UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
U. S. Aluminum, Inc.,	)	Docket No. II EPCRA-89-0124
	)	
Respondent	)	

RULING

This Ruling grants a motion for partial accelerated decision filed by the complainant in this proceeding, the Acting Regional Director, Region II, U.S. Environmental Protection Agency (hereinafter "Complainant"). The Ruling also denies a cross motion for accelerated decision filed by the respondent, U.S. Aluminum, Inc. (hereinafter "Respondent").

In granting Complainant's motion, the Ruling declares Respondent to have violated the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (hereinafter "EPCRA"), and the regulations promulgated thereunder (hereinafter "the Regulations"), as charged in the complaint. For this reason, the Ruling denies Respondent's motion to dismiss the case. Respondent had argued that no ground exists for Complainant's requested relief.

The complaint, issued September 26, 1989, charged that in 1988 Respondent failed to file a Form R that was required for reporting the 1987 production at its Haskell, New Jersey facility of aluminum fume or dust. In defense, Respondent argued chiefly that what it had produced was not aluminum fume or dust, but rather aluminum flake, properly called aluminum flake powder,[1] for which there was no reporting requirement.

An earlier Ruling in this case rejected Complainant's contention that Respondent was foreclosed from pleading this defense.[2] After the filing deadline for the Form R had passed, Respondent was told by EPA that it should have filed; and Respondent then did file a Form R. Complainant contended that this filing foreclosed Respondent from subsequently contesting whether or not it had actually been required to file. It was this contention by Complainant that was rejected by this prior Ruling.

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[1] Respondent's Further Brief in Support of Motion to Accelerated Decision and in Opposition to Complainant's Motion for Partial Accelerated Decision (September 17, 1972) at 6; Pre-Hearing Exchange on Behalf of Respondent (May 30, 1990) at 2, 4.

[2] Ruling on Motion for Partial Accelerated Decision (November 26, 1991).

Complainant then moved for an interlocutory appeal to the EPA Administrator of that Ruling, and this motion was denied.[3] On Complainant's appeal of the denial to the Administrator, the denial was affirmed by the Environmental Appeals Board.[4] The parties next tried but failed to negotiate a settlement of this case; and they agreed instead that the issue of Respondent's liability should be decided on the basis of their written submissions. These submissions have been made, and the record has thus been prepared for the instant Ruling.

Issue and Holding

A basic requirement of EPCRA is annual reporting by all facilities of their release into the environment of any of certain listed hazardous chemicals. This reporting enables the surrounding communities and the proper authorities to become aware of such releases and to plan for any emergencies involving these chemicals.

The listing of hazardous chemicals whose release is to be reported on the Form R includes the designation "Aluminum (fume or dust)." The issue in this case is whether that designation required Respondent to report, in a Form R for 1987 for its New Jersey facility, the production of what Respondent called "aluminum flake powder."[5]

Complainant argued that Respondent's aluminum flake powder is simply another name for aluminum fume or dust, whereas Respondent maintained that they are two different products. Respondent did not dispute that its New Jersey facility was subject to the pertinent reporting requirement and that the volume of aluminum flake powder that it produced met the threshold quantity for reporting, provided that it came within the Form R's category of aluminum fume or dust. Thus Respondent's liability turns on that issue.

This Ruling holds that Respondent's aluminum flake powder was properly reportable on the Form R as aluminum (fume or dust). Therefore Respondent is declared to have violated EPCRA and the Regulations as charged in the complaint.

Discussion

Complainant's position is supported by four arguments: an EPA

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[3] Order Denying Complainant's Motion for Interlocutory Appeal (January 31, 1992).

[4] Order Denying Motion for Interlocutory Review (EPCRA Appeal No. 92-1, March 11, 1992).

[5] Respondent's Further Brief, supra note 1, at 6; Pre-Hearing Exchange on Behalf of Respondent (May 30, 1990) at 2, 4.

document listing aluminum flake and aluminum powder as synonyms for aluminum (fume or dust);[6] the plain meaning of dust and powder; a section in the final rule for Form R reporting that elaborates on the meaning of aluminum (fume or dust);[7] and a Form R reporting aluminum flake powder as aluminum (fume or dust) and filed by a company related to Respondent.[8] Respondent advanced two arguments for its position: an affidavit stating that aluminum industry terminology distinguishes between aluminum flake and aluminum fume or dust;[9] and a Transportation Department regulation claimed to support this distinction.[10]

EPA Synonyms Document

Complainant's first argument was represented by the EPA document titled "Common Synonyms for Chemicals Listed under Section 313 of the Emergency Planning and Community-Right-to-Know Act."[11] This document listed "Aluminum Flake" and "Aluminum powder" as synonyms for "Aluminum (fume or dust)." Thus it is clear that EPA considered aluminum fume or dust as including what Respondent called aluminum flake powder.

