

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Burtin Urethane Corporation,) **Docket No. EPCRA 09-97-0009**
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: September 16, 1998
Washington, D.C.

Appearances

For Complainant:

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U.S. Environmental Protection Agency
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For Respondent:

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I. Introduction

This proceeding arises under the Emergency Planning and Community Right-To-Know Act ("EPCRA"). 42 U.S.C. § 11001 et seq. It involves the statutory reporting requirements for toxic chemicals. Section 313(a) of EPCRA requires owners or operators of facilities that manufacture, process, or otherwise use toxic chemicals in quantities exceeding a specified threshold amount to file toxic chemical release forms. 42 U.S.C. § 11023(a). These toxic chemical release forms are referred to as "Form Rs." Form Rs are to be filed annually with both the U.S. Environmental Protection Agency ("EPA") and designated State officials. The Form Rs provide information about the storage and release of the reported chemicals.(1)

EPA brought the present action against Burtin Urethane Corporation ("Burtin Urethane") charging respondent with failing to comply with this Section 313(a) reporting requirement. Specifically, EPA alleges that in 19 instances between 1991 and 1995, Burtin Urethane used or processed toxic chemicals in excess of their reporting threshold amounts, but did not file the requisite Form Rs.(2) The agency seeks a civil penalty of \$193,548. Section 325(c), 42 U.S.C. § 11045(c).

Subsequent to the filing of the complaint, EPA sought summary judgment on all counts. In response, Burtin Urethane admitted the violations, namely that it had failed to file the Form Rs as charged. Respondent, however, continued to challenge the civil penalty amount sought by complainant.

An order was issued on September 11, 1997, granting EPA's motion for summary judgment and finding respondent liable for 19 violations of Section 313(a). A hearing on the remaining penalty issue was held on January 14, 1998, in Los Angeles, California.

For the reasons that follow, Burtin Urethane is assessed a civil penalty totaling \$120,000.

II. Facts

Burtin Urethane owns and operates a chemical manufacturing facility located in Santa Ana, California. The facility produces polyurethane resins that are used for insulation, refrigeration, and structural products. Respondent blends urethanes composed of polyols, blowing agents, catalysts, plasticizers, fire retardants, pigments, surfactants, and various extenders. The chemicals used in the blending process are stored primarily in liquid form, in large holding tanks. The blending of the chemical components takes place in the facility's mixing tanks. After blending, the product is packaged for distribution. In addition, respondent receives, stores, and repackages urethanes which it does not blend, and it produces a spray-on polyurethane product that is applied to the beds of pick-up trucks. Jt. Ex. 1.

Burtin Urethane uses ethylene glycol, dichloromethane, methylenebis, diisocyanates, trichlorofluoromethane, and 1,1-dichloro-1-fluoroethane at its facility. These are the chemicals involved in the 19 violations and each is listed at 40 C.F.R. 372.65 as a toxic chemical. As noted

above, it is not disputed that Burtin Urethane violated Section 313(a) of EPCRA in failing to file Form Rs for these toxic chemicals.

III. Penalty Discussion

A. The Penalty Criteria

Section 325(c)(1) of EPCRA provides for a civil penalty assessment of up to \$25,000 for each violation of Section 313. Section 325(c)(1), however, does not contain any criteria for making a civil penalty determination. Accordingly, the penalty criteria contained in Section 325(b)(2) is looked to for guidance.

Section 325(b)(2) of EPCRA incorporates by reference the penalty provisions of Section 16 of the Toxic Substances Control Act ("TSCA"). 15 U.S.C. § 2615. TSCA Section 16 states:

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.

These factors will be considered in determining the civil penalty in this case.

B. The Role of EPCRA

Knowing the statutory penalty criteria to be applied here is simply not enough. The overall purpose of the Emergency Planning and Community Right-To-Know Act must be understood before these criteria can take on any meaning.

EPCRA was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986)("SARA"). The purpose of EPCRA is to provide communities with information on potential chemical hazards within their boundaries and to foster state and local planning efforts to control any accidental releases.

To achieve this end, EPCRA imposes a system of notification requirements on industrial and commercial facilities, as well as mandating the creation of state emergency response commissions and local emergency planning committees. The local emergency planning committees are charged with developing emergency response plans based on the information provided by the facilities. 42 U.S.C. §§ 11001-11003. The public, in turn, has the right to know the information reported by the facilities, as well as the contents of the emergency response plans. 42 U.S.C. § 11044. See *Troy Corp. v. Browner*, 120 F.3d 277 (D.C. Cir. 1997); *Huls America, Inc. v. Browner*, 83 F.3d 445 (D.C. Cir. 1996). As the U.S. EPA's Environmental Appeals Board ("EAB") recently observed in *Woodcrest Manufacturing, Inc.*, Appeal No. 97-2

(July 23, 1998), "This information is critical for effective local contingency planning." 1998 EPA App. LEXIS 63, *55, citing 51 Fed. Reg. 41,570 (Nov. 17, 1986).

