

**IN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

**ADMINISTRATIVE COMPLAINT AND OPPORTUNITY
TO REQUEST A HEARING**

IN THE MATTER OF:)
)
 MFG Chemical, Inc.) **Proceeding to Assess Class II**
 1200 Brooks Road) **Civil Penalty under Section**
 Dalton, GA 30719) **311 of the Clean Water Act**
) **For Spill Violation**
 Respondent.)
) **Docket No. CWA-04-2008-5192**
)
_____)

MOTION FOR ACCELERATED DECISION

Respondent, MFG Chemical, Inc., (“MFG”), by its undersigned counsel, respectfully moves the Court for an accelerated decision in favor of MFG Chemical for reasons stated below.

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STATEMENT OF FACTS

Respondent MFG operates a specialty chemical manufacturing facility in Dalton, Georgia. The Administrative Complaint (the “Complaint”) alleges discharges in violation of Section 311(b)(3) of the Clean Water Act that occurred on or about April 12, 2004, as a result of an accident the facility which has been the subject of extensive investigation by the State of Georgia, Environmental Protection Division, the U.S. Environmental Protection Agency, and the Chemical Safety Board (CSB).

Respondent admits that a vapor cloud of allyl alcohol escaped into the atmosphere from its facility on April 12, 2004. During the emergency response to that April 12, 2004, incident, the Incident Commander (“IC”) from the Dalton Fire Department was

informed during the response to the incident, that fire water runoff was entering Stacy Branch, which flows into Drowning Bear Creek from the property.

The Complaint alleges in Paragraph 9 that Respondent discharged 3,348 pounds of allyl alcohol into Stacy Branch and Drowning Bear Creek and that the amount discharged into those waters was in excess of the reportable quantity for allyl alcohol under 40 C.F.R. Part 117 which is 100 pounds. The Complaint further alleges that the discharge continued for at least two (2) weeks and caused a fish kill of at least 3,144 fish within Stacy Branch Creek and Drowning Bear Creek.

INTRODUCTION

In this Motion for Accelerated Decision, Respondent disputes the allegation in the Proposed Penalty Section of the Complaint that the alleged discharge continued for at least two weeks, and Respondent contends that the description of the harm caused by the alleged discharge is as not as extensive as described in the Complaint.

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE DISCHARGE WAS CAUSED SOLELY BY THE ACTS OF A THIRD PARTY

Section 311(g) of the Clean Water Act, 33 U.S.C. § 1321(g), allows Respondent to avoid liability for any discharge if the discharge was caused solely by a third party. Respondent admits that its actions lead to the accident and release of allyl alcohol into the atmosphere, but the decision to use water to respond to potential fire hazards instead of foam was made by the Incident Commander (“IC”) for the Dalton Fire Department.

The April 2006 CSB Report on the incident, states that the IC was informed during the firefighting activities that “firewater runoff was entering the stormwater drainage canal that flowed into nearby Stacey Branch Creek.” The IC works for the Dalton Fire Department (“DFD”). The report further states that “The IC decided that it

was more important to minimize the airborne concentration of the chemical, so they continued applying water to the reactor to knock down the vapor, acknowledging that contaminated water would enter the creek.” See p. 37, Exhibit A, U.S. Chemical Safety and Hazard Investigation Board Investigation Report, *Toxic Chemical Vapor Cloud Release*, MFG Chemical, Inc. April 12, 2004, Report No. 2004-09-I-GA. It was the decision of the DFD that lead to water contaminated with allyl alcohol entering the creeks and cause the fish kill.

In addition to the statement in the CSB Report, the CSB held a public hearing on November 16, 2004, in Dalton, Georgia, to discuss the April 12, 2004, incident. In the public hearing, the CSB official presenting the summary of the incident stated, “Additionally, on the environmental side, there was a nearby creek contaminated by the water runoff. This partially from fire water runoff and it was partially from the rain that was occurring that night.” See Exhibit B, Transcript U.S. Chemical Safety and Hazard Investigation Board Public Hearing, *In the Matter of Toxic Gas and Flammable Vapor Release On April 12, 2004, MFG Chemical, Inc. Callahan Facility, Dalton, Georgia*, Public Hearing November 16, 2004. Any allyl alcohol that reached the creeks was a result of actions of a party other than the Respondent and therefore the Complaint should be dismissed.

