

7/31/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF

CROWN METAL FINISHING COMPANY

DOCKET NO.

DOCKET NO. EPCRA-II-89-0103

Respondent

Superfund Amendments and Reauthorization Act (Emergency Planning and Community Right to Know Act), 42 U.S.C. § 11001 et seq.

§325 (42 U.S.C. §11045): Under the circumstances presented in this case, a fair and reasonable civil penalty for the violations committed is determined to be \$1500.00.

§325 (42 U.S.C. §11045): Enforcement Response Policy Civil Penalty Guidelines: Because the date of inspection of a facility can be determined by EPA in each instance with respect to each possible respondent, the regulated community cannot know in advance the point at which penalties will increase under the guidelines. Sooner or later, disparity of treatment, or the appearance of disparity, must creep into the application of a policy designed in large part to avoid disparity.

Appearances:

Lee A. Spielmann, Esquire, Assistant Regional Counsel, Office of Regional Counsel, United States Environmental Protection Agency, and Coles Phinizy, Esquire, Chief of the Waste and Toxic Substances Section, Air Waste and Toxic Substances Branch, Office of Regional Counsel, Region II, 26 Federal Plaza, New York, New York, for complainant:

Charles J. Irwin, Esquire, Irwin & Post, P.A., 85 Livingston Avenue, Roseland, New Jersey, for respondent.

BEFORE:

J. V. Greene, Administrative Law Judge



DECISION AND ORDER

This matter arises under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 et seq., also known as the Emergency Planning and Community Right-to-Know-Act of 1986 (hereafter "EPCRA" or "the Act.")¹

The complaint charges respondent with three violations of Section 313 of the Act (42 U.S.C. § 11023)² and the implementing regulations at 40 C.F.R. Part 372 et seq., for allegedly having

¹ Section 325(c), 42 U.S.C. §11045(c) of the Act provides in pertinent part that

(1) Any person . . . who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$ 25,000 for each such violation

(4) The Administrator [of the U.S. Environmental Protection Agency may assess any civil penalty for which a person is liable under this subsection by administrative order or may bring an action to assess and collect the penalty in the United States District Court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

² Section 313 provides in pertinent part 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 otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding 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.

failed to submit complete and accurate reports in connection with respondent's use of three toxic chemicals (xylene, methyl ethyl ketone, and dichloromethane) by July 1, 1988, as required by the Act.

Specifically, the complaint alleged that in calendar year 1987 respondent used approximately 23,950 pounds of xylene [Count I], 21,020 pounds of methyl ethyl ketone [Count II], and 36,916 pounds of dichloromethane [Count III]; that respondent was therefore required to report such uses on Form R's to the EPA Administrator and to the State of New Jersey no later than July 1, 1988, but failed to do so in violation of Section 313 of the Act and 40 C.F.R. §372.30.³ For each count, complainant proposed a civil penalty of \$5000.

The parties stipulated that respondent is a "person," within the meaning of section 329(7) of the Act, 42 U.S.C. § 11049(7); that respondent's facility has ten or more full time employees and falls within Standard Industrial Classification Code 3479; that the reports ("Form Rs") had not been filed with EPA or with the State of New Jersey by July 1, 1988, but were filed on September 15, 1988; and that respondent's facility was inspected on behalf of the

³ 40 C.F.R. §372.30(a) provides as follows, in pertinent part:

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 40 C.F.R. §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 . . . in accordance with the instructions referred to in Subpart E of this part.

EPA on August 24, 1988. During the early part of the trial it was determined that the reports ultimately filed by respondent on September 1f, 1988 in connection with xylene, methyl ethyl ketone, and dichloromethane on September 15, 1988, constituted admissions respecting the extent of respondent's use of those chemicals (TR 19-20; see also Stipulation 21, wherein it was agreed that the reports reflected respondent's usage of xylene, methyl ethyl ketone, and dichloromethane at the facility for calendar year 1988. As a consequence of that determination, no material facts remained in dispute, and it was ruled that complainant was entitled to judgment as to respondent's liability for the acts alleged in the complaint.

Accordingly, the only issue presented for resolution was the amount of penalty to be assessed for the violations committed.

Respondent argues with respect to the penalty that its actions were understandable and appropriate in the circumstances, and that complainant's proposed \$5000 per violation is far too high. Complainant's position is that respondent's actions constitute "non-filing" of the Form R's, and that respondent should be fined accordingly. For reasons set forth herein, it is held that respondent should be assessed a civil penalty of \$500 per violation, for a total of \$1500.

Complainant urges, as it has in other actions brought pursuant to Section 325(c) of the Act, that the amount of civil penalty assessed should reflect the date upon which EPA, not having received the Form R's which were due on July 1, 1988, first

contacted respondent to arrange an inspection of the facility.⁴ If respondent's Form R's had been filed on September 15, 1988 -- i.e. late but before EPA telephoned, complainant would view the submissions as a "late filing." However, where, as here, respondent filed the Form R's on September 15, 1988, but after EPA telephoned, then complainant considers the violation to be "non-filing," which carries a higher penalty. [TR 67-84]. Thus it is possible for two different respondents to file Form R's on the same date, ten weeks past the deadline, and be assessed different civil penalties for having committed different offenses under EPA policy. This difficulty inherent in this approach, and the resulting disparity of treatment based upon the date of a telephone call from EPA has been noted before⁵ and must be rejected. Adopted here is the reasoning set forth in Riverside Furniture, at pp. 10-12 of the slip opinion, wherein Judge Jones found, for a respondent which had been inspected on September 28, 1988, and had filed Form R's on October 24, 1988, that the adverse effect upon the EPCRA program of such late filing (91 days in that case) had been less than the impact of 180 days late filing. Under the EPCRA penalty policy (CX 1), 91-180 days late filing of Form R's is placed in "circumstance level" five ("Late reporting (91-180 days after due date)"⁶ and

⁴ See CX 1, Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act, December 2, 1988

⁵ Pease and Curren, Inc. Docket No. EPCRA-I-90-1008; Riverside Furniture Corporation, Docket No. EPCRA-88-H-VI-4065; CBI Services, Inc., Docket No. EPCRA-05-1990.