C. Evaluation of the Evidence

The evidence in this case warrants the assessment of a fairly severe penalty. First, it shows that respondent failed to report the use of substantial quantities of toxic chemicals for a significant period of time. Burtin Urethane used or processed 1,292,410 pounds of toxic chemicals in 1991, 1,278,625 pounds in 1992, 1,028,350 pounds in 1993, 1,846,350 pounds in 1994, and 3,636,775 pounds in 1995. Jt. Ex. 1, ¶¶ 7-12. The toxic chemical threshold reporting amount during this time was 10,000 pounds for each toxic chemical "used" and 25,000 pounds for each toxic chemical "manufactured or processed." Section 313(f)(1), 42 U.S.C. § 11023(f)(1).

Despite using or processing vast quantities of toxic chemicals at its Santa Ana facility from 1991 through 1995, respondent filed no Form Rs. The wide margin by which respondent exceeded each of the chemical's threshold reporting amount, and the number of years this condition existed, show the extensive nature of respondent's EPCRA violations.(3) The significance of this failure is brought out by the testimony of EPA witness, Adam Browning. Browning testified that the Form R information submitted to EPA "is aggregated and used to ensure progress or lack thereof in terms of reducing on a state, county area wide basis aggregate emissions." Tr. 219.

Second, while all the violations involve toxic chemicals, 14 of the 19 counts involve the chemical classes of "freon" and "methylenebis isocyanate," otherwise known as "MDI."(4)

Dr. Gerald Hyatt testified on behalf of EPA as to the hazards which these chemical classes present.(5) Dr. Hyatt explained that the primary risk to human health presented by MDI comes from compounds that can be generated from MDI in the presence of extreme heat. He added that the thermal decomposition of freons are almost as toxic as the thermal decomposition of MDI. Regarding that hazard, Dr. Hyatt testified that the thermal decomposition of freons can result in the formation of extremely toxic hydrogen chloride and chlorine gas. Tr. 44, 47. He also acknowledged, however, that ethylene glycol, a component of anti-freeze, is relatively non-toxic. Tr. 52, 55-56. This testimony shows the potential hazards presented by these chemicals and thus underscores the importance of Form R filings. Also, while the testimony of Dr. Hyatt shows that some of the involved chemicals are more hazardous than others, the fact remains that all the chemicals are listed at 40 C.F.R. 372.65 as "toxic."

Third, Burtin Urethane's Santa Ana facility is located within one-half mile of an elementary school and a high school, and within one mile of three other elementary schools, an intermediate school, and a hospital. Jt. Ex. 1, ¶¶ 24 & 25. This is the "community" for which Congress, in part, enacted the involved Right-To-Know provisions. The proximity of the schools and the hospital to respondent's place of business, where substantial quantities of toxic chemicals are processed and used, is a compelling fact which underscores the seriousness of Burtin Urethane's failure to file the Form Rs.

In sum, the facts of this case show that Burtin Urethane's failure to file the subject Form Rs constituted a serious breach of its EPCRA reporting obligation. As explained further below, this breach was the result of respondent's negligence.

Burtin Urethane raises several arguments in support of its request for the assessment of a minimal penalty. One argument is that it simply wasn't aware of EPCRA's Form R filing requirements. Respondent's ignorance of the law defense is rejected.

In that regard, Jorge Burtin, the company's president, testified that the Orange County Hazardous Waste Management District inspects the Santa Ana facility once a year. Also, respondent submits reports to the South Coast Air Quality Management Board. Tr. 153. Given the company's involvement with these local and regional environmental bodies, and the fact that from 1991 through 1995 respondent used or processed several million pounds of toxic chemicals, Burtin Urethane's failure to be aware of the existence of any Federal environmental obligations, specifically the Emergency Planning and Community Right-To-Know Act, can not be excused.

Moreover, Mr. Burtin admitted that Material Safety Data Sheets ("MSDS") containing references to "SARA 313," and thus to EPCRA, were filed with the company. Despite this fact, the reference to SARA 313 apparently went unobserved by Burtin Urethane. Tr. 165. Respondent's explanation that the SARA 313 notation went undetected because of the crush of MSDS filings and the routine nature of the chemical filing information again is not an adequate excuse for failing to know its filing obligations under EPCRA. These MSDS filings were a clear road map to Section 313 of EPCRA.

In a related argument, Burtin Urethane seeks to excuse its filing omission on what it views as EPA's failure to bring the Form R filing obligation to its attention. This argument must fail. Respondent can not place the blame for its failure to file Form Rs on EPA's EPCRA outreach program. The facts of this case establish that Burtin Urethane should have been aware of Section 313(a)'s Form R filing requirements.(6)

Another argument raised by respondent is that ethylene glycol, freon, and MDI are, in its view, on the lower end of the toxicity spectrum. Respondent, therefore, reasons that a lower penalty is warranted. Respondent is wrong. The only reliable evidence in this case on the issue of toxicity comes from EPA's expert witness, Dr. Hyatt. While Dr. Hyatt acknowledged that ethylene glycol is relatively non-toxic, he was not of the same view with respect to freon and MDI. In fact, Dr. Hyatt testified that if freon and MDI were subjected to fire, highly toxic gases would result. Tr. 47.

