UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
CLARKSBURG CASKET CO.,	)	**DKT. No. EPCRA-III-165**
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION

The Complainant has filed a Motion for Accelerated Decision as to liability on each of the six (6) counts of the Complaint. The Respondent has opposed such Motion. After consideration, it is determined that the Motion will be **GRANTED**, for the reasons set forth below:

I. BACKGROUND

This action arises under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. §§11001-11050. The Complaint charges the Respondent in six (6) counts with failing to file toxic chemical release forms ("Form R") for two chemicals, toluene and xylene, used at Respondent's manufacturing plant during 1991, 1992 and 1993. In its Answer, the Respondent admitted all elements of the causes of action except for whether, in fact, it used more than the threshold amount of 10,000 pounds of those chemicals during each of those years and consequently was required by EPCRA to file the Form Rs.

In the Motion for Accelerated Decision, the Complainant asserts, based upon its method of calculation, that in each of those years (1991-93), the Respondent did use more than 10,000 pounds of toluene and xylene. Therefore, the Complainant claims that it is entitled to judgment as a matter of law as to liability only on all six (6) counts of the Complaint. In its response to the Motion, the Respondent admits that, even using the alternative method of calculation it asserts is applicable, it *did* use more than 10,000 pounds of toluene in 1993 and 10,000 pounds of

xylene in 1991, 1992 and 1993. Nevertheless, Respondent asserts that entry of accelerated decision as to liability on *any* of the six counts of the Complaint is not appropriate at this time because: (A) while its usage exceeded the 10,000 pound reporting threshold for toluene in 1993 and xylene in 1991-93, the *exact* amount of usage for each chemical during each of those years has yet to be determined; (B) the Complainant's method of calculating pounds of chemicals used is incorrect and, using the *proper* method of calculation, results in no threshold exceedences for toluene in 1991 and 1992; and (C) the Complainant has improperly charged Respondent with *six* EPCRA violations, when, in fact, it should be charged with only *three* violations - one for each of the calendar years as to which it failed to file the Form Rs.

II. STANDARD OF REVIEW

Under the Consolidated Rules of Practice, an accelerated decision may be issued "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." *See*, 40 C.F.R. §22.20(a). This standard parallels the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and the same principles apply to the resolution of motions under the two sets of Rules. *See, In re CWM Chemical Services*, TSCA Appeal 93-1, 1995 TSCA LEXIS 10, 25 (Order on Interlocutory Appeal, May 15, 1995) ("Rule 22.20(a) is comparable to the summary judgment process allowed under Rule 56"); *In re Coastcast Corp.*, EPCRA-09-92-0006, 1993 EPCRA LEXIS 71 (Order Denying Complainant's Motion for Accelerated Decision, February 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 (Order on Interlocutory Review, December 2, 1991) ("An accelerated decision is comparable to a summary judgment under Federal Rule of Civil Procedure 56, which by analogy provides guidance").

The Supreme Court has written that summary judgment is authorized by the Federal Rules "upon proper showing 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; "[a]n issue of law is no barrier to a summary judgment." *Agustin v. Quern*, 611 F.2d 206, 209 (7th Cir. 1979). The Environmental Appeals Board has applied this principle to accelerated decisions in administrative proceedings. For example in *In re CWM Chemical Services*, *supra,* 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).

III. ISSUES

As set forth below, based upon the uncontested facts, I find there is no genuine issue as to any material fact regarding the Respondent's liability on the six counts of the Complaint and, therefore, the Complainant is entitled to judgment on those counts as a matter of law.

A. EXACTITUDE AS TO THE AMOUNT RESPONDENT'S TOXIC CHEMICAL USAGE EXCEEDED THRESHOLD IN THE YEARS AT ISSUE IS NOT A PREREQUISITE TO THE ENTRY OF JUDGMENT AS TO LIABILITY

Although Respondent acknowledges that, regardless of the method of calculation employed, its usage exceeded the 10,000 pound threshold reporting requirement for toluene in 1993, and xylene in 1991, 1992 and 1993, and that it did not report such usage in those years, the Respondent argues that entry of accelerated decision at this time, even on those counts (Counts II, IV, V, and VI), is not appropriate because a genuine issue exists as to the *exact* extent of the violations. The Respondent points out that the EPA has proffered a variety of figures as to the amount Respondent's usage of the chemicals in each of the years exceeded the 10,000 pound threshold and that the Respondent itself has proffered yet other figures. While it is true that there is no agreement as to exactly how many pounds over the threshold the two chemicals were used in those three years, I find such exactitude is not a material fact as to the issue of liability and, therefore, cannot serve to ward off the entry of judgment as to liability at this time.

