

10/25/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

ROOTO CORPORATION,

Respondent

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[V] Docket No. EPCRA-030-92

RULING GRANTING COMPLAINANT'S MOTION
FOR ACCELERATED DECISION ON LIABILITY

Emergency Planning and Community Right-to-Know Act -- Section 313's Form R -- Section 327's Transportation Exemption -- Respondent's failure to file a Form R for its receipt of toxic chemicals in bulk, bottling them, and shipping them to its customers violated Section 313; Respondent "processed" chemicals within meaning of Section 313, even though they remained unchanged physically; and Respondent's activities exceeded limits of Section 327's transportation exemption from Section 313.

Discussion

This ruling grants a motion for accelerated decision as to liability filed by Complainant--the Director, Environmental Sciences Division, Region V, U.S. Environmental Protection Agency ("EPA")--against Respondent Rooto Corporation. Complainant initiated this case under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001-11050 ("EPCRA") (also known as Title III of the Superfund Amendments and Reauthorization Act of 1986), and the implementing regulations promulgated pursuant to EPCRA, 40 C.F.R. Part 372 ("the Regulations"). Procedure is governed by EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22.

The September 22, 1993 Complaint charged that Respondent had failed to file a required form for its processing of each of two toxic chemicals for each of two years, and proposed a \$17,000 civil penalty for each of the four reporting failures, for a total of \$68,000. Respondent's Answer denied the charges. When settlement negotiations reached no agreement, Complainant moved for an accelerated decision, arguing that no significant facts were in dispute. In its response, Respondent again denied any liability, and Complainant then replied with a reaffirmation of its arguments. Thus the record is now ready for a ruling.

Background

A basic requirement of EPCRA, the statute underlying this case, is annual reporting by all facilities of the presence on their premises of any of certain listed toxic chemicals. This reporting enables the surrounding communities and the proper authorities to plan for emergencies involving any unauthorized release of these chemicals.

The factual background that produced this case is relatively undisputed. Respondent operates a facility in Howell, Michigan for the manufacture of cleaning chemicals. Complainant's initiation of the case stems from a June 20, 1990 inspection of this facility by an EPA representative. The representative concluded that during 1987 and 1988 Respondent had "processed" two toxic chemicals--sulfuric acid and hydrochloric acid--in amounts that required reporting in each of the following years in a so-called Form R, pursuant to Section 313 of EPCRA (42 U.S.C. § 11023(a)).

Since Respondent had not filed a Form R for either of these two chemicals in either of the following years (1988 and 1989), Complainant issued its Complaint charging these failures to file.¹ Respondent's defense was threefold: it denied that what it did with these two chemicals constituted "processing" under EPCRA and the Regulations; it asserted that sulfuric acid was improperly included in the EPCRA Section 313 list; and it claimed the benefit of a transportation exemption to the reporting requirements.

What Respondent did with the chemicals, according to Complainant, was to receive them in large quantities and put them in bulk storage tanks outside the facility, then pump them through pipes to indoor filling station tanks, and ultimately put them into bottles or other containers for shipment to customers. Respondent did not challenge this description of its activities, but instead emphasized that the sulfuric acid and hydrochloric acid that left its facility were essentially identical to these chemicals as they arrived at its facility.

¹ EPCRA Section 313 applies to the owner or operator of a facility that employs ten or more employees, that has a Standard Industrial Classification Code between 20 and 39, and that manufactures, processes, or otherwise uses in excess of threshold amounts any of a list of toxic chemicals. The Complaint charged that Respondent satisfied all these criteria with respect to its 1987-88 processing of sulfuric acid and hydrochloric acid, and Respondent disputed only the points mentioned in the text sentence following this note.

Complainant's Charges

Complainant charged that Respondent "processed" these two chemicals as that term is defined by EPCRA and the Regulations. Section 313 (b) (1) (C) (ii), cited by Complainant, states in pertinent part as follows (emphasis added).

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.

In issuing the Regulations to implement Section 313, EPA included within its definition of "process" this statutory definition almost verbatim (40 C.F.R. § 372.2). Complainant noted that EPA, in the preamble to the Proposed Rule incorporating this definition, explained as follows that processing includes repackaging (emphasis added by Complainant).

[P]rocessing includes making mixtures, repackaging, or use of a chemical as a feedstock, raw material, or starting material for making another chemical... [and] incorporating a chemical into an article.²

Further to support its argument, Complainant quoted from EPA's clarification of "process" in EPA's subsequent publication of the Final Rule (emphasis added by Complainant).

