10/11/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
TRA Industries, Inc.,	)	Docket No. EPCRA 1093-11-05-325
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: October 11, 1996

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I. Introduction

This case involves the toxic chemical release reporting provisions of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. ° 11001 et seq. The U.S. Environmental Protection Agency ("EPA") seeks a civil penalty of $26,745 against TRA Industries, Inc., also known as Huntwood Industries, Inc. ("Huntwood"), for six violations of Section 313(a) of EPCRA. 42 U.S.C. ° 11023(a).

Section 313(a) requires owners and operators of facilities that manufacture, process, or, as in this case, "otherwise use" toxic chemicals referenced in Section 313(c), and listed at 40 C.F.R. ° 372.65, in excess of a prescribed threshold amount, to submit annually a Toxic Chemical Release Inventory Reporting Form (a "Form R") to the Administrator of EPA and to

designated state officials. This information is to be submitted by July 1, and it is to include data reflecting toxic chemical releases which. occurred during the preceding calendar year.

Information reported on the Form R includes an estimate as to the maximum amount of the toxic chemical present at the facility during the reportable calendar year, the method for disposing of the toxic chemical, and the annual quantity of the toxic chemical disposed of by each method. See EPCRA Section 313(g) and 40 C.F.R. ° 372.85; see also, In re Spang Company, EPCRA Appeal Nos. 94-3 & 944 (EAB, October 20, 1995), at 4.

In an order dated February 5, 1996, EPA's motion for accelerated decision was granted in part and Huntwood was held to have violated EPCRA Section 313(a) as charged in Counts I through V of the complaint. Thereafter, a hearing was held in Spokane, Washington, on April 30, 1996. At the opening of the hearing, Huntwood admitted liability with respect to the remaining violation set forth in Count VI. Tr. 4. Accordingly, the only issue left to be decided in this case is the civil penalty to be assessed for the six violations.

For the reasons that follow, Huntwood is assessed a civil penalty of $19,797 pursuant to Section 325(c)(1) of EPCRA. 42 U.S.C. ° 11045(c)(1).

II. Facts

Huntwood manufactures home kitchen and bathroom cabinets at its facility located in Spokane, Washington. Respondent describes itself as a totally integrated manufacturing facility where it builds its cabinets from rough lumber. Tr. 99. In 1991 and 1992, Huntwood had an average workforce of 70 employees, with annual sales of approximately $5.4 million. Compl. Ex. 1, Attach. A; Tr. 100.

On August 26, 1993, EPA inspected Huntwood's facility to determine whether the respondent was in compliance with the toxic chemical reporting provisions of EPCRA Section 313(a). On the basis of this inspection, as well as a subsequent review of company : documents, EPA determined that Huntwood was not in compliance with Section 313(a) for certain toxic chemicals used in 1990, 1991, and 1992. Compl. Ex. 1, Attach. A; Tr. 16-19, 21, 25. All of the toxic chemicals cited by EPA had a reporting threshold of 10,000 pounds. See 40 C.F.R. °° 372.25(b) & 372.65. Thereafter, EPA fried an administrative complaint charging Huntwood with six counts of violating Section 313(a) by failing to timely file Form Rs for the cited toxic chemicals.

The complaint describes the following EPCRA violations. (Count I) In 1990, Huntwood used 12,279 pounds of Toluene. The reporting deadline for this usage was July 1, 1991. Huntwood did not file a Form R until October 18, 1993. (Counts II, [[I, IV and v) In 1991, Huntwood used 14,516 pounds of Methanol, 41,348 pounds of Toluene, 29,698 pounds of Xylene, and 16,282 pounds of Methyl isobutyl ketone. The reporting deadline for this usage was July 1, 1992. Huntwood did not file the Form Rs until October 18, 1993.