II. THE PROPOSED PENALTY DEMAND IS ERRONEOUS IN LAW AND FACT

The Complaint states that the penalty is to be administered pursuant to the statutory penalty factor set forth in Section 311(b)(8) of the Clean Water Act, 33 U.S.C. § 1321(b)(8). One factor listed in Section 311(b)(8) is “any other penalty for the same incident.”

To the extent that the civil penalty contained within the Proposed Penalty section of the Complaint, is based on EPA's August 1998 "*Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*", Respondent believes that the Policy allows this Court to dismissal of the penalty being sought in that a penalty has already been paid pursuant to a Consent Order with the Georgia Environmental Protection Division ("EPD"). On page 15 of the Policy, under the heading "C – Adjustments to Gravity," there is a paragraph labeled "Other Penalty for Same Incident." That paragraph states, "If the violator has already paid a penalty to a state or local government for a violation arising out of the same incident, the Agency litigation team may use the prior penalty to offset the statutorily available federal penalty . . ."

As argued in Section I above, Respondent asserts not that the volume and extent of the discharge was purely outside its control and that Respondent in a September 14, 2004, Consent Order entered into by Respondent, and the Environmental Protection Division, Georgia Department of Natural Resources, paid a penalty for the same discharge of allyl alcohol into Georgia waters under Consent Order No. EPD-RMP-ERT-4402. See Exhibit C, Environmental Protection Division, Georgia Department of Natural Resources, September 10, 2004, Letter and Consent Order No. EPD-RMP-ERT-4402.

The Consent Order portion dealing with the alleged discharge of allyl alcohol was subject to enforcement under O.C.G.A. § 12-5-51(a), which reads, "Any person who intentionally or negligently causes or permits any sewage, industrial waste, or other wastes, oil, scum, floating debris, or other substance or substances to be spilled, discharged, or deposited in the waters of the state, resulting in a condition of pollution as defined by this article, shall be liable in damages to the state . . ." The Consent Order

recognizes that the Respondent had no permit to discharge allyl alcohol at the facility, and it further alleges that the allyl alcohol was discharged into “an unnamed tributary to Sandy Creek, Sandy Creek itself, and subsequently into Drowning Bear Creek on April 12 and 13, 2004.” See Exhibit C. The Consent Order also states that the discharge resulted in a condition of pollution of state waters and the discharge resulted in a fish kill and that the Georgia DNR incurred costs investigating the incident and suffered loss of natural resources. The total penalty paid under that Consent Order, pursuant to the Georgia Water Quality Control Act, was \$26,000, of which \$5,000 was for damages and cost recovery of the fish kill.

Respondent believes that the state and federal provisions involved here have the same goal, and punish the same activities and harm. Most importantly, the duration of the violation leading to the fish kill in the Georgia Consent Order is just two days, while the Complaint erroneously states that the violation continued for at least two weeks. Respondent is not aware of any evidence that support the allegation that the discharge lasted more than the two days referred to in the Georgia Consent Order.

Therefore the penalty should be dismissed as duplicative of the penalty already paid to EPD.

III. THE COMPLAINT’S QUANTIFICATION OF THE ALLEGED DISCHARGE INTO WATER OF THE U.S. LACKS FOUNDATION

In its Answer, Respondent admits that allyl alcohol has a reportable quantity of 100 pounds under 40 C.F.R. Section 117.3. The Complaint’s allegation that the entirety of the 3,348 pounds of allyl alcohol released into the atmosphere as a gaseous vapor as a result of reactor release on April 12, 2004 also entered any waterbodies is without any foundation. In its Answer Respondent also admits that allyl alcohol entered both the

atmosphere as a gaseous vapor and certain waterbodies on April 12, 2004 as a result of firefighting activity at the plant on Callahan Road.

