UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
INDIANA MICHIGAN POWER COMPANY,	)	Docket Nos. CERCLA-05-2004-0010
	)	EPCRA-05-2004-0043
	)	MM-05-2004-0003
Respondent.	)	

ORDER ON MOTION FOR ACCELERATED DECISION
ON LIABILITY AND PENALTY

I. Background

This proceeding was initiated on July 27, 2004 by the filing of a Complaint by the United States Environmental Protection Agency, Region V ("Complainant"), pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9609,[1] and Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045,[2] against the Indiana Michigan Power Company ("Respondent").[3] The Complaint alleges that Respondent failed to immediately notify the National Response Center ("NRC"), the State Emergency Response Commission ("SERC"),[4]

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[1]CERCLA is commonly known as "Superfund."

[2]EPCRA was passed into law as Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").

[3]For the purposes of this Order on Accelerated Decision, this Tribunal may refer to CERCLA and EPCRA, collectively, as "the Acts."

[4]Complainant's reference to the "SERC" is somewhat imprecise. Count 2 of the Complaint alleges a "Failure to Immediately Notify the *SERC*" (Complaint at 4 (emphasis added)), citing Sections 304(a) and (b) of EPCRA, 42 U.S.C. §§ 11004(a) and (b). Complaint at ¶¶ 23 and 24. Section 304(b) of EPCRA states, in part: "Notice required under subsection (a) of this section shall be given immediately after the release ... to the *State emergency planning commission* of any State likely to be affected by the release." (Emphases added). Indeed, Section 304(b) speaks to both the "State emergency planning commission" ("SEPC") and the

and the Local Emergency Planning Committee ("LEPC") of a release on November 16, 2002 of approximately 1,033 gallons (or 1,227 pounds[5]) of sodium hypochlorite (NaOCl; Chemical Abstracts Service ("CAS") # 7681-52-9) from its "Donald C. Cook Nuclear Plant" facility, as soon as Respondent had knowledge of the release, in violation of Section 103(a) of CERCLA, 42 U.S.C. 9603(a), and Section 304(b) of EPCRA, 42 U.S.C. 11004.[6] Count 1 of the Complaint alleges the failure to notify the NRC in violation of CERCLA, Count 2 alleges the failure to notify the SERC in violation of EPCRA, and Count 3 alleges the failure to notify the LEPC in violation of EPCRA. In addition, the Complaint alleges a "failure to provide followup notice to the SERC" (Count 4), and a "failure to provide followup notice to the LEPC" (Count 5) in violation of Section 304(c) of EPCRA.

Complainant proposes a penalty of $20,453.55 for each of the three "initial notification" Counts, and $30,271.25 for each of the two "followup notification" Counts, for a total proposed penalty of $121,903.15. Complaint at 9-10. Complainant calculated this proposed penalty in

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"local emergency planning committees" ("LEPCs"), and Count 3 of the Complaint, again citing Section 304(b), alleges a failure to notify the "LEPC." Complaint at 5-6, ¶30. The root of the acronomical confusion between "SERCs" and "SEPCs" appears to be the fact that *Sections 311 and 312* of EPCRA, 42 U.S.C. §§ 11021 and 11022, setting forth "reporting requirements" pertaining to "material safety data sheets" ("MSDSs") and "emergency and hazardous chemical inventory forms" ("inventory forms"), speak to the "local emergency planning committee" ("LEPC"), the *"State emergency response commission" ("SERC")*, and the jurisdictional "fire department." *See, e.g.*, 42 U.S.C. §§ 11021(a)(1) and 11022(a)(1) (emphases added). However, to further blur the terms, the regulations implementing the *emergency* notification requirements under EPCRA, at 40 C.F.R. Part 355, refer to the "State emergency *response* commission." 40 C.F.R. § 355.20 (emphasis added).

The Complaint in the present case does not allege any violation of Sections 311 or 312 of EPCRA. However, for simplicity, and to the extent that there may be a difference between the "State emergency response commission" and the "State emergency planning commission," this Tribunal understands the parties' use of the term "SERC" to reference the "State emergency *planning* commission" mentioned in Section 304(b) of EPCRA, 42 U.S.C. § 11004(b). Further, this Tribunal shall use the terms interchangeably.

[5]As noted *infra*, the parties disagree to some extent as to the proper conversion of "gallons" of sodium hypochlorite to "pounds" of sodium hypochlorite. While Complainant asserts that 1,033 gallons equals 1,227 pounds of sodium hypochlorite (*see, e.g.*, Complaint at ¶ 19), Respondent maintains that 1,033 gallons equals 1,034 pounds of sodium hypochlorite (*see, e.g.*, Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalties ("Respondent's Response") at 4).

[6]Respondent apparently uses sodium hypochlorite in order to "prevent zebra mussel infestation" and control "condenser fouling" in the water circulation systems at the Plant. *See, e.g.*, Respondent's PHE, Exhibit ("Ex.") 1 at ¶ 18. Sodium hypochlorite is used, *inter alia*, as "household bleach." Condensed Chemical Dictionary 802-803 (8th ed. 1971).

accordance with the "Interim Final Enforcement Response Policy for Sections 304, 311, and 312 of the [EPCRA] and Section 103 of the [CERCLA] (dated January 8, 1999)" ("Penalty Policy"). *See, e.g.*, Complaint at 9.

Respondent answered the Complaint, denying the alleged violations and requesting a hearing.[7] In its Answer, Respondent admits that "it is estimated that at approximately 12:10 am, on November 16, 2002, a pipe feeding sodium hypochlorite solution into a metering pump became disconnected from the pump," and that "as of approximately 9:20 a.m., on November 16, 2002, Respondent had knowledge [that] sodium hypochlorite had been escaping from the plant's chlorination system and that leak had been stopped." Amended Answer at ¶¶ 14-15. Respondent further asserts that its "initial notification" was to the NRC at 11:50 a.m. on November 16, 2002. Respondent's Response at 6; Respondent's Prehearing Exchange ("Respondent's PHE") at ¶ 50.

While Respondent admits that some amount of sodium hypochlorite leaked from a pipe at Respondent's facility on November 16, 2002, Respondent advances a number of arguments against the allegations set forth in the Complaint. First, because, according to Respondent, it was necessary to conduct an internal investigation involving complex calculations in order to determine whether a potentially reportable quantity ("RQ") of sodium hypochlorite had leaked from the pipe, and because Respondent was not able to make such a determination until 11:00 a.m. on November 16, 2002, Respondent asserts that its initial notification of the NRC at 11:50 a.m. on the same day was "immediate," as contemplated by the relevant provisions of CERCLA and EPCRA and their implementing regulations. *See, e.g.*, Respondent's Response at 5-6.

In the alternative, Respondent asserts that "[t]he sodium hypochlorite leaving the plant chlorination system was contained entirely within the plant structures, including the plant circulation water intake forebay" (Amended Answer at ¶ 15), and that "[i]n the forebay, sodium hypochlorite mixes with water, which causes it to oxidize and break down into various products that, for regulatory purposes, are identified as 'total residual oxidants' or TRO." Respondent's Response at 2. Respondent argues, therefore, that "the release in question was a federally permitted release ... [which] was exempt from release reporting under EPCRA or CERCLA" (*Id.* at 11), because Respondent's National Pollutant Discharge Elimination System ("NPDES") permit allows Respondent to "release as much as 2,200 pounds of TRO into Lake Michigan per

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[7]Respondent filed an Answer on September 1, 2004, and an Amended Answer on January 27, 2005 (per this Tribunal's Order Granting Respondent's January 14, 2005 Motion to File Amended Answer and attached Amended Answer). The Amended Answer amends the original Answer only in that rather than admitting the allegation in paragraph 19 of the Complaint that "1,033 gallons of sodium hypochlorite ... is 1,227 pounds of sodium hypochlorite," the Amended Answer denies paragraph 19 of the Complaint. For simplicity, this Tribunal shall refer to the "Amended Answer" as the "Answer," unless otherwise indicated.

24-hour period..." *Id.* at 2.[8]

In brief summary, therefore, Respondent's essential arguments are that it was not "sodium hypochlorite" which was released "into the environment"[9] but rather "TRO," and that the amount of "TRO" which was released was authorized by Respondent's NPDES permit such that the release was a "federally authorized release" and therefore exempt from reporting under the relevant provisions of CERCLA and EPCRA. Alternatively, Respondent contends that, even if a "release" "into the environment" of a RQ of sodium hypochlorite occurred, Respondent's notification of the relevant authorities (beginning 50 minutes after Respondent was first able to determine that a potentially reportable release had occurred) was "immediate" under the Acts.

On January 20, 2005, Complainant filed a "Motion for Accelerated Decision on Liability and Penalty" with an attached "Memorandum in Support" thereof, "Proposed Findings of Fact and Conclusions of Law," and "Proposed Penalty Analysis" (collectively, "Complainant's Motion"). Complainant's Motion requests an accelerated decision as to Respondent's liability on all five Counts of the Complaint, on the basis that there are no genuine issues of material fact and that Complainant is entitled to judgment as a matter of law that Respondent is liable for failure to immediately notify the NRC, LEPC and SERC of a release of sodium hypochlorite from its Cook Nuclear Power Plant facility into Lake Michigan on November 16, 2002, and for failure to provide followup notice to the SERC and the LEPC. Further, Complainant's Motion requests an accelerated decision regarding penalty, on the basis that there are no genuine issues of material fact and that Complainant is entitled to judgment as a matter of law that

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[8]In support of this argument, Respondent cites to "NPDES Permit No. M00988, Exhibit 2 of [Respondent's PHE]." Respondent's Response at 2. The NPDES Permit No. M00988 attached as Exhibit 2 to Respondent's PHE is an "Authorization to Discharge" to *groundwater* which purports to authorize Respondent to discharge 2,400,000 gallons per day (876,000,000 gallons per year) of "process wastewater" and 60,000 gallons per day (21,900,000 gallons per year) of "sanitary wastewater" "via two seepage lagoons..." Respondent's PHE, Ex. 2 at 1-2. This Permit does not appear to speak to either "sodium hypochlorite" or "TRO," or, for that matter, discharge *at all* directly into Lake Michigan. However, Respondent's NPDES Permit No. MI0005827, included as Attachment 15 to *Complainant's* Rebuttal Prehearing Exchange ("CRPHE"), does appear to speak to the discharge of "TRO" into Lake Michigan. *See, e.g.*, CRPHE, Att. 15 at 3.

