UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
VALLORBS JEWEL COMPANY, INC.,	)	DOCKET NO. EPCRA-III-190
	)	
	)	
RESPONDENT	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY

This proceeding under Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045, was commenced on September 27, 1996, by the filing of a complaint by the Director, Air, Toxics and Radiation Division, EPA Region III, charging Respondent, Vallorbs Jewel Company, Inc.("Vallorbs") with violations of the Act and applicable regulations at 40 C.F.R. Part 372. Specifically, the complaint, Count I, alleged that Vallorbs "otherwise used" more that 10,000 pounds of 1,1,1-Trichloroethane and processed more than 25,000 pounds of chromium in the calendar year 1992 and failed to submit a toxic chemical release form (Form R) showing the use and processing of the mentioned chemicals to the Administrator and to the Commonwealth of Pennsylvania by July 1, 1993, as required by EPCRA § 313(a) and 40 C.F.R. § 372.30(d); alleged, Count II, that Vallorbs "otherwise used" more that 10,000 pounds of 1,1,1-Trichloroethane and processed more than 25,000 pounds of chromium in the calendar year 1993 and failed to submit a toxic chemical release form (Form R) showing the use and processing of the mentioned chemicals to the Administrator and to the Commonwealth of Pennsylvania by July 1, 1994; and alleged, Count III, that Vallorbs "otherwise used" more that 10,000 pounds of 1,1,1-Trichloroethane and processed more than 25,000 pounds of nickel and chromium in the calendar year 1994 and failed to submit a toxic chemical release form (Form R) showing the use and processing of the mentioned chemicals to the Administrator and to the Commonwealth of Pennsylvania by July 1, 1995. For

these alleged violations, it was proposed to assess Vallorbs a penalty totaling $49,734.

In a letter-answer, dated January 25, 1999, Vallorbs admitted the failures to submit toxic chemical release forms concerning the chemicals identified in the complaint for the calendar years 1992, 1993, and 1994 as alleged in the complaint and requested a hearing.[(1)] Vallorbs alleged, inter alia, that it was simply unaware of the requirement to inform EPA of the use and disposal of these materials and that to the best of its knowledge it has always handled the materials involved in conformance with all EPA, State and local requirements. Vallorbs pointed out, however, that the chromium involved in the violations is a component of stainless steel which Vallorbs "shaves" down into precision metal components, that shavings, not dust or particles, resulting from this processing are recycled and disposed of by a licensed recycling company and that, even though hundreds of thousands of pounds of stainless steel are utilized or processed in this manner each year, the actual loss of shavings which are not recycled is less than 100 pounds.

Additionally, Vallorbs asserted that it began the process of discontinuing the use of 1,1,1-Trichloroethane for cleaning [of components and parts] in 1994 and by 1996 had entirely discontinued the use of 1,1,1-Trichloroethane, substituting Trichloroethylene for this purpose. Vallorbs alleged that between 1994 and 1996 it had spent over $51,358 in actual direct costs for machines that would clean components using Trichloroethylene. Vallorbs emphasized that this change was entirely voluntary. Vallorbs says that it had been audited (inspected) in April 1996, and apparently alluding to the Agency's Enforcement Response Policy for EPCRA Section 313 (ERP) (1992), points out that the regulations seem to preclude relief for [environmentally beneficial] costs voluntarily incurred prior to the examination. Vallorbs argues that it is only fair to include these voluntary costs in determining relief from the proposed penalty.

The parties have filed prehearing exchange information in accordance with an order of the ALJ.

Responding to the ALJ's order that its prehearing exchange include a reply to the arguments for mitigation of the penalty in Vallorbs' letter-answer, Complainant states that it disagrees with Vallorbs' implied contention that the stainless steel shavings [containing chromium] present little or no risk to the environment, pointing out that this very issue was considered in 1993 when EPA denied a petition to delist chromium, nickel and copper contained in stainless steel and other alloys (Prehearing Exchange (PHX) Narrative, dated July 14, 1999, at 7-11; Complainant's Proposed Exh (CX) 13). Complainant says that even chromium in stainless steel alloy has the potential to corrode into chromium VI, a known human carcinogen, and that the mere fact chromium shavings are sent to a licensed recycling facility does not mean that there is no potential for release to the environment.

Complainant maintains that it has exercised prosecutorial discretion [to Vallorbs' benefit], because it combined chromium and nickel violations with the 1,1,1-trichloroethane violations and alleged one violation per year when it could have drafted the complaint to charge seven separate violations, thereby greatly increasing the proposed penalty.

Regarding Vallorbs' assertion that the change from the use of 1,1,1-trichloroethane to trichloroethylene in its operations should entitle it to a credit against the penalty, Complainant notes that trichloroethylene is potentially more toxic than 1,1,1-trichloroethane but that the risk of release to the environment is reduced, because trichloroethylene is used in a closed loop system (Id. 11). Complainant points out that, under the ERP, supplemental environmental projects (SEPs) are normally discussed only in the context of settlement negotiations and, apart from the fact that Vallorbs implemented the change at issue prior to the issuance of the complaint, emphasizes that there has been no settlement. Complainant says that, because SEPs are intended to encourage settlement and settlement negotiations with Vallorbs have been unsuccessful, a SEP-like credit is not available to Respondent under the ERP.[(2)] Complainant makes essentially the same argument to justify its failure to make any adjustment in the gravity-based penalty for Vallorbs' attitude,

i.e., its cooperation and compliance (Id. 12). This is contrary to Catalina Yachts, supra note 2, which makes it clear that such adjustments are not limited to negotiated settlements. It should also be noted that the ERP is not binding on the ALJ in determining the penalty. See Rule 22.27(b) (40 C.F.R. Part 22).

