2/28/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CBI Services, Inc.
St. George Road
Bourbonnais, Illinois

Docket No. EPCRA-05-1990

Judge Greene

ORDER
GRANTING IN PART
COMPLAINANT'S MOTION FOR "ACCELLERATED DECISION"
AND
DENYING RESPONDENT'S MOTION FOR "ACCELLERATED DECISION"

The complaint in this action was brought pursuant to the Emergency, Planning, and Community Right to Know Act ["EPCRA"], also known as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 11100 et seq. 1/ Respondent, a manufacturer of large steel alloy items such as containers and tanks, was charged with six violations of § 313 of EPCRA, 42 U.S.C. § 11023 and regulations promulgated pursuant thereto, 40 CFR §§ 372.22, 372.25, and 372.30, for alleged failure to file a "form R," the Toxic Chemical Release Inventory Reporting Form [U. S. EPA Form 9350 - 1 (1-88)], for for each of six toxic chemicals. The regulations require the owner/operator of a facility that has ten or more full time employees and a Standard Industrial Code ["SIC"] of 20 through 39 [defined at § 313(b) of EPCRA, 42 U.S.C. § 11023(b) and 40 CFR § 372.22(b)] and which manufactures, processes, or otherwise uses a toxic chemical listed pursuant to requirements of § 313 (c) of EPCRA, 42 U.S.C. § 11023(c) and 40 CFR § 372.65 in amounts that exceed the threshold for reporting (as set forth in 40 CFR § 372.25) to file a chemical release reporting form, i.e. "form R", with both the Administrator of the U. S. EPA and the state in which the facility is located.

1/ See particularly § 325(c), 42 U.S.C. § 11045(c), which provides that the Administrator of the United States Environmental Protection Agency [EPA] may assess civil penalties for violations of § 313 of EPCRA.

The parties have filed cross motions for "accellerated decision" pursuant to 40 CFR § 22.20. 2/

In its motion, complainant asserts that respondent had "processed," as that term is defined at 40 CFR § 372.3, manganese, chromium, and nickel in quantities exceeding 75,000 pounds; and further that respondent had "otherwise used," as the term is defined (40 CFR § 372.3), xylene, n-butyl alcohol, and methyl isobutyl ketone in quantities greater than 10,000 pounds. Complainant argues that respondent was required to file "form Rs" for each of these chemicals no later than July 1, 1988, and that in fact such forms were not filed until May 16, 1989, 3/ 180 days after they were due, and three months after the date upon which the facility was inspected by EPA. Complainant argues that respondent admitted all of

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2/ 40 CFR § 22.20(a) provides that an "accellerated decision may be rendered "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding." "Accellerated decision" is analogous to summary judgment under Federal Rule of Civil Procedure 56(c), which provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

3/ Complainant's Motion for Accellerated Decision of May 4, 1990, at 6; Respondent's Amended Answer to the Complaint, ¶ 7; respondent's Memorandum in Support of Accellerated Decision, at 6.

the charges of Counts I, II, and III either directly or by its failure to admit, deny, or explain the material allegations of the complaint. 4/ Complainant further urges that respondent admitted all elements of the charges in Counts IV, V, and VI except for the quantities of nickel, chromium, and mangangese that were "processed". Respondent's view of the quantities processed, according to complainant, is the result of erroneous readings of the Act, the regulations, and a guidance document prepared for the use of the regulated community to aid understanding obligations under EPCRA. Consequently, complainant believes it is entitled to judgment as a matter of law. In support of its penalty proposal, complainant asserts that the filing of the "form Rs" more than 180 days after the date upon which they were due constitutes "failure to report," as defined by EPA's "Enforcement Response Policy for § 313 of the Emergency Planning and Community Right to Know Act," 5/ and has proposed penalties accordingly ($17,000 each for Counts I, II, and III; $25,000 each for Counts IV, V, and

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4/ 40 CFR § 22.15(d) provides that "[F]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

5/ See particularly pp. 5 and 8 of that document, which was submitted as part of complainant's pretrial exchange as Complainant's Exhibit (for identification).

VI). The total proposed penalty, therefore, is $125,000. 6/

In its Motion for Accellerated Decision, respondent admits Counts I, II, and III of the complaint, i. e. that during calendar year 1987, respondent "otherwise used" xylene (mixed isomers), 7/ n-butyl alcohol, 8/ and methyl isobutyl ketone 9/ in quantities which exceeded the federally required threshold (10,000 pounds) for reporting. 10/ Respondent further admits that "form Rs" had to be submitted, for each of the three chemicals, to the EPA Administrator and to the State of Illinois on or before July 1, 1988 and that such forms were not filed until May 16, 1989. However, respondent denied in its amended answer to the complaint that nickel, chromium, and manganese were "processed" in quantities which exceed the reporting threshold (75,000 pounds) 11/, on the ground that, as used in respondent's operation, such chemicals are constitu-

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6/ Complaint, at 9-10.

7/ Count I of the complaint, paragraphs 12-17.

8/ Count II of the complaint, paragraphs 18-23.

9/ Count III of the complaint, paragraphs 24-

10/ 40 CFR § 372.25(b).

11/ 40 CFR § 372.25(a).

ents of the steel plating and are "processed" only at the edge of the steel plate. "Thus, only the toxic chemicals at the edge [of the plating] 12/ are processed and included in the measurement for threshold quantity purposes," according to respondent; the "constituents in the remaining steel plate are not chemically or physically impacted or altered." 13/ As measured at the edge of the plating, the chemical quantities involved would be far below the 75,000 pound reporting threshold. Respondent therefore denies the allegations of Counts IV, V, and VI of the complaint, and seeks "accellerated decision" in its favor as to these counts and as to the civil penalties proposed for them.

