9/18/95

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

IN THE MATTER OF	:	
Tillamook County Creamery Association	:	**Docket Number: EPCRA-1094-03-01-325**
Respondent	:	

ORDER UPON MOTIONS FOR "ACCELERATED DECISION"

This matter arises under the Emergency Planning and Community Right-to-Know Act (EPCRA) (42 U.S.C. § 11001 et seq.).

I. Procedural History

The complaint in this matter alleges that Respondent violated EPCRA by failing to report its use between 1990 and 1992 of nitric acid, phosporic acid and ammonia and proposes a penalty of $124,135. Respondent's answer, while it admits many of Complainant's factual allegations, denies Complainant's legal conclusions regarding alleged violations of the Act. The answer presents nine affirmative defenses; the disputed legal issues in this matter arise from several of these defenses.

On November 18, 1994, the parties filed a Statement of Agreed Facts that offered forty-six paragraphs regarding factual matters relating to Respondent's alleged violations and was accompanied by a Motion for Leave to File Statement of Agreed Facts. This Motion is hereby granted; the Statement is incorporated into the record of this proceeding and hereby made a

part of this Order.[1]

On November 30, 1994, Complainant filed a Motion for Accelerated Decision, Motion to Strike, and Memoranda in Support. By this Motion, Complainant asked that the legal issues regarding liability for violations presented by Respondent's Affirmative Defenses 2, 3, 4, 5 and 6 be resolved on the pleadings to date and that Respondent's Affirmative Defenses 7 and 8 be stricken as a matter of law. On December 21, 1994, Respondent filed a Cross-Motion for Accelerated Decision accompanied by a memorandum that argued (1) that Complainant's motions should be denied and (2) that Respondent is entitled to a dismissal of each count as a matter of law for reasons which parallel those previously offered as affirmative defenses.[2] Complainant and Respondent filed reply memoranda on these issues.

On June 1, 1995, Complainant's Motion to Strike was granted in part as to Affirmative Defense 7 and granted as to Affirmative Defense 8. On July 13, 1995, Respondent filed a Motion for Reconsideration of the order of June 1 regarding the granting of the Motion to Strike as to Affirmative Defense 8. Complainant filed its Response to Motion for Reconsideration on July 25,

---

[1]The Statement of Agreed Facts is attached hereto as Appendix 1.

[2]In this Cross-Motion, Respondent follows Complainant's approach of applying a standard of "accelerated decision" to the issues raised by Affirmative Defenses 2-6. In accordance with the parties' requests, this Order applies the "accelerated decision" standard to these issues.

1995.[3]

The legal issues presented on "accelerated decision" by the motions parallel Affirmative Defenses 2 through 6; issues presented by the Motion for Reconsideration involve Affirmative Defense 8.[4] This Order resolves outstanding issues associated with Defenses 2, 3, 5, and 6, and sets further proceedings with regard to the issues raised in Defense 4.

II. Accelerated Decision

A. Legal Standard

Both Complainant and Respondent have, by their motions, requested that the issues presented by Affirmative Defenses 2 through 6 be resolved by "accelerated decision." Under the Consolidated Rules of Practice, 40 C.F.R. Part 22, an accelerated decision may be granted "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." 40 C.F.R. § 22.20(a).

This standard for accelerated decision in Environmental Protection Agency (EPA) proceedings parallels the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; the same principles apply to the resolution of such

---

[3]A ruling on Respondent's motion will be issued in a separate order.

[4]The parties have not yet requested a resolution of the issues presented by Affirmative Defenses 1 and 9.

motions under the two sets of rules.[5] The Supreme Court has written that summary judgment is authorized by the Federal Rules "upon proper showings of the lack of a genuine, triable issue of material fact", Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The issue that defeats summary judgment must be one that requires further proceedings to find facts; "an issue of law is no barrier to a summary judgment." Agustin v. Quern, 611 F.2d 206, 209 (1979).[6] The Environmental Appeals Board has applied this principle to accelerated decisions in administrative proceedings. For example, in In re CWM Chemical Services, TSCA Appeal 93-1, 1995 TSCA LEXIS 10, at *26 (EAB, May 15, 1995), the Board held that the central issue in the case was "a question of law appropriate for resolution by an accelerated decision", citing Sheline v. Dun & Bradstreet, 948 F.2d 174 (5th Cir. 1991). While questions of fact will defeat summary judgment, questions of law do not.

---

[5]See, e.g., In re CWM Chemical Serv., TSCA Appeal 93-1, 1995 TSCA LEXIS 10, at *25 (EAB, Order on Interlocutory Appeal, May 15, 1995)("Rule 22.20(a) is comparable to the summary judgment process allowed under Rule 56 of the Federal Rules of Civil Procedure"); In re Coastcast Corp., EPCRA-09-92-0006, 1993 EPCRA LEXIS 71, at *3 (Feb. 19, 1993)("the equivalent of an accelerated decision is Fed.R.Civ.P. 56 addressing summary judgment"); In re ICC Indus., TSCA Appeal No. 91-4, 1991 TSCA LEXIS 61, at *16 (CJO, Order on Interlocutory Review, Dec. 2, 1991) ("An accelerated decision is comparable to a summary judgment under Federal Rule of Civil Procedure 56, which by analogy provides guidance").