[9]It does not appear that Complainant contends that the "forebay" at Respondent's facility constitutes "the environment" under the applicable statutes and regulations. Rather, Complainant argues that "if the sodium hypochlorite 'was released from the chlorination' and went into water in the 'intake forebay,' and water in the forebay was pumped 'into Lake Michigan,' ... it would seem obvious that the sodium hypochlorite, mixed with water, was discharged into Lake Michigan..." Complainant's Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision ("Complainant's Reply") at 4 (citations omitted).

Complainant's total proposed penalty of $121,903.15 is the appropriate penalty to be imposed in this case because "the penalty amount for each violation is supported by an analysis of all relevant and probative evidence, in consideration of the applicable statutory criteria, as interpreted in the Administrator's adopted penalty policies and the calculation methodologies of those policies." Complainant's Motion at 2.

On February 8, 2005, Respondent filed its "Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalties" ("Respondent's Response"). Respondent urges denial of Complainant's Motion on grounds that genuine issues of material fact do exist regarding both liability and penalty, thereby precluding accelerated decision. In particular, regarding liability, Respondent asserts that genuine issues of material fact in dispute include the proper mathematical conversion of sodium hypochlorite from "gallons" into "pounds;"[10] whether "sodium hypochlorite" or "TRO" was released "into the environment" (and, concomitantly, whether the release of TRO was a "federally permitted release" under Respondent's NPDES Permit No. MI0005827);[11] the time at which Respondent had "knowledge" (actual or constructive) that a potentially reportable quantity of sodium hypochlorite had been released into Lake Michigan;[12] and whether Respondent reported the release "immediately" after it had "knowledge" of the release.[13] Regarding penalty, Respondent maintains that genuine issues of material fact exist in that, under the particular factual circumstances of this case, Complainant's proposed penalty is "duplicative and unreasonably high." Respondent's Response at 9. Specifically, Respondent disputes Complainant's characterization and/or analysis of the "nature," "extent," "gravity," "circumstances," "compliance history," "economic benefit," and "culpability," aspects of Complainant's proposed penalty calculation (*Id.* at 9-13), and argues that this Tribunal "is not required to follow the penalty policy that Complainant used in its Proposed Penalty Analysis..." *Id.* at 13 (citations omitted).

Complainant filed its Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision ("Complainant's Reply") on February 18, 2005.

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[10]Specifically, Respondent disputes Complainant's Proposed Finding of Fact # 15. Respondent's Response at 4.

[11]Specifically, Respondent disputes Complainant's Proposed Findings of Fact # 6 and # 14. Respondent's Response at 2-4.

[12]Specifically, Respondent disputes Complainant's Proposed Finding of Fact # 9. Respondent's Response at 3-7.

[13]Specifically, Respondent contends that the term "immediate" "should be determined in light of the circumstances of each case," and that an initial report to the NRC fifty (50) minutes after Respondent had "knowledge" of a potential release of a reportable quantity of sodium hypochlorite, under the factual circumstances of the present case, was "immediate." Respondent's Response at 7-8.

Therein, Complainant's main argument regarding liability is that a finding of liability on all five Counts is warranted based upon undisputed facts, and that Respondent has failed to identify evidence to put at issue any fact cited by Complainant to support liability. Regarding the appropriate penalty amount to be imposed should liability be established, Complainant's primary argument is that Complainant's proposed penalty "manifest[s] the application of 'agency policies'" (Complainant's Reply at 29), and that "as a penalty determination in a final order of the Administrator, the penalty amounts proposed would meet the standards of review of Section 706 of the [Administrative Procedure Act]..." *Id.* (citations omitted). Complainant suggests, therefore, that any deviation from Complainant's proposed penalty or the Penalty Policy by this Tribunal would amount to "'impermissible whim, improper influence, or misplaced zeal.'" *Id.* (*quoting* Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 852 (D.C. Cir. 1970)).[14]

II. Standard for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g.*, *In re BWX Technologies, Inc.,* 9 E.A.D. 61, 74-75 (EAB 2000); *In re Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See In re CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).[15]

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[14]As a further procedural matter, by Order dated February 23, 2005, this Tribunal granted Complainant's "Motion to Suspend in Part Order Scheduling Hearing" ("Suspension Order"). Therein, this Tribunal suspended a portion of the Order Scheduling Hearing entered January 4, 2005. Specifically, the Suspension Order stated that "the deadlines for the parties submitting their Joint Set of Stipulated Facts, Exhibits, and Testimony and Pre-Hearing Motions are hereby vacated to be reset, if necessary, upon issuance of an Order on Complainant' Motion for Accelerated Decision." Suspension Order at 1. This Order on Complainant's Motion for Accelerated Decision hereby **RESETS THE DEADLINES**, as described *infra* in the "ORDER" section of this Order on Accelerated Decision, which had been vacated by the February 23, 2005 Suspension Order.

[15]*See also, In re Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine

Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law."

The United States Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). In considering such a motion, the judge must construe the evidentiary material in the light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985); Adickes, 398 U.S. at 158-59; Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. Rogers Corp. v. EPA, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

A factual dispute is "material" for summary judgment purposes where, under the governing law, it might affect the outcome of the proceeding (Anderson, 477 U.S. at 248; Adickes, 398 U.S. at 158-159), or where the factual issue "needs to be resolved before the related legal issues can be decided." Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989). The substantive law involved in the proceeding identifies which facts are material. Anderson, 477 U.S. at 248; Adickes, 398 U.S. at 158-159

The Supreme Court has found that a factual dispute is "genuine" if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248. That is, a dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. Anderson, 477 U.S. at 252.[16]

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, FRCP 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under FRCP 56(e), "[w]hen a motion for

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analogous federal procedural rules and federal court decisions applying those rules. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n.10 (EAB, Feb. 24, 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same).").

[16]As noted *infra*, the evidentiary standard applicable in the present proceeding is a "preponderance of the evidence." 40 C.F.R. § 22.24.

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the non-moving party must present "affirmative evidence," and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, 477 U.S. at 256 (*quoting* First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as FRCP 56(e) requires the opposing party to go beyond the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 at 322 (1986); Adickes, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist. *In re Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, Sept. 9, 2002). "Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact. Jones v. Chieffo, 833 F.Supp. 498, 503 (E.D. Pa. 1993). A party responding to a motion for accelerated decision must either reference some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing, or produce such evidence. *In re Strong Steel*, 2002 EPA ALJ LEXIS 57 at *22-*23; *see also, In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, Nov. 28, 1994); *In re Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999); *In re Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim, or that the opposing party produce evidence in a form that would be admissible at trial, in order to avoid summary judgment. Celotex, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits, provided that other evidence referenced in FRCP 56(c) adequately supports its position.[17] Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, 398 U.S. at 156.

The evidentiary standard of proof in the matter presently before this Tribunal, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, this Tribunal, as the judge and finder of fact, must consider whether it could reasonably find for the non-moving party under the "preponderance of the evidence" standard. In so doing, this Tribunal's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for an evidentiary hearing. Anderson, 477 U.S. at 249.

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[17]As noted *supra*, FRCP 56(c) references "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any ..."

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by a preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable fact finder could find in that party's favor by a preponderance of the evidence.

Finally, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See* Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979).

III. Statutory and Regulatory Provisions

A. CERCLA

Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), provides in pertinent part:

> Any person in charge of a ... facility shall, as soon as he has *knowledge* of any *release* ... of a hazardous substance from such ... facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, *immediately* notify the National Response Center ... of such release.

(Emphasis added). The regulations promulgated under Section 102 of CERCLA elaborate:

> Any person in charge of a ... facility shall, as soon as he or she has knowledge of any release (*other than a federally permitted release* ...) of a hazardous substance from such ... facility in a quantity equal to or exceeding the [RQ] ... in any 24-hour period, immediately notify the [NRC].

40 C.F.R. § 302.6(a) (emphasis added).

The term "release" appearing in Section 103(a) of CERCLA is defined by Section 101(22) of CERCLA to mean: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment* ..." (Exceptions omitted) (emphasis added). *See also*, 40 C.F.R. § 302.3. In turn, the term "environment" appearing in Section 101(22) of CERCLA is defined by Section 101(8) of CERCLA to mean:

> (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevenson Fishery Conservation and Management Act ... and (B) any other surface water, ground water, drinking

water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

CERCLA § 101(8), 42 U.S.C. § 9601(8). *See also*, 40 C.F.R. § 302.3.

Sodium hypochlorite is a "hazardous substance" under Section 102 of CERCLA. 40 C.F.R. §§ 302.4. The RQ of sodium hypochlorite is 100 pounds. *Id.* Therefore, any "release" of 100 pounds or more of sodium hypochlorite from a facility "into the environment" must be "immediately" reported to the NRC as soon as the person in charge of the facility has "knowledge" of any such release, pursuant to Section 103(a) of CECRLA.