(Count VI) In 1992, Huntwood used 14,079 pounds of Methyl isobutyl ketone. The deadline for reporting this usage was July 1, I993. Huntwood did not file a Form R until September 8, 1993. See Jt. Ex. 1 (Stipulations), at 2; see also, Compl. Exs. 3, 4, 5, 6, 7, and 8.

III. Discussion

Huntwood submits that the $26,745 civil penalty sought by EPA in this case is unrealistic and exorbitant" and that the penalty "should be at most a de minimis penalty." esp. Br. at 1. In seeking a lower penalty (or no penalty at all), Huntwood essentially raises three arguments. First, that it relied to its detriment upon representations made by the EPA inspector who inspected its facility. Second, that it has cooperated with EPA before, during, and after the Agency's inspection. Third, that upon learning of its EPCRA reporting obligations, the company has made special efforts to ensure compliance with Section 313. As discussed below, the arguments raised by Huntwood warrant only a modest reduction in the civil penalty sought by EPA.

The statute involved here, the Emergency Planning and Community Right-To-Know Act, by its very name identifies its important mission. EPCRA is intended to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control any accidental releases of toxic chemicals. Local emergency planning committees are charged with developing emergency response plans based on the information provided in the Form Rs by the covered facilities. The public, in turn, has the right to know the toxic chemical release information reported by the facilities, as well as the contents of the emergency response plans. See Huls America, Inc. V. Browner, 83 F.3d 445, 446-447 (D.C. Cir. 1996), and Atlantic States Legal Found. v. United Musical, 61 F.3d 473,474 (6th Cir. 1995).

It is a fairly simple proposition that the environmental and public health goals of EPCRA cannot be achieved if a facility, such as Huntwood's, uses a toxic chemical in excess of the chemical's reporting threshold, but does not timely file a Form R with the Administrator for EPA and with the appropriate state officials. See In the matter of Riverside Furniture Corp., EPCRA-88-H-VI-406S (Sept. 28, 1989), at 10 ("The success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act".)

In that regard, the Court in Citizens For A Better Environment v. The Steel Company, a/k/a Chicago Steel and Pickling Company, 90 F.3d 1237, 1239 (7th Cir. 1996), observed that the "Right-to-Know component ... aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level. " The Court's observation goes hand-in-hand with the provisions of EPCRA Section 3130) concerning the compilation and availability of the collected toxic chemical data.

Section 313(j) provides:

> The Administrator shall establish and maintain in a computer data base a national toxic chemical inventory based on data submitted to the Administrator under this section. The Administrator shall make these data accessible by computer telecommunication and other means to any person ....

42 U.S.C. ° 11023(j). It follows then, that failure to comply with the reporting provisions of Section 313(a) seriously impairs the public's right-to-know, as well as the Federal and state governments' ability to respond to releases of toxic chemicals. See Huls America, Inc, v. Browner, 83 F.3d at 446-447.

In proposing civil penalties totaling $26,745 in this case, EPA relied upon the penalty guidelines contained in its Enforcement Response Policy ("ERP"). Compl. Ex. 10. The Agency's penalty calculations are set forth in Complainant's Exhibit 14. Specifically, EPA seeks a $5,000 civil penalty each for Counts I through V and a $1,745 civil penalty for Count VI.

In determining the gravity-based penalty under the ERP, EPA concluded that the first five counts warranted a greater penalty because the Form Rs were fried more'than one year after they were due. /1/ Accordingly, Counts I through V were characterized as Circumstance Level 1 violations. /2/ Because Count VI involves a Form R that was submitted only 69 days late, this count qualified as a Circumstance Level 4 violation. In addition, EPA determined that no penalty adjustments, either upward or downward, were justified as to any of the six violations. Compl. Ex. 14, at 34.

> /1/ The ERP sets forth a two-stage penalty determination process. The first stage is the determination of the gravity-based penalty. The second stage is the determination of any adjustments to the gravity-based penalty. Compl. Ex. 10, at 7.

> /2/ "The circumstance levels of the [penalty] matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the federal government." Compl. Ex. 10, at 8.

