6/23/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

Penalty assessed against respondent, having been found in violation of section 313 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11023 and 40 C.F.R. §§ 372.22 and 372.30, for failure to submit toxic chemical release inventories (Form Rs) for copper in the calendar years 1987 and 1988, and for sulfuric acid and trichloroethane in the calendar year 1988.

INITIAL DECISION AND ORDER

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: June 23, 1993

Appearances:

For Complainant:
Yvette C. Roundtree, Esquire
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental
Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

For Respondent:
W. Scott Armentrout, Esquire
Vice President and General Counsel
Cox Creek Refining Company
100 Kembo Road
Baltimore, Maryland 21226

INTRODUCTION

This proceeding was commenced under section 325 of the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11045 (EPCRA or Act), by issuance of a complaint and notification of opportunity for hearing (complaint) by Region III of the Environmental Protection Agency (EPA or complainant). The complaint charges Cox Creek Refining Company (respondent) with four violations of section 313 of EPCRA, 42 U.S.C. § 11023, and of requirements of 40 C.F.R. Part 372, for failing to submit toxic chemical release inventories (Form Rs) concerning copper for the calendar years 1987 and 1988, and with regard to sulfuric acid and trichloroethane for the calendar year 1988. Pursuant to section 325 of EPCRA, complainant sought, in its complaint, a total civil penalty of $92,000 for the four alleged violations. Complainant subsequently sought a reduced penalty of $73,000 in response to recent administrative rulings.

In its answer, respondent denied that it manufactured copper in excess of the reporting threshold of 75,000 pounds in 1987 and 50,000 pounds in 1988. Respondent admitted that it "otherwise used" in excess of the 10,000 pound reporting threshold of sulfuric acid and trichloroethane without reporting that use.

The complainant filed a motion to amend to which the respondent did not object. The motion was granted on February 21, 1992. The amendment to the complaint, in relevant part, deleted the allegation of manufacturing copper and alleged processing instead. That complaint was never answered.

On May 1, 1992, complainant moved for an accelerated decision, pursuant to 40 C.F.R. § 22.20, alleging that no issue of material fact existed with respect to liability or to penalty on any of the four counts. A partial accelerated decision and order was issued on September 14, 1992, granting the motion solely on the question of liability. That order, which is incorporated herein by reference, found, among others, that at the times alleged under the amended complaint, respondent was an owner or operator of a facility to which section 313 of EPCRA applies; that it did have ten (10) or more full-time employees; that respondent's Standard Industrial Classification Code of 3341 was within the 2000 to 3999 range required; and that respondent processed and otherwise used toxic chemicals listed in the statute in excess of a quantity for which a release form is required, notably copper in the years 1987 and 1988, and sulfuric acid and trichloroethane in the year 1988. A hearing was held subsequently on the penalty question, the subject of this initial decision.

CIVIL PENALTY QUESTION

It is clear that there have been four violations of section 13 of EPCRA by respondent. A strict reading of the Enforcement Response Policy (sometimes ERP or CX 1) of December 2, 1988, under which complainant calculated the penalty (Comp. Op. Br. at 2) permits an assessment to the extent of $73,000. However, the Administrative Law Judge (ALJ) differs with the complainant as to the weight to be accorded the various factors in arriving at the

assessed penalty. The pertinent section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.27, requires that the ERP be considered in assessing a penalty. It also charges that the ALJ set forth specific reasons for any increase or decrease on a penalty assessed which differs from that recommended in the complaint.

Under section 325(c) of EPCRA, a maximum penalty is set at $25,000 for the failure to report chemical releases as required under the Act. This section, as complainant concedes, gives no guidance to the discretion allowed EPA in cases such as this. The ERP was created by EPA "in an effort to assure that enforcement actions . . . [under EPCRA] are arrived at in a fair, uniform and consistent manner." (CX 1 at 1) It sets forth how a proposed penalty is to be calculated by the EPA for violations of section 313 of EPCRA. ERP has created a matrix for this purpose. Vertically it consists of six circumstance levels, from one to six, with the former being the highest, setting forth $25,000, and the latter the lowest, designating $2,000. The circumstance levels in the matrix refer to the gravity of the violation; in this case for example, nonreporting or late reporting. The horizontal plane of the matrix designates three adjustment levels, A, B and C. A is the highest, providing for $25,000, and C is the lowest, stating $5,000. The adjustment level is based on the hazardous nature or gravity of section 313 chemical involved and the size of the business entity. The total penalty is determined by calculating

the penalty on the matrix for each violation on a per chemical, per facility basis. (CX 1 at 6-9)

After initial determination of the appropriate base penalty, an upward or downward adjustment to the penalty amount may be made in consideration of various factors which relate to the violator; for example, voluntary disclosure, culpability, history of prior violations, ability to continue in business, and such other matters as justice may require.