B. EPCRA

Section 304 of EPCRA, 42 U.S.C. § 1104, requires the owner or operator of a facility to immediately provide notice to the LEPC and SERC of any release which requires notification under Section 103(a) of CERCLA. Specifically, Section 304(a)(3) of EPCRA provides that:

> If a *release* of a substance which is *not on the list referred to in section 11002(a)* of this title [listing "extremely hazardous substances"] occurs at a facility at which a hazardous chemical is produced, used, or stored, and such release *requires notification under section 103(a) of CERCLA* ... the owner or operator shall provide notice as follows:
> (A) If the substance is one for which a *reportable quantity has been established under section 102(a) of CERCLA* ... the owner or operator shall provide notice as described in subsection (b) of this section.

(Emphasis added).[18] *See also*, 40 C.F.R. § 355.40(a). Section 103(b)(1) of EPCRA, in turn,

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[18]Regarding Counts 2 and 3 of the Complaint, Complainant cites "Section 304(a) of EPCRA" but quotes Section 304(a)*(1)* rather than Section 304(a)*(3)*. Complaint at ¶¶ 23 and 29. Section 304(a)(1) states: "If a release of an *extremely hazardous substance referred to in section 11002(a)* of this title occurs ..., and such release requires a notification under section 103(a) of [CERCLA] ..., the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section." (Emphases added). (Complainant misquotes Section 304(a)(1) as referring to "section 11102(a) of this title," while Section 304(a)(1) actually refers to "section 11002(a) of this title."). Section 302(a) of EPCRA, 42 U.S.C. § 1102(a), provides for a list of "*extremely hazardous* substances." (Emphases added). That list of "extremely hazardous substances" is set forth at 40 C.F.R. § 355.50, Appendices A and B. *See* 52 Fed.Reg. 13378 (Apr. 22, 1987). Thus, while a release of a RQ of any "*hazardous* substance" requiring notification of the NRC under Section 103(a) of CERCLA (such list appearing at 40 C.F.R. § 302.4) also requires notification of the LEPC and the SERC as described by Section 304(b) of EPCRA under Section 304(a)*(3)(A)* of EPCRA (even if the substance is not an "extremely" hazardous substance), any release of a RQ of an "*extremely* hazardous substance" (such list

states that:

> Notice required under subsection (a) of this section shall be given *immediately* after the *release* by the owner or operator of a facility ... to the community emergency coordinator for the [LEPC] ... and to the [SERC[[19]]] ...

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appearing at 40 C.F.R. § 355.50, Appendices A and B) requires notification of the LEPC and the SERC as described by Section 304(b) of EPCRA under Section 304(a)*(1)* of EPCRA. As the EPA has explained: "Section 304 [of EPCRA] ... establishes reporting requirements similar to CERCLA section 103 release reporting. However, instead of requiring notification only to the [NRC] for CERCLA substances when certain quantities of these chemicals are released, facilities must under section 304 [of EPCRA] also notify State and local emergency response officials of *these ['CERCLA hazardous substance'] releases, **and** of releases of extremely hazardous substances which have not been designated as CERCLA hazardous substances*. Note that the reporting requirements under section 304 are in addition to, not in replacement of, notification to the [NRC] under CERCLA section 103." 52 Fed.Reg. 13378, 13393 (Apr. 22, 1987) (emphases added). *See also*, 40 C.F.R. § 355.40, Note to Paragraph (a) ("Releases of CERCLA hazardous substances are subject to the release reporting requirements of CERCLA section 103, codified at 40 CFR part 302, in addition to the requirements of this part.").

"Sodium hypochlorite" does not appear on the list of "EPCRA extremely hazardous substances" at 40 C.F.R. § 355.50, Appendices A and B, but it does appear on the list of "CERCLA hazardous substances" at 40 C.F.R. § 302.4. Therefore, a release of a RQ of sodium hypochlorite requires immediate notification of the LEPC and the SERC under Section 304(a)(3)(A) of EPCRA, but not under Section 304(a)(1) of EPCRA. However, for the purposes of the present case, the distinction is without a difference. Both Section 304(a)(1) and Section 304(a)(3)(A) require the same reporting (*i.e.*, that of the LEPC and the SERC as described by Section 304(b)). That is, since a release of a RQ of sodium hypochlorite requires "hazardous substance notification" of the NRC under Section 103(a) of CERCLA, such a release would require the same notification of the LEPC and the SERC as described by Section 304(b) of EPCRA whether or not sodium hypochlorite was an "EPCRA extremely hazardous substance." *See also*, 40 C.F.R. § 355.40(a)(1) ("The requirements of this section apply to any facility ... at which there is release of a [RQ] of any *extremely hazardous substance **or** CERCLA hazardous substance*."). (Emphases added).

Therefore, while Complainant's quotation of EPCRA Section 304(a)(1) (rather than EPCRA Section 304(a)(3)) at paragraph 23 of the Complaint regarding Count 2 (and referenced in paragraph 29 of the Complaint regarding Count 3) is technically incorrect, Complainant does correctly cite to "Section 304(a) of EPCRA." Because the distinction has no practical legal effect in the present case (*i.e.*, both Sections require the same "notification" as described in Section 304(b) of EPCRA), this Tribunal understands Counts 2 and 3 of the Complaint to allege violations of EPCRA Section 304(a)(3).

[19] *See* note 4, *supra*.

(Emphasis added). *See also*, 40 C.F.R. § 355.40(b).

The term "release" appearing in Section 304(a) of EPCRA is defined by Section 329(8) of EPCRA to mean: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment* ... of any hazardous chemical, extremely hazardous substance, or toxic chemical." (Emphasis added). *See also*, 40 C.F.R. § 355.20.[20] In turn, the term "environment" appearing in Section 329(8) of EPCRA is defined by Section 329(2) of EPCRA to "include[] water, air, and land and the interrelationship which exists among and between water, air, and land and all living things." *See also*, 40 C.F.R. §§ 355.20 and 370.2.

Sodium hypochlorite is not on the list of "extremely hazardous substances" referred to in Section 302(a) of EPCRA, 42 U.S.C. § 11002(a), but a reportable quantity for sodium hypochlorite has been established under section 102(a) of CERCLA, and such a release requires notification under section 103(a) of CERCLA, as described above. The RQ for sodium hypochlorite is 100 pounds. 40 C.F.R. § 302.4. Therefore, any "release" of 100 pounds or more of sodium hypochlorite from a facility "into the environment" must be "immediately" reported to the LEPC and the SERC as soon as the person in charge of the facility has "knowledge" of any such release, pursuant to Section 304(a) of EPCRA.

IV. Undisputed Facts

The uncontested facts relevant to the issues raised in Complainant's Motion are as follow.

Respondent is a corporation incorporated in the State of Indiana and doing business in the State of Michigan. Complaint at ¶¶ 3 and 4; Answer at ¶¶ 3 and 4. Respondent owns and operates a nuclear power plant located in Bridgman, Michigan. *Id.* at ¶ 6.[21] Respondent used and stored sodium hypochlorite, CAS No. 7681-52-9, during the time relevant to the Complaint. *Id.* at ¶ 10; Respondent's PHE, Ex. 1, ¶ 18. Sodium hypochlorite is a "hazardous substance" under Section 102 of CERCLA with a "reportable quantity" of 100 pounds. CERCLA § 101(14), 42 U.S.C. § 9601(14); 40 C.F.R. §§ 302.3 and 302.4.

At approximately 12:10 a.m. on November 16, 2002, sodium hypochlorite began leaking from a pipe at Respondent's facility. Complaint at ¶ 14; Answer at ¶ 14. As of 9:20 a.m. on

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[20]The definition of "release" in the regulations implementing the emergency notification requirements under EPCRA, at 40 C.F.R. Part 355, is identical to the statutory definition except that the term "CERCLA hazardous substance" replaces the term "toxic chemical." 40 C.F.R. § 355.20.

[21]While Complainant refers to "Bridgeman, Michigan," Respondent's "Cook Nuclear Power Plant" here at issue is located in "Bridgman" (without an "e"), Michigan.

November 16, 2002, Respondent had actual knowledge that some amount of sodium hypochlorite had leaked from the pipe, and Respondent stopped the leak at that time. *Id.* at ¶¶ 15 and 16. The sodium hypochlorite which leaked from the pipe from approximately 12:10 a.m. until 9:20 a.m. on November 16, 2002 was released from the "plant chlorination system" into the "plant circulating water intake forebay," where it mixed with some amount of water. Answer at ¶¶ 14 and 15. At least 1,033 gallons of "sodium hypochlorite solution" was leaked from the pipe on November 16, 2002. Respondent's PHE, Ex. 1 at ¶ 21. The resultant liquid material from the "forebay" was discharged into Lake Michigan. Answer at ¶ 15; Respondent's PHE, Ex. 1 at ¶ 18.

Respondent had *actual* knowledge that a *potentially* reportable quantity of sodium hypochlorite had been released no *later* than 11:50 a.m. on November 16, 2002. Respondent's Response at 5-6; Respondent's PHE, Ex. 1 at ¶ 48. Respondent first reported the potentially reportable release[22] to the NRC at 11:50 a.m. on November 16, 2002. Respondent's Response at 6; Respondent's PHE, Ex. 1 at ¶ 50; Complaint at ¶ 20; Answer at ¶ 20. Respondent first reported the release to the Michigan State Emergency Response Commission at approximately 12:05 p.m. on November 16, 2002. Respondent's PHE, Ex. 1 at ¶ 51; Complaint at ¶ 27; Answer at ¶ 27. Respondent first reported the release to the Berrien County Local Emergency Planning Committee at approximately 2:30 p.m. on November 16, 2002. Respondent's PHE, Ex. 1 at ¶ 52; Complaint at ¶ 32; Answer at ¶ 32.

