1/1/75

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	Docket No. EPCRA-09-94-0015
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION TO STRIKE

The complaint in this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11045) (EPCRA), issued on June 17, 1994, charged Respondent, Catalina Yachts, Inc., with failing to file Toxic Chemical Release Inventory Reporting Forms (Form Rs) for acetone for the years 1988 and 1989 and for styrene for the years 1988-1992. For these alleged violations, it was proposed to assess Catalina the maximum penalty permitted by the Act, $25,000 per violation, for a total of $175,000.

Catalina answered, admitting that it was the owner or operator of a facility as defined in EPCRA § 329, which is in SIC Code 3732, and that it employed more than ten "full-time employees." Catalina asserted, however, that it was reviewing its records and unable, at the present time, to respond to the failures to file Toxic Chemical Inventory Reporting Forms as alleged in the complaint. Catalina denied the alleged violations, requested a hearing to contest the

violations alleged in the complaint and the penalties proposed therefor.

On October 4, 1994, Complainant filed a motion for an accelerated decision as to liability, alleging that there was no genuine issue as to material fact and that Complainant was entitled to judgment as a matter of law. Complainant argued that Catalina's answer does not clearly and directly deny any [material] factual allegation of the complaint as required by Rule 22.15(b) of the Consolidated Rules of Practice (40 CFR Part 22) and, therefore, constituted an admission thereof in accordance with Rule 22.15(d).

Catalina responded to the motion under date of October 19, 1994. Catalina admitted that it did not file "Form R" reports for its use of acetone in the years 1988 and 1989 and for its use of styrene in the years 1988-1992. Catalina alleged, however, certain mitigating circumstances, including that it had filed numerous reports with government agencies on its use of resins containing styrene and acetone as well as on its emissions. Additionally, Catalina alleged that it had discontinued the use of acetone, that its sales had declined from approximately $53 million to $29 million between 1988 and 1992, that it had suffered substantial operating losses each year from 1989 to 1993, that it was unaware of its EPCRA reporting obligations until the EPA inspection, that it had cooperated fully with the inspector and promptly filed Form R reports after actual notice of the applicability of the reporting program.

Finally, Catalina alleged that during settlement negotiations, it was informed by EPA representatives that they were required to strictly adhere to the Enforcement Response Policy (ERP) for Section 313 of EPCRA (1992) and that beyond a 30 percent (downward) adjustment, EPA staff had no discretion to further adjust the penalty. Catalina points out that to treat the ERP as binding makes it a "legislative rule," which, not having been promulgated in accordance with the Administrative Procedure Act, is invalid. Catalina requested that the ALJ either dismiss this action, determine liability without awarding any civil penalty, or schedule a hearing as soon as possible to determine an appropriate penalty based on all the evidence.

On November 10, 1994, Complainant filed a motion to strike that portion of Catalina's opposition to its motion for accelerated decision which referred to communications between the parties at a settlement conference, contending (1) that statements made during the course of settlement discussions are not admissible under Federal Evidence Rule 403;[1/] and (2) that the ERP is not a legislative rule, because Complainant was willing to adjust the penalty by 30 percent. Catalina has opposed the motion to strike, asserting that its opposition to Complainant's motion for an accelerated decision was not a pleading within the meaning of FRCP Rule 12(f) and, thus a motion to strike is not appropriate, and,

---

[1/] Consolidated Rule 22.22 provides ". . . that evidence relating to settlement which would be excluded under Rule 403 of the Federal Rules of Evidence is not admissible."

that, in any event, Federal Evidence Rule 403 does not require the exclusion of evidence "otherwise discoverable" merely because it was presented in the course of settlement negotiations. Catalina argues that, because the evidence at issue is offered to prove that Complainant treats the ERP as binding, rather than to prove invalidity of the claim or the amount thereof, the evidence is within the mentioned exception and that the motion to strike should be denied.

D I S C U S S I O N

Catalina having conceded that it failed to file "Form Rs" as alleged in the complaint, Complainant's motion for an accelerated decision as to liability will be granted.

The motion to strike in part Catalina's opposition to Complainant's motion for an accelerated decision will be denied.[2/] There can be no doubt that, if, in fact, Complainant treats the ERP as binding, the ERP would be a "legislative rule" and invalid, because it was not promulgated in accordance with the APA.[3/] Complainant's argument that the ERP is not a legislative rule, because Complainant was willing to consider an adjustment in the

---

[2/] Consolidated Rule 22.16 concerning motions does not limit the subject matter of motions in any manner and the fact that FRCP Rule 12(f) confines "motions to strike" to pleadings is not controlling.

[3/] See United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). See also Pacific Refining Company, EPCRA Appeal No. 94-1 (EAB, December 6, 1994) (dissenting opinion, McCallum, J).

proposed penalty of 30 percent, is wide of the mark because the adjustment is well within the contemplation of the ERP.[4/] Therefore, consideration of such an adjustment does not refute Catalina's contention that the ERP is a legislative rule.[5/] While there is nothing to preclude Complainant from taking patently illegal positions during settlement discussions, such tactics make a mockery of "good faith" negotiation.

Although statement's of Complainant's representatives during settlement discussions are not admissible, statements with respect to the binding nature of the ERP may be "otherwise discoverable" within the meaning of Federal Evidence Rule 408.[6/] It is unnecessary to decide at this time, however, whether such statements are otherwise discoverable, because no motion for discovery is before me. The fact that the exception exists and may be applicable is considered a sufficient reason for denying the motion to strike.

[4/] For example, the ERP under "attitude" authorizes an adjustment of up to 15 percent each for "cooperation" and "compliance" (Id. 18). Moreover, acetone has recently been proposed for delisting (59 Fed. Reg. 49888, September 30, 1994). If the proposal were finalized during the pendency of this action, Catalina would be entitled to a 25 percent downward adjustment in the proposed penalty for the acetone violations under the ERP.

[5/] The ERP is not, of course, binding on the ALJ (Consolidated Rule 22.27(b)).

[6/] See, e.g., Morse/Diesel, Inc. v. Fidelity and Deposit Company of Maryland, 122 F.R.D. 447 (S.D.N.Y. 1988) (requirement for a particularized showing that information sought, claimed to be protected by Federal Evidence Rule 408, will lead to discovery of other admissible evidence).

O R D E R

1. Complainant's motion for an accelerated decision as to liability is granted.

2. Complainant's motion to strike is denied.

3. The amount of the penalty remains at issue and will be decided after a hearing, if a hearing is necessary.

4. Absent a settlement of this matter, the parties will, on or before March 10, 1995, furnish to the other party, the Regional Hearing Clerk, and the undersigned lists of proposed witnesses, summaries of their expected testimony and a copy of each document or exhibit proposed to be offered in evidence. After receipt of the parties' submittals in accordance with this order, I will be in telephonic contact with counsel for the purpose of establishing a location and a mutually agreeable date for the hearing.

Dated this 10th day of January 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION TO STRIKE**, dated January 10, 1995, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: January 10, 1995

ADDRESSEES:

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
Beveridge & Diamond
One Sansome Street, Suite 3400
San Francisco, CA 94104

David M. Jones, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. IX
75 Hawthorne Street
San Francisco, CA 94105

Mr. Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105