8/18/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Rainbow Paint and Coatings, Inc.	)	**EPCRA Docket No.VII-89-T-609**
	)	
	)	
Respondent	)	

Respondent 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 xylene for the years 1987 and 1988 to complainant.

APPEARANCES:

For Complainant:

Kent Johnson, Esquire
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
726 Minnesota Ave.
Kansas City, Kansas 66101

For Respondent:

James R. Doran, Esquire
P.O. Box 10327
Springfield, Missouri 65808

ACCELERATED DECISION AND ORDER

Introduction

This proceeding was commenced under the Emergency Planning and Community Right to Know Act of 1986 (EPCRA), 42 U.S.C. § 11045, by the issuance of a complaint and notice of opportunity for hearing (complaint) by Region VII of the Environmental Protection Agency (EPA). The complaint charges Rainbow Paint and Coatings, Inc. (respondent) with violations of section 313 of EPCRA, 42 U.S.C. § 11023, and of the requirements of 40 C.F.R. Part 372, by failing to submit toxic chemical release inventories (Form Rs) for xylene to the Administrator of EPA and to the State of Missouri for the calendar years 1987 and 1988. Pursuant to section 325 of EPCRA, 42 U.S.C. § 11045, complainant seeks a total civil penalty of $10,000. In its answer, respondent denied the allegations of the complaint. In addition, respondent stated it was the debtor in Chapter 7 bankruptcy proceedings and had ceased all business activity and was no longer operating its business. Complainant subsequently served a motion for an accelerated decision (motion) pursuant to 40 C.F.R. §§ 26.16(a) and 22.20(a).

FINDINGS OF FACT

Respondent is a manufacturer of latex paints and roof coatings located at 2029 North Golden, Springfield, Missouri.

It is incorporated and registered to do business in the State of Missouri, and is a person as defined in section 329(7) of EPCRA and it is the owner or operator of a facility as defined in section 329(4).

On or about September 14, 1989, an authorized EPA representative conducted an inspection at respondent's facility in Springfield. During the course of the inspection, information was received from Carl Jensen (Jensen), Executive Vice President of respondent, that it employed in excess of 10 employees and had a Standard Industrial Classification (SIC) code designation of 2851. This information regarding the number of employees and the SIC Code listing was corroborated by information from the 1988 Missouri Manufacturer's Register and from Dun & Bradstreet. (Complainant's Proposed Exhibit 1, submitted as part of its prehearing exchange.)

Xylene is one of the 309 specific chemicals listed under section 313(c) of EPCRA and 40 C.F.R. § 372.65 for which reporting is required. It was confirmed during the inspection that respondent processed xylene at its facility during 1987 and 1988. Pursuant to 40 C.F.R. § 372.25, the threshold amount for purposes of reporting are 75,000 pounds of chemical processed in calendar year 1987 and 50,000 pounds in calendar year 1988. Information regarding the amount of xylene processed by respondent was received as a result of requests made at the time of the inspection. Invoices received from the respondent indicated xylene usage at its facility totalling 137,680 pounds for the year

1988. (Complainant's Proposed Exhibit 1). A letter from Jensen to EPA, dated December 15, 1989, indicates that 1987 usage of xylene was slightly less than the amount in 1988. (Complainant's Proposed Exhibit 2).

It has been established by means of certified statements from Linda A. Travers, Director of the Information Management Division, EPA, that Form Rs for xylene had not been submitted to EPA by respondent by the required reporting date of July 1, 1988 for year 1987 and by July 1, 1989 for year 1988. (Complainant's Proposed Exhibits 3 and 4).

In its answer to the complaint and its response to the motion, respondent states that it is the debtor in Chapter 7 bankruptcy proceeding before the United States Bankruptcy Court for the Western District of Missouri, Southern Division, Case No. 89-60983-S-7-KMS.

DISCUSSION AND CONCLUSIONS OF LAW

Whether or not the subject matter is amenable to an accelerated decision depends upon an interpretation of the pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20 (Rule).

In significant part, the Rule provides:

> § 22.20 Accelerated decision; decision to dismiss.
>
> (a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, 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 . . . . (emphasis added).
>
> (b) Effect. (1) If an accelerated decision . . . is issued to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk. (emphasis added).