Initially, complainant took the position that respondent should come within circumstance level one as a nonreporter. Since the issuance of the complaint, later decisions issued by the Office of Administrative Law Judges[1] militated a change in the circumstance level. ERP would treat respondents differently who eventually filed the necessary forms, even if this occurred after they were contacted by EPA for noncompliance. Now, a respondent's late reporting would not be considered nonreporting and all four counts would be viewed as circumstance level two. (TR 14, 16-17; Comp. Op. Br. at 2-3)

For the first three counts, the adjustment level A is appropriate since respondent's sales exceeded $10 million or respondent's employees numbered fifty or more, and it processed and/or otherwise used a section 313 chemical at ten times or more the threshold level for reporting. For the fourth count, the

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[1] In the Matter of Pease and Curren, Inc., Docket No. EPCRA-I-90-1008 (March 31, 1991) at 31; In the Matter of Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-406S (September 25, 1989).

adjustment level drops to B because respondent otherwise used trichloroethane in an amount less than ten times the threshold level for reporting. Employing the matrix, there are three penalties at $20,000 and one at $13,000, for a total of $73,000.

The aforementioned proposed penalty is before adjustment, however. Section 325(c) of EPCRA is silent concerning the appropriate considerations for adjustment. The clarification was provided by the well-researched and reasoned decision of Chief Administrative Law Judge Frazier.[2]

> Once the gravity based penalty amount has been determined, upward or downward adjustments to the penalty amount are made in consideration of the factors which relate to the violator: voluntary disclosure, culpability, history of prior violations, ability to continue in business, and such other factors as justice may require.

An adjustment has already been made for voluntary disclosure. This was the result of Pease and Curren which held that the assessment of a circumstance level 1 violation is inappropriate where when it stems from a failure to report by the time of inspection.

The base penalty may be increased or decreased depending upon the respondent's culpability. The factors ERP uses to assess culpability are the violator's knowledge, control over the violative conduct, and the attitude of the violator. (CX 1 at 14)

Both parties agree that there is no evidence of a knowing or willful violation. Respondent, however, observes that the company

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[2] Supra, Pease and Curren, at 15. Judge Frazier also provided additional background and rationale for penalty calculations under section 325(c). Id. at 11-14.

was in a start-up condition at the same time as 40 C.F.R. Part 372 was being promulgated; that the difficulties associated with getting the business underway understandably may have distracted respondent from complete compliance with regulations; and that the aforementioned factors should provide some reduction of the penalty. (Resp. Op. Br. at 11-12) This argument is less than convincing. It is admitted that the regulatory environment may be more complex and demanding than in the past. However, a responsible business entity, especially in a start-up condition, should acquaint itself with pertinent regulations and make all efforts to ensure compliance. Moreover, one would hope that a new venture, or even restart of an existing facility, would not be made without resort to the analysis of costs relating to environmental regulation. Although these regulations were promulgated contemporaneously with the start-up of this business, there is no injustice in requiring an entity to keep abreast of the laws and regulations that govern its operation. The penalty should not be reduced because the respondent did not know. It should have, and could have, known its responsibilities under the Act.

No question exists concerning control. There was some shared responsibility, with everyone in management responsible for environmental matters. This does not meet the criteria set forth for the reduction of the penalty. (CX 1 at 14) Respondent is fully responsible for its failure to comply with the pertinent regulations.