Section 313(a) of EPCRA, 42 U.S.C. §11023(a) requires owners and operators of certain facilities[(1)] that manufacture, process or, as in this case, otherwise use,[(2)] toxic chemicals referenced in Section 313(c), and listed at 40 C.F.R. §372.65, in excess of a prescribed threshold amount during a calendar year, to submit annually a Toxic Chemical Release Inventory Reporting Form (a "Form R") to the Administrator of EPA and to designated state officials. This information is to be submitted by July 1 of the following calendar year.[(3)] Thus, in order to establish a prima facie case as to liability for such an EPCRA violation, the Complainant is required to prove that: (a) Respondent's facility comes within the purview of the statute; (b) Respondent's usage of listed toxic chemicals exceeded 10,000 pounds in a calendar year; and (c) Respondent did not file a Form R reporting such

usage within the time allotted. In this case, the Respondent has admitted all of these elements of the cause of action as to four counts of the Complaint, and only challenges the two remaining counts, based upon a proposed (and as indicated below erroneous) alternative method of calculating usage.

Respondent has not cited any authority in the statute or regulations for the proposition that it would be improper to enter judgment on liability only, if the extent of the admitted violation was in dispute. It seems clear that for the purpose of determining merely whether or not a violation occurred, whether the usage was found to exceed the threshold by 1 pound or 100,000 pounds, results in the same outcome. Both levels of exceedences constitute a violation since both instances give rise to the obligation to file. The statute and regulations make it clear that the extent of the violation is an issue which must be addressed only in regard to assessing the penalty. Even then, the extent of violation is only one of many factors to be taken into account in establishing a penalty.[(4)] Further, even in regard to determining a penalty, there is no requirement that the exact extent of usage above the threshold be determined to a scientific certainty. It would seem sufficient for penalty purposes merely to establish a range of violation, such as between 5-10% above the threshold or 80-90% above the threshold. *See, In re Swing-A-Way Manufacturing Co.*, EPCRA Appeal No. 94-1, 1995 EPCRA LEXIS 1, 5 E.A.D. 742 (Final Order, March 9, 1995).

In *Swing-A-Way*, *supra*, the Respondent made an argument similar to that in the instant case. In *Swing-A-Way*, the Respondent argued that the EPA had failed to prove with certainty the exact amount of nickel processed by the Respondent in 1989 and thus, claimed EPA could not prove an EPCRA reporting violation. The Environmental Appeals Board (EAB) found that the EPA had, nevertheless, established a *prima facie* case by producing sufficient evidence that Respondent's usage at least exceeded the reporting threshold. The Board found the uncertainty as to the exact amount of nickel processed by the Respondent to be immaterial, stating that "in order to avoid the EPCRA reporting obligation Respondent would have had to demonstrate it plated less than 19,500 pounds of nickel onto its products (since 19,500 pounds plus 5,526 [admittedly used] would exceed 25,000 pounds [the reporting threshold]). The record simply provides no basis for that conclusion." 5 EAD at 750. Therefore, although the exact amount the respondent's use exceeded the threshold was not determined, the Board held that the Region had, nevertheless, met its burden of proof by a "preponderance of the evidence." *Id.*[(5)]

In addition, I note that while the Respondent in this case bemoans the repeated revisions in the Complainant's calculations, it will, in fact, probably benefit from such revisions, in that the most recent figures proffered by the Complainant as to the extent of the Respondent's violation are lower than the figures originally proffered. The current calculations show that the Respondent's usage now only minimally exceeded the threshold in a number of instances.

Furthermore, the Complainant's assertion that the Respondent is attempting to take advantage of revisions in the figures caused by its own improper conduct is well taken. In 1992, 1993 and 1994, the Respondent should have gathered and evaluated its records regarding toxic chemical usage in order to determine whether it needed to file Form Rs under EPCRA. However, it failed to do so. Prior to May 1995, the Complainant notified the Respondent to prepare for an EPCRA inspection by gathering its records on usage, but again the Respondent failed to do so. The Respondent did not even know with certainty the extent of its 1991-1993 toxic chemical usage when the case was instituted in September 1995, but simply denied that its usage was in excess of the threshold in each instance. Even in November 1996, four years after 1991 Form Rs should have been filed, Respondent in its Opposition to the Motion for Accelerated Decision (at p. 5), merely indicated that it was still attempting "to calculate the exact volume of each product for each year but ha[d] not yet reached a final number."

As a result of this nonfeasance on the part of the Respondent, from the time of the inspection until the prehearing exchange directed by the undersigned was completed, the Complainant was limited to relying upon incomplete information to calculate the Respondent's usage. It is thus no surprise that its final calculations vary somewhat from the original estimates.