Questions addressed to Vallorbs in the ALJ's prehearing order were intended to elicit information supporting its implicit claim that the change from use of 1,1,1-trichloroethane to trichloroethylene was beneficial to the environment.[(3)] Vallorbs agrees with Complainant that trichloroethylene is at least as toxic, if not more so, than 1,1,1-trichloroethane (PHX Narrative at 2) and has not provided any rationale for the change. Complainant has, however, referred to the use of trichloroethylene in a "closed loop system" as reducing the risk of releases to the environment. Vallorbs says that it came into compliance with the regulation within 40 days of the EPA inspection by filing all of the required Form R's.

On July 22, 1999, Complainant filed a motion for an accelerated decision as to liability pursuant to Section 22.50, actually § 22.20, of the Rules of Practice,[(4)] stating that Vallorbs had admitted the violations and was only challenging the amount of the proposed penalty. In an accompanying memorandum, Complainant points out that the standard for granting a motion for an accelerated decision is similar to that for granting a motion for summary judgment under the Federal Rules of Civil Procedure, i.e., that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Here, Vallorbs has admitted the allegations of the complaint that it "otherwise used" more than 10,000 pounds of 1,1,1-trichloroethane during the calendar years 1992, 1993, and 1994, that it processed more than 25,000 pounds of chromium during the calendar years 1992 and 1993, and that it processed more than 25,000 pounds of chromium and nickel during the calendar year 1994. Vallorbs has also admitted that it failed to submit Form R's concerning the use and processing of the mentioned chemicals to the Administrator and to the Commonwealth of Pennsylvania by July 1 of the following year as required by EPCRA § 313(a) and 40 C.F.R. § 372.30(d). Additionally, Vallorbs has admitted that it owns and operates a precision screw machines components operation (facility) in Bird-in-Hand, Pennsylvania, that this facility is in Standard Industrial Classification ("SIC") code 34, and that Vallorbs had ten or more full-time employees during each of the years 1992, 1993, and 1994. Because of these admissions and because Vallorbs has not indicated in its prehearing exchange or in any other submission that it is in any way contesting its liability for the violations alleged in the complaint, Complainant asserts that its motion should be granted.

Vallorbs has not responded to the motion.

Discussion

The only matter worthy of mention is the facial ambiguity in Count III created by the allegation that Respondent "...processed more that 25,000 pounds of Chromium and Nickel in calendar year 1994" (Complaint ¶ 24), raising the issue of whether the 25,000- pound threshold was exceeded for chromium and for nickel individually or only in combination. It is noted that the EPCRA Section 313 Penalty Calculation Summary (C's PHX 15) reflects that 54,481 pounds of chromium and 26,393 pounds of nickel were used (processed) in 1994, both figures being comfortably in excess of the 25,000-pound threshold. Moreover, one toxic, reportable chemical may not be combined with another chemical for the purpose of determining whether an applicable threshold has been equaled or exceeded. It is concluded that, although inartfully worded, ¶ 24 is intended to allege that more than 25,000 pounds of chromium and more than 25,000 pounds of nickel were processed in 1994.

Complainant has clearly made the showing necessary for a finding of Vallorb's liability for the violations alleged in the complaint and its motion for an accelerated decision will be granted.

Order

Vallorbs having violated the Act and regulation as alleged in the complaint, Complainant's motion for an accelerated decision as to liability is granted. All aspects of the penalty calculation, including whether Vallorbs is entitled to an adjustment in the proposed penalty for "attitude" and whether it would be manifestly unjust not to allow Vallorbs a credit against the penalty for environmentally beneficial expenditures, remain at issue and will be decided after the hearing currently scheduled to be held on September 15, 1999.(5)

Dated this 30th day of August 1999.

Original signed by undersigned

_____

Spencer T. Nissen
Administrative Law Judge

1. Documents in the file available to the ALJ reflect that on August 29, 1997, the Regional Administrator granted Vallorbs an extension in which to file an answer to October 3, 1997, and that on October 28, 1998, the Regional Administrator extended the time in which Vallorbs could file an answer to December 2, 1998. There is no indication that Vallorbs was granted any further extensions in which to file an answer nor is there an explanation for the extended period between the filing of the complaint, the granting of the mentioned extensions and the filing of the answer.

2. Although the Environmental Appeals Board (EAB) has held that SEPs are not available in determining the penalty in adjudicated cases, it, nevertheless, held that "environmentally beneficial expenditures" could appropriately be considered for penalty mitigation purposes under the statutory rubric of "other factors as justice may require." Spang and Company, EPCRA Appeal Nos. 94-3 & 94-4, Remand Order, 6 E.A.D. 226 (EAB, October 20, 1995). The broad avenue for potential penalty mitigation apparently available under Spang was severely restricted in Catalina Yachts, Inc., EPCRA Appeal Nos. 92-2 & 98-5, Final Decision, 1999 EPA App LEXIS 7 (EAB, March 24, 1999), the EAB holding that penalty mitigation was available under the "as justice may require" statutory criterion only if it were manifestly unjust not to do so.

3. Vallorbs asserts that EPA has directed that use of 1,1,1-trichloroethane be discontinued by the end of 1999 (Prehearing Exchange narrative, dated June 28, 1999, at 2).

4. The Consolidated Rules of Practice have been revised effective August 23, 1999, 64 Fed. Reg. 40137, 40176 (July 23, 1999). No significant change has been made to Rule 22.20, the rule upon which Complainant's motion is based.

5. Vallorbs should be fully prepared to address at the hearing any differences in the use of trichloroethylene as compared to 1,1,1-trichloroethane so that the benefits to the environment of this change as well as any cost differences, operational or otherwise, will clearly appear in the record.