

10/12/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Solar Machine Products Company,)
) Docket No. EPCRA-031-93
Respondent)

Emergency Planning and Community Right-to-Know Act -- Default Order -- Where Respondent failed to file prehearing exchange as directed, Respondent was declared to be in default and to have committed the violations charged in the Complaint, and was subjected to the civil penalty proposed by Complainant.

Appearances

For Complainant: Robert S. Guenther
Assistant Regional Counsel
Region V
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

For Respondent: Richard Werner, President
Solar Machine Products Co.
29350 Northline Road
Romulus, MI 48174

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045. Complainant is the Director of the Environmental Sciences Division, Region V, United States Environmental Protection Agency ("EPA"), and Respondent is Solar Machine Products Company. Respondent is declared by this Default Order to have violated EPCRA and regulations promulgated pursuant to EPCRA, 40 C.F.R. Part 372.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of \$9,945. This issuance of a Default Order grants Complainant's Motion for Default Order filed on January 20, 1995.

Procedural Background

1. On June 1, 1993, Complainant issued to Respondent a Complaint alleging two violations of Section 313 of EPCRA, 42 U.S.C. § 11023, and proposing a penalty of \$9,945.
2. On or about June 25, 1993, Respondent filed its Answer to the Complaint.
3. On August 30, 1993, the Presiding Officer directed that the Prehearing Exchange in this matter take place no later than November 12, 1993.
4. To date, Respondent has not filed its Prehearing Exchange.
5. The Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. Part 22, provide that a party may be found to

be in default, inter alia, upon failure to comply with a prehearing order of the Presiding Officer. 40 C.F.R. § 22.17(a). "Default by respondent constitutes, for purpose of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." Id.

6. On January 20, 1995, Complainant filed a Motion for Default Order, alleging Respondent's failure to file its Prehearing Exchange as grounds for default. The file in this matter includes a return receipt showing that Respondent was served with this motion.

Statutory and Regulatory Background

7. Under Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. Part 372, owners or operators of facilities that have ten or more full-time employees, that are in Standard Industrial Classification Codes through 20 and 39, and that manufacture, process, or otherwise use a toxic chemical identified at Section 313(c) or listed at 40 C.F.R. § 372.65 in amounts that exceed the applicable threshold for reporting must complete and submit to EPA by July 1, 1988, and annually thereafter on July 1, a chemical release form published pursuant to Section 313(g) of EPCRA for each chemical.

8. Under Section 313(g)(1) of EPCRA, 42 U.S.C. § 11023(g)(1), the EPA Administrator has published the Toxic Chemical Release Inventory Reporting Form, or "Form R," at 53

Fed. Reg. 4540-44 (1988). The requirements of Form R are specified at 40 C.F.R. § 372.85.

9. Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), requires that Form R be used by all persons required to report under Section 313 of EPCRA.

Findings of Fact and Conclusions of Law

10. Respondent is a "person" under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

11. Respondent owns and operates a "facility," as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), located at 29350 Northline Road, Romulus, Michigan.

12. Respondent's facility is covered by Standard Industrial Classification Code 3451, which is between Standard Industrial Classification Codes 20 and 39.

13. Respondent has at least ten full-time employees.

14. Trichloroethylene is a "toxic chemical" under Sections 313(c) and 329(10) of EPCRA, 42 U.S.C. §§ 11023(c) and 11049(10), and 40 C.F.R. § 372.65.

15. Under Section 313(f)(1)(A) of EPCRA, 42 U.S.C. § 11023(f)(1)(A), the threshold use level for trichloroethylene is 10,000 pounds per calendar year.

16. During calendar year 1987, Respondent "otherwise used" 33,261 pounds of trichloroethylene.

17. During calendar year 1988, Respondent "otherwise used" 35,526 pounds of trichloroethylene.

18. Respondent failed to submit a Form R for its use of trichloroethylene during the calendar year 1987 to EPA on or before July 1, 1988, and had not submitted the required Form R at the time of an EPA inspection conducted on June 21, 1990.

19. Respondent failed to submit a Form R for its use of trichloroethylene during the calendar year 1988 to EPA on or before July 1, 1989, and had not submitted the required Form R as of the EPA inspection on June 21, 1990.

20. Respondent filed its Form R reflecting its use of trichloroethylene during the calendar year 1987 with EPA on or about June 28, 1990.