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 a 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

² 52 Fed. Reg. 21,155 (June 4, 1987).

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.

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.³

Respondent's Defenses

As noted, Respondent disputed the characterization of what it did with sulfuric acid and hydrochloric acid as "processing," challenged the propriety of sulfuric acid's inclusion in Section 313's list of toxic chemicals, and claimed a transportation exemption from the reporting requirements. Each of these defenses is reviewed below; none is found persuasive.

Processing

Respondent argued that it did not "process" the two chemicals so as to be subject to Section 313's reporting requirements because "the sulfuric acid and hydrochloric acid which came into Roto's facility were identical to the chemicals which left Roto's facility."⁴ Respondent contended further that "the statute is ambiguous as to whether processing includes ... repackaging."⁵ In addition, Respondent asserted that neither EPA's preamble to its Proposed Rule nor EPA's clarification published in connection with its Final Rule, both cited above by Complainant on the point, represent "binding authority as to what constitutes 'processing' under the statute."⁶

Finally, Respondent observed that both the preamble and the clarification speak of "repackaging." But, Respondent averred, "the term 'repackaging' implies that some prior packaging of the product was done, which is not the case here."⁷

³ 53 Fed. Reg. 4,505-4,506 (February 16, 1988).

⁴ Respondent's Response to Complainant's Motion for Accelerated Decision, at unnumbered page 4 (November 3, 1994).

⁵ Id.

⁶ Id.

⁷ Id.

Ruling. Respondent's arguments are unsupported by the pertinent law. Respondent stressed the identity of the sulfuric acid and hydrochloric acid leaving its facility with those chemicals as they entered its facility. But, as contended by Complainant, the statutory definition of processing quoted above⁸ includes chemicals that remain just as they were received.

The term process means the preparation of a toxic chemical, after its manufacture, for distribution in commerce ... in the same form or physical state as ... that in which it was received by the person so preparing such chemical.⁹

As for Respondent's contention that the statute is ambiguous on whether processing includes repackaging, Respondent failed to point out wherein any ambiguity lies. The statutory definition quoted immediately above would seem to include it clearly enough.

EPA's interpretation of this definition, cited above by Complainant from the preamble to EPA's Proposed Rule and from the clarification accompanying EPA's Final Rule, states directly that processing includes repackaging. Respondent claimed that these EPA statements are not "binding authority." But EPA is entitled to interpret statutes that it administers, and such administrative agency interpretations are accorded distinct deference by courts.¹⁰ Even without any deference, EPA's interpretation appears to follow logically from the statutory definition of "process," and Respondent has advanced no significant reason why it does not.

As for Respondent's argument that it could not have "repackaged" the two chemicals because there was no "prior packaging," this argument seems undone by Respondent's own submissions. As described by Respondent, it "received sulfuric acid and hydrochloric acid in bulk, put the identical material in bottles, and shipped it to its customers" (emphasis added).¹¹

⁸ See supra text, 1st paragraph under heading "Complainant's Charges."

⁹ EPCRA § 313(b)(1)(C)ii. Prior administrative cases are consistent with the holding of the instant Ruling that a chemical need not be physically altered to be "processed" under Section 313 of EPCRA. In the Matter of CBI Services, Inc., Docket No. EPCRA-05-1990, Order Granting Motion for "Accelerated Decision" (February 28, 1991); In the Matter of Pitt-Des Moines, Inc., Docket No. EPCRA-VIII-89-06, Initial Decision (August 22, 1991).

¹⁰ Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

¹¹ Respondent's Response, supra note 1, at unnumbered page 6.

Also, "[t]he chemicals were transported to Rooto, placed in a different container, and then shipped to Rooto's customers" (emphasis added).¹² Thus Respondent's own accounts of its actions supply a reasonable description of a repackaging operation.

Finally, in terms of the purpose of the statute, EPCRA requires facilities that handle large quantities of toxic chemicals to report their presence, so that the surrounding communities and proper authorities can plan for emergencies. Respondent's suggested interpretation, by removing from reporting those toxic chemicals that are handled as were these two chemicals at its facility, would clearly defeat this objective of the statute. This consideration further documents the unpersuasiveness of Respondent's proffered interpretation. In sum, Respondent "processed" the sulfuric acid and hydrochloric acid within the meaning of EPCRA Section 313, and was accordingly subject to that Section's reporting requirements.

Sulfuric Acid

Respondent argued that sulfuric acid was improperly included in Section 313's list of toxic chemicals for which reporting was required. As authority, Respondent referenced a report in a 1991 trade publication citing an EPA statement that non-aerosol forms of sulfuric acid did not meet the criteria for such listing.

