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

In the Matter of	:	
KAW VALLEY, INC.	:	Docket Number: EPCRA-VII-89-T-356
Respondent	:	Judge Greene

Emergency Planning and Community Response Act [EPCRA] 42 U.S.C § 11001, et seq.: §§ 313, 325, 42 U.S.C. §§11023, 11045: In the circumstances presented here the appropriate civil penalty is $4250.00 per violation, or $12,750.00. Circumstances included publication of final regulations which differed in a significant respect from those discussed at an EPA sponsored seminar upon which respondent relied in believing it was not subject to EPCRA; and respondent's failure to file reporting forms after being advised that it was subject to the Act and final regulations.

Appearances:

Becky Ingram Dolph, Esquire, and Julie M. Van Horn, Esquire, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, for complainant;

John C. Tillotson, Esquire, Tillotson & Van Parys, 606 Delaware, P. O. Box 10, Leavenworth, Kansas 66048, for respondent.

BEFORE: J. F. Greene, Administrative Law Judge

September 30, 1992

DECISION AND ORDER

This matter arises under section 325 of the Emergency Planning and Community Response Act ["the Act"], 42 U.S.C. §11045. An Order granting summary judgment as to liability for the three violations of section 313 of the Act charged in the complaint was issued in favor of complainant herein on June 7, 1991. Thereafter, the parties were unable to reach a settlement as to the amount of the civil penalty, and sought a hearing with respect to that issue.

The issue presented for decision is whether the penalty ($15,000) sought by complainant for the violations found (failure to file toxic chemical release reporting forms by July 1, 1988) should be reduced in consideration of the circumstances surrounding respondent's failure to file the forms on or before the date specified by the Act and the implementing regulations.

On December 1, 1987, seven months before the forms were due to be filed, respondent's Director of Regulatory Affairs attended a day-long seminar, sponsored jointly by the U. S. Environmental Protection Agency ("EPA") and the Kansas Department of the Environment, on the then newly-passed Act. Proposed regulations to implement section 313 of the Act had been published in the Federal Register.[1] Both the Act[2] and the proposed regulations state that

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[1] June 4, 1987.

[2] At §313(b)(1)(A), 42 U.S.C. §11023(b)(1)(A): "The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees . . . ."

the release reporting requirements of section 313 do not apply to businesses having less than ten full-time employees. (Neither the Act nor the proposed regulations define the term "full-time employee"). Likewise, information presented at the seminar made clear that section 313 of the Act does not apply to businesses having less than ten full-time employees.[3] Final regulations had not yet been published but were expected to be published on December 31, 1987. Materials distributed at the seminar stated that the final regulations had not been published.[4]

When the final regulations were published,[5] a definition of "full-time employee" had been added such that, even though respondent did not have ten employees who worked "full time," e.g. 40 hours per week all year, the facility now fell within the definition under a newly provided method of calculation.[6] In essence, "full-time" had become a determination based upon total hours worked by all employees. Relying upon statements made at the seminar about ten full-time employees, however, respondent did not read the final regulations in the belief that the Act did not apply to its business. The first year for which reports had to be filed

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[3] Stipulation between the parties.

[4] R.X.2; TR at 102-103. See also TR 22-23, where an EPA official testified in effect that he probably told attendees that final regulations had not been issued.

[5] Federal Register, February 16, 1988. See 40 C.F.R. §312.3.

[6] 40 C.F.R §312.3 provides that "full-time employee" means 2000 hour per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totaling the hours worked during the calendar year by all employees, including contract employees, and dividing that total by 2000 hours."

pursuant to the Act was 1987. The reports were due on July 1, 1988. Respondent did not file the reports by July 1, 1988. On January 10-11, 1989, respondent's facility was inspected by EPA, and, on those dates, respondent was informed that under the (final) regulation it had ten or more full-time employees and should file the reporting forms. [TR 31, 108] On June 21, 1989, the complaint herein was filed. At some point after that, possibly as soon as July 7, 1989, the forms were received. Accordingly, respondent was found liable for failure to file 1987 reporting forms by July 1, 1988.[7]

It appears that EPA's important and commendable "outreach" program, which assisted the regulated community in knowing and understanding its obligations under the new Act, needs to place far more emphasis upon the importance of final regulations when the programs take place before the issuance of final regulations. Here, however, considering that the audience was not composed of regulatory lawyers who could instantly recognize the significance of statements to the effect that the regulations being discussed were not final, it is hardly surprising that misunderstandings occurred. For instance, Respondent's Exhibit 2 [a pamphlet entitled Title III Release Reporting Requirements -- A New Federal Law], which was distributed at the seminar, contains the following statement: "(T)he proposed Toxic Chemical Release Inventory rule under Section 313 was published in the Federal Register on June 4,

[7] See June 7, 1991, Order Upon Motion for Summary Judgment as to Liability, In re Kaw Valley, Inc., Docket No. EPCRA-VII-89-T-356.