⁶ CX 1 at the page marked 11 at the top.

carries a lower penalty than the that sought here for 75 days late filing. Accordingly, circumstance level 5 is adopted for these violations, at "level C."⁷

This is not to say that late reporting is to be tolerated or that the regulatory responsibilities of EPA are not urgent. In the circumstances here, given that the EPCRA program was just starting up, and given also respondent's testimony (which is specifically found to be credible) that it made significant efforts to determine its own responsibilities under the new program, some difficulties are to be expected.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. EPA has jurisdiction to prosecute this action by virtue of authority set forth in 42 U.S.C. §11045. (Stipulation 2)

2. Respondent, a New Jersey corporation, has as its principal place of business a facility located at 39 Boright Avenue, Kenilworth, New Jersey, which respondent operates, and is a "person" within the meaning of Section 329(7) of EPCRA, 42 U.S.C. §11049(7). (Stipulations 3-5).

⁷ Level C, found on page 12 of the penalty policy (CX 1) is appropriate for a "facility for which the total corporate entity has sales of less than ten million dollars or less than 50 employees and which uses the section 313 chemical associated with the violation at less than ten times the threshold level for reporting." [Emphasis original] Complainant used level C in setting the proposed penalty in circumstance level 1 (failure to report).

3. Respondent has ten or more full time employees. (Stipulation 4).
4. Respondent's facility falls within Standard Industrial Classification Code (SIC) 3479. (Stipulation 10)
5. In connection with its business, respondent used ("otherwise used") 23,950 pounds of xylene, 21,020 pounds of methyl ethyl ketone, and 36,916 pounds of dichloromethane during calendar year 1987. (See stipulations 21-24; and respondent's answer to the complaint at 2-4, wherein respondent states that it advised investigators that it had used these amounts).
6. Respondent did not file a Form R for any of these chemicals by July 1, 1988, with the EPA Administrator or with the State of New Jersey. The forms were filed on September 15, 1988, with EPA and with the State of New Jersey. (Stipulations 13-15, 18-20).
7. Accordingly, respondent violated 42 U.S.C. §11023 as charged in the complaint, and applicable regulations at 40 C.F.R. 372.30, as charged in the complaint.
8. Respondent's testimony as to the efforts it made to determine its responsibilities under the Act is credible and worthy of belief.
9. Annual report forms filed 75 days late have a much less severe


impact upon the EPCRA program much less severe than a filing which is 180 days late; accordingly, the penalties for the violation here should be assessed at the "late filing" of up to 180 days rate, i. e. circumstance level 5, adjustment level C, or \$500 per violation.

10. A fair and reasonable penalty in the circumstances of this case is \$500 per violation, for a total of \$1500.00.

ORDER

Accordingly, respondent is assessed a civil penalty of \$1500.00 for the violations found, pursuant to Section 325(c) of the Act, 42 U.S.C. §11045(c). Payment of the assessed penalty shall be made within 60 (sixty) days after receipt of this order, by means of a cashier's check or certified check, payable to Treasurer, United States of America. The check shall be forwarded to:

Regional Hearing Clerk
EPA - Region II
P. O. Box 360188M
Pittsburgh, PA 15251




J. F. Greene
Administrative Law Judge

Dated: July 31, 1992
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on 7-31-92.


Shirley Smith
Secretary to
Judge J. F. Greene

NAME OF RESPONDENT; CROWN METAL FINISHING COMPANY
DOCKET NUMBER; EPCRA-II-89-0103

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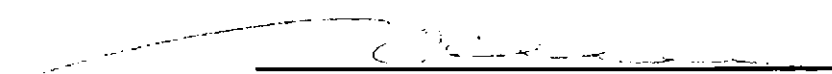
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

IN THE MATTER OF :
Crown Metal Finishing Company : Dkt. No. EPCRA-II-89-0103
Respondent :

ORDER REISSUING DECISION AND ORDER

It having been determined that one of the parties herein has received a nonconformed copy of the decision issued recently in this matter, the decision and order are hereby reissued. All dates for filing appeals shall run as provided in the rules of practice from the date of reissue.

And it is FURTHER ORDERED that any motion for reconsideration of the decision and order shall be filed no later than twenty (20) days from the date of reissue.

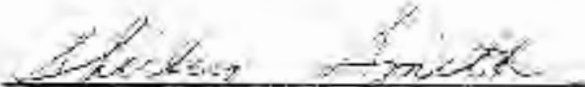


J. F. Greene
Administrative Law Judge

Dated: October 26, 1992
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on October 26, 1992.


Shirley Smith
Secretary to Judge J. F. Greene

NAME OF RESPONDENT: Crown Metal Finishing Company
DOCKET NUMBER: EPCRA-II-89-0103

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