Moreover, I note that the Respondent explicitly approved such estimations. The Respondent admits that it sent a letter to the EPA on June 28, 1995 in which the Respondent adopted, as its own, the estimated calculations as to level of usage, in excess of the threshold, made by the inspector. *See*, Respondent's Opposition to Motion for Accelerated Decision at 3; Complainant's Motion for Accelerated Decision, Exhibit 4; and Complainant's Prehearing Exchange, Exhibit 11.

Respondent now attempts to deflect the impact of its prior approval of the inspector's estimates of its usage in excess of the threshold by arguing that additional evidence now exists as

to the levels of xylene and toluene it used and such evidence shows it did not exceed the threshold in two of the six instances. However, Respondent does not directly point to any such specific evidence. Respondent merely presents the Affidavit of Teresa Bush, its accounting clerk (who previously approved the inspector's calculations), dated November 1996, in which she states, "[w]e have now reviewed [the inspector's] calculations . . . and believe that [his] calculations are in error." Ms. Bush states further that the inspector included in his calculations for 1993 two particular products, and that Respondent's records do not reflect purchases of either product in 1993. Ms. Bush represents in her Affidavit that "[o]ur own calculations from our records reveal totals for toluene and xylene in 1991 and 1992 [and 1993] less than 10,000 pounds." *See*, Affidavit attached to Respondent's Opposition to Motion for Accelerated Decision).

This Affidavit, itself, does not contain allegations which rise to the level required to create a dispute as to a material fact. This can been clearly seen from the fact Ms. Bush's conclusions in her 1996 Affidavit that Respondent usage for both chemicals during the three years were less than the 10,000 pound threshold are directly contradicted by the Respondent's own subsequent admission in connection with the Motion that its usage, in fact, exceeded 10,000 pounds for xylene in 1991 through 1993 and for toluene in 1993. *See*, Response to Complainant's Supplemental Memorandum of Law in Support of Its Motion for Accelerated Decision, pp. 4, 7, 8. As to the usage of toluene in 1991 and 1992, Respondent *estimated* its usage in those years at less than 10,000 pounds: 8,153 pounds in 1991 and 8,814 pounds in 1992. *See*, Respondent's Prehearing Exchange at 3; Response to Complainant's Supplemental Memorandum of Law in Support of Its Motion for Accelerated Decision at 8. However, as discussed in greater detail below, Respondent used an erroneous method of calculating the weight to reach such estimates. Therefore, the Respondent's estimates do not rise to the level of specific facts which raise a genuine dispute.

Thus, the Respondent's allegations denying it exceeded the threshold in two instances are unsupported. Unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law are insufficient to defeat a properly supported motion for summary judgment. *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216, *rehearing denied*, 762 F.2d 1004 (5th Cir. 1985). *See also, Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990)(Requirement of Fed. R. Civ. Proc. 56(e) to "set forth specific facts showing that there is a

genuine issue for trial" is not satisfied by conclusory allegations in an affidavit); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)(Neither wishful thinking, mere promises to produce admissible evidence at trial nor conclusory responses unsupported by evidence will defeat a properly focused motion for summary judgment).

In sum, I find that Respondent has not raised a genuine issue of fact as to whether its usage of xylene or toluene exceeded the 10,000 pound threshold in 1991, 1992 or 1993. Further, I find the issue as to the exact amount by which the Respondent's usage exceeded the 10,000 pound reporting threshold to be relevant to the issue of penalty, but *not* to be a *material* fact as to liability which would prevent the proper issuance of summary judgment.

B. EPA'S METHOD OF CALCULATING THE AMOUNT OF CHEMICALS USED BY RESPONDENT IS CONSISTENT WITH THE APPLICABLE REGULATIONS

It is undisputed that the Respondent does not use the liquid toxic chemicals at issue in this case, xylene and toluene, in their pure form. Rather, such chemicals are but one or two of the many chemical ingredients which make up the paints, lacquers and finishes used by the Respondent in its casket manufacturing business. Thus, to determine the amount of these two specific toxic chemicals used by the Respondent in a calendar year, it is necessary to determine the amount of the toxic chemical in each liquid product used and then convert that amount from liquid gallons to pounds to determine whether the 10,000 pound reporting threshold has been exceeded.

The parties dispute the method of calculating the weight in pounds of each chemical, xylene and toluene, in the liquid products. The Material Safety Data Sheet (MSDS) supplied with each liquid product states a percentage by weight of xylene and toluene. Complainant takes the percentage stated in the MSDS as the percentage of the chemical's weight in the whole product. On the other hand, Respondent takes the same percentage stated in the MSDS to be the percentage of the chemical's weight in that portion of the product which consists of volatile organic chemicals (VOCs).