For purposes of this case, however, all that this EPA document establishes is EPA's interpretation of aluminum fume or dust; what it fails to establish is any EPA interpretation for which Respondent can be held accountable. Indeed, Complainant ultimately conceded as much.[12]

Complainant cannot use this EPA document against Respondent because, in the first place, EPA's handling of it was not shown to have satisfied either of the possibly applicable tests for such use postulated by Section 552 of the Administrative Procedure Act

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[6] Common Synonyms for Chemicals Listed under Section 313 of the Emergency Planning and Community-Right-to-Know Act (EPA560/4-90-005) (November 1989) at 43. The title page and page 43 of this EPA document were submitted for the record of this case in Complainant's Prehearing Exchange (May 30, 1990), Exhibit 6.

[7] 53 Federal Register 4,519 (February 16, 1988).

[8] Complainant's Further Brief in Support of Her Motion for Partial Accelerated Decision (August 31, 1992) at 16-17, Exhibit E.

[9] Affidavit in Opposition to Motion for Partial Accelerated Decision (July 24, 1990), submitted by Respondent July 24, 1990.

[10] 49 C.F.R. § 173.232.

[11] EPA560/4-90-005 (November 1989). The title page and page 43 of this EPA document were submitted for the record of this case in Complainant's Prehearing Exchange (May 30, 1990), Exhibit 6.

[12] Complainant's Further Brief, supra note 8, at 16.

("APA") (5 U.S.C. § 552). One test is provided for "substantive rules of general applicability ..., and statements of general policy or interpretations of general applicability ..." by Section 552(a)(1)(D). Pursuant to this Section, such a document may be used against Respondent only if it was published in the Federal Register or incorporated therein by reference; and the EPA synonyms document was never so published or incorporated.[13]

The other APA test is provided by Section 552(a)(2)(B) for "statements of policy and interpretations which ... are not published in the Federal Register." Probably the EPA synonyms document comes within this group.[14] But Section 552(a)(2)(B) requires, before any of these documents can be used against a party, that the document be indexed and made available to the public or published.[15] Complainant has made no showing that this EPA synonyms document has been thus indexed and made available or published.

The second reason why Complainant cannot hold Respondent accountable for the EPA synonyms document is that the case record lacks conclusive evidence that the appropriate synonyms document existed in 1988 when Respondent allegedly should have filed. The EPA synonyms document that Complainant supplied the record, which clearly equated aluminum flake and aluminum powder with aluminum fume or dust, was dated November 1989.[16] In EPA's proposed rule for Form R reporting, published in the Federal Register in 1987, a "Glossary of Synonyms" was listed as one of ten basic documents that constituted the rulemaking record and that were available to

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[13] The 1988 Federal Register publication of the final rule imposing the Form R reporting requirement nowhere mentioned the EPA synonyms document (53 Federal Register 4,500 (February 16, 1988)). The final rule did state that a proposed rule had been issued in 1987 (id.), and supplied the Federal Register citation of that proposed rule (52 Federal Register 21,152 (June 4, 1987)). In that proposed rule, a "Glossary of Synonyms" was named as one of ten documents that constituted the rulemaking record and that were available to the public (id. 21,166; see also 21,155).

[14] See, e.g., In the Matter of U.S. Nameplate Company, RCRA (3008) Appeal No. 85-3, Docket No. RCRA-84-H-0012, Final Decision (March 31, 1986) at 6-11.

[15] Even without such indexing, availability, or publication, one of these documents may still be used against a party having "actual and timely notice of the terms thereof." 5 U.S.C. § 552(a)(2)(B). But no contention has been made in this case that Respondent had such notice.

[16] See supra note 6 for the citation of this document.

the public.[17]

But the title of that document cited in 1987--Glossary of Synonyms--differs from the title of the November 1989 document submitted by Respondent for this case--Common Synonyms for Chemicals Listed under Section 313 of the Emergency Planning and Community-Right-to-Know Act. The case record lacks evidence that they are simply different editions of the same document or, more to the point, that the document existing before the 1988 filing deadline--the Glossary of Synonyms--equated aluminum flake powder with aluminum fume or dust. In sum, for the instant case, although the EPA synonyms document establishes EPA's interpretation of aluminum fume or dust, it is not an interpretation that can be used against Respondent.