Here the Complaint alleges that a discharge in excess of a reportable quantity occurred, but the Complaint does not establish how the discharge occurred in excess of a reportable quantity. While 40 C.F.R. § 22.20 only permits the granting of a Motion for Accelerated Decision if no genuine issue of material fact exists, this is not a question of fact, since there is no dispute as to the amount of allyl alcohol released into the atmosphere, nor any dispute as to how allyl alcohol entered waters of the U.S. However, the Complaint's allegation that all of the allyl alcohol released into the atmosphere also entered into the waters is matter of insufficient pleading, not one of fact. Whether a discharge in excess of a reportable quantity occurred is a legal conclusion drawn from facts, not a fact itself.

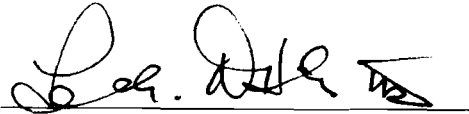
A reading of the agreement entered by Complainant and Respondent in *CONSENT AGREEMENT AND FINAL ORDER IN THE MATTER OF: MFG Chemical, Inc.*, Docket Number: EPCRA-04-2005-2010(b), filed February 8, 2005 for EPCRA and CERCLA violations arising from the same incident that is the object of this Complaint eliminates any factual dispute as to the allegations underlying this aspect of the Motion.

CONCLUSION

For the foregoing reasons, and pursuant to 40 C.F.R. § 22.20, the Respondent respectfully moves the Court to grant Respondent's Motion for Accelerated Decision and dismiss the Complaint.

Respectfully submitted this 16th day of January, 2008.

ALSTON & BIRD LLP

A handwritten signature in black ink, appearing to read "Lee A. DeHihns, III", written over a horizontal line.

Lee A. DeHihns, III
Georgia Bar No. 216259
ATTORNEYS FOR RESPONDENT

1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Phone: 404-881-7151
Fax: 404-253-8569

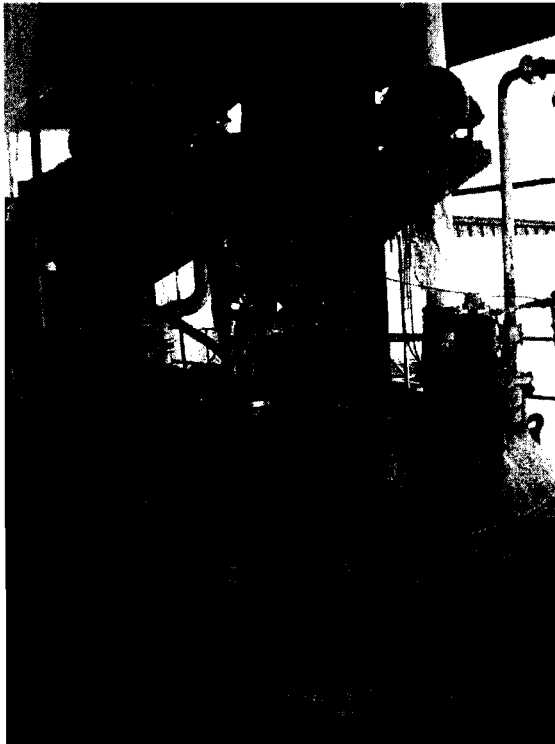


U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

INVESTIGATION REPORT

TOXIC CHEMICAL VAPOR CLOUD RELEASE

(154 Treated, Five Hospitalized for Toxic Chemical Exposure)



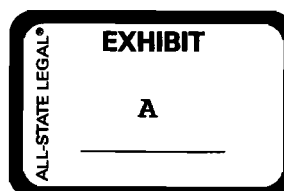
MFG CHEMICAL, INC.