The penalty again may be adjusted upwards or downwards based on the violator's good faith efforts to comply and the promptness of its corrective actions. (CX 1 at 14) It is true, as complainant asserts, and respondent has testified, that the latter did not submit Form Rs until after the inspection and almost four months after Mr. Rago learned of the requirement to do so. (TR 89-90; Comp. Op. Br. at 7) However, Mr. Rago was in the process of preparing the Form Rs forward from the time it was made his responsibility (TR 85), and filed them promptly for the previous periods, notably 1987 and 1988 when he became aware of the importance of those filings. (TR 85) Complainant fails to see any good faith here. (Comp. Op. Br. at 7) The ALJ does. It is clear that when respondent got organized, after both a major copper spill and a strike (TR 83-84), it took corrective actions promptly. For this reason, an adjustment should be made under the attitude consideration of culpability to the extent allowed by ERP, namely 15 percent.

Neither party has asserted that there is a history of prior violations or that imposition of this fine will cause the respondent to cease business. Therefore, no discussion is necessary and no adjustment shall be made.

There are other factors as justice may require. Those "factors" that ERP contemplates are burdening new ownership with the previous owner's history of violations or performance of environmentally beneficial expenditures. (CX 1 at 16-17) However, other factors as justice may require encompass factors beyond the

EPA's reading of the Act. This is the first such violation that is known for this plant, even though management and officers have changed numerous times. (TR 60-61) One should consider the factor of the burden on new ownership of the previous owner's activities. However, EPA cannot create a policy that allows violators to avoid penalties by frequently replacing officers.

Respondent notes that it has made environmentally beneficial expenditures. (TR 63-67) Most of the expenditures do not relate to the violations in question and shall not be considered to reduce penalties in this case.

Respondent did take steps toward responsible reporting of its chemical use inventory. (TR 80-83, 89-91) While it has not hired an additional compliance officer, it has delegated compliance to specific parties within its plant. (TR 55, 79-80) This is more than an agreement to come into compliance. It represents a dedication of work time to compliance matters that will assure timely reporting. Respondent, at the time of the violation, had completed part of the purpose of the Act. It notified certain state agencies and departments of the nature of its dealings and activities. (TR 83) Considering the purposes of the Act, respondent should be given some credit in the penalty calculation for reporting these matters to the community they will most affect.

The pertinent section of the Rules, 40 C.F.R. § 22.27(b), requires merely that the ALJ "consider" any civil penalty

guidelines. He is not compelled to follow them in lockstep. In the Matter of High Plains Cooperative, Inc., FIFRA Appeal No. 87-4 (July 3, 1990).

The phrase "such other factors as justice may require" stated in the Act and ERPs should not be given a narrow construction. Much of the interpretation should be left to the sound discretion of the ALJ. In light of the respondent's behavior, particularly that of good faith and other considerations, an adjustment shall be made in the penalty, reducing it another 25 percent, for a total reduction in the proposed penalty of 40 percent.

ULTIMATE CONCLUSION AND ORDER

The liability of respondent for violating section 313 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11023, and the requirements of 40 C.F.R. Part 372, has been established by the accelerated decision issued previously in this matter. It is now concluded that the appropriate penalty to be assessed against respondent is $43,800.

IT IS ORDERED[3] that a penalty of $43,800 shall be paid by submitting a certified or cashier's check in this amount, payable to the Treasurer of the United States and mailed to:

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[3] This decision concerning penalty, coupled with the previously issued partial accelerated decision in this matter concluding respondent's liability, represents a complete initial decision and order. Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).

EPA-Region III
(Regional Hearing Clerk)
P.O. Box 36051M
Philadelphia, Pa. 15251

Payment shall be made within sixty (60) days of receipt of the decision and final order. Failure upon part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. §§ 102.13(b),(c),(e).

Frank W. Vanderheyden
Administrative Law Judge

Dated: June 23, 1993

Certificate of Service

I hereby certify that on this 30th day of June 1993, copies of Initial Decision in the matter of Cox Creek Refining Company, Docket No. EPCRA-III-032, were distributed as follows.

Certified Mail To:

W. Scott Armentrout, Esquire
Vice President and General Counsel
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First Class Mail To:

Bessie Hammiel
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401 M Street, S.W. (A-110)
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Hand Delivered To:

Yvette C. Roundtree, Esquire, (3RC13)
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Date: JUN 30 1993

Lydia A. Guy
Regional Hearing Clerk