9/30/88

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MOBIL OIL CORPORATION,	)	Docket Nos. EPCRA-91-0120
	)	EPCRA-91-0122
	)	EPCRA-91-0123
	)	
Respondent	)	

INTERLOCUTORY ORDER GRANTING COMPLAINANT'S CROSS-MOTION FOR PARTIAL ACCELERATED DECISION

Pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22.20(a), Respondent has filed a motion to dismiss or, alternatively, for an accelerated decision, on the grounds that the emissions herein were subject to "a permit" or to a "control regulation under section 111" of the Clean Air Act (CAA), 42 U.S.C. § 7411, or to a "State implementation plan[]," and thus, were "federally permitted releases" within the meaning of Section 101(10)(H) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA) 42 U.S.C. § 9601(10)(H). Respondent maintains that as "federally permitted releases," the emissions were exempt from notification and reporting under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and CERCLA. Finally, Respondent contends that it had, in

any event, made proper and timely notifications of the emissions and had submitted the requisite written follow-up reports.[1]

Complainant has filed a cross-motion for a partial accelerated decision in this matter on the grounds that no genuine issue of material fact exists and the Complainant is entitled to judgment as a matter of law regarding Respondent's liability for 1) the federally permitted release issue, 2) failing to send proper follow-up notification to the State Emergency Response Commission (SERC) regarding three reportable releases of hydrogen sulfide or sulfur dioxide, and 3) failing to notify the National Response Center (NRC) immediately following a release of hydrogen sulfide.[2] Based upon the pleadings, motions, memoranda, and prehearing exchanges filed by the parties in this matter, I conclude that the Complainant's motion should be granted as to all three issues.

I. Complaints and Answers

On May 9, 1991, pursuant to Section 325 of EPCRA, 42 U.S.C. § 11045, and pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, the Regional Administrator of the United States Environmental Protection Agency, Region II (Complainant or EPA) issued three administrative complaints (EPCRA Docket Nos. 91-0120, 91-0122 and 91-0123) alleging that Mobil Oil Corporation (Respondent or Mobil)

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[1]Respondent's Memorandum in Support of Motion to Dismiss, or, Alternatively, for Accelerated Decision (Respondent's Memorandum) (April 3, 1992).

[2]Complainant's Brief in Opposition to Respondent's Motion for Accelerated Decision, and in Support of Complainant's Cross-Motions for Partial Accelerated Decision (Complainant's Brief) (May 14, 1992).

violated Section 304 of EPCRA, 42 U.S.C. § 11004, and Section 103 of CERCLA, 42 U.S.C. § 9603, by failing to comply with the emergency notification and reporting requirements mandated by the cited statutes. The complaints stem from three alleged air releases at Respondent's Paulsboro refinery of hazardous and extremely hazardous substances in quantities exceeding the reportable quantity (RQ) established under CERCLA and EPCRA.

On April 1, 1992, on motion of the Complainant, unopposed by Respondent, Complainant was granted leave to amend the three complaints by deleting or modifying certain alleged violations and by reducing certain proposed penalties. The complaints, as amended, allege the following:

Complaint No. 91-0120:

Count I: Respondent violated the notification requirements of EPCRA § 304(a) and (b), 42 U.S.C. § 11004(a) and (b), for the failure to immediately notify the SERC as soon as it had knowledge of a release of an RQ of sulfur dioxide, an extremely hazardous substance, from its facility on September 25, 1989. The release was approximately 2,900 pounds over Respondent's permit for sulfur dioxide emissions, for which the RQ is one pound.

Count II: Respondent violated the notification requirements of EPCRA § 304(a) and (b), 42 U.S.C. § 11004(a) and (b), for the failure to immediately notify the Local Emergency Planning Committee (LEPC) as soon as it had knowledge of the release of the RQ of sulfur dioxide.

Count III: Respondent violated the notification requirements of EPCRA § 304(c), 42 U.S.C. § 11004(c), for the failure to provide written follow-up notice to the SERC as soon as practicable after the release occurred.