While EPA may properly rely upon the ERP in calculating a proposed penalty, the starting point for the court's assessing a civil penalty in this case is the statute. In that regard, Section 325(c)(1) of EPCRA, 42 U.S.C. ° 11045(c)(1), provides for the assessment of a penalty of up to $25,000 for each violation of Section 313(a). Section 325(c)(1), however, does not set forth the specific criteria for determining the penalty amount. Accordingly, the penalty criteria contained in EPCRA Section 325(b)(2) is looked to for guidance in calculating a penalty under Section 325(c)(1). See In re Microtechnology, Inc., EPCRA-0992-00-07,

(May 11, 1993), at 9; see also, In the matter of GEC Precision Corp., EPCRA-VII-94-T-381-E (August 28, 1996), at 4.

The penalty provisions of EPCRA Section 3250)(2) incorporate by reference the penalty provisions of Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. ° 2615. TSCA Section 16 provides:

> *In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.*

In arguing for a substantial penalty, EPA puts forth a strong case. First, with respect to Counts I through V, EPA notes that the toxic chemicals released in the years 1990 and 1991 were not reported until October 18, 1993. Jt. Ex. 1, at 2. This filling was more than two years late for the toxic chemical cited in Count I and more than one year late for the toxic chemicals cited in Counts II, 1II, IV, and V.

Huntwood's failure not only to timely submit Form Rs for the violations listed in Counts I through V, but in particular its failure to submit the reports within one year of their filing deadline, completely thwarted the intended purpose of Section 313(a) of EPCRA. That purpose is to provide adequate notice to the Federal and state governments and to the public concerning the release of toxic chemicals. As a result of Huntwood's tardiness in reporting, the toxic chemical release for Toluene in 1990, and the toxic chemical releases for Toluene, Xylene, Methanol, and Methyl isobutyI ketone in 1991, were not included in the toxic chemical release inventory data base of Section 313(j), As explained by EPA witness Philip Wong, a former EPA Region 10 program manager for the toxic release inventory program, this type of a reporting failure is a more serious violation because it "effectively denies the agency and the public of any information regarding the releases of chemicals." Tr. 53.

Further underscoring the seriousness of not timely reporting the release of toxic chemicals is the health and environmental threat posed by the toxic nature of the chemicals. For example, the toxic chemicals covered by EPCRA Section 313(a) are capable of causing (1) significant adverse acute human health effects; (2) cancer, birth defects, including serious or irreversible reproductive dysfunctions, neurological disorders, heritable genetic mutations, or other chronic health effects; and (3) significant serious adverse effects on the environment because of the chemicals' toxicity, persistence in the environment, or tendency to bioaccumulate in the environment. Sections 313(c) & (d). Accordingly, given the health and the environmental hazards posed by chemicals which come within the coverage of EPCRA Section 313(a), it is vitally important that the Federal and state governments, as well as the public, obtain toxic chemical release information in a timely manner.

Huntwood's failure to timely report its 1992 release of Methyl isobutyl ketone as set forth in Count VI poses similar health and environmental concerns. Nonetheless, because the Form R for this 1992 release was filed only 69 days late, as opposed to the more than one-year delay mentioned above, EPA properly sought a lesser civil penalty for this violation. /3/

/3/ As noted earlier, EPA seeks a penalty of $1,745 for Count VI, as opposed to $5,000 each for Counts I through V.

With respect to Huntwood's culpability for failing to file the Form Rs in this case, the facts disclose that the respondent indeed was negligent. First, numerous Material Safety Data Sheets ("MSDS") submitted to Huntwood by chemical manufactures Akzo Coatings, Inc., Reliance.Universal, The Dow Chemical Company, Sherwin Williams, ZEP Manufacturing Company and the Darworth Company identified on their face the requirement that the particular chemical was subject to the reporting requirements of EPCRA Section 313(a). See Tr. 17-18. These MSDS are contained in Complainant's Exhibit 1, Attachment D.