V. Discussion and Analysis

A. Arguments of the Parties

As discussed in greater detail in the "Background" section of this Order, *supra*, Complainant's essential argument regarding liability is that the undisputed facts, as recited above, demonstrate that there is no genuine issue of material fact that Respondent released a RQ of sodium hypochlorite into Lake Michigan, and that Respondent failed to "immediately" provide notification and/or followup notification of such release as required by the cited provisions of CERCLA and EPCRA. More specifically, Complainant contends that: 1) the material released into Lake Michigan was a RQ of "sodium hypochlorite;" 2) Respondent had actual or constructive "knowledge" that a RQ of sodium hypochlorite had been released "into the environment" as of 9:20 a.m. on November 16, 2002; 3) Respondent's initial notification of such release occurred no earlier than 11:50 a.m. on November 16, 2002; 4) even if Respondent did not have actual or constructive "knowledge" of the release as of 9:20 a.m., Respondent

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[22]As discussed *infra*, a factual dispute exists regarding whether the material which was discharged into Lake Michigan was "sodium hypochlorite" or "TRO" (some amount of which may be permitted by Respondent's NPDES Permit). Therefore, a factual issue exists regarding whether the discharge into Lake Michigan was *actually* a RQ of sodium hypochlorite. However, for the purposes of this Order on Accelerated Decision, this Tribunal shall hereinafter refer to the "*actual or potentially* reportable release" as "the release."

admittedly had actual knowledge of a release of a potentially RQ of sodium hypochlorite as of 11:00 a.m. on November 16, 2002; and 5) a delay of fifty (50) minutes (from 11:00 a.m. to 11:50 a.m.) between acquiring "knowledge" of a potentially RQ release and "notification" is not "immediate" under the Acts. Further, Complainant emphatically argues that Respondent has failed to identify affirmative evidence to rebut Complainant's Motion. Regarding the proposed penalty, Complainant's essential argument is that no genuine issues of material fact exist because the proposed penalty was calculated according to the relevant Penalty Policy.

On the other hand, Respondent's essential arguments are that it was not "sodium hypochlorite" which was released "into the environment," but rather "TRO," and the amount of "TRO" which was released was authorized by Respondent's NPDES permit, such that the release was a "federally authorized release" and therefore exempt from reporting under the relevant provisions of CERCLA and EPCRA. Alternatively, Respondent contends that, even if a "release" "into the environment" of a RQ of sodium hypochlorite occurred, Respondent's notification of the relevant authorities (beginning 50 minutes after Respondent was first able to determine that a potentially reportable release had occurred) was "immediate" under the Acts. More specifically, regarding liability, Respondent asserts that existent genuine issues of material fact include the proper mathematical conversion of sodium hypochlorite from "gallons" into "pounds;" whether "sodium hypochlorite" or "TRO" was released "into the environment" (and, concomitantly, whether the release of TRO was a "federally permitted release" under Respondent's NPDES Permit No. MI0005827); the time at which Respondent had "knowledge" (actual or constructive) that a potentially reportable quantity of sodium hypochlorite had been released into Lake Michigan; and whether Respondent reported the release "immediately" after it had "knowledge" of the release (*i.e.*, the meaning of the term "immediate" under the Acts, as applied to the facts of the present case, where Respondent argues that it was necessary to complete complex mathematical calculations in order to determine whether a potentially RQ of sodium hypochlorite had been released into Lake Michigan from the "forebay."). Regarding penalty, Respondent maintains that genuine issues of material fact exist in that, under the particular factual circumstances of this case, Complainant's proposed penalty is "duplicative and unreasonably high," and that this Tribunal is not bound by the "Penalty Policy."

B. Genuine Issues of Material Fact as to Liability

In light of all of the foregoing, this Tribunal finds, as discussed below, that genuine issues of material fact exist regarding Respondent's alleged liability, thereby precluding accelerated decision in the present case.

1. Whether a "release" occurred

A "release" occurred if, *inter alia*, a "hazardous substance," other than a "federally permitted release," entered "into the environment." In the present case, the nature of the substance which was discharged into Lake Michigan (and therefore whether it was a "federally permitted release") is a genuine issue of material fact. Further, although Complainant does not appear to argue that the Cook Power Plant's "forebay" may have constituted "the environment,"

this Tribunal is unable to determine from the record presently before it whether the sodium hypochlorite which leaked into the "forebay" (as opposed to the material which was discharged into Lake Michigan) entered "into the environment."

a. "Sodium Hypochlorite" versus "Total Residual Oxidants"

Complainant's Proposed Finding of Fact ("PFOF") # 6 states, in part pertinent to the present discussion, that "*sodium hypochlorite* was released out of Respondent's its [sic] plant chlorination system into a forebay, where *it* was mixed with water and *discharged* through its NPDES permitted outfall ... *into Lake Michigan*." Complainant's Proposed Findings of Fact and Conclusions of Law ("Complainant's Proposed FOF & COL") at ¶ 6 (emphasis added). In support of PFOF # 6, Complainant cites Respondent's PHE, Ex. 1 at ¶¶ 18 and 33 (Complainant's Motion at 9),[23] Respondent's PHE, Ex. 3 at 1 (Complainant's Reply at 4),[24] and Respondent's PHE, Ex. 4 at 1 (Complainant's Reply at 5).[25] Further, Complainant's PFOF # 14 states that "Respondent determined that 1,033 gallons of sodium hypochlorite was *released from its power plant* between approximately 12:10am and 9:20am on November 16, 2002." Complainant's Proposed FOF & COL at ¶ 14 (emphasis added). In support of PFOF # 14, Complainant cites Respondent's PHE, Ex. 1 at ¶ 21 (Complainant's Motion at 10) and ¶ 22 (Complainant's Reply at 11), along with a reiteration of Complainant's citations to the portions of Respondent's PHE previously cited in support of Complainant's PFOF # 6, above.

Respondent's PHE, Ex. 1 at ¶ 18 states in pertinent part:

> The release of sodium hypochlorite solution from the plant on November 16, 2002 was from the plant chlorination system...
>
> Sodium hypochlorite solution flowed out of the disconnected manifold pipe, through the floor grating ..., into the containment sump in the floor of the chlorination building, out of the containment sump through the drain line and drain valve, which was open at the time, and onto the painted concrete screenhouse floor... The solution then ran across the screenhouse floor and through the floor grating into the Unit One circulating water intake forebay.
>
> The water in the intake forebay along with the released sodium hypochlorite solution was pumped through the Unit One condensers and back out

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[23]Exhibit 1 to Respondent's PHE is Respondent's January 30, 2003 Response to Complainant's CERCLA § 104(e) Request for Information ("Respondent's CERCLA § 104(e) Response").

[24]Exhibit 3 to Respondent's PHE is a "spill report letter" from Respondent to the Michigan Department of Environmental Quality ("MDEQ") dated November 26, 2002.

[25]Exhibit 4 to Respondent's PHE is a December 9, 2004 "report" written by Alan E. Gaulke, "Consulting Environmental Specialist," entitled "Analysis of the Implications to Biota of the Release of 1,034 Pounds of NaOCl from Donald C. Cook Nuclear Plant."

> into the lake through ... NPDES Outfall 001.

Respondent's PHE, Ex. 1 at ¶ 18. Respondent's PHE, Ex. 1 at ¶ 21, states in pertinent part: "Approximately 1,033 gallons of sodium hypochlorite solution was released during the release." *Id.* at ¶ 21. Respondent's PHE, Ex. 1 at ¶ 22, states in pertinent part: "The release continued into a grating where it entered the plant Unit One intake forebay area, transferred through the Unit One condensers and discharged to the surface water of Lake Michigan from ... (NPDES Outfall 001)." *Id.* at ¶ 22. Respondent's PHE, Ex. 1 at ¶ 33 states in pertinent part:

> The released sodium hypochlorite solution ultimately reached Lake Michigan... The sodium hypochlorite solution was released from the chlorination through the containment sump drain and from there it ran across the screen house floor to the Unit One intake forebay. The water in the intake forebay is pumped through the plants [sic] main cooling system and out into Lake Michigan (NPDES Outfall 001).

Id. at ¶ 33. Exhibit 33 of Respondent's PHE states in pertinent part:

> A leak of approximately two gallons per minute of ~12% sodium hypochlorite discharged into the forebay, where it was diluted and carried through the circulating water system and finally discharged into Lake Michigan through Outfall 001 for approximately 9 hours.

Id. at Ex. 3 at 1. Exhibit 4 of Respondent's PHE states in pertinent part: "The release of sodium hypochlorite from Donald C. Cook Nuclear Plant to Lake Michigan on November 16, 2002, was estimated to be 1,034 pounds of NaOCl based on the liquid levels in the NaOCl storage tank." *Id.* at Ex. 4 at 1.

Complainant states that:

> Complainant does not dispute that there was substantial dilution of the sodium hypochlorite with water in the forebay... [n]or does Complainant dispute that the total residual oxidant [("TRO")] is the parameter by which Respondent's concentration of chlorine in its discharged wastewater is measured... [n]or does Complainant dispute the fact that Respondent's NPDES permit sets chlorine concentration limits in Respondent's wastewater in terms of [TRO]...