DALTON, GEORGIA

APRIL 12, 2004

KEY ISSUES:

- REACTIVE CHEMICALS PROCESS DESIGN
- PROCESS SCALE-UP
- EMERGENCY PLANNING AND RESPONSE



REPORT NO. 2004-09-I-GA

APRIL 2006

With the concurrence of the deputy fire chief, the IC permitted three MFG personnel to reenter the building to check the reactor temperature, quickly observe the reactor equipment, check on the status of the reactor cooling system, and retrieve their respirators from the building. The IC made it clear to the MFG personnel that they would enter at their own risk. Furthermore, the fire department would not attempt a rescue in the event that an employee was overcome by the vapor, or sustained serious injury during the entry since the fire department personnel did not have the protective equipment required for allyl alcohol exposure. Nevertheless, the inadequately protected MFG employees entered the facility without monitoring the allyl alcohol vapor concentration in the air. After the first entry into the building, one MFG employee returned to the building to retrieve the MSDS for the fire department.

Two Dalton Utilities employees arrived at 11:18 PM and informed the IC that firewater runoff was entering the storm-water drainage canal that flowed into the nearby Stacey Branch creek (See Figure 10). The IC decided that it was more important to minimize the airborne concentration of the chemical so they continued applying water to the reactor to knock down the vapor, acknowledging that contaminated water would enter the creek. The Georgia Department of Natural Resources subsequently conducted a survey of the creeks after the incident and determined that a significant aquatic kill occurred as far as seven miles downstream from the facility.

Shortly after 2:00 AM, the IC again permitted MFG personnel wearing only Tyvek/Tychem[®] suits, boots, gloves and full-face cartridge respirators,²⁴ to return to the process equipment to place a 5-gallon bucket filled with water under the rupture disc vent-pipe. The Lyondell Emergency Response Manager recommended this makeshift vapor scrubber to reduce the

²⁴ The Emergency Response Guidebook specifies fully encapsulating, vapor protective clothing when entering an allyl alcohol spill area. (U.S. DOT, 2004)

UNITED STATES OF AMERICA

+ + + + +

CHEMICAL SAFETY AND HAZARD
INVESTIGATION BOARD

+ + + + +

PUBLIC HEARING
In the Matter of
TOXIC GAS & FLAMMABLE VAPOR RELEASE
ON APRIL 12, 2004
MFG CHEMICAL, INC., CALLAHAN
FACILITY, DALTON, GEORGIA

+ + + + +

TUESDAY
NOVEMBER 16, 2004

+ + + + +

NW Georgia Trade & Convention Center
2211 Dug Gap Battle Road
Dalton, Georgia

+ + + + +

7:02 p.m.

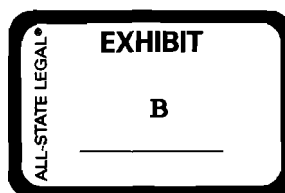
BEFORE:

Chemical Safety Board Members:

CAROLYN W. MERRITT, Chairman
GARY VISSCHER, Member
JOHN BRESLAND, Member

Assisted by:

CHRIS WARNER, General Counsel



1 Of those, 137 were private citizens or employees of nearby
2 facilities. There were 13 police officers who were involved
3 in the emergency evacuation that were contaminated and had to
4 be decontaminated and treated and there were four ambulance
5 personnel who were there to help evacuate the community and
6 they were also treated at the hospital.

7 Additionally, on the environmental side, there was
8 a nearby creek contaminated by the water runoff. This was
9 partially from fire water runoff and it was partially from
10 the rain that was occurring that night.

11 The next series of slides I'm calling the incident
12 time line. This was taken from 911 call center records, it
13 was taken from interviews that we conducted with more than 60
14 individuals that included police officers that were on scene,
15 that included fire department personnel that were on scene,
16 it included ambulance personnel, it included MFG personnel
17 and various others.

18 I'm going to set the basis for our preliminary
19 findings in this time line. We have chosen some very
20 specific elements as we move through the period of time from
21 the beginning of the release that we have established at
22 approximately 9:30 p.m.