In fact, the earliest MSDS relied upon by EPA which shows that Huntwood should have been aware of its Section 313(a) Form R filing duty long before the August 26, 1993, inspection, is dated February 1, 1991. This MSDS is for the toxic chemical 2-butoxyethanol. Compl. Ex. 1, Attach. D; Tr. 60, 69. The following notation appears midway through the first page of this MSDS, "This material is subject to reporting under SARA TITLE III, SECTION 313." Indeed, Huntwood's operations manager, John Tomzak, conceded that these Material Safety Data Sheets provided notice that there is a reporting requirement. Tr. I25. This is a key admission.

Second, operations manager Tomzak was informed by EPA representative John Davis, even before the August 26, 1993, inspection that EPA was checking to see if the company had fried all the required Form Rs. Tomzak testified that he had a pre-inspection telephone conversation with Davis in May or June and that Davis "was questioning whether we had fried enough Form Rs". Tr. 100, 105-106.

Third, Huntwood timely filed Form Rs for three chemicals used in 1992. See Tr. 58. See also, Huntwood's Response to Motion for Accelerated Decision and to Strike, at 3, and attached affidavit of operations manager, John Tomzak, at 1. Yet, despite this timely filing for 1992, respondent failed to report the toxic chemical releases of 1990, 1991, and 1992 which are the subject of this proceeding until after EPA's inspection of its facility on August 26, 1993.

Finally, the EPA points out that in the Spring of 1993, Huntwood had registered to attend an EPA Section 313(a) reporting seminar to be held in Spokane, Washington. /4/ Despite the fact that the seminar subsequently was canceled, Huntwood's actions again show that prior to the EPA inspection in this case, Huntwood was aware that Section 313(a) existed. See Tr. 46, 106. As Huntwood's operations manager Tomzak stated: "The EPA opened our eyes obviously to, it started with the notice of that seminar, and reading the actual requirement." Tr. 118, 127. Tomzak added, "[t]hat was the first time that I had seen documentation to that effect at Huntwood." Ibid. Again, it is quite significant that the events to which Tomzak testified occurred before the EPA inspection which resulted in the six-count complaint.

/4/ A toxic chemical reporting requirements workshop has been held in the Spokane region by EPA since 1988. Tr. 46; Compl. Ex. 13.

In its defense, Huntwood argues that it relied to its detriment upon certain representations made by the EPA inspector. Based upon the inspection exit interview between operations manager Tomzak and EPA Inspector David Somers, Huntwood submits that it "did not believe that there would be a fine and a fine of that magnitude." In that regard, Tomzak testified that Somers told him that all that Huntwood had to do was to file the necessary Form Rs. Resp. Br. at 4, citing Tr. 116-117, 119.

This argument is simply not persuasive. First, Inspector Somers denied telling Tomzak that if Huntwood were deficient in the filing of any Form Rs that there would be no problem as long as the information eventually was submitted. Inspector Somers testified that he doesn't have the authority to make such a representation. Tr. 39. Inspector Somers' testimony is consistent with his overall testimony regarding his duties and his actions during the inspection. In short, Inspector Somers reviews the company books, and others within EPA make the enforcement decisions. Tr. 39-40. In that regard, an affidavit of John Davis, an EPA specialist for Toxic Chemical Release Inventory, establishes that it was he who made the determination to take the present enforcement action against Huntwood. See Compl. Ex. 13. Accordingly, the testimony of Inspector Somers that no representations were made to Huntwood relative to EPA's enforcement efforts is deemed credible.