[6]See also Williams v. Leybold Technologies, 784 F.Supp. 765, 767 (N.D.Cal. 1992), where the Court held in an EPCRA matter that summary judgment was appropriate where "the only dispute [was] as to pure legal questions," citing Smith v. Califano, 597 F.2d 152 (9th Cir. 1979), cert. denied, 444 U.S. 980 (1979).

Applying these principles to the present case, few "genuine issues of material fact" remain that would prevent an accelerated decision. Most of the factual allegations in the complaint were admitted in the answer. Moreover, as noted above, the parties have filed an extensive Statement of Agreed Facts which contains forty-six detailed factual stipulations. As a result, the record supports an accelerated decision as to each factual issue, with only one apparent exception (see II.D, below). Instead, the principal points of disagreement between the parties are legal issues, which precedent suggests can be resolved by "accelerated decision".

B. The "Otherwise Use" of Nitric Acid and Phosphoric Acid

Complainant's Memoranda in Support of its Motion for Accelerated Decision (hereinafter "Complainant's Memoranda"), which provides a summary that need not be reviewed here, argues that Respondent's use of nitric acid and phosporic acid satisfies all of the criteria that require reporting of these two chemicals as "otherwise used" under 40 C.F.R. Part 372. Complainant's Memoranda at 5. Respondent has admitted and/or agreed to each of the factual elements of the "otherwise use" violation in its answer and the Statement of Agreed Facts.

In its Consolidated Memorandum (hereinafter "Respondent's Memorandum"), Respondent urges that nitric acid and phosphoric acid are not "otherwise used" at the facility. Respondent's Memorandum at 15-23. Under Respondent's theory, the chemicals are brought to the facility, stored, diluted, and circulated

through a distribution system of pipes and tanks[7] that cleans Respondent's equipment but are not "used".

A review of applicable law demonstrates that Respondent's argument is without merit. First, the regulatory scheme and plain language of Part 372 are designed to capture in the "'otherwise use' or 'use'" category all uses not already regulated under the terms "manufacture" or "process" (40 C.F.R. § 372.3).[8] Clearly, Respondent "uses", as any reader might understand that term, these chemicals.

A review of the Federal Register notice setting forth the applicable final rule confirms the rule's plain language:

> EPA is interpreting otherwise using a covered toxic chemical to be activities that support, promote, or contribute to the facility's activities, where the chemical does not intentionally become part of a product distributed in commerce...[Examples include] manufacturing aids such as lubricants, refrigerants, or metalworking fluids, or chemicals used for other purposes at the facility such as cleaners, degreasers, or fuels.

53 Fed. Reg. 4500, 4506 (emphasis added). Respondent used phosphoric acid and nitric acid in excess of the threshold quantity in a cleaning solution[9]; use as a cleaner is included within the scope of the "otherwise use" category. Therefore, this "otherwise use" is subject to the reporting requirements of

---

[7]The "Clean-in-Place" network; Statement of Agreed Facts, Paragraph 18, etc.

[8]"*Otherwise use* or *use* means any use of a toxic chemical that is not covered by the terms *manufacture* or *process* and includes use of a toxic chemical contained in a mixture or trade name product." 40 C.F.R. § 372.3 (italics in original).

[9]Statement of Agreed Facts, Paragraphs 15-17.

40 C.F.R. Part 372 and Complainant's motion for "accelerated decision" on this issue will be granted.

C. The "De Minimis" Use of Nitric Acid and Phosphoric Acid

Respondent also argues that its use of phosphoric acid and nitric acid in its cleaning solution meets all of the criteria for the exemption for de minimis concentrations of a toxic chemical in a mixture under 40 C.F.R. § 372.38(a). Respondent offers a theory that the cleaning solution containing these chemicals is only "either (1) stored in pure form...or (2) present in a dilute mixture (less than 1%)" in a holding tank or the facility's network of pipes (the "Clean-in-Place" system). Respondent's Memorandum at 18. Applying the language of 40 C.F.R. § 372.38(a), Respondent argues that the chemicals at issue were merely "present in a mixture" that was produced by Respondent by mixing the chemicals involved. Respondent's Memorandum at 20-21.