23 The MFG operators in the control room were -- had
24 experienced and identified what was an unexpected temperature
25 increase in the reactor system. They had a device that was

GEORGIA DEPARTMENT OF NATURAL RESOURCES

7 Martin Luther King, Jr., Drive-Room 643, Atlanta, Georgia 30334

Noel Holcomb, Commissioner
Carol A. Couch, Ph.D. Director
Environmental Protection Division
404/656-6905

September 10, 2004

Mr. Charles E Gavin
President
MFG Chemical, Inc.
1200 Brooks Road
Dalton, Georgia 30719


RE: Consent Order No. EPD-RMP-ERT-4402

Dear Mr. Gavin:

The Georgia Environmental Protection Division has received your signed Consent Order. You will be expected to meet all of the conditions of this Order.

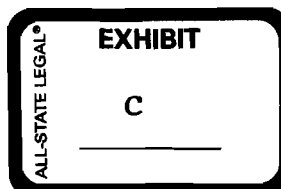
Your cooperation in this matter has been greatly appreciated. Should you need further assistance, please do not hesitate to contact this office at 404-656-6905.

Sincerely,



Carol A. Couch, Ph.D.
Director

CC:cwg
ATTACHMENT



ENVIRONMENTAL PROTECTION DIVISION
Department of Natural Resources
State of Georgia

In RE: MFG Chemical, Inc. #
 1200 Brooks Road # CONSENT ORDER NO. EPD-RMP-ERT-4402
 Dalton, Georgia 30719

Consent Order

Whereas, MFG Chemical, presently operates a facility in Whitfield County, Georgia (hereinafter the "Facility"); and

Whereas, Section 391-3-1-02(10) of the rules promulgated to the Air Quality Control Act (hereinafter the "State Act"), makes it unlawful to store, use, or otherwise handle greater than 15,000 pounds of allyl alcohol without the development and implementation of a Risk Management Program; and

Whereas, the State Act provides, inter alia, that any person violating any provision of the Act shall be liable to the State of Georgia for a civil penalty not to exceed \$25,000 per day for each day during which such violation continues; and

Whereas, the Facility received shipment of 35,000 pounds of allyl alcohol (CAS No. 107-18-6) on April 12, 2004; and

Whereas, inspections by the Georgia Environmental Protection Division (hereinafter the "Division") on April 30, 2004, determined that a Risk Management Program was not in place and filed with the US EPA prior to receipt of the allyl alcohol; and

Whereas, Official Code of Georgia Annotated (O.C.G.A.) Section 12-14-1(4) defines Allyl Alcohol as a hazardous substance; and

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To	Lee DeHines	From	J. MacKey		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #		Fax #			

Whereas, O.C.G.A. 12-14-3(a) requires any person having knowledge of the release of an amount of a hazardous substance equal to or greater than the reportable quantity, or of an unknown amount of a hazardous substance, to immediately notify the Division through the Department of Natural Resources Emergency Operations Center of said release; and

Whereas, 40 C.F.R. Part 302 specifies that the Reportable Quantity for a release of Allyl Alcohol is 100 pounds; or that the release of Allyl Alcohol is reportable in the event the quantity is unknown (O.C.G.A. 12-14-1(7)); and

Whereas, the Respondent first had knowledge of a release of an unknown amount of Allyl Alcohol at approximately 9:30 p.m. on April 12, 2004; and

Whereas, Division records document that the Respondent notified the Department of Natural Resources Emergency Operations Center of the release the morning of April 13, 2004 at 7:12 a.m., instead of making notification immediately upon having knowledge of the release, as required; and

Whereas, O.C.G.A. 12-14-4 specifies, inter alia, that any person knowingly violating any provision of this section of the Code shall be liable to the State of Georgia for civil penalties not to exceed \$1,000 per day for each day during which such violation continues; and

