. Consequently, Respondent was under no obligation to file Forms R for acetone for 1987 and 1988.

Complainant also maintains that "if Respondent's affirmative defense is successful, it does not apply to the 1989 reporting year, because by its own admission, the Respondent knew the concentration of acetone in February/March 1990." Complainant also points out that Respondent did not raise this defense for the alleged 1989 reporting violation.

Respondent contends that knowledge of the rate of evaporation and the degree of evaporation of the acetone in the Flexweld 4442SU at the time the Forms R were due is a condition precedent to a finding of liability under EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. Part 372 and SAS lacked that knowledge at all applicable times. This argument need be examined only in connection with the Form R for 1989 because I have already concluded that it was not necessary for SAS to file Forms R for 1987 and 1988.

Respondent has submitted an affidavit of Ms. Virginia Lavigne, an employee at the Conway facility who is responsible for maintaining MSDSs and for maintaining records and making reports of toxic chemicals used or processed at the facility, in which she stated that she did not know how much acetone evaporated from the Flexweld as it dries, nor the rate at which it evaporated.[31] She also swore that she had no useable information with which to

[31]Affidavit of Virginia A. Lavigne (September 26, 1991).

estimate the rate or amount of acetone released from Flexweld. Ms. Lavigne also certified that she is neither a chemist nor an engineer and has had no training in chemistry. She further stated that the Conway facility had no employees trained in chemistry or engineering at the time of the inspection. Respondent therefore contends that no one at the facility could know the rate and an amount of evaporation of acetone after the Flexweld was applied to the shoes.

Respondent emphasizes that both subsections (a) and (b) of Section 372.30[32] of the governing rules require that Respondent possess knowledge that acetone was used in excess of its threshold quantity before the reporting requirement must be met. Since SAS lacked factual knowledge regarding the rate and degree of evaporation of the acetone in Flexweld, Respondent contends that SAS did not possess the necessary element of knowledge required under Section 372.30(a) and (b) of the rules.

Section 372.30(b)(1) requires the owner or operator to file the Form R report on a toxic chemical "that the owner or operator knows is present as a component of a . . . trade name product which the owner or operator receives from another person, if that chemical as . . . otherwise used . . . in excess of an applicable threshold quantity.[33] The knowledge required of the owner or

---

[32]Supra at pp. 14-15.

[33]Section 372.30(b)(2) alone refutes Respondent's fallacious argument that it was not required to submit a Form R because neither Flexweld 4442SU nor any mixtures appear on the Section 313 list of toxic chemicals.

operator is described in Section 372.30(b)(2). "The owner or operator knows that a toxic chemical is present as a component of a . . . trade name product . . . if the owner or operator has been told by the supplier . . . that the . . . trade name product contains a toxic chemical subject to section 313 of the Act or this part." Respondent possessed such knowledge because it had been provided an MSDS by Imperial Adhesives which showed that Flexweld contained acetone. Further, Ms. Lavigne has admitted that SAS possessed such knowledge at the time of the inspection.[34]

Section 372.30(b)(3)(iii) provides the only basis upon which an owner or operator, such as SAS, may be excused from factoring the toxic chemical (acetone) contained in the trade name product (Flexweld) into the threshold and release calculations. Lacking factual knowledge regarding the rate and degree of evaporation of the toxic chemical is not included in Section 372.30(b)(3)(iii). Hence, Respondent may not be excused for its failure to file a Form R for 1989.

Moreover, contrary to Respondent's arguments, SAS may not be relieved of this statutory responsibility simply because one employee, Ms. Lavigne, lacked the knowledge, ability and education to make the necessary threshold and release calculations. Where a corporation has knowledge of information which would trigger a legal duty to act, it cannot escape its responsibility to so act because the particular official charged with the responsibility to

---

[34]Supra at 16.

operator is described in Section 372.30(b)(2). "The owner or operator knows that a toxic chemical is present as a component of a . . . trade name product . . . if the owner or operator has been told by the supplier . . . that the . . . trade name product contains a toxic chemical subject to section 313 of the Act or this part." Respondent possessed such knowledge because it had been provided an MSDS by Imperial Adhesives which showed that Flexweld contained acetone. Further, Ms. Lavigne has admitted that SAS possessed such knowledge at the time of the inspection.[34]

Section 372.30(b)(3)(iii) provides the only basis upon which an owner or operator, such as SAS, may be excused from factoring the toxic chemical (acetone) contained in the trade name product (Flexweld) into the threshold and release calculations. Lacking factual knowledge regarding the rate and degree of evaporation of the toxic chemical is not included in Section 372.30(b)(3)(iii). Hence, Respondent may not be excused for its failure to file a Form R for 1989.