Complaint No. 92-0122:

Count I: Respondent violated the notification requirements of Section 103 of CERCLA, 42 U.S.C. § 9603, for the failure to immediately notify the NRC as soon as it had knowledge of a release of an RQ of hydrogen sulfide, a hazardous substance, from its facility on December 4, 1989. The total hydrogen sulfide released was approximately 2,200 pounds and the RQ for hydrogen sulfide is 100 pounds.

Count II: Respondent violated the notification requirements of EPCRA § 304(c), 42 U.S.C. § 11004(c), for the failure to provide written follow-up notice to the SERC as soon as practicable after the release occurred.

Complaint No. 91-0123:

Count I: Respondent violated the notification requirements of EPCRA § 304(a) and (b), 42 U.S.C. § 11004(a) and (b), for the failure to immediately notify the LEPC as soon as it had knowledge of a release of an RQ of sulfur dioxide, an extremely hazardous substance, from its facility on March 12, 1990. The total sulfur dioxide released was approximately 450 pounds and the RQ for sulfur dioxide is one (1) pound.

Count II: Respondent violated the notification requirements of EPCRA § 304(c), 42 U.S.C. § 11004(c), for the failure to provide

written follow-up notice to the SERC as soon as practicable after the release occurred.

In its answers to the complaints, Respondent admitted that the releases at issue occurred, but alleged that they were "federally permitted releases" within the meaning of Section 101(10)(H) of CERCLA, 42 U.S.C. § 9601(10), and thus, exempt from the notification and reporting requirements of EPCRA and CERCLA. Respondent alleged further that even if the releases were not "federally permitted," and thus, not exempt from reporting requirements, Mobil made all necessary notifications in a timely fashion.

Complainant contends that Respondent's releases do not fall within the purview of the federally permitted release exemption, and Mobil is liable for failing to make proper and timely reports as required by EPCRA and CERCLA.

Both parties agree that an accelerated decision is appropriate with respect to the federally permitted release issue. The parties disagree as to the appropriateness of an accelerated decision with regard to the second and third issues raised by Complainant in its cross-motion, namely, the alleged failure to provide written follow-up notices to the SERC (91-0120: Count III; 91-0122: Count II; 91-0123: Count II) and the alleged failure to provide immediate notification to the NRC (91-0122: Count I).

Thus, the posture of the matter as it is now before me as a result of Respondent's motion and Complainant's cross-motion, is as follows:

Respondent seeks dismissal of all seven (7) counts in the three (3) complaints or, in the alternative, an accelerated decision in favor of Mobil on all counts as a matter of law. Complainant, on the other hand, seeks a partial accelerated decision finding in its favor on the federally permitted release issue and finding Respondent liable for the violations alleged in four (4) of the seven (7) counts contained in the three (3) complaints on the grounds that no genuine issue of material fact exists with respect to these four (4) counts and that Complainant is entitled to judgment as a matter of law.

I find that after viewing the facts in a light most favorable to the Respondent, Complainant's cross-motion should be granted as a matter of law on all three issues raised therein. In rejecting Respondent's arguments here I make no determination as to whether such contentions would constitute mitigating circumstances in determining what amount of civil penalty, if any, may be appropriate for the violations here found. I leave the question of liability in the remaining three (3) counts (91-0120: Counts I and II and 91-0123: Count I) and the question of any penalty for the violations found or which later may be found, for further proceedings in this matter.

II. Findings of Fact and/or Conclusions of Law

Based upon the pleadings, motions, cross-motions, memoranda and prehearing exchanges submitted by the parties, I make the findings of fact and/or conclusions of law which follow. All contentions submitted by the parties have been considered, and whether or not

discussed specifically herein, those which are inconsistent with this decision are rejected.