Following it conclusion that the weight percentage stated for xylene in the MSDS represents a percentage of the whole product, EPA bases its calculations for Respondent's yearly usage in pounds of the two toxic chemicals on a method which employs the pound-per-gallon conversion factor for the *total product weight*,

that is, the number of pounds each gallon of the total liquid product weighs, be it a paint, lacquer or finish. Complainant cites to 40 C.F.R. §372.30(b)(3)(i) in support for this calculation method. As a sample of its method of calculating Respondent's usage, EPA provided the following in regard to Product No. 40213, "natural poplar stain," purchased by Respondent from Lawrence McFadden (the product's distributor) in 1993:

No. of gallons of stain purchase by Respondent: 126.00 gal.

multiplied by x

The no. of pounds each gallon of *the stain* weighs: **7.63#/gal.**
Sum = TOTAL pounds of stain used by Respondent: 961.38 lbs.

multiplied by x

The percentage of xylene in *the stain* by weight: 42.87%

SUM = TOTAL pounds of xylene in the stain: 412.14 lbs

See, Complainant's Supplemental Memorandum of Law in Support of Motion for Accelerated Decision, p.7, n.6.

On the other hand, following its belief that the weight percentage stated for xylene in the MSDS represents a percentage of xylene in that portion of the total product which is made up of VOCs, Respondent argues that the proper conversion method requires the use of the pound-per-gallon factor for the weight only of the *VOCs* in the product. "Volatile organic chemicals" include an element which is carbon based, *i.e.*, "organic," and have the tendency to pass easily from a solid or liquid state into a vapor state, and thus are "volatile." *See*, Hawley's Condensed Chemical Dictionary (11th ed. 1987). Xylene and toluene are "volatile organic chemicals." Respondent argues that in converting from gallons to pounds of product used, the conversion factor representing the weight of each gallon of the volatile organic chemicals in the product is more appropriate than using the conversion factor for total product weight because VOC weight represents the "specific concentration" of the chemicals, toluene and xylene, in the mixture referred to in the same regulatory section cited by Complainant. More particularly, the Respondent claims that:

[it] used the VOC weight per gallon . . . to convert to pounds because the weight percentage of toluene and xylene are

expressed as a *percentage of the total VOC weight* and not a percentage of the total product weight. Thus, use of the total weight per gallon of toluene and xylene is proper *only if* the percentage weight of toluene and xylene is expressed as a *percentage of the total weight* and not as a percentage of the VOC weight.

See, Respondent's Response to Complainant's Supplemental Memorandum of Law in Support of its Motion For Accelerated Decision, p. 10 (emphasis added).[(6)]

In this case, the weight of that portion of the mixture made up of volatile organic chemicals in the product is *less* than the total weight of the product. Thus, using the VOC weight in the conversion results in less pounds of chemical used being mathematically calculated.

For example, the Respondent made the following calculation regarding the same Product No. 40213, "natural poplar stain," purchased by Respondent from Lawrence McFadden in 1993:

No. of gallons of stain purchase by Respondent: 126.00 gal.

multiplied by x

No. of pounds each gallon *of VOCs in the stain* weighs:**6.95#/gal.**[(7)]

Sum = TOTAL pounds of VOCs used by Respondent: 875.70 lbs.

multiplied by x

The percentage of xylene *in the VOCs* by weight: 42.87%

SUM = TOTAL pounds of xylene in the stain: 375.41 lbs

See, Complainant's Supplemental Memorandum of Law in Support of Motion for Accelerated Decision at 3, Exhibit B; Exhibit 3 to Respondent's Pre-Hearing Exchange.

The regulatory provision cited to by both parties in support of their method of conversion, 40 C.F.R. Section 372.30(b)(3) provides:

To determine whether a toxic chemical which is a component of a mixture[(8)] . . . has been . . . otherwise used in excess of an applicable threshold . . ., *the owner or operator shall consider*

only the portion ***of the mixture*** *. . . that consists of the toxic chemical*

. . . as follows:

(i) If the owner or operator knows the specific chemical identity of the toxic chemical and the *specific concentration* at which it is present **in the mixture** . . ., the owner or operator shall determine *the weight of the chemical . . . otherwise used* ***as part of the mixture*** . . . at the facility and shall combine that with the weight of the toxic chemical . . . otherwise used at the facility other than as part of the mixture . . . . After combining these amounts, if the owner or operator determines that the toxic chemical was . . . otherwise used in excess of the applicable threshold . . ., the owner or operator shall report the specific chemical identity and all releases of the toxic chemical on EPA Form R in accordance with the instructions referred to in subpart E of this part. (Emphasis added).

In order to facilitate this reporting requirement, Section 372.45 provides that facilities which manufacture, sell or otherwise distribute, mixtures, containing toxic chemicals, must notify each person to whom the mixture is sold, in writing, of the following:

(1) A statement that the mixture . . . contains a toxic chemical or chemicals subject to the reporting requirement of section 313 of Title III of the Superfund Amendments and Reauthorization Act of 1986 and 40 CFR part 372.