Moreover, contrary to Respondent's arguments, SAS may not be relieved of this statutory responsibility simply because one employee, Ms. Lavigne, lacked the knowledge, ability and education to make the necessary threshold and release calculations. Where a corporation has knowledge of information which would trigger a legal duty to act, it cannot escape its responsibility to so act because the particular official charged with the responsibility to

---

[34]Supra at 16.

ensure that the corporation met its legal duty was unaware of that information.[35]

Once Respondent possessed knowledge of the concentration of acetone in the Flexweld, the Respondent corporation had a duty to act. That duty to act here was a duty under the applicable provisions of statute and regulation to make the necessary threshold and release calculations. Although Respondent may not have possessed actual knowledge of the evaporation rate of acetone in Flexweld, it did possess sufficient constructive knowledge to make the necessary inquiries to develop whatever information it may have required to make those calculations. Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts. The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.[36] Respondent failed to exercise the due diligence required to make the necessary threshold and release calculations for 1989 and consequently failed to meet its obligation to file a timely Form R report for that year.

---

[35]In the Matter of Hodag Chemical Corporation, Docket No. TSCA-V-C-025-88, Initial Decision (November 16, 1988) slip op. at 28 (footnote omitted).

[36]In the Matter of Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA VIII-90-04, Initial Decision (May 12, 1992) slip op. at 21-22 (footnotes omitted).

In summary, I find that Respondent's failure to submit, by July 1, 1990, a Form R for acetone for the year 1989 constitutes a violation of Section 313(a) of EPCRA as alleged in Count I of the amended complaint. However, so much of Count I of the amended complaint which alleges a violation of Section 313(a) of EPCRA for Respondent's failure to submit timely Forms R for acetone for the years 1987 and 1988 should be, and hereby is, dismissed for the reasons stated.

B. Count II

On August 5, 1991, Respondent made a "voluntary revision" of the three Forms R (for 1987, 1988 and 1989) which it had initially submitted on June 3, 1991. The only change on the three forms was in the estimate of the number of pounds of acetone which had been released through fugitive or nonpoint air emissions. In each case, Respondent reduced the amount of the estimated release by the approximate number of pounds of acetone which was in the Flexweld used in each particular year.

Respondent contends that the filing of the August 5, 1991, revised Forms R for reporting years 1987, 1988 and 1989 constituted a good faith attempt on the part of the SAS to file correct Forms R. Respondent maintains that there was no effort on the part of SAS to mislead EPA or to provide inaccurate data to EPA. Respondent asserts that since it was not required to file the initial Forms R for 1987, 1988 and 1989, there is no legal basis under which liability may be imposed upon SAS for having subsequently filed incorrect amended Forms R for those years.

Complainant insists that the Respondent is under a legal duty to report truthfully to the EPA and to the State and that it is critical that the information received is accurate. Complainant maintains that the Forms R were revised in response to the Complainant's Prehearing Exchange, when it was pointed out that Respondent's position that the acetone was "otherwise used" contradicted the emissions information that the Respondent certified as correct on the Forms R that it had previously filed. Complainant submits that if the reports are incorrect, then it is irrelevant whether the reports were required to be submitted, because the Respondent had a legal duty to report truthfully to EPA, and in fact certified that it had reported truthfully.[37]

It has been found previously (supra p. 18) that under 40 C.F.R. § 372.30(b)(3)(iii) Respondent was not required to factor into its calculations the acetone contained in the Flexweld for the years 1987 and 1988 because Respondent did not possess the information described in that provision at the time the Forms R were due for 1987 and 1988. Subsequent to the inspection, and long after the Forms R were due for 1987 and 1988, Respondent acquired the necessary information described in 40 C.F.R. § 372.30(b)(3)(iii). Some months later the initial complaint was filed and Respondent, appearing pro se, filed an answer.

The message to SAS from EPA in the initial complaint was clear - SAS was required to file a Form R for 1987 and 1988 because it

[37]Complainant also has moved to strike portions of Respondent's brief herein. I find it unnecessary to act on that motion given the disposition of the matter herein.

otherwise used more than 10,000 pounds of acetone. That usage, of course, included the acetone which had been in the Flexweld. Respondent, continuing to appear pro se, complied and filed the required Forms R for 1987 and 1988 (as well as a Form R for 1989) and included in the calculations the acetone which had been in the Flexweld. The Forms R for 1987 and 1988 which Respondent filed at that time were those which (as found above) Respondent was not required to file because Section 372.30(b)(3)(iii) had relieved Respondent of the need to include the acetone in the Flexweld in its release and threshold calculations.

Thereafter, on July 17, 1991, Respondent indicated that it had "just now involved counsel to represent it in this matter."[38] On July 23, 1991, Respondent filed a notice of appearance and motion for change of lead counsel and thereafter Respondent was represented by counsel.

Respondent then found itself in a "catch-22" situation. Now represented by counsel for the first time and no longer appearing pro se, Respondent recognized the significance of 40 C.F.R. § 372.30(b)(3)(iii) and filed a motion to amend its answer to the initial complaint in which it advanced that provision in the EPA regulations as a defense.[39] Although the motion to amend the answer was denied because the complaint had been amended and Respondent was given an opportunity to file an amended answer to

---

[38]Respondent's Motion for Extension of Time to File Prehearing Exchange (July 17, 1991).