Complainant's Reply at 7 (footnote omitted). However, based on the foregoing evidence, Complainant concludes that:

> [I]f the sodium hypochlorite "was released from the chlorination" and went into water in the "intake forebay," and water in the forebay was pumped "into Lake Michigan," ... *it would seem obvious* that the sodium hypochlorite, mixed with water, was discharged into Lake Michigan...

Id. at 4 (emphasis added) (citations omitted).

Respondent, however, argues that Complainant's "obvious" conclusion is incorrect because sodium hypochlorite is chemically altered (or "disassociated"[26]) upon contact with water, such that, while "sodium hypochlorite" was released into the "forebay," something other than "sodium hypochlorite" (*i.e.*, "the total residual oxidants of sodium hypochlorite"[27]) was discharged into Lake Michigan. Further, Respondent contends that the "TRO" which was released into Lake Michigan was a "federally permitted release" pursuant to Respondent's NPDES Permit No. MI0005827 (CRPHE, Att. 15[28]). More specifically, Respondent asserts:

> While sodium hypochlorite was released from a tank at Respondent's D. C. Cook Plant facility, that sodium hypochlorite was not "released into the environment." Rather, it was released into the plant circulating water intake forebay... In the forebay, sodium hypochlorite mixes with water, which causes it to oxidize and break down into various products that, for regulatory purposes, are identified as "total residual oxidants" or TRO.

Respondent's Response at 2 (citations omitted).[29] Respondent further asserts that "Respondent is permitted to release as much as 2,200 pounds of TRO into Lake Michigan per 24-hour period pursuant to [Respondent's NPDES Permit]," (Respondent's Response at 2 (citations omitted)), and that, therefore, "the release in question was a federally permitted release and as such, was exempt from release reporting under EPCRA or CERCLA." *Id.* at 11.

In support of Respondent's contention that "sodium hypochlorite" was released only into the "forebay" and not into Lake Michigan, Respondent cites Respondent's PHE, Ex. 1 at ¶¶ 22, 23, and 32-34. *See* Respondent's Response at 2; Respondent's PHE at ¶ B. A recitation of these paragraphs, here, is not necessary. Suffice to say that the cited paragraphs, taken together, describe the same events as did the portions of Respondent's PHE, discussed above, cited by Complainant in support of the proposition that "sodium hypochlorite" *was* released into Lake Michigan and *not* merely into the "forebay."

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[26]*See, e.g.*, Respondent's PHE at ¶ G.

[27]Respondent's PHE at ¶ G.

[28]*See* note 8, *supra*.

[29]*See also*, Respondent's Response at 5, n.2 ("Respondent maintains that what was released into the environment was TRO, *not sodium hypochlorite*." (Emphases added)). *See also*, Respondent's PHE at ¶ G ("[W]hile sodium hypochlorite was ... released into the forebay as a result of a disconnected ... pipe, ... the substance released into Lake Michigan was not sodium hypochlorite ***but was the total residual oxidants of sodium hypochlorite***... [T]he ... sodium hypochlorite released from the tank ... would have disassociated into TRO prior to being released into Lake Michigan." (Underlining in original) (italics and bold type added)).

In support of Respondent's contention that "TRO," and not "sodium hypochlorite," was released into Lake Michigan (*i.e.*, that "sodium hypochlorite" "disassociates" into "TRO" which is chemically distinct from "sodium hypochlorite"), Respondent states that "Respondent's witness, Chris Hawk, can testify to this fact." Respondent's Response at 2. In addition, Respondent cites its NPDES Permit for the proposition that "the [MDEQ] ... recognizes that sodium hypochlorite breaks down to TRO when mixed with water ..." *Id.*[30]

Complainant's essential arguments regarding "accelerated decision" on the critical issue of release of sodium hypochlorite into Lake Michigan are, first, that Respondent has admitted that sodium hypochlorite was released into Lake Michigan such that Complainant has met its burden under the evidentiary standard, and, second, that Respondent has failed to carry its burden to identify specific evidence in rebuttal. This Tribunal finds that the portions of Respondent's PHE identified by Complainant as "admissions" may be fairly construed, *in the light most favorable to the Respondent* and in the context of the current record as a whole, to be statements to the effect that "sodium hypochlorite" was released into the "*forebay*," and that the "sodium hypochlorite mixed with water solution" (*whatever* its specific chemical constitution) was released into Lake Michigan. As such, since this Tribunal is unable to determine from the current record the crucial chemical constitution of the material released into Lake Michigan, this Tribunal finds that Respondent's statements, cited by Complainant, do not amount to "admissions" that "sodium hypochlorite" was released into Lake Michigan. Similarly, the events described by Respondent's statements – as so far illuminated by the current record – do not demonstrate by a preponderance of the evidence that the water-mixture solution which was released into Lake Michigan either constituted or contained a reportable quantity of "sodium hypochlorite." Therefore, Complainant has not met its initial burden of demonstrating by a preponderance of the evidence the absence of a genuine issue of material fact as to liability (*i.e.*, the precise chemical nature of the material which was released into Lake Michigan). Simply put, this Tribunal is unable to determine the accuracy, based on the present record, of Complainant's "common sense" hypothesis that, since sodium hypochlorite mixed with water in the forebay, and since the resultant mixture was released into Lake Michigan, "it would seem obvious that the sodium hypochlorite, mixed with water, was discharged into Lake Michigan..." Complainant's Reply at 4.[31] While Complainant's hypothesis may well ultimately prove to be correct, the truth

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[30]While this Tribunal recognizes that Respondent's NPDES Permit No. MI0005827 authorizes the discharge of an amount of "TRO" "During Chlorination" (*See, e.g.*, CRPHE, Att. 15 at 3-4), it remains unclear in precisely what sense Respondent contends that the NPDES Permit evinces a "recognition" that "sodium hypochlorite" "breaks down" into something other than "sodium hypochlorite."

[31]For example, this Tribunal observes that the Condensed Chemical Dictionary states that sodium hypochlorite is "*[s]oluble* in *cold* water; *decomposed* by *hot* water." Condensed Chemical Dictionary 802 (8th ed. 1971) (emphasis added). The present record neither indicates the temperature of the water in the forebay nor elucidates the distinction between "solution" and "decomposition." In any event, this Tribunal does not find the precise chemical nature of the

of the conclusion has not yet been demonstrated by a preponderance of the evidence and accelerated decision is therefore inappropriate.

Because Complainant has not met its initial evidentiary burden in this regard, no defense is required of Respondent. Adickes, 398 U.S. at 156.

Further, under the federal rules pertaining to summary judgment, applicable by analogy to the present Motion for Accelerated Decision, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See* Roberts v. Browning, 610 F.2d at 536. As explained above, this Tribunal does *not* believe that accelerated decision in this proceeding is "technically proper" because Complainant has failed to demonstrate the absence of any genuine issue of material fact. However, even if accelerated decision were "technically proper," sound judicial policy requires that the highly technical, mechanical, mathematical, and scientific facts at issue in this case be fully developed at hearing. In particular, Respondent states that "Alan Gaulke ... will discuss ... [the] rapid *breakdown [of sodium hypochlorite] upon contact with water* in the forebay prior to discharge through NPDES permitted outfalls..." (Respondent's PHE at 1 (emphasis added)), and that "Chris Hawk ... will explain *calculations* used to determine the quantity of sodium hypochlorite *breakdown products* discharged through the NPDES permitted outfalls ..." *Id.* (emphasis added). In sum, the arguments of the parties regarding whether a "release" occurred, including whether "sodium hypochlorite" or "TRO" was released into Lake Michigan and whether "TRO" is nevertheless a reportable "hazardous substance," describe factual issues which can only be properly measured against the backdrop of an evidentiary hearing.

b. "Federally Permitted Release"

A further issue of material fact is whether Respondent's NPDES Permit No. MI0005827 (CRPHE, Att. 15[32]) authorizes the discharge of the material (be it "TRO" or "sodium hypochlorite") which was released into Lake Michigan (and in the amount in which it was released) on November 16, 2002. In alleging a "release" of a RQ of a hazardous substance under the Acts, Complainant must implicitly allege that the release was *not* a "federally permitted release," as the regulations promulgated under Section 102 of CERCLA require immediate notification of a release of a RQ of a hazardous substance "other than a federally permitted release." 40 C.F.R. § 302.6(a). A "federally permitted release" is defined by Section 101(10) of CERCLA, in relevant part, to mean "continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33 [*i.e.*, an NPDES Permit], which are caused by events occurring within the scope of relevant operating or treating systems ..." 42 U.S.C. § 9601(10)(C).

"sodium hypochlorite solution" which was released into Lake Michigan to be "obvious."

[32]*See* note 8, *supra*.

In support of Respondent's contention that the amount of TRO released was authorized under the NPDES Permit,[33] Respondent cites Respondent's PHE at ¶ G, and Respondent's PHE, Ex. 6. Respondent's Response at 2. Exhibit 6 to Respondent's PHE is a calculation done by Chris Hawk, purporting to demonstrate that the NPDES Permit, which appears to authorize the continuous discharge during chlorination (without Bromine use) of 38 µg/l of TRO per day (CRPHE, Ex. 15 at 3), in fact authorizes the discharge of 2,200 pounds of "sodium hypochlorite" per day, which also equals 18,400 pounds of "12% sodium hypochlorite solution" per day. Paragraph G of Respondent's PHE states, in part:

> The NPDES permit authorizes releases of up to <u>2,200 pounds</u> of TRO per day: <u>998 pounds</u> *of TRO per day from Outfall 001* and 1,202 pounds of TRO per day from Outfall 002. See calculations attached hereto as Exhibit 6. Consequently, *the release was less than the permitted limits* on a 24-hour basis ...