1. Mobil is a "person" as defined in Section 329(7) of EPCRA, 42 U.S.C. § 11049(7). Complaint (Compl.) 91-0120 at 2, 91-0122 at 3, 91-0123 at 2; Answer (Ans.) 91-0120 at 1, 91-0122 at 3, 91-0123 at 1.)[3]

2. Mobil is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). (Compl. 91-0122 at 2; Ans. 91-0122 at 1.)

3. Mobil's Paulsboro refinery, located on Billingsport Road, Paulsboro, New Jersey, is a "facility" as that term is defined in Section 329 of EPCRA, 42 U.S.C. § 11049. (Compl. 91-0120 at 2, 91-0122 at 3, 91-0123 at 2; Ans. 91-0120 at 1, 91-0122 at 3, 91-0123 at 1.)

4. Mobil's Paulsboro refinery is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9). (Compl. 91-0122 at 2; Ans. 91-0122 at 1.)

5. Mobil owned and operated the Paulsboro refinery (the "facility") at the time of the releases described in each of the three complaints referenced herein. (Compl. 91-0120 at 2; 91-0122 at 3, 91-0123 at 2; Ans. 91-0120 at 1, 91-0122 at 3, 91-0123 at 1.)

6. Mobil was "in charge" of the facility at the time of the release described in complaint no. 91-0122. (Compl. 91-0122 at 2; Ans. 91-0122 at 1.)

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[3]References throughout this section are to the amended complaints and to Respondent's amended answers.

7. On September 25, 1989, at approximately 4:30 p.m. a release of sulfur dioxide began from the facility's powerhouse. (Compl. 91-0120 at 2; Ans. 91-0120 at 1.)

8. The release of sulfur dioxide which began on September 25, 1989, continued for approximately 7.5 hours, between 4:30 p.m. on September 25, 1989, and 12:00 a.m. on September 26, 1989. The amount of sulfur dioxide released was approximately 2,900 pounds. (Compl. 91-0120 at 2; Ans. 91-0120 at 2.)

9. The RQ for sulfur dioxide is one pound, as specified in 40 C.F.R. Part 355, App. A. (Compl. 91-0120 at 2, 91-0123 at 2; Ans. 91-0120 at 2, 91-0123 at 2.)

10. Sulfur dioxide is an "extremely hazardous substance" as defined in Section 329(3) of EPCRA, 42 U.S.C. § 11049(3). (Compl. 91-0120 at 2, 91-0123 at 2; Ans. 91-0120 at 2, 91-0123 at 2.)

11. On December 4, 1989, at approximately 2:00 p.m. a release of hydrogen sulfide began at the facility from the sulfur complex tail gas unit #80. The release continued intermittently from 2:00 p.m. until 3:00 p.m. for a total of approximately 16 minutes. The amount of hydrogen sulfide released was approximately 2,200 pounds. (Compl. 91-0122 at 2; Ans. 91-0122 at 1-2.)

12. The RQ for hydrogen sulfide is 100 pounds as designated in 40 C.F.R. Part 302, Table 302.4 and as specified in 40 C.F.R. Part 355, App. A. (Compl. 91-0122 at 2-3; Ans. 91-0122 at 2-3.

13. Hydrogen sulfide is a "hazardous substance" as defined in Section 102 of CERCLA, 42 U.S.C. § 9602 and is an "extremely hazardous substance" as defined in Section 329(3) of EPCRA,

42 U.S.C. § 11049(3). (Compl. 91-0122 at 2-3; Ans. 91-0122 at 1 and 4.)

14. Mobil had knowledge that the December 4, 1989, release of hydrogen sulfide had exceeded the RQ at approximately 12:40 p.m. on December 5, 1989. (Ans. 91-0122 at 3.)

15. Mobil notified the NRC of the release of hydrogen sulfide at approximately 2:50 p.m. on December 6, 1989. (Compl. 91-0122 at 2; Ans. 91-0122 at 3.)

16. On March 12, 1990, at approximately 10:00 a.m., a release of sulfur dioxide began at the facility, from the sulfur complex incinerator stack. (Compl. 91-0123 at 2; Ans. 91-0123 at 1.)