Complainant replies that Respondent's use of the chemicals "falls outside the language of the de minimis exemption because Tillamook used the concentrated acids in the process of creating the diluted cleaning solution." Complainant's Reply re Motion for Accelerated Decision and Motion to Strike (hereinafter "Complainant's Reply") at 3 (emphasis in original). Complainant argues that the de minimis exemption does not apply because Respondent "'produced the mixture' with non-de minimis concentrations of toxic chemicals." Complainant's Reply at 4, quoting the language of 40 C.F.R. § 372.38(a). Additionally,

Complainant presents "guidance documents that deal directly" with the de minimis issue; one excerpt from a document entitled "Section 313 Interpretive Guidance System" indicates that in a situation parallel to that presented here, the de minimis exemption would not apply (Complainant's Memoranda at 6-7 and Exhibit A).[10] Accordingly, Complainant argues, the exemption does not apply to Respondent's use of nitric acid and phosphoric acid. Complainant's Memoranda at 6-7.

This issue can be resolved -- without reference to guidance documents -- by a close reading of the specific language of the de minimis exemption. The pertinent language states:

> If a toxic chemical is present in a mixture of chemicals at a covered facility and the toxic chemical is in a concentration in the mixture which is below 1 percent of the mixture...a person is not required to consider the quantity of the toxic chemical present in such mixture when determining whether an applicable threshold has been met under § 372.25 or determining the amount of release to be reported under § 372.30. This exemption applies whether the person received the mixture from another person or the person produced the mixture...However, this exemption applies only to the quantity of the toxic chemical present in the mixture.

---

[10]The relevant passage reads:

QUESTION[:] A facility brings on-site a 5% by weight solution of HCl for cleaning. The cleaning solution is diluted with water and the HCl concentration drops to 0.5% by weight (the de minimis for HCl is 1%). Since the HCl actually used for cleaning is below 1%, does the de minimis exemption apply?

ANSWER[:] No. The de minimis exemption does not apply for threshold determination purposes to HCl because the HCl concentration in a mixture brought on-site for use exceeds the 1% de minimis. Use of HCl begins with the step of dilution. Any releases of HCl occurring during the handling and dilution of the 5% mixture are reportable. The facility must count any HCl that is diluted towards an otherwise use threshold.

Complainant's Brief, Appendix A.

> If the toxic chemical is also manufactured (including imported), processed, or otherwise used at the covered facility other than as part of the mixture or in a mixture at higher concentrations, in excess of an applicable threshold quantity set forth in § 372.25, the person is required to report under § 372.30.

40 C.F.R. § 372.38(a)(emphasis added). First, then, the exemption applies only where a toxic chemical is merely "present in a mixture". Furthermore, the regulation which creates the de minimis exemption specifies that toxic chemicals that are manufactured, processed, or otherwise used in excess of threshold quantities (1) other than as part of the mixture or (2) in a mixture at higher concentrations fall beyond the scope of this exemption and therefore must be reported. The preamble to the final rule explained the intended effect of the de minimis exemption:

> In essence, the *de minimis* cut-off adopted for mixtures...would apply to the presence of impurities created as a result of making that mixture, or a component of that mixture...EPA does not expect that the processing and use of mixtures containing less than the *de minimis* concentration would, in most instances, contribute significantly to the threshold determinations or releases of listed toxic chemicals from any given facility.

53 Fed. Reg. 4500, 4504, 4509 (1988)(italics in original). The de minimis exemption, then, was designed to apply to impurities created incidentally during the manufacturing of a mixture. It was not expected that the use of mixtures containing de minimis concentrations of toxic chemicals would have an impact on threshold determinations for these toxics.

The plain language of the regulation indicates that Respondent's "otherwise use" (see II.B. above) of nitric acid and

phosphoric acid does not meet the criteria for a de minimis exemption. First, the exemption is designed to cover toxic chemicals merely "present in a mixture". Clearly, the nitric acid and phosphoric acid used by Respondent are more than simply "present in a mixture": these chemicals are brought on site in a concentrated solution, diluted, and circulated in dilute form through Respondent's "Clean-in-Place" pipe network. Respondent characterizes the chemicals as being merely "stored" in concentrated form and then "present in dilute mixture" (Respondent's Memorandum at 18); Respondent again labors diligently to make the step of dilution disappear from the process. However, these chemicals clearly are diluted from their arrival at the facility in concentrated form (Statement of Agreed Facts, Paragraph 12) to their use in dilute form (Statement of Agreed Facts, Paragraph 20). The fact that the chemicals are not simply "present in a mixture", by itself, strongly suggests that Respondent's use of these chemicals is not eligible for the de minimis exemption.

The last sentence of the above-quoted passage of the regulation that describes the de minimis exemption confirms this reading. Applying the specific language of that sentence to this case, Respondent's "otherwise use" (II.B. above) of the toxic chemicals[11] at its "facility"[12] in a mixture (the concentrated

[11]Phosphoric acid and nitric acid are subject to EPCRA reporting per 40 C.F.R. § 372.65.