21. Respondent filed its Form R reflecting its use of trichloroethylene during the calendar year 1988 with EPA on or about June 28, 1990.

22. By failing to submit a Form R reflecting its use of a toxic chemical during the year 1987 by July 1, 1988, Respondent violated Section 313 of EPCRA, 42 U.S.C. § 11023, as alleged in Count I of the Complaint.

23. By failing to submit a Form R reflecting its use of a toxic chemical during the year 1988 by July 1, 1989, Respondent violated Section 313 of EPCRA, 42 U.S.C. § 11023, as alleged in Count II of the Complaint.

24. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes penalties not to exceed \$25,000 for each violation of Section 313 of EPCRA, 42 U.S.C. § 11023.

25. EPA has issued an Enforcement Response Policy for use in calculating penalties in all EPCRA Section 313 administrative cases issued after August 10, 1992 (Exhibit 2 of Complainant's Prehearing Exchange; hereinafter "Penalty Policy").

26. Under the Penalty Policy, the appropriate penalty for violations of Section 313 of EPCRA is calculated by first determining the "extent" and "circumstances" of a violation and then applying a "penalty matrix" to determine the penalty corresponding to the extent and circumstances of the violation at issue.

27. Respondent used less than ten times the threshold amount of trichloroethylene in 1987 and 1988.

28. At the time of the June 21, 1990 inspection, Respondent had fifty or more employees.

29. Respondent had sales of about \$6.6 million for 1987 and about \$5.8 million for 1988, or less than \$10 million for each year.

30. In accordance with the Penalty Policy, the appropriate "extent level" for violations involving less than ten times the threshold amount of a chemical by companies with fifty or more employees and less than \$10 million in sales is "C".

31. Under the Penalty Policy, the failure to report in a timely manner where reports are submitted one year or more after the July 1 due date results in a "circumstance level" of 1.

32. Under the Penalty Policy, the failure to report in a timely manner where reports are submitted less than one year after the July 1 due date results in a "circumstance level" of 4.

33. Under the Penalty Policy, Respondent's failure to report in a timely manner as alleged in Count I of the Complaint is assessed at extent level C and circumstance level 1, resulting in a penalty of \$5,000.

34. Under the Penalty Policy, Respondent's failure to report in a timely manner as alleged in Count II of the Complaint is assessed at extent level C and circumstance level 4. Applying the "per day" formula required by the Penalty Policy to Respondent's submission on June 28, 1990 of the Form R due on July 1, 1989 (361 days late) results in a penalty of \$4,945.

35. A total penalty of \$9,945--\$5,000 for Count I, plus \$4,945 for Count II--is a reasonable civil sanction in terms of the purposes of EPCRA. Respondent's violations--a failure for two successive years to report use of a toxic chemical--produced no actual environmental pollution, but did undermine an environmental protection system whose effectiveness depends on accurate reporting. Several factors mitigate the seriousness of Respondent's violations: the quantities of the toxic chemical whose use went unreported were moderate; Respondent's failure to report was inadvertent, rather than deliberate; Respondent obtained no economic benefit from its nonreporting; and the record reflects no prior violations by Respondent. In view of this overall situation, a penalty of \$9,945--which is just under

20 percent of \$50,000, the statutory maximum based on a \$25,000 authorized maximum for each of the two violations--achieves appropriate deterrence, the objective of civil sanctions. Finally, Respondent's annual sales of around \$6 million (see Paragraph 29 above) suggest that a \$9,945 penalty is within Respondent's ability to pay.

ORDER¹

Respondent is found to be in default with respect to the Complaint and, as charged therein, is found to have committed two violations of Section 313 of EPCRA, 42 U.S.C. § 11023. For this default and these violations, Respondent is assessed a civil penalty of \$9,945.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of nine thousand, nine hundred, and forty-five dollars (\$9,945). Payment shall become due according to 40 C.F.R. § 22.17(a), and shall be made by

¹This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005

forwarding a cashier's or certified check, payable to "Treasurer,
United States of America", to:

United States Environmental Protection Agency
Region V
P.O. Box 70753
Chicago, IL 60673

with a copy to the following address:

Branch Secretary
Pesticides and Toxic Substances Branch (SP-14J)
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Failure to pay the civil penalty imposed by this Default
Order shall subject Respondent to the assessment of interest and
penalty charges on the debt pursuant to 4 C.F.R. § 102.13.


Thomas W. Hoya
Administrative Law Judge

Dated: October 12, 1995