17. The release on March 12, 1990, continued for approximately two (2) hours between 10:00 a.m. and 12:00 p.m. The amount of sulfur dioxide released was between 450 and 473 pounds. (Compl. 91-0123 at 2; Ans. 91-0123 at 2.)

18. On August 17, 1987, notice was published in the New Jersey Register that written follow-up notification for reportable releases under EPCRA must be sent to the SERC at the following address:

> Department of Environmental Protection
> Division of Environmental Quality
> Bureau of Communications and Support Services
> CN 411
> Trenton, New Jersey 08625

(Complainant's Prehearing Exchange (PHE) 91-0120, Exh. 4; 91-0122, Exh. 6; 91-0123, Exh. 4.)

19. On October 3, 1989, Mobil prepared a written follow-up notice regarding its September 25, 1989, release of sulfur dioxide and mailed it to:

N.J. Department of Environmental Protection
Division of Environmental Quality
Bureau of Hazardous Substance Information
CN-405
Trenton, New Jersey 08625

(Complainant's PHE 91-0120, Exh. 5; Respondent's PHE 91-0120, Exh. 5.)

20. On December 8, 1989, Mobil prepared a written follow-up notice regarding its December 4, 1989, release of hydrogen sulfide and mailed it to:

N.J. Department of Environmental Protection
Division of Environmental Quality
Bureau of Hazardous Substance Information
CN-405
Trenton, New Jersey 08625

(Respondent's PHE 91-0122, Exh. 4; Complainant's PHE 91-0122, Exh. 7.)

21. On March 29, 1990, Mobil prepared a written follow-up notice regarding its March 12, 1990, release of sulfur dioxide and mailed it to:

N.J. Department of Environmental Protection
Division of Environmental Quality
Bureau of Hazardous Substance Information
CN-405
Trenton, New Jersey 08625

(Respondent's PHE 91-0123, Exh. 6; Complainant's PHE 91-0123, Exh. 5.)

22. As of August 21, 1991, the Bureau of Communications and Support Services of the Division of Environmental Quality of the New Jersey Department of Environmental Protection (NJDEP) had no record of receiving written follow-up notices from Mobil for releases which had been reported initially on December 4, 1989, (notification

report case no. 89-12-04-1445); on September 26, 1989, (notification report case no. 89-09-26-1329); and on March 12, 1990 (notification report case no. 90-03-12-1327). (Complainant's PHE 91-0120, Exh. 6; 91-0122, Exh. 8; 91-0123, Exh. 6.)

III. Discussion

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., commonly known as "Superfund," provides authority for federal cleanup of uncontrolled hazardous waste sites and response to releases of hazardous substances.

CERCLA established a broad Federal authority to respond to releases or threats of releases of hazardous substances from vessels and facilities and facilitates this response by implementing emergency release notification requirements. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in charge of a vessel or facility to notify immediately the NRC as soon as he or she has knowledge that there has been a release of a hazardous substance[4] from the vessel or facility in an amount equal to or greater than the RQ[5] for that substance.

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[4]Section 101(14) of CERCLA defines the term "hazardous substances" chiefly by reference to other environmental statutes and to Section 102 of CERCLA, which authorizes the Administrator of EPA to designate additional hazardous substances by promulgating regulations, which are located at 40 C.F.R. § 302.4.

[5]Pursuant to Section 102(a) of CERCLA, RQs for releases of hazardous substances are established by regulation, located at 40 C.F.R. § 302.4.

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") revised and extended the authorities established under CERCLA. Title III of SARA, also known as the "Emergency Planning and Community Right-to-Know Act of 1986" (EPCRA), 42 U.S.C. § 11001, et seq., established new authorities for emergency planning and preparedness, emergency release notification, community right-to-know reporting, and toxic chemical release reporting.