[12]Statement of Agreed Facts, Paragraph 8.

form of the cleaning solution)[13] containing higher than de minimis concentrations of the chemicals[14] in excess of the threshold quantities[15] is subject to the reporting requirements of § 372.30. Therefore, under the language of the regulation at issue, Respondent's use of nitric acid and phosphoric acid does not meet the criteria for the de minimis exemption.[16]

The principles announced in the passages from the preamble to the final rule quoted above support this interpretation of the regulation. First, the "de minimis cut-off adopted for mixtures" applies, in essence, "to the presence of impurities" in the mixture (55 Fed. Reg. at 4504). Respondent's situation could hardly be further from the intended scope of the exemption: the nitric acid and phosphoric acid are not impurities but rather intended and, it would seem, essential constituents of the

---

[13]Under 40 C.F.R. § 372.3, "mixture" means, among other things, any combination of two or more chemicals, if the combination is not, in whole or in part, the result of a chemical reaction.

[14]About 25% nitric acid and about 8% phosphoric acid; Statement of Agreed Facts, Paragraph 12.

[15]Statement of Agreed Facts, Paragraphs 15 and 16.

[16]See also In re R.C.A. Rubber Co., EPCRA-031-1990 (Aug. 9, 1991). There, as here, it was argued that the reportable chemical (zinc oxide) which it admitting "purchasing and processing" in amounts well over the reporting threshold "was used to produce mixtures in which zinc oxide was below one percent of the mixture...". Id. at 2. After reviewing the relevant regulatory language, the tribunal was "persuaded beyond peradventure" that the de minimis exemption did not apply. Id. at 3-4.

cleaning solution.[17] Second, the preamble to the final rule states that the use of mixtures containing de minimis concentrations of chemicals was not expected to "contribute significantly to threshold determinations" (55 Fed. Reg. at 4509). Here, with an applicable threshold for the "otherwise use" of nitric acid and phosphoric acid of 10,000 pounds per year, Complainant's evidence indicates that Respondent used from 140,000 to 160,000 pounds of nitric acid and from 44,800 to 51,200 pounds of phosphoric acid during the reporting years at issue. Complainant's Memoranda, Exhibit B, p. 2. Clearly, Respondent's use of these chemicals has a significant effect on threshold determinations, again demonstrating that this use is beyond the intended scope of the de minimis exemption.

Finally, it must be noted that the purpose of EPCRA is to develop publicly available information about the use of toxic chemicals, information that is available to everyone from local citizens to federal policy makers. In the words of one court:

> A consultation of the entirety of EPCRA's provisions reveals that the statute has two central objectives: public access to centralized information, at a reasonably localized level, concerning hazardous chemicals used, produced or stored in the community and the use of this information to formulate and administer local emergency response plans in case of a hazardous chemical release.

---

[17]See, for example, the Statement of Agreed Facts which, with reference to the dilute solution containing nitric acid and phosphoric acid, describes (1) an "acid wash and rinse cycle" using the dilute solution "to dissolve any potential impurities in the system" (Paragraph 26) and (2) an electronic mechanism which maintains a particular concentration of the dilute solution containing the acids in the cleaning system's holding tank (Paragraph 28).

Atl. States Legal Found. v. Whiting Roll-Up Door Mfg., 772 F.Supp. 745, 746 (W.D.N.Y. 1991). See also In re Swing-A-Way Manufacturing, EPCRA-VII-910-T-650E (Decision and Order, Dec. 27, 1993), aff'd, EPCRA Appeal 94-1, 1995 EPCRA LEXIS 4 (EAB, Mar. 9, 1995), holding that "it is the clear intent of [EPCRA] and implementing regulations, given the statutory objectives recited in the Act, that the public should be informed as to quantities of toxic chemicals that go into facilities' operations." Id. at 5. The regulations at Part 372 are designed to accomplish EPCRA's objective of developing information about chemical use; the de minimis exemption, then, must be construed in a manner consistent with this Congressional goal. Respondent's construction of the de minimis exemption would allow any user of a toxic chemical to avoid reporting the use of any amount of the chemical so long as the chemical was diluted to de minimis concentrations prior to "use". The nonreporting of large amounts of toxic chemicals would defeat the intent of EPCRA and Respondent's reading of this exemption is, therefore, inconsistent with the purposes of the statute as well as contrary to the letter and spirit of the exemption itself.[18]

[18]Because the question presented here is answered by the terms of the regulations at issue, the applicability of the "guidance document" presented by Complainant need not be reached. In interpreting regulations promulgated under EPCRA, courts have sometimes looked to such materials; see discussion and cases cited at Note 27, infra. However, with reference to the guidance document offered on the issue of the de minimis exemption (Complainant's Memoranda, Exhibit A), Complainant has offered no details regarding its authorship, distribution, and availability to the regulated community. For future reference, the parties should note [Footnote 18 continued on next page]

Respondent's use of phosphoric acid and nitric acid does not qualify for the de minimis exemption of 40 C.F.R. § 372.38(a). The contrary interpretation urged by Respondent does not simply attempt to pass a camel through the eye of a needle, but urges the creation of a needle with a camel-sized eye. Such an enlargement of the de minimis exemption cannot be made by this tribunal. Therefore, Complainant's motion for "accelerated decision" on this issue will be granted.