Plain Meaning

A strong argument for Complainant is the plain meaning of the words[18] "dust" and "powder." The following definitions are taken from Webster's Third New International Dictionary of the English Language Unabridged 703, 1778 (1986); for each word, the definition quoted is taken from the first of several definitions provided by the Dictionary.

> dust ... fine dry pulverized particles of earth or other matter : something reduced to minute portions : fine powder ....
>
> powder ... a substance composed of fine particles: as ... dry pulverized earth or disintegrated matter : dust ....

(emphasis in original)

Thus, according to Webster's Dictionary, a synonym for "dust" is "fine powder," and a synonym for "powder" is "dust." As noted, the listing of hazardous chemicals to be reported on the Form R included "Aluminum (fume or dust)." In view of these dictionary definitions, the plain meaning of this listing reasonably gave Respondent notice that, absent some special meaning for dust or powder when applied to aluminum, its aluminum flake powder was subject to the reporting requirement.

Respondent's Affidavit

It was just such a special meaning for aluminum fume or dust and aluminum flake that Respondent advanced in its principal documentary submission: an affidavit executed by one of

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[17] 52 Federal Register 21,166 (June 4, 1987); see also 52 Federal Register 21,155 (June 4, 1987).

[18] See, e.g., U.S. v. Unitank Terminal Service, 724 F.Supp. 1158, 1165 (E.D.Pa. 1989).

Respondent's vice presidents. In his affidavit, the vice president described his extensive personal experience in the business of manufacturing aluminum flake. The thrust of the affidavit was as follows.

> [A]luminum flake is the product manufactured by U.S. Aluminum, Inc. It constitutes a material which is used in other industrial applications.... From my experience in the aluminum industry, "dust" or "fumes" are never used to describe the type of particles or product which we manufacture. Dust and fumes refer to waste and not a specific product.[19]

Final Rule for Form Rs

The force of this affidavit is, however, persuasively overcome by the third and fourth arguments supporting Complainant: a section in the final rule for Form Rs published in the Federal Register,[20] and a Form R itself filed by a company related to Respondent. The relevant section from the final rule stated as follows.

> C. Reporting Substances of a Certain Form
>
> Certain of the chemicals listed in the Committee Print have parenthetic qualifiers listed next to them. EPA attempted to clarify these qualifiers in its proposal. A chemical that is listed without a qualifier is subject to reporting in all forms in which it is manufactured, processed, and used.
>
> 1. Fume or dust. Three of the metals on the list (aluminum, vanadium, and zinc) contain the qualifier "fume or dust." EPA interprets this qualifier to mean that a facility is manufacturing, processing, or using the metal in the form of fume or dust. Fume or dust does not refer to "wet" forms, solutions, or slurries, for example, but only dry or anhydrous forms of these metals. As explained in Unit IV.A. of this preamble, the term manufacture includes the generation of a chemical as a byproduct or impurity. In such cases, a facility should determine if, for example, it generated more than the 1987 threshold of 75,000 pounds per year of aluminum fume or dust as a byproduct of its activities. If so then the facility must report that it manufactures aluminum (fume or dust). Similarly, there may be certain technologies in which one of these metals is processed in the form of a fume or dust to make other chemicals or other products

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[19] Affidavit in Opposition to Motion for Partial Accelerated Decision (July 24, 1990) at 3, ¶ 9, at 2, ¶ 5, submitted by Respondent July 24, 1990.

[20] 53 Federal Register 4,519 (February 16, 1988).

> for distribution in commerce. In reporting releases, the facility would only report releases of the fume or dust.[21]

(emphasis in original)

It is the last paragraph in this section that relates to the instant case. The fourth sentence states that "the term manufacture includes the generation of a chemical as a byproduct or impurity." "A byproduct or impurity" are two illustrations of what can reasonably be considered "waste." This sentence indicates that "a byproduct or impurity" is not the equivalent of aluminum fume or dust, but only one component thereof. Therefore this sentence should have told Respondent that its aluminum flake powder was not excluded from the aluminum fume or dust reporting requirement simply because the flake powder was not considered a waste product.

The same message should have been delivered by the penultimate sentence. "[T]here may be certain technologies in which one of these metals is processed in the form of a fume or dust to make other chemicals or other products for distribution in commerce." This sentence seems to describe Respondent's preparation of aluminum flake powder for subsequent use in other industrial applications. At any rate, this sentence again should have told Respondent that it could not avoid reporting its aluminum flake powder on the ground that it was not a waste product.