EPCRA expanded CERCLA's emergency notification requirements to include State and local emergency officials as well as Federal response officials. EPCRA Section 304(a), 42 U.S.C. § 11004, requires the owner or operator of a facility to notify immediately the appropriate governmental entities for any release that requires notification under Section 103(a) of CERCLA, and for releases of "extremely hazardous substances" referred to in Section 302(a) of EPCRA and listed at 40 C.F.R. Part 355, Appendix A.[6] The notification described in Section 304(b) of EPCRA must be given to the SERC for all states affected by the release and to the LEPC for all areas affected by the release. Additionally, EPCRA Section 304(c), 42 U.S.C. § 11004(c), requires any owner or operator who has had a release reportable under EPCRA Section 304(a) to submit, as soon as

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[6]Sulfur dioxide is not listed under 40 C.F.R. § 302.4 as subject to the notification requirements of Section 103 of CERCLA, but it is listed as an "extremely hazardous substance" pursuant to Section 302(a) of EPCRA. Thus, releases of sulfur dioxide must be reported under EPCRA. The reportable quantity established for sulfur dioxide is the statutory value of one (1) pound. 40 C.F.R. Part 355, App. A. Hydrogen sulfide is subject to the requirements of Section 103(a) of CERCLA, and the RQ has been set at 100 pounds. Id.

practicable, a follow-up written notice updating the information required under Section 304(b) and providing additional information.

A. The "Federally Permitted Release" Exception

The notification and reporting requirements of both EPCRA and CERCLA are qualified by an exception for "federally permitted releases."[7] The term "federally permitted release" is defined in Section 101(10) of CERCLA, 42 U.S.C. § 9601(10).[8] The definition

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[7]See Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of EPCRA, 42 U.S.C. § 11004.

[8]The definition reads as follows:

> The term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A. § 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of* section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C. § 7412], Title I part C [42 U.S.C.A. § 7470 et

contains eleven parts. EPCRA incorporates the definition in CERCLA by reference.[9]

The threshold issue presented by this case concerns the definition of a "federally permitted release" as the term applies to releases of hazardous substances regulated by the CAA. Section 101(10)(H) of CERCLA defines a "federally permitted" air release as:

> any emission into the air subject to a permit or control regulation under section 111, section 112, Title I part C, Title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including

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> seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil, natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317 (b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

*So in original. Probably should be "or".

[9]See Section 304(a)(2)(A) of EPCRA, 42 U.S.C. § 11004(a)(2)(A).

> any schedule or waiver granted, promulgated, or approved under these sections.[10]

At issue specifically is the meaning of the phrase "subject to." The question is whether any emission of any quantity of a substance which is included in such a permit or control regulation is excepted from the reporting requirements, or whether only those emissions in compliance with a permit are excepted.

Respondent maintains that the various components of the definition of "federally permitted release" differentiate between releases or discharges "in compliance with a permit" and emissions "subject to a permit." Since the provision concerning emissions regulated by a permit or control regulation issued under the CAA contains the "subject to" form of words rather than the "in compliance with" form, such discrepancy must be given due effect. Thus, Respondent argues that the plain meaning of the statutory exemption for air emissions is that the exception applies regardless of whether the emission is in compliance with the applicable permit or regulation.[11]

In other words, Respondent argues that the exception applies to any emission subject to a permit or control regulation, not just to the subset of such emissions that are in compliance with a permit or control regulation. Respondent claims that an emission that exceeds the permit can be the basis of an action brought under the CAA or comparable state law and may require notification under state

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[10]42 U.S.C. § 9601(10)(H) [emphasis added].

[11]Respondent's Memorandum at 11-12.

or local laws. However, Respondent contends, an air emission "subject to" a permit or control regulation which exceeds such requirements does not require notification pursuant to 42 U.S.C. §§ 9603 or 11004, the CERCLA and EPCRA notification requirements at issue in these complaints.[12]

Respondent contends that the emissions at issue here constituted federally permitted releases exempt from notification and reporting under EPCRA and CERCLA because the emissions were subject to "a permit" or to a "control regulation under section 111" of the CAA, 42 U.S.C. § 7411, or to a "State implementation plan[ ]."[13] Respondent maintains that the releases at issue here were exempt from the reporting requirements even though each of the releases, as Mobil admits, exceeded the applicable RQ's as well as the permit levels.[14]

Complainant maintains that Respondent's releases do not qualify as "federally permitted releases." Complainant contends that the phrase "subject to" means "under the control of" or "in compliance

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[12]Respondent's Reply in Support of its Motion to Dismiss, or, Alternatively, for Accelerated Decision and in Opposition to Complainant's Cross-Motion for Partial Accelerated Decision (June 12, 1992) (Respondent's Reply) at 3.