D. The Amount of Ammonia Processed

In a declaration submitted by Complainant, EPA's inspector stated that two of Respondent's officials informed him "verbally and in writing that the company consumed" 30,450 pounds of anhydrous ammonia in 1992. Complainant's Memoranda, Exhibit B, p. 2. Complainant moved for "accelerated decision" on the issue that this amount exceeds the threshold amount of 25,000 for a listed chemical processed at a facility. Complainant's Memoranda at 11.

In its Memorandum, Respondent offers the theory that while Respondent purchased 30,450 pounds of ammonia in 1992, calculations performed by Respondent's Environmental Supervisor based on the amount of ammonia that would have been processed into starter media for the cheese actually produced in 1992 was

---

[continued from previous page] that a guidance document is more likely to have legal effect in an enforcement action (that is, to satisfy due process/notice concerns) and is certainly more compelling to the trier of fact if it has been demonstrated that the document was widely distributed and could have been obtained independent of an enforcement action.

about 7,232 pounds. Respondent's Memorandum at 23-25. Other than an affidavit signed by the Environmental Supervisor, Respondent offers no documents or other exhibits which describe production methods, levels or techniques to support this theory.

Complainant replies that it disagrees with Respondent's method of calculating usage, that the large discrepancy claimed by Respondent between amounts purchased and used during 1992 "needs substantial clarification before a final decision on liability can be rendered", and that Complainant therefore withdraws its motion for accelerated decision on this count (Complainant's Reply at 5-6). Complainant's position is well taken: direct evidence gathered during the inspection has been called into question by a model of ammonia usage described in an affidavit of the same witness interviewed by Complainant's inspector.[19] Accordingly, the parties' motions on this issue

---

[19]It is noted that, in several cases, after-the-fact attempts to recalculate chemical use in a manner designed to construe use as below EPCRA reporting thresholds have failed to persuade.

For example, in In re Pitt-Des Moines, EPCRA-VIII-89-06 (July 24, 1991), the tribunal rejected Respondent's attempt to remove a portion of its chemical use from reporting requirements:

> It would place not only an undue burden on the companies that are subject to EPCRA to require such calculations for every mixture covered under the Act but would also constitute a substantial hindrance in enforcement of the statute to require EPA to make such calculations to determine whether enforcement is needed. The intent of EPCRA is to determine the amount of toxic substances which might potentially cause harm to the public and/or the environment that are located at the various industrial facilities. To adopt the narrow interpretation on calculation of threshold amounts urged by [Respondent] would defeat the basic purposes of the Act.

Pitt-Des Moines at 18. [Footnote 19 continued on next page]

therefore will be denied.

E. The "Article Exemption" and Ammonia

Offering a theory not unlike its argument regarding the de minimis exemption, Respondent claims that its processing of ammonia is exempted from reporting requirements by the exemption covering toxic chemicals which are "present in an article at a covered facility" (Respondent's Memorandum at 25, quoting 40 C.F.R. § 372.38(b)). Since "(t)he processed ammonia is incorporated and remains part of the final cheese product"[20] and the "final cheese product" meets the criteria of an article under the applicable definition,[21] Respondent claims that its

---

[Continued from previous page] See also In re Swing-A-Way Manufacturing, EPCRA-VII-910-T-650E (Decision and Order, Dec. 27, 1993), where it was held that nickel in a waste stream must be included in threshold calculations and found that Respondent's use of nickel was therefore over the reporting threshold: "[t]he term 'process'...cannot reasonably be construed in the narrow sense contended for by respondent...[I]t is the clear intent of the Act and implementing regulations, given the statutory objectives recited in the Act, that the public should be informed as to quantities of toxic chemicals that go into facilities' operations." Swing-A-Way at 5. In affirming that opinion, the Environmental Appeals Board agreed that nickel in the waste stream did indeed support a finding of the use of that chemical in reportable amounts and held that "invoices alone may be sufficient to establish a prima facie case" of use over threshold quantities. In re Swing-A-Way Manufacturing, EPCRA Appeal No. 94-1, 1995 EPCRA LEXIS 4, *15 (Mar. 9, 1995).

[20]Statement of Agreed Facts, Paragraph 42.

[21]Under 40 C.F.R. § 372.3, "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. The "final cheese product" satisfies each of these requirements; see Statement of Agreed Facts, Paragraphs 43-46.

processing of ammonia should be exempt from the reporting requirements of 40 C.F.R. Part 372. Respondent's Memorandum at 25-26.

Complainant replies that Respondent "misconstrues the regulation" and that "(t)he chemical is in use in the cheese factory prior to its incorporation into the starter media." Complainant's Reply at 6. Complainant argues that the exemption, by its own terms, "applies only to the quantity of the toxic chemical present in the article." Id., quoting 40 C.F.R. § 372.38(b). In support of its theory, Complainant points out that "(t)he ammonia is not present in the article when Tillamook uses it"[22] and that excess ammonia may be released at the time of its application to the starter medium.