Respondent's PHE at ¶ G (emphases added).[34]

On the other hand, Complainant contends that "the concentration of chlorine in [Respondent's] wastewater discharge during the leak *exceeded its NPDES permitted levels*," (Motion at 14 (emphasis added)), and that the "release of sodium hypochlorite from [the] ... discharge outfall resulted in [Respondent] being *700% to 1,000% in excess of its permitted limit for [TRO]*." Complainant's Reply at 18 (emphasis added).

The crux of the dispute as to whether the NPDES Permit did or did not permit the release (in addition to the chemical nature of the material itself) appears to be whether the Permit and/or the release should be considered in terms of the *rate* of discharge or the *quantity* of discharge. *See, e.g.*, Respondent's PHE at ¶ G ("[C]oncentrations are not relevant to ... the RQ assessment. Rather, it is the total mass quantity released per 24 hour period ..."). However, (assuming for the moment that the material released was "sodium hypochlorite" rather than something else, and that the poundage of "TRO" is equivalent to the poundage of "sodium hypochlorite"), even if Respondent is correct that 1,034 pounds of sodium hypochlorite were lost (as opposed to the 1,227 pounds asserted by Complainant), and that the NPDES Permit authorizes the *total* release of 2,200 pounds of TRO, it is still not clear that the NPDES Permit authorizes the release because the Permit only authorizes the release of *998 pounds* of TRO *from Outfall #1*, where the

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[33]Respondent asserts that "Respondent is permitted to release as much as *2,200 pounds* of TRO into Lake Michigan per 24-hour period pursuant to [Respondent's NPDES Permit]," (Respondent's Response at 2 (citations omitted) (emphases added)), and that, therefore, "*the release in question was a federally permitted release and as such, was exempt from release reporting* under EPCRA or CERCLA." *Id.* at 11 (emphasis added).

[34]However, Respondent complicates matters by stating that: "[t]he condition was immediately identified at 9:20 AM ... as a release *exceeding our NPDES Permit limits* for Total Residual Chlorine..." Respondent's PHE, Ex. 1, ¶ 47 (emphasis added).

release actually occurred.[35] A further factual dispute in this regard is raised by *Complainant*: "While he acknowledges generally that there was a substantial dilution ratio of sodium hypochlorite when mixed with water in the forebay, *Complainant has been provided no opportunity to address* any particular quantification of the dilution rate." Complainant's Reply at 7, n.4 (emphasis added).[36]

In any event, the only clear "fact" regarding the NPDES Permit is that Respondent contends that the Permit *does* authorize the release while Complainant maintains that the Permit does *not* do so. This is a material issue of fact which must be further developed by an evidentiary hearing.

c. "Into the Environment"

As discussed *supra*, a further element of a "release" under the Acts is that the hazardous substance enter "into the environment." In the present case, there is no question that the material entering Lake Michigan entered "into the environment." However, although Complainant does not appear to argue that the Cook Power Plant's "forebay" may have constituted "the environment," this Tribunal is unable to determine from the record presently before it whether the sodium hypochlorite which leaked into the "forebay" (as opposed to the material which was discharged into Lake Michigan) entered "into the environment."

The statutory provision here at issue, as set forth above, states in pertinent part: "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment* ..." CERCLA Section 101(22), 42 U.S.C. § 9601(22) (emphasis added).[37]

The long list of terms in the definition suggests a broad construction of the definition of

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[35]Although not raised by the parties, a further issue may be whether the "accidental" release of sodium hypochlorite solution fits within the definition of a "federally permitted release," which is defined, in relevant part, to mean "continuous or *anticipated* intermittent discharges from a point source, identified in a [NPDES] permit ..., which are caused by events occurring *within the scope* of relevant operating or treating systems ..." CERCLA Section 101(10)(C), 42 U.S.C. § 9601(10)(C) (emphasis added).

[36]An evidentiary hearing would provide the "opportunity" Complaint seeks, as Respondent states that it intends to call as a witness Chris Hawk, whom Respondent anticipates will "explain calculations used to determine the ... dilution ratio of sodium hypochlorite breakdown products to water during the spill event ..." Respondent's PHE at 1.

[37] The definition of "release" in EPCRA Section 329(8) is also at issue, but the text of that definition which is relevant to the present analysis is identical to that of CERCLA Section 101(22), and therefore for purposes of simplicity, references in this discussion to CERCLA Section 101(22) refer also to Section 329(8) of EPCRA.

"release." The terms encompass not only intentional human conduct (*i.e.*, pouring), but also passive migration (*i.e.,* leaching) and accidents (*i.e.,*escaping), involving hazardous substances. *See* United States v. CDMG Realty Co., 96 F.3d 706, 714 -715 (3rd Cir. 1996); United States v. Amro Realty Corp., 806 F.Supp. 349 (N.D. NY 1992). Indeed, federal courts have held repeatedly that the definition of "release" in CERCLA Section 101(22) should be construed broadly. *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152 (1st Cir. 1989); Nutrasweet Co. v. X-L Engineering Corp., 993 F.Supp. 1409, 1419 (N.D. Ill. 1996). *See also*, State of Colorado v. United States Dep't of Interior, 880 F.2d 481, 487 (D.C. Cir. 1989) ("[A] broad definition of terms such as ... 'release' was necessary to provide for diverse matters such as notification requirements"); United States v. Union Gas Co., Civ. No. 83-2456, 1992 WL 277647, *7 (E.D.Pa., Sept. 30, 1992) (CERCLA definitions of "release" and "environment" are extremely broad); Rhodes v. County of Darlington, S.C., 833 F.Supp. 1163, 1178 (D.S.C. 1992) ("Clearly, this definition contemplates a broad, remedial view of how hazardous substances can find their way into the environment without their affirmative discharge by an owner or operator of a facility"); Lincoln Properties, Ltd. v. Higgins, 823 F.Supp. 1528, 1536 (E.D.Calif. 1992) ("The statutory definition is broad and deliberately so. It uses a profusion of terms, all slight variations on much the same theme, to encompass the entire universe of ways in which hazardous substances may come to exist in the environment. Courts have given the term 'release' a liberal reading, and have consistently rejected attempts to limit CERCLA's reach – or expand its narrow defenses – through restrictive interpretations of the term 'release'") (citations omitted); State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1045 (2nd Cir. 1985) ("We will not interpret section 9707(a) [of CERCLA] in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intention otherwise.").

Such a liberal construction of the term "release" is consistent with the broad definition of the term "environment" in Section 329(2) of EPCRA as including "water, air, and land and the interrelationship which exists among and between water, air and land and all living things," and in Section 101(8) of CERCLA as "the navigable waters ... and ... any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States ..." *See also,* 40 C.F.R. §§ 302.3, 355.20, and 370.2. *See, e.g.*, *In re U.S. Leather, Inc.*, 2000 WL 341008 (EPA ALJ, Feb. 23, 2000) (EPCRA-7-99-0048), holding that:

> [U]nder both CERCLA and EPCRA, the term "environment" is defined in the most general terms. A plain reading ... supports EPA's position that the *concrete roadway at respondent's ... facility* fits within the broad categories of "land surface" and "land." As a result, the sulfuric acid spill onto the roadway was release into the environment... The fact that Congress did not specifically mention "engineered surfaces or man-made structures" in its definition of environment does not ... indicate that it intended to exclude concrete roadways.

In re U.S. Leather, 2000 WL 341008, *5 (emphases added).

However, the D.C. Circuit in Fertilizer Institute v. U.S. Environmental Protection

Agency, 935 F.2d 1303 (D.C. Cir. 1991), addressed the issue of placement of hazardous substances into an "unenclosed containment structure," *i.e*, a facility that is not sealed off from surrounding air, water or soil, and that is in a location owned or operated, or at least supervised, by the persons in charge of the hazardous substance. The court held that such a situation constitutes only a *threatened* release "into the environment," and that "nothing less than the *actual* release of a hazardous material into the environment triggers its reporting requirement." *Id.* at 1310 (emphasis added). Further, the EPA has explained:

> A key element of the definition of "release" is the phrase "into the environment." Although the word "environment" is broadly defined in Section 101(8) [of CERCLA], some releases of hazardous substances may not enter the environment. For example, the spill of a hazardous substance *onto the concrete floor of a manufacturing facility may not, for notification purposes, be "into the environment" if wholly contained in the facility*.[[38]] If part of the substance does enter the environment, *e.g.*, *seeps into the ground or volatilizes into the atmosphere, there would be a release into the environment* and, if released in a quantity equal to or greater than the reportable quantity for that substance, the release would be subject to notification requirements of Sections 103 (a) and (b).

48 Fed.Reg. 23552, 23555 (May 25, 1983) (emphases added).

With this background in mind, this Tribunal simply observes that the record currently before it does not demonstrate by a preponderance of the evidence whether the release of sodium hypochlorite into the "forebay" at the Cook facility either did or did not constitute a release "into the environment." Given the fact that Complainant does not appear to so allege, it may well be that the forebay is not the "environment" under the facts of this case. However, sound judicial policy requires that the factual nature of the "forebay" in this regard be illuminated through an evidentiary hearing.

2. Whether Respondent's Initial Report was "Immediate"

As described above, Respondent was required to "immediately" notify the NRC, LEPC, and SERC as soon as it had "knowledge" of a release of a reportable quantity of sodium hypochlorite. Respondent first reported the release to the NRC at 11:50 a.m. on November 16, 2002. Respondent's Response at 6; Respondent's PHE at ¶ 50; Complaint at ¶ 20; Answer at ¶ 20.