(2) The name of each toxic chemical . . . .

(3) **The percent by weight of each toxic chemical *in the mixture*** . . . .

(Emphasis added).

Section 372.45(b)(5) indicates that if a Material Safety Data Sheet (MSDS) is required to be prepared and distributed for the mixture in accordance with 29 CFR 1910.1200, the notification referred to above must be attached to or otherwise incorporated into such MSDS.[(9)]

The instruction manual published by EPA in connection with the Form R suggests the method to be employed in computing the weight of toxic chemicals in mixtures. The example given in the manual calls for the specific concentration (i.e., percentage)

of the toxic chemical *in the mixture* to be multiplied by the *"total weight or pounds" of the mixture*. *See*, EPA, *Toxic Chemical Release Inventory Reporting Package for 1989*, (EPA Pub. no. 560/4-90-001) (1989 ed.), pp. 11-13 (Section B.4.b and Figure C) and EPA, *Toxic Chemical Release Reporting Form R and Instructions*, (EPA Pub. no. 745-K-96-001) (1995 ed.), pp. 14-15 (Section B.4.b and Example 5).[(10)]

The foregoing provisions all refer to determining the extent of the weight of the toxic chemical in "the mixture" and, thus, support the Complainant's calculation methodology. Respondent does not cite in its Opposition to any statutory or regulatory provision suggesting that the weight of the volatile organic chemicals in the mixture is the correct conversion factor to be used, rather than the conversion factor for the total mixture.[(11)] Moreover, in my review of the applicable provisions I could find nothing in either the regulations or the instruction manual which even mentions VOC weight and particularly nothing which mentions using the VOC weight to calculate the amount of toxic chemical in a mixture.[(12)]

Even more importantly, there is no support in the regulations for the underlying assumption on which the Respondent's whole methodology argument is premised, that is, that the weight percentage of xylene provided by Lawrence McFadden in its MSDS is expressed as a *percentage of the total VOC weight and not a percentage of the total product weight*. To the contrary, Section 372.45(b)(3), indicates that the distributors are required to disclose the "percent by weight of each toxic chemical *in the mixture*." On review it is clear that the MSDS for the poplar stain does just that - 42.87% represents the percentage of weight of the chemical *in the whole product,* not the percentage of weight of the chemical in the total amount of VOCs. This can be seen by adding the "percent weight[s]" of the several VOCs listed in the table set out on page 1, in Section II of the MSDS, including xylene, and comparing the result with the summary on page 4, Section XI of the MSDS. The total percent weight of VOCs on page 1 is 91.1%. The remaining 8.90% of the weight is comprised of solids, as shown in the table on page 4. The table on page 4 also reveals that 94% of the mixture *by volume* consists of VOCs. This is entirely consistent with the lower density of VOCs than of the mixture as a whole, as given in the table on page 1, and with the lower percentage by weight of VOCs (91%), than the percentage of VOC by volume (94%). Respondent's calculation is based upon the density of VOCs only, as if the total mixture were composed only of VOCs. Respondent misconstrues the table on page 1 as giving the xylene percentage

by weight of VOCs only, rather than of the total mixture. The total mixture includes the solids. The calculation of xylene's total weight is therefore properly based on the given percentage by weight of the total mixture.[13]

Thus, Complainant's method of calculating the weight of xylene in the product is correct. The table on page 1 of the MSDS gives the percentage weight of xylene in the total mixture (42.87%). The density of the total mixture is given on page 4 of the MSDS as 7.63 lbs/gal. The total weight therefore is known as 126 gallons x 7.63 lbs/gal. = 961.38 lbs. The total weight of the xylene in the mixture can thus straightforwardly be calculated as 961.38 x 42.87% = 412.14 lbs.

There appears to be no dispute that, using the Complainant's correct methodology, the Respondent exceeded the 10,000 pound threshold as to its usage of toluene and xylene in 1991, 1992 and 1993. Therefore, it is concluded that entry of judgment as to liability for failing to file Form Rs for both such chemicals in each of the three years is entirely appropriate.

C. CHARGING RESPONDENT WITH SIX VIOLATIONS IS APPROPRIATE

The Respondent's final challenge to entry of Accelerated Decision is directed to the number of counts or violations charged against it in the Complaint. The Complaint charges the Respondent with six separate EPCRA violations for failing to file Form Rs for two (2) chemicals for three (3) calendar years. Specifically, Count I of the Complaint charges the Respondent with failing to file a Form R for toluene for the 1991 calendar year by September 2, 1992; Count II charges Respondent with failing to file a Form R for xylene for the 1991 calendar year by September 2, 1992; Count III charges Respondent with failing to file a Form R for toluene for the 1992 calendar year by July 1, 1993; Count IV charges Respondent with failing to file a Form R for xylene for the 1992 calendar year by July 1, 1993; Count V charges Respondent with failing to file a Form R for toluene for the 1993 calendar year by July 1, 1994; and Count VI charges Respondent with failing to file a Form R for xylene for the 1993 calendar year by July 1, 1994. The Complainant seeks $17,000 as a penalty for each count for a total of $102,000 in penalties.