Additionally, Complainant offers two documents further explaining the article exemption. First, Complainant presents portions of a document entitled "Toxic Chemical Release Inventory Questions and Answers (Revised 1989 Version)". Complainant's Reply, Exhibit D. One of the excerpts offered states, in part, that "(t)he article exemption does not apply to the processing of chemicals to make articles." Id., p. 32 (Answer to Question #179). Complainant reports that this "instruction manual" was "sent to all companies who reported under EPCRA to EPA the

[22]The word "it" in this sentence refers, presumably, to the ammonia (and not to "the article"): Complainant's theory is that Respondent uses the ammonia by incorporating the ammonia into the article (the "final cheese product").

previous year"[23] (Complainant's Reply at 6). Second, Complainant again offers excerpts from the "Section 313 Interpretive Guidance System". Complainant's Memoranda, Exhibit A. This document contains language similar to the passage from the Question and Answer document quoted above: "The article exemption does not apply to the processing of chemicals to manufacture the article." Id. (Record #123).

As with the de minimis exemption (II.C. above), the starting point for the analysis of this issue is the regulatory language creating the article exemption. The article exemption states:

> If a toxic chemical is present in an article at a covered facility, a person is not required to consider the quantity of the toxic chemical present in such article when determining whether an applicable threshold has been met under § 372.25 or determining the amount of release to be reported under § 372.30. This exemption applies whether the person received the article from another person or the person produced the article. However, this exemption applies only to the quantity of the toxic chemical present in the article. If the toxic chemical is manufactured (including imported), processed, or otherwise used at the covered facility other than as part of the article, in excess of an applicable threshold quantity set forth in §372.25, the person is required to report under §372.30...If a release[24] of a toxic chemical occurs as a result of the processing or use of an item at the facility that item does not meet the definition of *article*.

40 C.F.R. § 372.38(b); underlining added, italics in original. This section starts by discussing chemicals that are "present in

---

[23]The document is dated January 1990.

[24]Under 40 C.F.R. § 372.3, release means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any toxic chemical.

an article", implying that the exemption is designed for chemicals that are present in an item that is incorporated into another product at the facility; the phrase "present in an article" does not explicitly encompass the processing of chemicals into articles. However, the exemption also applies, by its own terms, "whether the person received the article from another person or the person produced the article"; it is not immediately clear whether the phrase "produced the article" is meant to include the use of chemicals to produce the article or merely the incorporation of one item already containing chemicals into an article.

The article exemption is qualified in two significant ways. First, the exemption applies only to toxic chemicals present in the article and does not apply to uses of the chemical at the covered facility "other than as part of the article". Again, it is not immediately clear from this language whether the processing of a chemical into an article is a use that is "part of the article" or whether this phrase is designed to cover only chemicals that arrive at the covered facility already "part of the article." Second, if a release of a chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of an article.[25]

The final rule announcing Part 372 describes the origins of

---

[25]Complainant has not asserted that this qualification of the article exemption applies in this proceeding.

the definition of "article" at issue here.[26] In formulating the definition of "article" at 40 C.F.R. § 372.3, EPA adopted, with modifications, the definition of article appearing in the Occupational Safety and Health Administration (OSHA) Hazard Communications Standard (HCS). 53 Fed. Reg. at 4507. The OSHA HCS definition was, in turn, adapted from a definition appearing in regulations issued under the Toxic Substances Control Act (TSCA). Id. EPA explained:

> The TSCA article definition is worded primarily to distinguish "chemical substances" and "mixtures" from those manufactured items that contain chemical substances and mixtures. The OSHA HCS definition was adapted from the TSCA regulatory definition, for the purpose of exempting certain items from the MSDS preparation requirements; the supposition being that the item's normal end use would not release or cause exposure to a "hazardous chemical" in the article.

Id. (emphasis added). The article definition focuses on an item's normal end use. EPA further explained that the lack of risk presented by the end use was the basis for the article exemption:

> Commenters [sic] encouraged EPA to specifically exempt the use and processing of articles from the threshold determination and release reporting requirements of the rule. According to these comments, the normal end uses of such articles by definition do not result in the release of toxic [chemicals] contained within such articles. Therefore, such an exemption will reduce the burden on industry significantly because fewer materials will have to be evaluated for threshold and

[26]The notice proposing Part 372 included, without discussion, a definition of the term "article"; however, the notice did not include the article exemption. 52 Fed. Reg. 21152, 21167-68 (1987). See also 53 Fed. Reg. 4500, 4507 (1988) ("EPA included a proposed definition of article [in the proposed rule] but, as certain commenters pointed out, did not specifically exclude the use or processing of articles").

release determinations.