[13]Respondent claims that with respect to the sulfur dioxide emissions, the pertinent limits are specified in the applicable New Jersey permits. A control regulation as well as a permit is applicable to the hydrogen sulfide emission. The control regulation is 40 C.F.R. § 60.104(a)(2)(ii), an NSPS issued under Section 111 of the CAA applicable to Claus sulfur recovery plants which are part of a petroleum refinery. See affidavit of Cathy Zelaskowski at 2, ¶¶ 3,4 (submitted with Respondent's Memorandum).

[14]Amended Ans. 91-0120 at 2; 91-0122 at 2; 91-0123 at 2.

with."[15] The "federally permitted release" provision, Complainant asserts, excepts certain permitted, regulated releases from notification and liability.[16] A release that exceeds permit or regulation limits, Complainant argues, is not made pursuant or "subject to" these controls because it has not been authorized by any permitting authority and, hence, cannot be termed "federally permitted."[17]

Complainant asserts that the best that can be said for Respondent's interpretation is that the term "subject to" can be construed in two different ways.[18] Complainant submits that if the term were given the meaning attributed to it by Respondent, the result would be to allow virtually all hazardous air releases where a permit exists to go unreported. Complainant claims this would be a ridiculous and dangerous result because it would render the notification requirements nonexistent as far as the vast majority of air releases are concerned.[19]

Complainant further argues that EPA's interpretations of "federally permitted releases" published in the Federal Register support Complainant's position, and should be accorded deference

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[15]Complainant's Reply in support of Motion in Opposition and Cross-motions for Partial Accelerated Decision (Complainant's Reply) (June 26, 1992) at 1.

[16]Complainant's Brief at 10.

[17]Id.

[18]Complainant's Reply at 2.

[19]Complainant's Brief at 10.

under the Supreme Court's holding in Chevron U.S.A. v. Natural Resources Defense Council.[20]

In that case, the Court set forth a two step analysis for statutory construction when an administrative agency's interpretation is at issue. The first prong is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[21] Congressional intent may be discerned by employing the "traditional tools of statutory construction."[22]

A fundamental canon is that statutory construction begins with the language of the statute itself.[23] Respondent argues that the term "subject to" is plain and unambiguous, especially in the context of the definition of federally permitted releases in its entirety. (See Footnote 8, supra.) The other components of the definition refer to releases or discharges "in compliance with" a permit. Such disparity of language indicates a clear legislative intent to distinguish between the two generic types of releases and to attribute different meanings to "subject to" and "in compliance with," according to Respondent. In support of this contention,

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[20]467 U.S. 837 (1984).

[21]Id. at 842-43.

[22]Id. at 843, n. 9.

[23]Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 557-58 (1990).

Respondent cites Russello v. United States,[24] wherein the Supreme Court held that the phrase "any interest . . . acquired" was more expansive than the phrase in the succeeding subsection of the statute, "any interest in . . . any enterprise . . ." on the following principle:

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion . . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.[25]

Respondent also cites Fertilizer Institute v. EPA[26] where it was held that the term "release" under CERCLA must be read literally to mean the "movement of a substance into" the environment and not the "exposure of a substance to" the environment. In that decision the Court of Appeals pointed out that nowhere in CERCLA is there any language requiring that EPA be notified when there is a threatened release. The court found this omission to be especially significant given the sections of CERCLA that expressly distinguish between actual releases and threats of releases. "Under these circumstances, we must presume that Congress's failure to subject threatened releases to the reporting requirement was intentional."[27] The court

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[24]464 U.S. 16 (1983).