Finally, the third sentence provides the single exclusion in this section from the fume or dust coverage: for "'wet' forms, solutions, or slurries." This single exclusion is unconnected with any distinction related to waste products. Thus again Respondent should have been alerted that EPA in its form R reporting requirement was employing the term "aluminum (fume or dust)" to mean something different from the definition advanced in Respondent's affidavit.

In sum, this paragraph told Respondent that EPA's "Aluminum (fume or dust)" covered more than waste. Therefore Respondent was unjustified in relying on the special industrial meaning alleged in its vice president's affidavit as a reason to withhold reporting of its aluminum flake powder.

Related Company's Form R

Complainant cited also the Form R filed by United States Bronze Powders, Inc. According to Complainant, this company is "Respondent's parent corporation located a few miles away;"[22] as described by Respondent, it is a company to which Respondent is

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[21] Id.

[22] Complainant's Further Brief, supra note 8, at 16.

"affiliated."[23] More pertinently, it apparently deals in the same products as Respondent.[24]

Complainant's point was that United States Bronze Powders, Inc. submitted a Form R for 1987 that reported the processing of aluminum (fume or dust). Since both companies apparently deal with aluminum flake powder, United States Bronze Powders, Inc. must have interpreted aluminum flake powder to be included within the meaning of aluminum (fume or dust). Respondent did not dispute this inference.[25]

At minimum, the Form R filed by United States Bronze Powders, Inc. undercuts any argument that terminology in the aluminum industry was totally contrary to the dictionary definitions of dust and powder. The plain meaning of these words, as shown by these definitions, thus retains significant force as applied to Respondent's situation. Further, the section of the Form R final rule quoted above indicated clearly that EPA was using aluminum fume or dust to mean something broader than just waste.

Transportation Department Regulation

Respondent's remaining argument--a Transportation Department regulation--avails it little. According to this regulation, "[a]luminum flake powders which have been rendered nondusting ..., aluminum granules, aluminum atomized powder and aluminum paste ... [and] [l]imited quantities of metallic aluminum powder ... in earthenware, glass, metal, or plastic inside [certain] packagings" are exempted from packaging requirements that apply to other "[m]etallic aluminum powder."[26]

Respondent contended that "[t]his section makes a distinction between aluminum flake powder and what is in essence aluminum dust".[27] It is true that this section distinguishes between, on the one hand, aluminum flake powder that is nondusting, together with aluminum in other enumerated forms, such as paste, and, on the other hand, apparently all other metallic aluminum powders. But this distinguishing fails to support Respondent's argument in this case.

To begin with, Respondent has not shown that its aluminum flake powder is nondusting. More fundamentally, nothing in the

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[23] Respondent's Further Brief, supra note 1, at 6.

[24] Complainant's Brief, supra note 8, at 16; Respondent's Further Brief, supra note 1, at 6.

[25] Respondent's Further Brief, supra note 1, at 6.

[26] 49 C.F.R. § 173.232.

[27] Respondent's Further Brief, supra note 1, at 3.

distinction drawn in this section confirms Respondent's basic point that aluminum fume and dust refer only to waste. Nor does this section's distinction establish a clear difference between aluminum flake powder and aluminum fume or dust. The section merely draws a line between certain aluminum powders, of which nondusting aluminum flake powder is one, and all other metallic aluminum powders.

If the distinction drawn by the section were consistent with Respondent's basic point--which it is not--it would be evidence supporting Respondent's affidavit concerning industry terminology. But even then, it would still leave for decision other important questions. For example, was the purpose of this Transportation Regulation sufficiently similar to the purpose of EPA's Form R requirement that the Transportation terminology should be accorded significant weight in interpreting the EPA requirement.

Conclusion

In conclusion, Respondent's aluminum flake powder was properly reportable on the Form R as aluminum (fume or dust). Moreover Respondent, on the basis of a reasonable reading of the final rule for the Form R reporting, could not reasonably have used its different understanding of terminology to reach a contrary decision.

Order

Complainant's motion for a partial accelerated decision as to liability is granted. Accordingly, Respondent is declared to have violated EPCRA and the Regulations as charged in the complaint. Respondent's motion for an accelerated decision dismissing the complaint is denied.

Dated: November 23, 1992

Thomas W. Hoya
Administrative Law Judge

2IN THE MATTER OF U.S. ALUMINUM, INC.,, Respondent,
Docket No. II EPCRA-89-0124

Certificate of Service

I certify that the foregoing **Ruling,** dated November 23, 1992, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: November 23, 1992