

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

|                               |   |                              |
|-------------------------------|---|------------------------------|
| IN THE MATTER OF              | : |                              |
|                               | : |                              |
|                               | : |                              |
| Swing-A-Way Manufacturing Co. | : | Dkt. No. EPCRA-VII-91-T-650E |
|                               | : |                              |
|                               | : |                              |
| Respondent                    | : |                              |
|                               | : |                              |
|                               | : |                              |

**ORDER GRANTING COMPLAINANT'S  
MOTION FOR JUDGMENT AS TO  
LIABILITY FOR CERTAIN COUNTS**

The complaint herein charges respondent with four counts of failure to report the use of certain toxic chemicals as required under section 313 of the Emergency Planning and Right To Know Act [EPCRA, "the Act"] 42 U.S.C. §11023, and federal regulations issued pursuant to authority at 40 C.F.R. Part 372 governing the submission of toxic chemical release inventories by owners and operators of facilities that are subject to the Act.<sup>1</sup>

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<sup>1</sup> Section 313(a) and (b)(1) of the Act provides as follows:  
§11023. Toxic chemical release forms [EPCRTKA §313]

(a) Basic requirement

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 section 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

Specifically, the complaint charges that respondent failed to report (1) the processing of nickel for calendar year 1989; and (2) the use of sulfuric acid for calendar years 1987, 1988, and 1989. The complaint proposes a civil penalty of \$17,000 for each count, for a total of \$68,000.

Complainant asserts in its motion for Partial Accelerated

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(continued on page 2)

submitted to the Administrator and to an official or officials of the State designed by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

(b) Covered owners and operators of facilities

(1) In general

(A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

(B) The Administrator may add or delete Standard Industrial Classification Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section.

(C) For purposes of this section--

(i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.

(ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce--

(iii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce--

(I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or

(II) as part of an article containing the toxic chemical.

Decision <sup>2</sup> that no genuine issue of material fact exists, and that it is entitled to judgment as to respondent's liability for Counts II, III and IV (those counts which charge violations with respect to the use of sulfuric acid) as a matter of law because respondent has merely denied liability as to these counts. At this point in the proceeding, with pretrial exchange and stipulations having been filed in anticipation of trial, complainant asserts, respondent must do more than deny.<sup>3</sup>

An inspection of the pleadings, pretrial exchange, and the stipulations entered into by the parties discloses that respondent not only denied without more the charges as set forth in Counts II - IV, but has stipulated to each of the elements of these reporting offenses. [A copy of the stipulations entered into by the parties is attached]. It is clear that on a motion for summary judgment, the moving party must demonstrate that there is no "genuine issue of any material fact. . . (T)he pleadings and other documentary evidence must be construed in favor of the party opposing the motion," Cowdrey, at 1379, quoting Otteson v. United States, 622 F. 2d 516, 519 (10th Cir. 1980). Further, "(I)f the movant presents documents which demonstrate the absence of a genuine issue, the opposing party must produce evidence sufficient to withstand the motion," Cowdry at 1379 quoting Brown v. Ford Motor Co., 494 F. 2d 418, 420 (10th Cir. 1974). However, if the moving party's papers do not establish the absence of a genuine issue of fact beyond a

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<sup>2</sup> The motion was received in this office on July 13, 1992.

<sup>3</sup> Complainant's motion at 2.

reasonable doubt, summary judgment is not proper even if no opposing evidentiary matter is presented, Cowdry at 1379 citing Fed. R. Civ. P. 56(e); and Lockett v. Bethlehem Steel Corp. 618 F. 2d 1373, 1382-83 (10th Cir. 1980).

Here, complainant and respondent have presented documents which demonstrate the absence of a genuine issue of fact with respect to three counts of the complaint, and no probative evidence to overcome the motion has been produced by respondent.

Accordingly, it is found that complainant is entitled to judgment as to respondent's liability for the violations alleged in Counts II, III, and IV of the complaint.

#### FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. Respondent is the owner or operator of the facility in question (4100 Beck Avenue, St. Louis, Missouri) within the meaning of the Act and regulations (stipulation 1).

2. Respondent has ten or more full time employees at its facility (stipulation 2).

3. Respondent's facility falls within Standard Industrial Classification Codes 20-39 (stipulation 3).

4. Respondent "otherwise uses," as that term is defined at 40 C.F.R. §372.65, sulfuric acid, a toxic chemical listed under section 313(c) of the Act and at 40 C.F.R. §372.65 (stipulations 11 and 12).

5. Respondent used over 10,000 pounds of sulfuric acid at its facility during calendar years 1987, 1988, and 1989, but did not

submit toxic release inventory reports by, respectively, July 1, 1988; July 1, 1989; and July 1, 1990 as required by the Act and applicable regulations (stipulations 13 - 18).

6. Respondent had more than fifty employees during the years 1987 - 1989.

Accordingly, respondent violated section 313 of the Act and 40 C.F.R. §372.

**ORDER**

It is ORDERED that complainant's motion for judgment as to liability for counts II, III and IV of the complaint be, and it is hereby, GRANTED.

And it is FURTHER ORDERED that the parties shall confer for the purpose of attempting to reach a settlement as to the issue of the penalty for Counts II - IV herein. The parties shall also attempt to determine what likelihood of settlement exists with respect to Count I of the complaint.

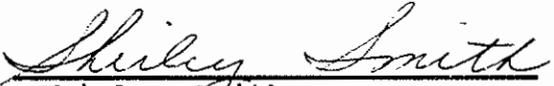
And it is FURTHER ORDERED that the parties shall report to this office upon the status of their efforts during the week ending December 18, 1992.

  
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J. F. Greene  
Administrative Law Judge

Dated: November 20, 1992  
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 11-20-92.

  
Shirley Smith  
Shirley Smith  
Legal Staff Assistant

**NAME OF RESPONDENT: Swing-A-Way Mfg. Co.**  
**DOCKET NUMBER: EPCRA-VII-91-T-650E**

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