9-11-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COX CREEK REFINING COMPANY,	)	**Docket No. EPCRA-III-032**
	)	
Respondent	)	

PARTIAL ACCELERATED DECISION AND ORDER

An administrative complaint initiating this proceeding was served on August 17, 1990 by the United States Environmental Protection Agency (complainant or EPA), charging Cox Creek Refining Company (respondent) with violating Section 325 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045(c), for infractions concerning the reporting requirements found at Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. §§ 372.22 and 372.30. The violations alleged in the complaint are set forth in four counts, each charging respondent with failure to file pertinent release forms in 1988 and 1989 for toxic chemicals processed or otherwise used at respondent's Anne Arundel County, Maryland facility, in violation of the aforementioned section of EPCRA[1] and regulations. The requirements of Section 313 and the

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[1] This section provides as follows: 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 (continued...)

regulations apply to owners and operators of facilities that have ten (10) or more full-time employees and that are in Standard Industrial Classification Codes (SIC) 20 through 39 and that manufactured, processed, or otherwise used a toxic chemical listed in the statute in excess of the quantity of that toxic chemical established during the calendar year for which a release form is required.

The complaint alleged that respondent was the owner or operator of a facility that had 10 or more full-time employees in 1987 and 1988 and that respondent in these years had a SIC between 2000 and 3999.

In Count I, respondent is alleged to have processed more than 75,000 pounds of copper during the calendar year 1987. Count II alleged that respondent processed more than 50,000 pounds of copper in calendar year 1988. Count III and Count IV alleged that respondent otherwise used more than 10,000 pounds of sulfuric acid and otherwise used more than 10,000 pounds of trichloroethane in calendar year 1988. The complaint proposes a total penalty of $92,000.

Each count also alleged that respondent exceeded the threshold quantity for a toxic chemical processed or otherwise used, that

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[1](...continued)
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 thereafater on July 1 and shall contain data reflecting releases during the preceding calendar year.

respondent did not submit a completed toxic chemical release form for each chemical processed or otherwise used in excess of the threshold quantity. The complainant alleges that respondent's failure to submit the form by the due date violates Section 313. Respondent, in its answer to original complaint, served September 10, 1990, admits that it operated a refining facility at Fort Smallwood and Kembo Roads in Anne Arundel County, Maryland, nor does it dispute that it operated this facility during 1987 and 1988, the calendar years in question. Respondent also admits that it had 10 or more full-time employees during a portion of 1987 and during 1988, and that the facility had a SIC of 3341 in 1987 and 1988, which falls between 2000 and 3999.

Respondent does not deny that it otherwise used more than 10,000 pounds of sulfuric acid and more than 10,000 pounds of trichloroethane in calendar year 1988, both toxic chemicals as defined by 40 C.F.R. § 372.3 and listed in 40 C.F.R. 372.65. (Answer to original complaint at 2) In its answer, respondent denied that it manufactured more than 75,000 pounds of copper in 1987 and more than 50,000 pounds of copper in 1988. On February 21, 1992, complainant's motion amending the complaint to allege process as opposed to manufacturing of a toxic chemical in 1987 and 1988 was granted. However, respondent did not respond to the amended complaint, served January 16, 1992, which alleged that respondent processed, not manufactured, more than 75,000 pounds of copper in 1987 and more than 50,000 pounds of copper in 1988. Nor did it dispute that it processed more than the threshold quantity

and that Form Rs should have been filed for copper in 1987 and 1988. The failure of respondent to admit, deny, or explain any material factual allegation in the amended complaint, as here where respondent did not answer the amended complaint, is an admission of the allegations. 40 C.F.R. § 22.15(d). To be observed also is that respondent states in its prehearing exchange that it "is contesting the appropriateness of the penalty proposed in the complaint." This is a clear implication that the liability question is unchallenged.