[25]Id. at 23 (citations omitted).

[26]935 F.2d 1303 (D.C. Cir. 1991).

[27]Id. at 1310.

held that EPA's interpretation of releases "runs contrary to the plain meaning of the statute and therefore must be revised."[28]

Thus, Respondent's assertion that the meaning of the phrase "subject to" is "plain" rests upon the well-settled principle of statutory interpretation that where Congress includes particular language in one provision of a statute but omits it in another, it is generally presumed that Congress acted intentionally with respect to the disparate inclusion or exclusion.[29] Applying this principle to the "federally permitted release" definition, Respondent concludes that the expression "subject to" does not mean the same as "in compliance with", and therefore, the statutory exemption for air emissions applies regardless of whether the emissions are in compliance with the applicable permits.[30]

To sum it up, Respondent insists that under the first part of the Chevron test there is a plain meaning to the definition of "federally permitted release" respecting air emissions and Congress' intent is clear. The definition "explicitly and straightforwardly defines exempted releases under different acts as either 'in compliance with' permits or other regulatory requirements in some

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[28]Id. at 1309.

[29]INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

[30]Respondent's Memorandum at 12. Respondent also cites Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) (holding that the phrase "any other final action" in Section 307(b)(1) of the CAA is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final), to support its contention that the definition of "federally permitted releases" applies to "any" emissions subject to a permit or control regulation including those which are, as well as those which are not, in compliance with such permit or regulation.

cases or 'subject to' permits or regulatory requirements in others. Paragraph 101(10)(H) respecting air emissions is manifestly of the 'subject to' type, not the 'in compliance with' variety, and the plain meaning of paragraph (H) must be given effect here."[31]

While application of the Russello principle is persuasive, the Chevron analysis may not end here. The phrase "subject to" by itself is inherently ambiguous. "The expression 'subject to' has no well-defined meaning but ordinarily means 'subordinate to,' 'subservient to,' or 'governed or affected by;' the expression is a term of qualification acquiring its meaning from the context."[32] Moreover, a conflicting tool of statutory construction dictates against the result which Respondent advocates. Where the literal meaning of a statutory term would "compel an odd result," the court "must search for other evidence of congressional intent to lend the term its proper scope . . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress's intention . . . ."[33]

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[31]Respondent's Memorandum at 13.

[32]Words and Phrases "Subject To."

[33]Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454-55 (1989); citing Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989), and Boston Sand and Gravel Co. v. United States, 278 U.S. 41 (1928). See also, E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 120-21 (1988) (Agency interpretation as supported by related statutory provisions and legislative history upheld against contrary interpretation, which led to "absurd or futile results . . . 'plainly at variance with the policy of the legislation as a whole.'"); citing United States v. American Trucking Assns., Inc., 310 U.S. 534, 543 (1940).

If two rules of construction lead to conflicting interpretations of the statute, Congressional intent should be divined by examining the legislative history and design of the act.[34]

Both parties cite the legislative history of CERCLA in support of their respective interpretations of federally permitted releases under the CAA. Section 101(10) of the Act had its origin in the Senate Bill, S. 1480. The Senate Report accompanying S. 1480 described the releases encompassed by the "federally permitted release" under the CAA as follows:

> Subparagraph (H) of the definition covers several sections of the Clean Air Act, as amended, where they result in the control of air emissions of hazardous substances. In the Clean Air Act, unlike some other Federal regulatory statutes, the control of hazardous air pollutant emissions can be achieved through a variety of means . . . . Whether control of hazardous substance emissions is achieved directly or indirectly, the means must be specifically designed to limit or eliminate emissions of a designated hazardous pollutant or a criteria pollutant. This section of the federally permitted release definition includes any permit or control regulation under one of the cited sections of the Clean Air Act which has this effect.[35]

The Senate Report went on to explain the notification exemption for "federally permitted releases" in general:

> The Committee does not intend for the notification elements of the bill to apply to the federally permitted releases defined in section 2(b)(18). The laws authorizing permits and regulations that control these releases

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[34]DuBois v. Thomas, 820 F.2d 943, 948-49 (8th Cir. 1987); citing United States v. St. Regis Paper Co., 355 F.2d 688, 695 (2d Cir. 1966); see, K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988).