Complainant asserts that "Respondent first realized that a hazardous substance had been

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[38]Of further relevance in this regard may be the definition of "facility" set forth in Section 101(9) of CERCLA, Section 329(4) of ECPCRA, and 40 C.F.R. §§302.3, 355.20, and 370.2.

released from its facility at approximately 9:20am, on November 16, 2002." Complainant's PFOF # 9. In support of this proposition, Complainant cites Respondent's PHE, Ex. 1 at ¶¶ 18, 19, and 47. Motion at 10, 14; Complainant's Reply at 8-10. Those portions of Respondent's PHE state, in pertinent part: "The release of sodium hypochlorite solution ... was from the plant chlorination system ... [which] consists of an 8,800-gallon ... tank ..." (Respondent's PHE, Ex. 1 at ¶ 18); "... at approximately [12:10 a.m.], a sodium hypochlorite solution pipe ... became disconnected... This time estimate was based on the readout from the ... chlorine analyzer. It is at about this time [that] the concentrations recorded on the strip chart increased" (*Id.* at ¶ 19); and "[t]he condition was immediately identified at 9:20 AM ... as a release exceeding our NPDES Permit limits for Total Residual Chlorine..." *Id.* at ¶ 47.

Respondent, on the other hand, argues that it did not have "knowledge" of a potentially RQ release until 11:00 a.m., citing "Respondent's PHX, ¶ 15"[39] and Respondent's PHE, Ex. 1, ¶ 48. The latter states, in pertinent part: "By 11:00 a.m. ... the Chemistry Manager identified that a reportable spill of sodium hypochlorite solution had been released."

Thus, the parties agree that the "leak" began at approximately 12:10 a.m. on November 16, 2002, and that Respondent first became aware of the leak at 9:20 a.m. on the same day. However, while Complainant argues that Respondent had "knowledge" (for purposes of Section 103(a) of CERCLA and 40 C.F.R. § 302.6(a)) of the "release" as of 9:20 a.m., Respondent maintains that it did not have such "knowledge" until 11:00 a.m. This is so, Respondent contends, because it was not until 11:00 a.m. that Respondent was able to complete the "engineering calculations" necessary to surmise that a potentially reportable ***quantity*** of hazardous material had been released. *See* Respondent's Response at 5-6. Therefore, while Complainant asserts that 2 hours and 30 minutes elapsed between "knowledge" and "notice," Respondent contends that its initial notice at 11:50 a.m. came only 50 minutes after it first acquired "knowledge" of a "reportable quantity release."

Complainant further contends that even if Respondent did not have "actual" knowledge of a RQ release as of 9:20 a.m., Respondent had "constructive" knowledge at that time. That is, based upon the size of the chlorination tank (8,800 gallons) and the presumed ease of determining the time at which the leak began (based on the "strip chart readout" from the "chlorine analyzer"), Respondent *should* have known that a RQ release had occurred as of 9:20 a.m. *See, e.g.*, Motion at 14, including n.10; Complainant's Reply at 9-10.

The factual issue of when Respondent had "knowledge" of a release is inextricably intertwined with the legal question of the meaning of "immediate" under the Acts. Complainant argues that the "rough standard" under the Acts for "immediacy" between "knowledge" and notice" is fifteen (15) minutes. *See, e.g.*, Motion at 15 (*citing* S. Rep. No. 99-11, 99th Cong., 1st

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[39]This Tribunal is unable to locate "Respondent's PHX, ¶ 15." Paragraph 15 of "Exhibit 1" to Respondent's PHE is not relevant to the issue discussed, and "Paragraph 15" of "Respondent's PHE" does not exist.

Sess. at 8-9 (1985) (Senate Environment & Public Works Committee Report, Reporting S. 51). Respondent, on the other hand, argues that "[the term] 'immediate' is not defined in the relevant statutes or regulations and should be determined in light of the circumstances in each case." Respondent's Response at 8.

Complainant is correct that the an articulation of a "rough standard" for "immediacy" appears in the legislative history of SARA at S. Rep. No. 99-11, 99th Cong., 1st Sess. at 8-9 (1985) (Reporting S. 51).[40] That Senate Report states, in part:

> In these emergency situations, every minute may count in taking effective action, and immediate notification of local authorities is essential. <u>*Ordinarily*</u>, delays in making the required notification should not exceed *15 minutes* after the person in charge *has <u>knowledge</u> of the release*, and "immediate notification" requires shorter delays *whenever practicable*.

Id. (emphases added).[41] *See also*, *In re Great Lakes Div., National Steel Corp.*, 5 E.A.D. 355, 356, n.3 (EAB, June 29, 1994). However, Respondent is also correct that the determination of "immediacy" must be fact-specific, and that "knowledge" (even "constructive knowledge") involves *some* level of knowledge of a "reportable *quantity*." *See, e.g.*, *In re Cenex / Land O' Lakes Agronomy Company*, EPA Docket No. 5-EPCRA-076-97 at 4 (ALJ, June 29, 1998) ("[K]nowledge of the release, by itself, is not sufficient to trigger the reporting requirements under §§ 304. The release must also be of a 'reportable quantity' pursuant to EPCRA §§ 304(a)(2)(B).").

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[40]While legislative history may be instructive, this Tribunal notes that S. 51 was not passed into law. Rather, H.R. 2005 was passed in lieu of H.R. 2817 and S. 51 after amending its language to contain much of the text of H.R. 2817. *See* House Report (Science and Technology Committee) No. 99-255, Sept. 4, 1985 (to accompany H.R. 3065). Further, as Judge Gunning wrote regarding this very same piece of legislative history in *In re Morton International, Inc.*, EPA Docket No. CWA-VII-97-W-0008 (ALJ, Dec. 12, 1997): "[L]egislative history, although an excellent source for guidance, is not authoritative. Moreover, I do not find legislative history to be authoritative when determining whether a party moving for accelerated decision has established that it is entitled to judgment as a matter of law." *Id.* at 13.

[41]Even if this piece of legislative history does articulate an applicable "rough standard" of 15 minutes, the determination of whether notification was "immediate" presupposes the determination of when "knowledge" occurred. That is, the "15 minute clock" still does not start ticking until "knowledge" (actual or constructive) occurs, and this piece of legislative history does not address that "knowledge" question. In addition, the "rough standard" is clearly qualified by the term "ordinarily," indicating that the determination of "immediacy" is a fact-specific endeavor. *See also*, Complainant's Reply at 16, stating that the "immediacy" requirement is "*something around* 15 minutes." (Emphasis added).

Judge Frazier, in *In re Thoro Products Co.*, EPA Docket No. EPCRA VIII-90-04, 1992 WL 143993 (ALJ, May 19, 1992), described "constructive knowledge" as follows:

> Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts. The failure to know what could have been known in the exercise of due diligence amount to knowledge in the eyes of the law.

Thoro Products, 1992 WL 143993 (pages not indicated) (footnotes omitted).

Further, the EAB has elucidated the "immediacy" of the reporting requirement here at issue as follows:

> The duty to report under EPCRA arises as soon as the facility personnel have knowledge that a reportable release has occurred, or should know of such a release. *See In re Genicom Corp.*, EPCRA-III-057 (ALJ, July 16, 1992), *aff'd*[,] *In re Genicom Corp.*, EPCRA No. 92-2 (EAB, Dec. 15, 1992); 52 Fed.Reg. 13,378, 13,393 (Apr. 22, 1987) (explaining that "knowledge" of a release under EPCRA includes constructive knowledge as well as actual knowledge). Further, <u>"knowledge" does not necessarily mean conclusive knowledge of the exact quantity of a release</u>. As the Presiding Officer stated in *Genicom*:
>
>> What is at issue is when did Genicom have enough information that it could reasonably be said that it knew that the releases were at or above reportable quantities even though it did not know the exact quantities released. <u>A company should be given some latitude about how it interprets the information it has</u>. <u>*At some point*</u>, however, the nature of the information can be such that the failure to give notice is indicative of the company not knowing the requirements or being hostile or indifferent to them, rather than of any uncertainty that a release in reportable quantities had taken place.
>
> *Genicom*, EPCRA-III-057 at 13 [(emphases added)].

In re Mobil Oil Co., 5 E.A.D. 490, 509-510 (EAB, Sept. 29, 1994) (emphasis added).

These cases make clear that "constructive knowledge" of a "reportable quantity" release shall "at *some* point" be imputed to facility personnel. However, the cases also plainly indicate that the *precise* point at which such knowledge should be imputed is necessarily based upon the unique facts of each particular case. In making such a determination, the knowledge (actual or constructive) of the release, by itself, does not trigger the reporting requirements. Rather, the facility personnel must be allowed an opportunity – in the prudent exercise of reasonable diligence – to determine whether a "reportable quantity" of a hazardous substance has been

released. Although the personnel "should be given some latitude" in interpreting their information, "constructive knowledge" may arise before the personnel determine the "exact quantities released."

Although a review of the relevant case law suggests that a delay of fifty (50) minutes (as argued by Respondent) between "knowledge" and "notification" is ordinarily not "immediate," the evidence thus far presented in this case fails to establish facts sufficient to make such a determination. Among the outstanding factual questions are the degree of difficulty involved in determining whether a potentially RQ release occurred (*e.g.*, the "engineering calculations"[42]); the point at which Respondent had *actual* knowledge that a potentially RQ release occurred; and the point in time, given all the information available to Respondent, that it *should* have known that a potentially reportable quantity of sodium hypochlorite had been released. In addition, the statutory penalty criteria, should Respondent's liability be established, require further development of such facts.[43]

3. Reportable Quantity – The Conversion of "Gallons" of Sodium Hypochlorite into "Pounds"

Complainant asserts that "1,033 gallons of sodium hypochlorite is the equivalent of 1,227 pounds of sodium hypochlorite." Complainant's PFOF # 15. In support of this proposition, Complainant cites Paragraph 19 of Respondent's original Answer to the Complaint, filed on September 1, 2004. Motion at 11. However, pursuant to this Tribunal's January 27, 2005 Order Granting Motion to File Amended Answer, Respondent's Amended Answer (attached to the Motion) was deemed filed on January 27, 2005. The Amended Answer amends the original Answer only in that rather than admitting the allegation in paragraph 19 of the Complaint that "1,033 gallons of sodium hypochlorite ... is 1,227 pounds of sodium hypochlorite," the Amended Answer denies paragraph 19 of the Complaint.