[39]Respondent's Motion for Leave to Amend Answer (September 27, 1991).

the amended complaint, Respondent advanced the same defense in its answer to the amended complaint.

Respondent had also elected to file "voluntary revision[s]" to the Forms R for 1987, 1988 and 1989 on August 5, 1991. These Forms R were consistent with Respondent's reliance upon Section 372.30(b)(3)(iii) and reflected accurate release calculations, had those calculations been made by Respondent when the Forms R for 1987 and 1988 had been due. Hence, the amounts of acetone reported as released in the revised Forms R for 1987 and 1988 are consistent with the EPA regulations had the necessary calculations been made in a timely fashion and before the information described in 40 C.F.R. § 372.30(b)(3)(iii) was acquired by Respondent.

Based upon the information which was available to Respondent at the time the Forms R for 1987 and 1988 were due, these revised forms are correct. I find that Respondent was not attempting to file inaccurate or untruthful information as Complainant implies in the arguments which it advances. I find that the filing of the Forms R for 1987 and 1988 were a good faith attempt to file Forms R which accurately reflected the situation correctly and consistently with EPA regulations at the time the reports initially were due.

I acknowledge that the EPCRA program must require voluntary and timely compliance with the Act and regulations to succeed in attaining the objective envisioned by the Act: having available information for the government and the public reflecting the

location, character and quantities of toxic chemicals released by industry into and onto air, waste, and land.[40]

However, there is no requirement in the EPA regulations that facilities, such as Respondent's, which acquire the necessary information described in Section 372.30(b)(3)(iii) after the due date of a Form R, retroactively recalculate its releases to include the additional amounts of a toxic chemical that may have been contained in a trade name product. In other words, the EPA data base established under EPCRA is expected to exclude those amounts of toxic chemicals which may be exempt from reporting by Section 372.30(b)(3)(iii). Therefore, I cannot find that the revised Forms R for 1987 and 1988 which Respondent submitted on August 5, 1991, were incorrect as alleged in Count II. However, by the time the 1989 report was due to be filed, Respondent possessed the information described in 40 C.F.R. § 372.30(b)(3)(iii) and was required to include in its calculations the amount of acetone contained in the Flexweld for that year. Consequently, the revised Form R for 1989 was in error.

In summary, I find that Respondent has violated 40 C.F.R. § 372.30 and 40 C.F.R. Part 372, Subpart E, by incorrectly calculating the acetone emissions for calendar year 1989 in the revised Form R as alleged in Count II of the amended complaint. However, so much of Count II of the amended complaint which alleges a violation for Respondent's calculations of the acetone emissions

---

[40] In the Matter of Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-406S, Initial Decision (September 28, 1989) slip op. at 11.

for the years 1987 and 1988 should be, and hereby is, dismissed for the reasons stated.

IV. Conclusions and Order

I conclude that no genuine issues of material fact exist as to the question of liability as to both Count I and Count II in this matter. I find that Respondent has violated Section 313(a) of EPCRA, 42 U.S.C. § 11023 and 40 C.F.R. § 372.30, as alleged in Count I by failing to file timely the requisite Form R for acetone for the calendar year 1989. I also find that Respondent has violated 40 C.F.R. § 372.30 and 40 C.F.R. Part 372, Subpart E, by incorrectly calculating the acetone emissions for calendar year 1989 in the revised Form R as alleged in Count II of the amended complaint. Therefore, Complainant's motion for an accelerated decision on liability is hereby granted as to those alleged violations.

Additionally, I find that Complainant has failed to establish that Respondent has violated Section 313(a) of EPCRA, 42 U.S.C. § 11023 and 40 C.F.R. § 372.30, as alleged in Count I by the failure to file the requisite Forms R for acetone for the calendar years 1987 and 1988. I also find that Complainant has failed to establish that Respondent has violated 40 C.F.R. § 372.30 and 40 C.F.R. Part 372, Subpart E, by incorrectly calculating the acetone emissions for calendar years 1987 and 1988 in the revised Forms R as alleged in Count II of the amended complaint. Therefore, Respondent's motion to dismiss the complaint is hereby granted as to those alleged violations.

Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that the issue of the amount, if any, of the civil penalty, which appropriately should be assessed for the violations found herein, remains controverted and the hearing requested shall proceed for the purpose of deciding that issue.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: March 18, 1993
Washington, DC

IN THE MATTER OF SAN ANTONIO SHOE, INC., Respondent
EPCRA Docket No. VI-501S

Certificate of Service

I hereby certify that this Interlocutory Order on Complainant's Motion for Accelerated Decision on Liability and Respondent's Motion to Dismiss, dated MAR 18 1993, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Certified Mail,
Return Receipt Requested to:

Attorney for Complainant:

Evan L. Pearson, Esquire
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Attorney for Respondent:

James W. Ingram, Esquire
Nanette K. Beaird, Esquire
Akin, Gump, Hauer & Feld, L.L.P.
2100 Franklin Plaza
111 Congress Avenue
Austin, TX 78701

Doris M. Thompson
Secretary

Dated: MAR 18 1993