Whereas, the GWQCA provides at O.C.G.A. 12-5-5(a), that anyone who intentionally, negligently or accidentally permits or causes any sewage, industrial wastes, oil, scum, or floating debris, or any other substance to be spilled, discharged or deposited in the waters of the State resulting in a condition of pollution is liable in damages to the State; and

Whereas, the Director did not issue a permit to the Respondent for the discharge of Allyl Alcohol at this site; and

Whereas, the Director alleges that the Respondent discharged Allyl Alcohol into an unnamed tributary to Sandy Creek, Sandy Creek itself, and subsequently into Drowning Bear Creek on April 12 and 13, 2004; and

Whereas, this discharge resulted in a condition of pollution of state waters; and

Whereas, the discharge resulted in a fish kill in the above named waters; and

Whereas, the Georgia Department of Natural Resources incurred costs investigating the incident and suffered loss of natural resources; and

Whereas, the Director and the Facility desire to resolve the matter of alleged violations associated with the Risk Management Program; and

Whereas, this Order shall not constitute a finding or adjudication of violations of any State law, rules or regulations by the Facility, nor does the Facility, by its consent to this Order, admit any liability to any third party or parties;

Now, therefore, the Director hereby Orders and the Facility hereby agrees to the following:

1. Upon execution of this Order the Facility shall pay to the State of Georgia Department of Natural Resources, Environmental Protection Division the sum of twenty thousand dollars (\$20,000.00). This is the penalty for not being in full compliance with 40 CFR Part 68.
2. Should the facility receive further shipments of allyl alcohol, the Facility shall comply with each element of 40 CFR Part 68 [Amended] Subpart A, Subpart B, Subpart C, Subpart D, Subpart E, and Subpart G, **PRIOR** to receiving shipments.
3. After compliance with the requirements in item 2, the Facility shall submit their RMP to EPA, notifying the Director and **PRIOR** to receiving shipments.
4. The facility shall pay to the State of Georgia, Department of Natural Resources, Environmental Protection Division the sum of one thousand dollars (\$1,000) for failure to report in a timely manner; and five thousand dollars (\$5,000) for damages/cost recovery of fish kill.

By agreement of the parties, this Order shall be considered final and effective immediately, and shall not be appealable, and the Facility does hereby waive any hearing on the terms and conditions of same.

It is so Ordered, Consented, and Agreed to this 14 day of SEPTEMBER 2004.



Dr. Carol Couch, Director
Environmental Protection Division
Department of Natural Resources
State of Georgia EPD

MFG Chemical, Inc.

By: Shapiro & Kamin IV
Title: President
Date: 8-20-04

GEORGIA DEPARTMENT OF NATURAL RESOURCES

7 Martin Luther King, Jr., Drive-Room 643, Atlanta, Georgia 30334

Noel Holcomb, Commissioner
Carol A. Couch, Ph.D. Director
Environmental Protection Division
404/656-6905

December 28, 2004

Mr. Charles E Gavin
President
MFG Chemical, Inc.
1200 Brooks Road
Dalton, Georgia 30719

RE: Consent Order No. EPD-RMP-ERT-4402

Dear Mr. Gavin:

The Georgia Environmental Protection Division has received your check for \$26,000 in accordance with Consent Order No. 4402. You will be expected to meet all of the conditions of this Order.

Your cooperation in this matter has been greatly appreciated. Should you need further assistance, please do not hesitate to contact this office at 404-656-6905.

Sincerely,



Carol A. Couch, Ph.D.
Director

CC:cwg
ATTACHMENT

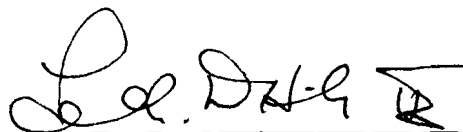
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the original and one copy of the foregoing Motion for Accelerated Decision on the following parties:

Joan Redleaf Durbin
Associate Region Counsel
U.S. Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Patricia Bullock
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

This 16th day of January, 2008



Lee A. DeHihns, III
ALSTON & BIRD, LLP

1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Phone: 404-881-7151
Fax: 404-253-8569