Id. (emphasis added). The rationale behind the article exemption, then, is that the end uses of the articles do not result in the release of chemicals. This rationale is consistent with Complainant's reading of the article exemption: "Essentially, the articles exemption obviates the need to report the presence of toxic chemicals that are already present in the finished products that a manufacturer incorporates into its own product." Complainant's Memoranda at 8. The theory of the exemption, as reflected in the Federal Register notice and the text of the exemption itself, seems to be that chemicals that are merely present in an article arriving at a covered facility and that leave the facility incorporated in the same or another article do not present the same risk of release as do chemicals that are manufactured, processed, or otherwise used on site. Additionally, the prior act of incorporation of these chemicals into the article may have already been the subject of an EPCRA report; in such a case, the article exemption prevents duplicative reporting of chemical use.

The regulatory language, together with the context for this language presented by the Federal Register notice, is persuasive that the article exemption does not encompass Respondent's use of phosphoric and nitric acid. EPA's "Toxic Chemical Release Inventory Questions and Answers (Revised 1989 Version)" ("Q & A

Document") confirms this reading of the article exemption.[27] As noted above, the Q & A Document states: "The article exemption does not apply to the processing of chemicals to make articles."[28] Here, Respondent has processed ammonia to make the "final cheese product" which is, as Respondent argues,[29] an article. Therefore, the Q & A Document confirms that this processing of ammonia is not eligible for the article exemption.

The language of the regulation at issue, the Federal Register notice, and publicly distributed EPA guidance support Complainant's reading of the article exemption. Because Respondent's processing of ammonia into its "final cheese product" is beyond the scope of the article exemption, Complainant's motion for "accelerated decision" on this issue will be granted.

F. The "Laboratory Exemption" and Ammonia

---

[27]Tribunals have applied EPA guidance documents to resolve similar issues of EPCRA regulatory interpretation. In fact, in In re Pacific Refining, EPCRA-09-92-0001, 1993 EPCRA LEXIS 77 (Dec. 14, 1993), modified on other grounds, EPCRA Appeal No. 94-1, 1994 EPCRA LEXIS 11 (Dec. 6, 1994), the tribunal relied on a later edition of the same guidance document offered by Complainant in the instant proceeding to resolve an EPCRA reporting issue. In In re Autosplice, EPCRA-09-91-0003, 1992 EPCRA LEXIS 49 (Interlocutory Order) (Oct. 30, 1992), the tribunal applied "an EPA policy directive" in interpreting "the third requirement of the 'article' definition" (the same definition that is at issue here). 1992 EPCRA LEXIS 49 at *6. Additionally, in In re Dempster Industries, EPCRA VII-91-T-606-E, 1994 EPCRA LEXIS 9 (Aug. 2, 1994), the tribunal looked to EPA's "Section 313 Reporting: Issue Paper" in determining the applicability of the article exemption.

[28]Q & A Document, p. 32 (Answer to Question #179).

[29]See Respondent's Memorandum, at 25-26.

Respondent claims to have "processed ammonia in laboratory settings under the supervision of a technically qualified individual" and to be, therefore, "exempt from reporting for ammonia pursuant to 40 C.F.R. § 372.38(d)." Answer, p. 9. In apparent support of this theory, the parties have stipulated that Respondent "maintains a laboratory and laboratory personnel on-site" and that its Laboratory Supervisor "is a 'technically qualified individual' as that term is defined" in applicable regulations. Statement of Agreed Facts, Paragraphs 35, 40.

However, as argued by Complainant, the exemption claimed here by Respondent requires that the chemical in question be processed "in a laboratory"; the regulations specifically state that the exemption does not apply to "(a)ctivities conducted outside of the laboratory." Complainant's Memoranda at 10; 40 C.F.R. § 372.38(d). As Complainant points out, the ammonia at issue here is processed in a creamery, clearly outside of a "laboratory" under any reasonable definition. Complainant's Memoranda at 10. In its pleadings to date, Respondent has offered nothing further on this issue. Therefore, it must be found that no genuine issue of material fact remains and Complainant is entitled to judgment as a matter of law that the "laboratory exemption", 40 C.F.R. § 372.38(d), does not apply to Respondent's processing of ammonia. Complainant's motion for "accelerated decision" on this issue will be granted.

III. Findings of Fact and Conclusions of Law[30]

1. Respondent is a "person," as that term is defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

2. Respondent is an owner or operator of a "facility," as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 372.3.

3. Respondent's facility has ten or more "full-time employees," as that term is defined by 40 C.F.R. § 372.3.

4. Respondent's facility is classified under Standard Industrial Classification Code 2022 (Major Group 20).

5. Respondent initially submitted a Toxic Chemical Release Inventory Reporting Form ("Form R") for calendar year 1992 for nitric acid on December 28, 1993. Respondent submitted a revised Form R for 1992 for nitric acid on January 4, 1994.

6. On January 4, 1994, Respondent also submitted Form Rs for nitric acid for calendar years 1990 and 1991, for phosphoric acid for calendar years 1990, 1991, and 1992, and for ammonia for calendar year 1992.

7. During the calendar year 1990, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, nitric acid at its facility in quantities exceeding the reporting threshold specified in 40 C.F.R. § 372.25.