Respondent contends that "1,033 gallons of sodium hypochlorite (12% solution) equals 1,034 pounds." Respondent's Response at 4. In support thereof, Respondent cites Respondent's PHE, Ex. 1 at ¶¶ 20 and 21, Ex. 6, and Ex. 7. Respondent's Response at 4. Paragraph 21 of Exhibit 1 of Respondent's PHE states, in part: "The release of 1,033 gallons of 12% sodium hypochlorite solution is equivalent to about 1,034 pounds of sodium hypochlorite, as far as can

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[42]Further, although Complainant apparently assumes that determining the time at which the leak began based upon the "strip chart readout" from the "chlorine analyzer" is a simple matter, such a conclusion based upon the record presently before this Tribunal would be pure speculation.

[43]Although Complainant contends that Respondent failed to provide "immediate" notification whether it acquired the requisite "knowledge" at 9:20 a.m. or at 11:00 a.m., Complainant states that such a time difference *is* material to the penalty calculation. Motion at 16, n.11.

be determined." The calculations presented as Exhibits 6 and 7 to Respondent's PHE do speak to the conversion of "gallons" of sodium hypochlorite to "pounds,"[44] and Respondent has stated its intention to call as a witness Chris Hawk to "explain the calculations used to determine the quantity of sodium hypochlorite breakdown products discharged ..." Respondent's PHE at 1.

The parties agree that at least 1,033 gallons of "sodium hypochlorite solution" were leaked from the pipe on November 16, 2002 (Respondent's PHE, Ex. 1 at ¶ 21), and that sodium hypochlorite is a "hazardous substance" under Section 102 of CERCLA with a "reportable quantity" of 100 pounds. CERCLA § 101(14), 42 U.S.C. § 9601(14); 40 C.F.R. §§ 302.3 and 302.4. Thus, whether the released "sodium hypochlorite solution" contained 1,227 pounds of sodium hypochlorite (as argued by Complainant) or 1,034 pounds of sodium hypochlorite (as argued by Respondent[45]), a "reportable quantity" was released in either case.

Complainant's argument is well taken, therefore, that "while it is clear that this 'fact' is disputed, it is a fact that is not material to [liability]." Complainant's Reply at 12. Further, Complainant states that the "gravity" component of the proposed penalty calculation "would not change" in either case. *Id.*[46] Nevertheless, in light of the integral nature of the question of the "amount" of release to the question of liability in general, and in light of the fact that (as discussed *infra*) this Tribunal is not bound by the "Penalty Policy" but must make its own determination of the appropriate penalty in this case (should liability be established) based on the statutory penalty criteria, this Tribunal finds that sound judicial policy dictates that the "poundage" issue be developed fully at hearing.

4. The "Followup Notification" Allegations of Counts 4 and 5

Complainant asserts that "Respondent has apparently abandoned its challenge to a finding that it committed the violations alleged in Count IV and V of the Administrative Complaint ..." Complainant's Reply at 28. However, while Respondent's Response to Complainant's Motion for Accelerated Decision did focus on Counts 1, 2, and 3 of the Complaint to the exclusion of Counts 4 and 5, Respondent has not admitted liability on Counts 4 and 5. *See* Answer at ¶¶ 34-41. This Tribunal rejects Complainant's assertion that Respondent has "abandoned" is defenses or admitted liability with regard to Counts 4 and/or 5 by virtue of Respondent not having addressed those Counts in its Response to the Motion for Accelerated Decision. In any case, however, having already found that Complainant has failed to

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[44]Those calculations do not, however, appear to *explicitly* state that "1,033 gallons" of sodium hypochlorite equals "1,034 pounds."

[45]Respondent's argument in this regard is "in the alternative" to its argument that no "sodium hypochlorite" (as opposed to "TRO") was released at all. *See, e.g.*, Respondent's Response at 5, n.2.

[46]This Tribunal understand's Complainant's statement regarding the "gravity figure" to mean that the *total* proposed penalty would not change in either case.

demonstrate by a preponderance of the evidence that it is entitled to an accelerated decision finding liability for failure to *initially* report a release of a reportable quantity of a hazardous substance, this Tribunal cannot logically find that Complainant has demonstrated that Respondent was *required* to provide "followup" notification, let alone that Respondent failed to do so. Thus, this Tribunal does not reach the question of liability on Counts 4 or 5 and therefore denies Complainant's Motion for Accelerated Decision as to liability on those Counts. The issue of Respondent's liability on Counts 4 and 5 remain in controversy and are reserved for hearing.

C. Genuine Issues of Material Fact as to Penalty

Similarly, having found that Complainant has failed to demonstrate by a preponderance of the evidence that it is entitled to an accelerated decision on liability, this Tribunal does not reach the question of the appropriateness of Complainant's proposed penalty.

Further, to the extent that Complainant may suggest that any deviation from the Penalty Policy by this Tribunal would amount to "'impermissible whim, improper influence, or misplaced zeal'" (Complainant's Reply at 29 (*quoting* Greater Boston Television Corp., 444 F.2d at 852) because Complainant's proposed penalty "manifest[s] the application of 'agency policies'" (Complainant's Reply at 29) and therefore "the penalty amounts *proposed*" constitute "a penalty determination in a *final order* of the Administrator" (Respondent's Reply at 29 (emphasis added) (citations omitted)), this Tribunal rejects such an interpretation of the relevant law. Rather, although "[a]gency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors" *(Allegheny Power Service Corp. and Choice Insulation, Inc.*, 9 E.A.D. 636, 655 (EAB 2001) (citations omitted)), "the [EAB] has repeatedly explained that this regulatory requirement does not compel an ALJ to use a penalty policy in making his or her penalty determination. Rather, 'a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.'" *John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op. at 30, 11 E.A.D. __ (EAB, Mar. 25, 2003) (citations omitted).

Therefore, Complainant's Motion for Accelerated Decision regarding penalty is denied.

D. Summary

The evidence presented in the present case thus far fails to establish facts sufficient to determine Respondent's liability on any of the five Counts of the Complaint. That being the case, it would not be useful or appropriate at this time for this Tribunal to consider a possibly appropriate penalty amount on any or all of the Counts. The arguments of the parties can be properly measured only against the backdrop of an evidentiary hearing, which is necessary to fully develop the genuine issues of material fact and law that are presented in this matter. Such issues thus preclude the granting of Complainant's "Motion for Accelerated Decision on Liability and Penalty" under the appropriate legal standard for accelerated decision. Complainant has not established the absence of genuine issues of material fact as to

Respondent's liability on any of the five Counts of the Complaint. The issue of Respondent's liability for the five Counts of violation alleged in the Complaint, and if liability is found, the issue of any penalty to be imposed against Respondent, remain in controversy and are reserved for hearing.

ORDER

1. Complainant's Motion for Accelerated Decision on Liability and Penalty is **DENIED.**

2. The hearing as currently scheduled for **May 24-27, 2005** in this matter shall proceed as planned.

3. Within **5 days** of this Order, the parties shall reconvene a settlement conference wherein they shall, in good faith, attempt to negotiate a settlement of this case, taking into account this Order. Complainant shall report the occurrence of such conference and the status of settlement to the undersigned within **7 days** of this Order.

4. The deadlines originally set in the January 4, 2005 Order Scheduling Hearing, which were vacated and/or suspended by the February 23, 2005 Suspension Order pending this Order on Accelerated Decision, are hereby reset as follows:

   a. In the event the parties have failed to reach a settlement within **7 days** of this Order, they shall strictly comply with the requirements of this Order and prepare for a hearing. In connection therewith, on or before **May 13, 2005**, the parties shall file a Joint Set of Stipulated Facts, Exhibits, and Testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

   b. All prehearing motions, such as motions to amend and motions in limine, must be filed on or before **May 16, 2005**.

   c. The parties may, if they wish, file prehearing briefs. The deadline for filing such briefs is Friday, **May 20, 2005**. A copy of the briefs should be faxed and/or hand-delivered to the undersigned by that date. The Complainant's brief should specifically state each Count of the Complaint, and each claim therein, which is to be tried at the hearing and indicate which Counts and/or claims are not. The Respondent's brief should identify each of the defenses that the Respondent

intends to pursue at the hearing.[47]

Susan L. Biro
Chief Administrative Law Judge

Dated: May 3, 2005
Washington, D.C.

[47]The undersigned is cognizant of the very short time frames set by this Order, and recognizes that either party, or both parties jointly, may wish to file a motion to reschedule the hearing in this matter in order to adequately prepare for hearing. The undersigned is prepared to consider such a motion in light of the need to fully and adequately develop the factual and legal issues presented in this case. Further, in the context of such a motion, the undersigned is prepared to consider modification of the due dates for settlement conference, settlement status report, Joint Set of Stipulated Facts, Exhibits, and Testimony, prehearing motions, and prehearing briefs set forth in Paragraphs 3 and 4 of the "ORDER" section of this Order on Accelerated Decision.