1987. The target date for the final rule is December 31, 1987." This sort of statement is wholly inadequate, even taken with statements to the same effect which complainant's witness believes he or others made [TR 31], to suggest to the regulated community that significant changes in the rules, particularly changes pertaining to what businesses are covered, could be made -- or at least could not be ruled out -- in the final regulations.[8] Or, considering the size of the outreach effort already made, perhaps it would not have been burdensome to notify seminar participants of a major change in the regulations in these circumstances.

A change of the magnitude seen here between the proposed regulations as discussed at the seminar and the final version could certainly have formed the basis for a significant reduction in the penalty proposed[9], if respondent had been diligent in determining its responsibilities upon being advised, on January 10-11, 1989, that it had ten full-time employees and had corrected its error. Although the record is not clear as to what the inspector may have said about sending further information (respondent's official testified that she asked him to send the forms to her) [TR 108-109] it is clear that respondent was then placed on notice that an EPA official believed respondent was subject to the regulations as published in final form on February 16, 1988. [TR 94, 108] It then became respondent's responsibility to find out, if doubt still

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[8] See TR 102-103, where complainant counsel calls this statement to respondent's attention.

[9] This relates only to seminar participants.

existed on its part as to the requirements of the final rule.[10] This it did not do. The reports for 1987 were not received, as has been noted, until July, 1989, at the earliest. Respondent's lack of diligence at this point weighs against a significant reduction of the penalty, although the original failure to file stems from a misunderstanding that should result in a small reduction, in the circumstances here.

Accordingly, recognizing the requirements of Section 325(b)(2) of the Act, i.e. taking into account the nature, circumstances, extent, and gravity of the violations, any prior history of "such violations,"[11] the degree of culpability, and other such matters as justice may require[12], it is determined that a reduction of $750.00 in the proposed civil penalty for each count should be made, for a total of $12,750. A reduction is deemed necessary in the interests of fairness in this unfortunate situation, considering that a fundamental change, from respondent's point of view, took place between the date of the seminar and the publication of the final regulations. This in no way minimizes respondent's failure to act at once after the January 10-11, 1989, inspection.

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[10] A telephone number which could be used in case seminar participants had questions about the Act and regulations had been provided, TR 32.

[11] The record does not show any history of prior violations of the Act.

[12] In this case, "such other matters as justice may require" include the insufficient emphasis at the seminar upon the possible extent of changes to the final regulations which resulted in respondent failing to examine them.

Reference was made in the Order Upon Motion for Summary Judgment as to Liability issued in this matter on June 7, 1991 [at page 9, slip opinion] to decisions in CBI Services, Inc., Docket No. EPCRA-05-1990 and cases cited therein, including Riverside Furniture, Docket No. EPCRA-88-H-VI-406S, to the effect that penalty reductions made in those cases based upon distinctions between "failure to file" violations and "late filing" violations might be considered here. However, arguments of counsel for complainant are persuasive that those issues do not arise in this case since the reporting forms had not been filed by the time the complaint was issued. As a consequence, the degree of violation selected by complainant in preparing the complaint did not depend upon the date respondent was contacted by complainant for inspection, as it did in CBI Services and Riverside Furniture. In a related argument, respondent suggests that the "circumstance level" set forth in EPA's Enforcement Response Policy for section 313 violations of the Act should be reduced because less than 180 days had elapsed between the date upon which respondent was advised of the contents of the final rule and the date upon which respondent says it filed the reports, June 29, 1989. [TR 97] The violations would then be a question of "late reporting" rather than "failure to file." However, according to the Enforcement Response Policy, the period runs only from the date upon which the reports were initially due (July 1, 1988). This is entirely reasonable. In the absence of an argument to the contrary, or in the absence of abuse of discretion, there is no basis for finding otherwise.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A fair and reasonable civil penalty in the circumstances presented here is $4250 per violation.

2. Respondent's facility was inspected by EPA on Janaury 10-11, 1989, at which time respondent was informed that, in the opinion of the inspector, respondent had more than ten full-time employees as calculated pursuant to the final version of the reporting regulations at 40 C.F.R. §312.3 published on February 16, 1988. At that time, it became respondent's responsibility to investigate and determine its obligations, if it doubted the inspector's opinion.

3. Respondent was not diligent in investigating to determine its obligations under the final regulations, upon learning that it has ten full-time employees under the final section 313 regulations, or, subsequently, in filing the reporting forms.

4. The date upon which the Enforcement Response Policy circumstance level period of 180 days begins to run is the date upon which the toxic release reports are due -- in this case, July 1, 1988 --, not when respondent was advised that it was subject to the Act (January 10-11, 1989).

ORDER

Accordingly, it is ordered that, pursuant to section 325 of the Act, 42 U.S.C. §11045, respondent shall pay a civil penalty of $12,750 for violations of the Act and regulations, within sixty (60) days from the date of final service of this Order, by

forwarding to the Regional Hearing Clerk a cashier's check or a certified Check for the said amount payable to:

Environmental Protection Agency
Regional Hearing Clerk
Region VII
Post Office Box 360748M
Pittsburgh, PA 15251

J. F. Greene
Administrative Law Judge

Dated: September 30, 1992
Washington, D.C.