8. At the time of the July 1, 1991, reporting deadline, nitric acid was a chemical referenced in Section 313 of EPCRA and

[30]See also Statement of Agreed Facts, Appendix 1 to this Order; complaint; answer.

listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

9. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1991, for nitric acid for the 1990 reporting year.

10. Respondent's failure to submit Form R for nitric acid for the 1990 reporting year by July 1, 1991, is a violation of EPCRA Section 313 and 40 C.F.R. Part 372.

11. During the calendar year 1990, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, phosphoric acid at its facility in quantities exceeding the established reporting threshold specified in 40 C.F.R. § 372.25.

12. At the time of the July 1, 1991, reporting deadline, phosphoric acid was a chemical referenced in Section 313 of EPCRA and listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

13. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1991, for phosphoric acid for the 1990 reporting year.

14. Respondent's failure to submit Form R for phosphoric acid for the 1990 reporting year by July 1, 1991, is a violation of EPCRA Section 313 and 40 C.F.R. Part 372.

15. During the calendar year 1991, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, nitric acid at its facility in quantities exceeding the established reporting threshold specified in 40 C.F.R. § 372.25.

16. At the time of the July 1, 1992, reporting deadline, nitric acid was a chemical referenced in Section 313 of EPCRA and listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

17. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1992, for nitric acid for the 1991 reporting year.

18. Respondent's failure to submit Form R for nitric acid for the 1991 reporting year by July 1, 1992, is a violation of EPCRA Section 313 and 40 C.F.R. Part 372.

19. During the calendar year 1991, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, phosphoric acid at its facility in quantities exceeding the established reporting threshold specified in 40 C.F.R. § 372.25.

20. At the time of the July 1, 1992, reporting deadline, phosphoric acid was a chemical referenced in Section 313 of EPCRA and listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

21. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1992, for phosphoric acid for the 1991 reporting year.

22. Respondent's failure to submit Form R for phosphoric acid for the 1991 reporting year by July 1, 1992, is a violation of EPCRA Section 313 and 40 C.F.R. Part 372.

23. During the calendar year 1992, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, nitric acid

at its facility in quantities exceeding the established reporting threshold specified in 40 C.F.R. § 372.25.

24. At the time of the July 1, 1993, reporting deadline, nitric acid was a chemical referenced in Section 313 of EPCRA and listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

25. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1993, for nitric acid for the 1992 reporting year.

26. Respondent's failure to submit Form R for nitric acid for the 1992 reporting year by July 1, 1993, is a violation of EPCRA Section 313 and 40 C.F.R. Part 372.

27. During the calendar year of 1992, Respondent "otherwise used," as that term is defined in 40 C.F.R. § 372.3, phosphoric acid at its facility in quantities exceeding the established reporting threshold specified in 40 C.F.R. § 372.25.

28. At the time of the July 1, 1993, reporting deadline, phosphoric acid was a chemical referenced in Section 313 of EPCRA and listed in 40 C.F.R. § 372.65 as subject to the requirements of 40 C.F.R. Part 372.

29. Respondent failed to submit Form R to EPA and to the State of Oregon on or before July 1, 1993, for phosphoric acid for the 1992 reporting year.

30. Respondent's failure to submit Form R for phosphoric acid for the 1992 reporting year by July 1, 1993, is a violation of EPCRA section 313 and 40 C.F.R. Part 372.

ORDER

Accordingly, it is ORDERED that Complainant's motion for "accelerated decision" as to the issues raised by Affirmative Defenses 2, 3, 5, and 6 is granted.

And it is FURTHER ORDERED that Complainant's motion for "accelerated decision" as to the issues raised by Affirmative Defense 4 is denied.

And it is FURTHER ORDERED that Respondent's cross-motion for accelerated decision is denied.

And it is FURTHER ORDERED that, no later than October 13, 1995, the parties shall have conferred for the purpose of pursuing settlement of this matter. In particular, the parties shall make every effort to resolve factual matters pertaining to the amount of ammonia processed in 1992, without resorting to motions for discovery.

And it is FURTHER ORDERED that, no later than October 20, 1995, the parties shall report upon the status of their effort. If, as of that date, the parties are not able to report progress with respect to settlement, the matter will be set for trial forthwith.

J. F. Greene
Administrative Law Judge

Dated: September 18, 1995
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 September 18, 1995.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: Tillamook County Creamery Assn.
DOCKET NUMBER; EPCRA-1094-003-01-325

Ms. Mary Shillcutt
Regional Hearing Clerk
Region X - EPA
1200 Sixth Avenue
Seattle, Washington 98101

Mark Ryan, Esq.
Office of Regional Counsel
Region X - EPA
1200 Sixth Avenue
Seattle, Washington 98101

Thomas M. Grim, Esq.
Cable Huston Benedict
Haagensen & Ferris
Suite 2000
1001 S.W. Fifth Avenue
Portland, Oregon 97204-1136