Section 313(f) of EPCRA establishes the threshold amounts for reporting. For the calendar year 1987, the threshold for reporting toxic chemicals (1) used at a facility was 10,000 pounds, (2) processed at a facility was 50,000 pounds. For the calendar year 1988, the threshold for reporting toxic chemicals (1) processed at a facility was 75,000 pounds. As stated above, respondent does not deny that it used or processed these chemicals in excess of the reportable quantities for calendar years 1987 and 1988. (Answer to original complaint at 2)

Respondent admits that it did not complete and submit the required Form Rs for sulfuric acid and trichloroethane by July 1, 1989, as required, to EPA and the State of Maryland, consistent with Section 313(a) of EPCRA. (Answer to original complaint at 2) Respondent also admitted, by failure to respond to the amended complaint, that it did not complete and submit the required Form Rs for copper by July 1, 1988 for calendar year 1987 and by July 1, 1989 for calendar year 1988.

On May 1, 1992, complainant moved, pursuant to 40 C.F.R. § 22.20(a), for an accelerated decision on both the liability and penalty issues with regard to all four counts of the complaint, on grounds that no genuine issue of material fact exists with respect to liability on any of the four counts or with respect to the penalty.[2] Respondent submitted a response to the motion on May 18, 1992.

On the issue of liability, respondent, either in its answer to the original complaint, its response to the motion for accelerated decision, or its failure to respond to the amended complaint, essentially admits all of the factual allegations of the complaint. Further, an examination of the pleadings fails to show that a "genuine issue of material fact" exists in this matter on the issue of liability so as to preclude an accelerated decision, pursuant to 40 C.F.R. § 22.20.

Even when a statute mandates a hearing, neither that statute, due process nor the Administrative Procedure Act[3] require an agency to conduct a meaningless evidentiary hearing when the facts are undisputed. United States v. Cheramie Bo-Truc #5, Inc., 538 F.2d 696, 698 (5th Cir. 1976). This principle is incorporated in 40 C.F.R. § 22.20, which allows accelerated decisions if there are

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[2] 40 C.F.R. § 22.20(a) provides that the Presiding Officer may grant an accelerated decision at any time, without further hearing or upon such limited additional evidence, such as affidavits, as he may require 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.

[3] 5 U.S.C. § 500 et seq.

no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

In responding to complainant's motion, respondents had the opportunity to establish their entitlement to a hearing by demonstrating an issue of material fact. It failed to present any evidence demonstrating a factual issue as to any of the allegations in the amended complaint.

It is concluded that respondent has violated Section 313 of the EPCRA, 33 U.S.C. § 11023, as enumerated in the four counts of the complaint, by failing to file the required toxic chemical release forms by the required deadlines. In reaching this conclusion, and in the event this matter is not settled, respondent is assured that it will have "its day in court" on what is an appropriate penalty to be assessed in this matter.

IT IS ORDERED that:

1. Complainant's motion for an accelerated decision be **GRANTED** concerning liability on all four counts of the complaint.

2. Complainant's motion for an accelerated decision on the question of penalty be **DENIED**.

3. The parties continue to engage in good faith settlement negotiations concerning the amount of penalty in this matter.

4. Complainant submit a status report to the undersigned no later than 30 days from the service date of this partial accelerated decision and each month thereafter until a consent agreement is executed or a hearing date is set concerning the penalty issue.

Frank W. Vanderheyden
Administrative Law Judge

Dated September 11, 1992

IN THE MATTER OF COX CREEK REFINING CO., Respondent,
Docket No. EPCRA-III-032

Certificate of Service

I certify that the foregoing Order, dated 9/11/92, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Lydia A. Guy
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region III
841 Chestnut Building
Philadelphia, PA 19107

Copy by Regular Mail to:

Attorney for Complainant:

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Assistant Regional Counsel
U.S. Environmental Protection
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Attorney for Respondent:

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Vice President and General Counsel
COX CREEK REFINING COMPANY
1000 Kembo Road
Baltimore, MD 21226

Marion Walzel
Secretary

Dated: Sept. 14, 1992