In response, to the Motion for Accelerated Decision on the six counts, the Respondent asserts that it should be charged with only three violations, one for each of the calendar years as to which it failed to file the Form Rs. However, the Respondent cites no authority in support of this proposition.

Section 313 of EPCRA (42 U.S.C. §11023(a)) provides as follows:

The owner or operator of a facility subject to the requirements of this section shall complete *a toxic chemical release form* as published under subsection (g) of this *for each toxic chemical* listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the proceeding calendar year. (emphasis added)

Section 325 of EPCRA (42 U.S.C. §11045(c)(1)) indicates that a violation of section 11023 subjects the violator to a maximum civil penalty of $25,000.

The regulations promulgated to implement Section 313 (40 C.F.R. §372.30(a)) mimic the pertinent language of the statute, providing that:

For *each toxic chemical* known by the owner or operator to be manufactured [], processed, or otherwise used in excess of an applicable threshold . . . must submit . . . *a completed EPA Form R* (EPA Form 9350-1) . . . .

Thus, the statute and the regulations both explicitly indicate that an owner has a duty to file an individual "Form R" for each chemical used in excess of the threshold during each calendar year and, in fact, the government form, which the EPA designed and distributes for use in compliance with this reporting provision, as well as the instruction manual as to its completion, provide that a separate form should be filed for each chemical, each year. *See,* 40 C.F.R. Chapter I, Subpart E (§§ 372.85 & 372.95) as well as EPA Form 9350-1 known as *EPA Form R - Toxic Chemical Release Inventory Reporting Form* (OMB Approval Number 2070-0093), EPA *Toxic Chemical Release Inventory Reporting Package for 1989*, (EPA Pub. no. 560/4-90-001) (1989 ed.), p. 1 and Toxic Chemical Release Inventory Reporting Form R and Instructions (1995 ed.).[(14)]

The regulations and statute further indicate that failure to file "*a* completed form" for "*a* toxic chemical" constitutes a violation subjecting the owner to a penalty of $25,000. Nothing in the statute or regulations suggests that failing to file a

number of Form Rs for a single calendar year would not merely concomitantly increase the number of violations. And, in fact, the EPA has interpreted this provision consistent with this interpretation, charging respondents with an additional violation for each chemical not reported rather than each year for which a form was not filed. *See e.g., Pacific Refining Co.*, *supra* (Respondent held liable by Presiding Judge for ten violations for failing to file Form Rs as to each of ten toxic chemicals for a single year; on appeal, EAB increased penalty assessment for the violations); *In the Matter of TRA Industries Inc.*, EPCRA-1093-11-05-325 1996 EPCRA LEXIS 1 (Initial Decision, October 11, 1996)(Respondent charged and found liable for four EPCRA reporting violations for a single calendar year with penalty assessed separately for each violation); *In re Swing-A-Way Manufacturing Co.*, *supra* (Respondent charged and found liable for two EPCRA reporting violations for a single calendar year with penalty assessed separately for each violation); *In the Matter of Cox Creek Refining Co.*, EPCRA-III-032, 1993 EPCRA LEXIS 73 (Initial Decision and Order, June 2, 1993)(Respondent charged with and found liable for three EPCRA reporting violations for a single calendar year).

In addition, I note that the method of tallying the number of reporting violations, based upon the number of chemicals not reported, would be consistent with the purpose of EPCRA. The purpose of EPCRA's reporting requirements is to "provide the public with important information on the hazardous chemicals in their communities for the purpose of enhancing community awareness of chemical hazards and facilitating development of State and local emergency response plans." 40 C.F.R. §370.1. The charge of separate violations for each chemical not reported allows for the imposition of a greater penalty upon those who fail to file in regard to more chemicals, *i.e,* those withholding more pertinent information from the public and placing the public at arguably greater risk from non-preparedness, than those failing to report fewer chemicals. On the other hand, Respondent's method of tallying violations would lead to the illogical result that a owner of a facility who fails to report its above-threshold usage of a hundred toxic chemicals in one calendar year would be subject to the same maximum penalty as the owner of a facility who failed to report its above-threshold usage of a single chemical. It also would open the question as to whether a Respondent who reported some, but not all, of its toxic chemicals on a form in a calendar year could be held liable for a violation since some filing in the calendar year had occurred.

Based upon all of the foregoing, it is clear that (a) the Respondent was required to file a separate Form R for each of the two chemicals it used during each of the three calendar years, because its usage of each chemical for each of the three years exceeded the 10,000 pound threshold; and (b) failing to file each such form constitutes a separate violation of the statute. Thus, the format of the Complaint, charging the Respondent with six separate violations, is lawful and appropriate.