In any event, even if Huntwood's representations regarding what Inspector Somers told operations manager Tomzak were true, Huntwood still cannot show that it was prejudiced by its reliance upon those representations. Tomzak testified that the respondent was advised by the inspector to submit the subject Form RS as soon as possible. Tomzak added, "which we did as soon as we figured out what it was that we needed to report." Tr. 116. By his own testimony, Tomzak stated that the Form Rs were filed as soon as the respondent obtained the necessary information. There is no evidence that respondent delayed filing the Form Rs based upon what Inspector Somers said. Moreover, by the inspection date of August 26, 1993, Huntwood was already more than one year late in filing the Form Rs referenced in Counts I through V (and the Form R for Count VI was fried only several days later on September 8,

1993). Thus, any reliance by Huntwood on the inspector's purported statements did not result in a greater civil penalty being sought by EPA and, in particular, being assessed by the court in this case.

Next, Huntwood argues that the penalty should be reduced because of its cooperation with EPA regarding this matter. EPA disagrees. Although acknowledging the respondent's cooperation surrounding the inspection in this case, EPA asserts that Huntwood's cooperation was "incomplete" because "its cooperation did not extend to settlement negotiations." R.Br. at 2. E PA's view as to what constitutes "cooperation" by Huntwood for purposes of affecting the civil penalty determination is much too narrow. In this case, Huntwood's cooperativeness with the Agency is determined by its actions relative to the EPA inspection, and not by any decisions made by the respondent relative to settlement discussions.

Regarding the facts of this case, 'the EPA inspector testified that Huntwood was "cooperative" during the inspection and provided the information requested. Tr. 28-29. Inspector Somers added that "[d]uring and following the inspection ... [Huntwood] had a positive attitude," as the respondent was trying to learn more about its EPCRA reporting obligations. Tr. 35. Indeed, the inspector further testified that Huntwood's cooperation with EPA started with his initial pre-inspection telephone call to the respondent. Tr. 36.

Thus, given the fact that Huntwood cooperated with EPA before, during, and after the inspection of its facility, a penalty reduction of 25 percent for each violation is found to be warranted. This penalty reduction fits within the statutory criteria of "such other matters as justice may require." 15 U.S.C. ° 2615. Seep. 5, supra. Accordingly, the penalty amount sought by EPA for Counts I through V is reduced by $1,250 for each violation, and by $436.25 for the penalty sought with respect to Count VI.

In addition, the penalty sought by EPA in Count VI is further reduced by $261.75 (i.e., an additional 20 percent of the lowered penalty amount) due to the fact that Huntwood filed the Form R for its 1992 usage of Methyl isobutyl ketone as soon as it learned that the underlying data previously supplied by the chemical manufacturer was wrong. Tr. 109, 121. While the final responsibility for determining when Form Rs are required to be filed rests with Huntwood, and not with any of its chemical suppliers, given the particular facts of this case, this further reduction fits within the applicable statutory penalty criteria.

Finally, Huntwood argues that the penalty should also be reduced because it has since made special efforts to ensure future compliance with Section 313(a) of EPCRA. This argument is rejected. Huntwood has simply failed to show why its present compliance with Section 313(a) should be a factor to be taken into account in the penalty assessment stage for past Section 313(a) violations. Moreover, as pointed out by EPA, Huntwood has provided no documentation to support the rough estimate of its operations manager regarding EPCRA compliance costs. Compl. R.Br. at 2.

ORDER

Accordingly, for the foregoing masons, it is found that Huntwood violated Section 313(a) of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. ° 11023, as alleged in Counts I through VI of EPA's complaint. A civil penalty of $19,797 is assessed against Huntwood pursuant to EPCRA Section 325(c)(1) for these six violations. 42 U.S.C. ° 11045(c)(1). Of that mount, $3,750 is being assessed each for Counts I, II, 1II, IV, and V, and $1,047 is being assessed for Count VI.

Payment of the penalty shall be made within 60 days of the date of this order by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, to the Regional Hearing Clerk, U.S. EPA Region 10, P.O. Box 360903M, Pittsburgh, Pennsylvania 15251. /5/

Carl. C. Charneski
Administrative Law Judge

/5/ Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. ° 22.30, or unless the EAB elects to review this decision sua sponte, it will become a final order of the EAB. 40 C.F.R. ° 22.27(c).

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