It is rooted firmly in common sense that oral hearings are to be used for the resolution issues of material facts. The Rule, in part, exemplifies this.[1] The concept of an accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The existence of minor factual disputes would not preclude an accelerated decision. To have such an effect, the disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in litigation. Genuine issues involving such facts are absent in this proceeding.

1. Bankruptcy Issue

In its answer and in its response to the motion, respondent stated that it is involved in a Chapter 7 bankruptcy proceeding. This matter, however, is not subject to the automatic stay provisions of the Bankruptcy Code. In the Matter of Watervliet Company, Inc., Docket No. TSCA-V-C-098-88, August 21, 1989, at 3-4.

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[1] See generally, 3 Davis, Administrative Law Treatise, § 12.2 2d Ed. (1980).

2. Liability

Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), provides that the owner or operator of a facility subject to the requirements of EPCRA shall complete a toxic chemical release form for each toxic chemical listed in the section, by reference, that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity set forth in subsection (b) during the preceding calendar year at the facility. Subsection (b) provides that the requirements of section 313 apply to owners and operators of facilities that have 10 or more full-time employees and that are in SIC Codes 20 through 39; and that the facility manufactured, processed, or otherwise used a toxic chemical listed in subsection (c), by reference, in excess of the quantity of that toxic chemical set forth in subsection (f) during a calendar year for which reporting is required.

Section 328 of EPCRA provides that the Administrator of EPA "may prescribe such regulations as may be necessary" to carry out EPCRA. The Administrator promulgated final regulations to carry out the provisions of EPCRA, 53 Fed. Reg. 4525, February 16, 1988, which were codified at 40 C.F.R. Part 372.

Subpart D - Specific Toxic Chemical Listings, 40 C.F.R. § 372.65, lists the chemicals and chemical categories to which the requirements of EPCRA apply. It contains an alphabetical listing of 309 specific chemicals for which reporting is required, and the CAS number for the chemicals. Xylene, the

chemical involved in this matter, CAS number 1330-20-7, is one of the specific chemicals listed.

It has been shown clearly and conclusively that respondent is subject to the requirements of EPCRA and that it violated section 313 of EPCRA by failing to submit Form Rs for xylene for the years 1987 and 1988.

3. Civil Penalty

A respondent is not entitled to a hearing concerning the penalty question under any and all circumstances. The facts in the instant matter represent a stellar example of those isolated or rare cases where a hearing is not required. These are the salient considerations in this case: EPA's Enforcement Response Policy (ERP) was provided to respondent with the complaint. The penalty calculation in this case was made by one Doug F. Elders (Elders), an Environmental Engineer in the Toxic Substance Control Section of EPA's Region VII, who was the case review officer assigned to the subject matter. The declaration of Elders relates that the penalty was calculated in accordance with the provisions of EPCRA and the ERP, and the $10,000 sought comports with same. The motion contained a detailed explanation of how the penalty was calculated. Significantly, the response to the motion consisted of three sentences. Respondent's counsel related, in short, that he had no authority to settle the claim because such was vested in the Chapter 7 trustee. The response did not offer a soupcon of evidence challenging the penalty, or request a hearing concerning

it, or proffer any information in mitigation of the amount. Under the circumstances of this case, it would display a startling suspension of common sense, and ill-serve the public interest, to suggest or foist a hearing on the parties with regard to the penalty issue. The case of Katzson Bros., Inc. v. United States Environmental Protection Agency, 838 F.2d 1396 (10th Cir. 1988) is not applicable to this matter. There a default order was involved, with EPA's apparent transgression being the "complete absence of inquiry into the factual basis for the penalty." (at 1400). Even if the instant matter were a default case, it should not be followed in matters arising outside the Tenth Circuit. In the Matter of Custom Chemical & Agricultural Consulting, Inc. and David H. Fulstone, II, FIFRA Appeal No. 86-3, March 6, 1989, at 16, n.20. Complainant has demonstrated persuasively that the civil penalty sought in the amount of $10,000 is condign and comports with the appropriate provisions of EPCRA and the ERP.

ULTIMATE CONCLUSION AND ORDER

It is concluded that respondent violated section 313 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11023, in failing to submit toxic chemical release inventories (Form Rs) for xylene for the years 1987 and 1988 and a penalty of $10,000 is assessed against respondent.

IT IS ORDERED that this penalty of $10,000 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:

EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pa. 15251

Payment shall be made within 60 days of the receipt of a final order.[2] 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: August 8, 1991

[2] 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).