Finally, it must be noted that section 325 of EPCRA (42 U.S.C. §11045(c)(1)) provides in pertinent part that:

(1) Any person . . . who violates any requirement of section . . . 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

* * *

(3) *Each day* a violation described in paragraph (1) . . . continues *shall*, for the purposes of this subsection, *constitute a separate violation* (emphasis added).

See also, 40 C.F.R. §372.18.

The Complainant indicated in its pleading that the Respondent has yet to file its Form Rs for toluene and xylene for calendar years 1991, 1992 and 1993, even though those forms were due, respectively, on September 2, 1992, July 1, 1993, and July 1, 1994. *See*, Complainant's Prehearing Exchange, p. 2. Thus, fully consistent with the statutory language, the Complainant could have charged Respondent with thousands of separate violations and the EPA could have sought a penalty of millions of dollars. Therefore, the fact that the Complainant charged Respondent with only six violations and is seeking only $102,000 in penalties, appears quite magnanimous.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. Respondent is an owner or operator of a "facility," as that term is defined in EPCRA Section 329(4), 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's Standard Industrial Classification Code is within the 20 to 39 range.

5. Toluene is a chemical referenced in EPCRA Section 313 and listed in 40 C.F.R. §372.65 as subject to the reporting requirements of 40 C.F.R. Part 372.

6. Xylene is a chemical referenced in EPCRA Section 313 and listed in 40 C.F.R. §372.65 as subject to the reporting requirements of 40 C.F.R. Part 372.

7. During calendar year 1991, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, toluene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

8. Respondent failed to submit a Form R to EPA for toluene for the 1991 calendar year on or before July 1, 1992, the filing deadline.

9. Respondent's failure to submit a Form R for toluene for calendar year 1991, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

10. During calendar year 1991, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, xylene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

11. Respondent failed to submit a Form R to EPA for xylene the 1991 calendar year on or before July 1, 1992, the filing deadline.

12. Respondent's failure to submit a Form R for xylene for calendar year 1991, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

13. During calendar year 1992, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, toluene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

14. Respondent failed to submit a Form R to EPA for toluene for the 1992 calendar year, on or before July 1, 1993, the filing deadline.

15. Respondent's failure to submit a Form R for toluene for calendar year 1992, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

16. During calendar year 1992, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, xylene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

17. Respondent failed to submit a Form R to EPA for xylene the 1992 calendar year, on or before July 1, 1993, the filing deadline.

18. Respondent's failure to submit a Form R for xylene for calendar year 1992, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

19. During calendar year 1993, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, toluene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

20. Respondent failed to submit a Form R to EPA for toluene for the 1993 calendar year, on or before July 1, 1994, the filing deadline.

21. Respondent's failure to submit a Form R for toluene for calendar year 1993, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

22. During calendar year 1993, Respondent "otherwise used, as that term is defined in 40 C.F.R. §372.3, xylene, at its facility in excess of the 10,000 pound reporting threshold specified in 40 C.F.R. §372.25.

23. Respondent failed to submit a Form R to EPA for xylene the 1993 calendar year, on or before July 1, 1994 the filing deadline.

24. Respondent's failure to submit a Form R for Toluene for calendar year 1993, by the filing deadline, constitutes a violation of EPCRA section 313, 42 U.S.C. 11023.

THEREFORE, it is this day,

ORDERED, that the Complainant's Motion for Accelerated Decision is hereby GRANTED, and it is further,

ORDERED, that JUDGMENT on this issue of liability, only, be hereby entered in favor of the Complainant in this action as to all six counts of the Complaint.

Susan L. Biro

Administrative Law Judge

Dated:

Washington, D.C.

1. [1] The facilities covered by EPCRA's reporting requirements are those with 10 or more "full-time employees" and a Standard Industrial Classification Code between 20 and 39. *See*, EPCRA section 313, 40 C.F.R. §372.22.

2. [2] "Otherwise use" is defined as "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.

3. [3] The filing deadlines for certain calendar years were extended.

4. [4] EPCRA does not explicitly state the criteria to be taken into account in assessing an administrative penalty for violations of reporting requirements. However, the Act provides that as to actions for violations for emergency notifications "the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 42 U.S.C. 11045(b)(1)(C). These same factors have been relied upon in other cases in assessing administrative penalties for reporting violations. *See*, *In re TRA Indus.*, EPCRA-1093-11-05-325, 1996 EPCRA LEXIS 1 (Initial Decision, October 11, 1996; *In re Apex Microtechnology, Inc.*, EPCRA-099-02-00-07, 1993 EPCRA LEXIS 79 (Initial Decision, May 7, 1993), *appeal dismissed,* EPCRA Appeal

No. 93-2, 1994 EPCRA LEXIS 6 (July 8, 1994); *In re GEC Precision Corp.*, EPCRA-VII-94-T-381-E (Initial Decision, August 28, 1996).