DISCUSSION

With respect to Counts I, II, and III of the complaint, respondent's liability is clear, and has been admitted.

As for Counts IV, V, and VI, the only liability issue remaining to be determined is whether or not respondent "processed" nickel, manganese, and cadmium in such quantities that

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12/ 3/32" to 1/2" into the steel plate.

13/ Respondent's Motion for Accellerated Decision, Fifth Affirmative Defense, at 4 (¶ 15).

respondent was required to file "form Rs" for each of them. The validity of respondent's defense, i. e. that only the edge of the steel plating that is being cut, welded, or blasted counts toward the threshold reporting amounts, must be determined.

With respect to this defense, complainant replies that the entire amount of steel alloy plating in items distributed in commerce must be considered for threshold reporting purposes, and cites the language of the regulations (Complainant's Memorandum in Opposition to respondent's Motion for Accellerated Decision, at 7-8).

The term "process" is defined at 40 CFR § 372.5 as follows:

> "Process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce:
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> (1) 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 substance, or
>
> (2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

In response to comments made by the public when the regulations in question were published in the Federal Register, EPA responded, in connection with the definition of the term

"process," that the statutory definition of "process" had been included in the definition at 40 CFR § 372.5, and that

> a. 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 the 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 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. 14/ [Emphasis added]

It is clear from the definition of "process" and from the responses to public comment that the manufacturing activity in which respondent is engaged is "processing," since the toxic chemicals incorporated into the steel plating are being prepared (after their manufacture) for distribution in commerce

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14/ Federal Register Vol. 53. No. 30, February 16, 1988, 4505-4506

"in a different form or physical state from that in which it was received by the person so preparing such substance," 40 CFR § 372.5.

It is also clear from the statutory and regulatory definition of "process" and in U. S. EPA's response to comments that emphasis has been placed upon the incorporation of toxic chemicals into products distributed in commerce. The concept of "process" includes distribution of such products in commerce. There does not appear to be, in the definition or in response to comments, any interest in measuring the amount of toxic chemicals that might escape during "processing." The comment

> "(W)hatever 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" 15/

is particularly significant in this connection. Accordingly, it is held that it is the weight of the plating, not the quantity of material at the edge where cutting, blasting, and welding occur, that determines whether "form Rs" must be filed for

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15/ Id.

nickel, chromium, and manganese. Respondent's affirmative defense, ingenious though it first appears, must be rejected.

OTHER AFFIRMATIVE DEFENSES RAISED BY RESPONDENT

Respondent asserts, in its first affirmative defense, that the complaint fails to state a claim upon which relief can be granted. However, it is clear that a claim upon which relief can be granted has been stated in the complaint.

Respondent asserts in its second and third affirmative defenses that that nickel, chromium, and manganese are not subject to reporting requirements. This position is clearly erroneous, as may be seen in the language of § 313 of EPCRA, 42 U.S.C. § 11023.

Respondent asserts in its fourth affirmative defense that the fabrication process is exempt from the requirements of "form R" reporting because the items fabricated are "articles." However, the definition of "article," at 40 CFR § 372.3, 16/

16/ 40 CFR § 372.3 provides that "article" means a manufactured item:

> (1) which is formed to a specific shape or design during manufacture; (2) which has end use functions dependent in whole or in part upon its shape or design during end use; and (3) which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments."

provides that, in order to be an "article," no release of toxic chemicals may take place under normal conditions of processing at the fabricating facility. Accordingly, respondent's steel alloy items are not "articles".

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is the owner or operator of a "facility," as defined at 42 U.S.C. § 11049(4) and 40 CFR § 372.3. Respondent has ten or more "full time employees," as that term is defined at 40 CFR § 372.3, and is in Standard Industrial Classification Codes 20-39, as defined at 42 U.S.C. § 11023(b) and 40 CFR § 372.22(b).

Respondent manufactured or processed in amounts of at least 75,000 pounds of manganese, chromium, and nickel and was required to file a "form R" for each chemical for the year 1987, pursuant to § 313 of EPCRA, 42 U.S.C. § 11023, no later than July 1, 1988, but did not file such forms until May 16, 1989. Respondent "otherwise used," as that term is defined at 40 CFR § 372.3, xylene (mixed isomers), n-butyl alcohol, and methyl isobutyl ketone in amounts of at least 10,000 pounds during the year 1987, and was required to file a "form R" for each such chemical but did not file the forms

until May 16, 1989. Respondent has, therefore, violated the Act and applicable regulations as charged.

It is ORDERED that complainant's motion for "accellerated decision" be, and it is hereby, granted as to respondent's liability for the violations charged. It is FURTHER ORDERED that respondent's motion for "accellerated decision" be, and it is hereby, denied.

PENALTY

In order to be entirely fair to both parties, a further opportunity to brief the penalty issue will be afforded. It appears from the moving papers that the parties' principal areas of concentration have been respondent's affirmative defenses, particularly as to "processing." Respondent's Sixth Affirmative Defense goes briefly to the appropriateness of the penalty.

Accordingly, the parties shall have through April 5, 1991, in which to file further briefs on the issue of appropriate penalty.

J. F. Greene
Administrative Law Judge

Washington, D. C.
February 28, 1991

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 March 7, 1991.

Shirley Smith
Secretary

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