In any event, regardless of where these chemicals fall in terms of their toxicity, the fact remains that they are listed under 40 C.F.R. 372.65 as toxic chemicals. It is undisputed that they are subject to Section 313's Form R filing requirements. Given this fact, Burtin Urethane's unsubstantiated claim that it uses only chemicals characterized by the U.S. Department of Transportation as non-flammable and non-hazardous is not persuasive.

Somewhat along the same lines, Burtin Urethane maintains that EPA's EPCRA internet website, "Envirofacts Warehouse," does not report chemical usage. Accordingly, respondent claims that

the information which it did not report in this case "is not 'high priority' information for dissemination to the public." Resp. Br. at 5. Other than the post-hearing submission of its own website documents, EPA does not respond to the company's argument.

This court is not persuaded that the civil penalty assessment should be lowered because of what the EPA publishes, or does not publish, in its Envirofacts Warehouse. The focus of this penalty proceeding is upon the filing requirements of EPCRA Section 313, and the purpose for which those provisions were enacted. Congress enacted this reporting statute in part so that the public could know what toxic chemicals were being manufactured, processed, or otherwise used in its community. How EPA distributes this reported information is an entirely separate matter. In any event, as noted earlier, Form Rs provide information regarding aggregate emissions on a State-wide and county-wide basis. Tr. 219.

Also unpersuasive is respondent's argument that the penalty should be low because its facility is essentially fire and earthquake proof. Even assuming respondent's sweeping assertions to be true, the focus of this matter is not upon the likelihood of an accidental chemical release occurring, but rather the statutory requirement that Burtin Urethane report the amounts of toxic chemicals processed, manufactured, or otherwise used at its facility.

D. The Ability-To-Pay Issue

Burtin Urethane argues that it is unable to pay the \$193,548 civil penalty sought by EPA. Inasmuch as the penalty being assessed is \$120,000, respondent's ability-to-pay defense will be measured against this lesser amount. It is the finding of this court that Burtin Urethane has the ability to pay a civil penalty of \$120,000.(7)

[Confidential Business Information Deleted]

ORDER

Accordingly, for the 19 violations of Section 313(a) of the Emergency Planning and Community Right-To-Know Act at issue in this case, Burtin Urethane Corporation is assessed a civil penalty of \$120,000. 42 U.S.C. § 11045(c). Respondent shall pay the civil penalty within 60 days from the date of this order.(8) Unless this case is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. 22.30, or unless it is directed for review sua sponte, it will become a final order of the Board.

Carl C. Charneski
Administrative Law Judge

1. Form Rs are to include whether the toxic chemical is manufactured, processed, or otherwise used, an estimate of the maximum amounts (in ranges) of the toxic chemical present at any time during the preceding calendar year, waste treatment and disposal information, and the annual quantity of the toxic chemical entering each environmental medium. Section 313(g)(1), 42 U.S.C. § 11023(g)(1).

2. The 19 counts are broken down as follows. Counts I - V: from 1991 to 1995, Burtin Urethane processed between 53,985 pounds and 86,475 pounds of ethylene glycol; Counts VI - X: from 1991 to 1995, it otherwise used between 18,000 pounds to 22,000 pounds of dichloromethane; Counts XI - XIV: from 1991 to 1994, respondent processed between 794,450 pounds and 1,154,800 pounds of methylenebis; Count XV: in 1995, respondent processed 2,782,050 pounds of diisocyanates; Counts XVI and XVII: in 1991, respondent processed 400,000 pounds of trichlorofluoromethane and in 1992, it processed 410,000 pounds of this chemical; and Counts XVIII and XIX: Burtin Urethane processed 597,000 pounds of 1,1-dichloro-1-fluoroethane in 1994, and 746,250 pounds of 1,1-dichloro-1-fluoroethane in 1995. Jt. Ex. 1.

3. Burtin Urethane represents that subsequent to the hearing in this case, it has filed all outstanding Form Rs for the years 1991 through 1994. Resp. Br. at 11 n.3. Apparently, this filing brings respondent up-to-date. Tr. 68-69.

4. The chemicals involved in this case can be grouped into three categories. They are ethylene glycol (Counts I through V), freon (Counts VI through X and XVI through XIX), and MDI (Counts XI through XIV). Tr. 53-55.

5. Dr. Hyatt holds a Ph.D. in Pharmacology and Toxicology. He was accepted as an expert in the field of toxicology. Tr. 36, 40.

6. Insofar as EPA's EPCRA outreach program is concerned, the agency's Regional Toxics Release Inventory Program Coordinator testified that on the basis of data obtained from Dun and Bradstreet reports, numerous mass mailings were made to covered facilities. The Program Coordinator was of the view that respondent would have been so notified in the normal course of business. Tr. 79.

7. Resolution of this issue involves consideration of Confidential Business Information ("CBI"), which is protected by 40 C.F.R. Part 2. Accordingly, only the parties and the agency's Regional Hearing Clerk will be provided with the CBI analysis portion of this decision.

8. Payment may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States of America, EPA Region 9, Mellon Bank, P.O. Box 360863M, Pittsburgh, Pennsylvania, 15251.