5. It should be noted that, unlike four of the six counts in this case, the respondent in *Swing-A-Way* challenged whether its usage even exceeded the threshold at all. Moreover, in that case, the Board upheld the entry of a penalty amount by the Presiding Officer even though the amount of usage was not determined to an exact scientific certainty.

6. [6] Lawrence McFadden, the distributor of the product, provided both the weight in pounds of a gallon of the total product and a gallon of the volatile organic chemicals contained therein. *See*, the Material Safety Data Sheet for that product, attached as part of Exhibit C to Complainant's Supplemental Memorandum in Further Support of Motion for Accelerated Decision.

7. [7] Figure provided by Lawrence McFadden, the distributor of the stain.

8. [8] Under EPCRA, the paints, lacquers, and finishes used by Respondent are considered "mixtures," that is, combinations of two or more chemicals, combined not as a result of a chemical reaction. *See*, 40 C.F.R. §372.3.

9. [9] Section 1910.1200 is in the OSHA's Revised Hazard Communication Standard, which requires chemical manufacturers to assess the hazards of chemicals they produce and affix labels with appropriate warning to their products.

10. [10] The examples given in the manual are intended to illustrate the process to be used where the manufacture provides only limited information as to the specific concentration of the toxic chemical in the mixture, such as the upper and/or lower bound concentrations. The manual has no example for the simplest case where the specific concentration of the toxic mixture is known, such as that at issue in the instant case. However, from the more complex examples which first engage in calculations to estimate that concentration one can derive the method in the simpler case. Tribunal have applied EPA guidance documents to resolve similar issues of EPCRA regulatory interpretation. *See, In the Matter of Tillamook County Creamery Association*, EPCRA-1094-03-01-325, 1995 EPCRA LEXIS 5 (Order Upon Motions for Accelerated Decision, September 18, 1995); *In re Pacific Refining*, EPCRA-09-92-0001, 1993 EPCRA LEXIS 77 (Initial Decision, December 14, 1993), *modified on other grounds*, EPCRA Appeal No. 94-1, 1994 EPCRA LEXIS 11, 5 EAD 607 (Final Decision

and Order, December 6, 1994); *In re Autosplice*, EPCRA-09-91-0003, 1992 EPCRA LEXIS 49 (Interlocutory Order, October 30, 1992); *In re Dempster Indus.*, EPCRA VII-91-T-606-E, 1994 EPCRA LEXIS 9 (Initial Decision, August 2, 1994).

11. [11] The only "authority" the Respondent relies upon for the accuracy of its methodology was that the Complainant's inspector allegedly used this same methodology to determine the extent of the

Respondent's usage. The erroneous methodology employed by the inspector simply carries no weight as to whether violation in fact occurred using the proper methodology.

12. [12] This absence of reference to VOC and VOC weight is significant because VOC is a term used in environmental regulations in other contexts. *See e.g*, 21 C.F.R. 165.110 (establishing allowable levels of volatile organic chemicals in bottled water, (including xylenes and toluene) and methods for determining the amount of VOC in the water).

13. [13] This can be seen as follows:

You purchase a gallon of a mixed drink made from gin, other alcoholic beverages, and some non-alcoholic solid ingredients, such as olives. **You know the gin weighs 10% of the total weight of the mixture.** One gallon of the drink weighs 10 pounds but the alcoholic ingredients alone weigh only 7 pounds per gallon. Using Complainant's method of calculation would work as follows:

1 gallon of mixture x 10 pounds/per gallon of mixture = 10 pounds of mixture x 10% (the amount of mixture weight that is gin) = 1 pound gin.

Respondent's method:

1 gallon of mixture x 7 pounds/per gallon of alcohol = 7 pounds *of alcohol* x 10% (the portion of *the total mixture's* weight that is gin) = .7 pounds of gin.

The Respondent's method goes astray by shifting from amounts pertaining to the total mixture to those pertaining to all the alcohol back to the amount that is the percentage of gin in the total mixture.

14. [14] Section A of the 1989 and 1995 instruction manual provides that: "A completed Form R must be submitted for *each* toxic

chemical manufactured, processed, or otherwise used . . ." (Emphasis added). A Form R consists of two parts. Part I focuses on acquiring Facility Identification Information and Part II refers to Chemical-Specific Information. Section A.2 of the instruction manual indicates that the information in "Part II must be completed separately for each toxic chemical or chemical category." However, Part I can be photocopied and attached to each chemical specific report. The form itself is written so as to permit the reporting as to only one chemical.