In reply, Complainant asserted that sulfuric acid has been on Section 313's list of toxic chemicals since the statute's 1986 enactment, and that it has continued on the list up through the present. It was thus, averred Complainant, on the list during 1987 and 1988, the years for which Respondent is charged with a failure to report.

The 1991 trade publication report referenced by Respondent, according to Complainant, simply described an EPA proposal to delete non-aerosol forms of sulfuric acid from Section 313's list of toxic chemicals. As set forth in the report, EPA agreed with a claim by American Cyanamid that such non-aerosol forms do not meet the Section 313 criteria for listing, and therefore proposed their removal from the list, inviting comments on the proposal. But, declared Complainant, EPA has never followed up the 1991 proposal with a Final Rule, and thus all forms of sulfuric acid remain on the Section 313 list.

Ruling. With respect to Respondent's argument, it is undisputed that sulfuric acid was present on the Section 313 list in 1987 and 1988, the years for which Respondent is charged with a failure to report. Respondent has supplied no evidence that sulfuric acid's listing was invalid other than Respondent's

¹² Id. at unnumbered page 7.

reference to a 1991 EPA proposal to remove from the listing its non-aerosol forms. This 1991 EPA proposal remains a proposal only, with no suggestion of retroactive effect even were it ever to be adopted. Thus Respondent's argument provides no basis for excusing its noncompliance with the 1987-88 requirement to report its processing of sulfuric acid.

Transportation Exemption

Respondent's last argument was a claim to the transportation exemption of Section 327 of EPCRA. That Section exempts from Section 313's reporting requirements "the transportation, including the storage incident to such transportation, of any substance or chemical" otherwise subject to Section 313. As stated by Respondent, "Rooto merely stored sulfuric acid and hydrochloric acid in bulk tanks, transferred the materials into bottles, and transported the bottles to Rooto's customers."¹³

In reply, Complainant denied that this transportation exemption applies to Respondent. The exemption, stated Complainant, is available only to those "whose connection with a toxic chemical is limited to its mere 'transportation' or its 'storage' incident to such transportation."¹⁴ But, asserted Complainant, "at a minimum, Rooto bottled the chemicals and sold the bottled chemicals to customers, activity which could not reasonably be characterized as mere transportation or storage."¹⁵

Ruling. Respondent's handling of the sulfuric acid and hydrochloric acid transcended the confines of "transportation, including storage incident to such transportation." Respondent received the chemicals in bulk, stored and bottled them, and shipped them to customers, a combination of activities that exceeds the limits of Section 327.

That the transportation exemption is intended for narrowly limited activities connected with transportation is clear from EPCRA's legislative history. The report of the House conference committee reads in pertinent part as follows.

[T]he provisions of ... [EPCRA] do not apply to transportation or storage incidental to such transportation. The exemption relating to storage is limited to the storage of materials which are still moving under active shipping papers and which have not

¹³ Respondent's Response, supra note 1, at unnumbered page 5.

¹⁴ Complainant's Reply Memorandum in Support of Complainant's Motion for an Accelerated Decision 8 (November 17, 1994).

¹⁵ Id. 9.

reached the ultimate consignee For example, storage of materials in rail cars or in motor carrier warehouses would be exempt ... if the materials were under active shipping papers. On the other hand, storage of materials in facilities on the site of the consignor or consignee, even if such facilities are primarily transportation-related [sic], are subject to the provisions of ... [EPCRA], since the storage would occur either before or after actual transportation of the materials.¹⁶

Respondent's handling of the sulfuric acid and hydrochloric acid clearly extended beyond "storage incidental to ... transportation." Respondent made no suggestion, for example, that these chemicals were "still moving under active shipping papers." In conclusion, the transportation exemption of Section 327 is unavailable to Respondent, and hence its failure to report its processing of the two chemicals remains unexcused.

RULING

Complainant's Motion for Accelerated Decision as to liability is granted; Respondent is ruled to have violated EPCRA Section 313, 42 U.S.C. § 11023, as charged in the Complaint.

Dated: October 25, 1995

Thomas W. Hoya
Thomas W. Hoya
Administrative Law Judge

¹⁶ H.R. No. 99-962, 99th Cong, 2d Session 5 (1986), reprinted
in U.S.C.C.A.N. 3276, 3404.

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Certificate of Service

I certify that the foregoing Ruling Granting Complainant's Motion For Accelerated Decision On Liability, dated October 25, 1995, was sent this day in the following manner to the addressees listed below.

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Dated: October 25, 1995