[35]S. Rep. No. 848, 96th Cong., 2d Sess. 49 (1980).

> provide for notification and such notification procedures should provide the same public benefits -- especially regarding timely response -- as would be provided in S. 1480. Notice is crucial to the removal and remedial operations which are central to the reported bill. The federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law apply to discharging sources.[36]

Senator Randolph, a co-sponsor of the bill in the Senate, offered a similar explanation:

> The defined term 'federally permitted release' (Section 101(10)) is a key element in the treatment of these releases under this bill . . . .
>
> 'Federally permitted releases' would be excluded from the liability and notification provisions of this legislation.
>
> * * * * * * *
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> While the exemptions from liability for federally permitted releases are provided to give regulated parties clarity in their legal duties and responsibilities, these exemptions are not to operate to create gaps in actions necessary to protect the public or the environment.
>
> Accidents - whatever their cause--which result in, or can reasonably be expected to result in releases of hazardous pollutants would not be exempt from the requirements and liabilities of this bill. Thus, fires, ruptures, wrecks and the like involve the response and liability provisions of the bill.
>
> The Environment and Public Works Committee does not intend for the notification elements of the bill to apply to the federally permitted releases defined in section 101(10). The laws authorizing permits and regulations that control these releases provide for notification and such notification procedures should provide

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[36] Id. at 50.

> the same public benefits -- especially regarding the timely response -- as would be provided in this substitute bill. Notice is crucial to the timely Government response which is central to the superfund bill. The federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law apply to discharging sources.[37]

Unfortunately, none of this legislative history offers clear illumination on the answer to the question of whether Congress intended a difference between the terms "in compliance with" and "subject to" as they are used in the definition of "federally permitted release." Moreover, these passages are sufficiently general to provide support for the positions of either party and both parties have relied upon selected portions of them. Thus, Respondent relies upon certain of these passages from the legislative history to support its claim that "the statute deliberately extends the exemption to any air release 'subject to' a permit or control regulation." On the other hand, Complainant relies upon selected portions of these passages to support its position that the federally permitted release exemption was narrowly drawn so as to apply only to releases that do not exceed permit or regulatory restrictions, and where such releases do exceed these restrictions, to avoid duplicative notice under CERCLA (and later, EPCRA) only where similar notice would be required under the CAA (or another statute).

The Supreme Court acknowledged the "inadequacies of the 'traditional tools of statutory construction'" in a case in which

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[37]126 Cong. Rec. S14964-65 (Nov. 24, 1980).

similar attempts were made by the parties "to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent."[38] In such a case, the court customarily defers to the agency's expertise in its administrative construction of the statute.[39]

Thus, where the intent of Congress is not clearly expressed in the words of the statute, nor has any clear definition of the term been revealed from an examination of legislative history, step two of the Chevron test is triggered, as follows:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.[40]

The agency interpretations which courts most commonly defer to are "legislative rules," which are promulgated pursuant to delegation of authority from Congress to issue such regulations having the force of law.[41]

The EPA, however, has not promulgated regulations concerning "federally permitted releases" under the CAA which are exempt from CERCLA and EPCRA emergency notification requirements. To date EPA

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[38]Rust v. Sullivan, 500 U.S. ___, 114 L. Ed. 2d 233, 250, n. 3 (1991).

[39]Id. at 251.

[40]Chevron, 467 U.S. at 843.

[41]See, National Latino Media Coalition v. F.C.C., 816 F.2d 785, 787-88 (D.C. Cir. 1987) and cases cited therein.

has expressed only its interpretation of the "federally permitted releases" in several Federal Register items, including Notices of Proposed Rulemaking (NPRM) and a Proposed Rule. Indeed, EPA's interpretation of a "federally permitted release" and its attempts to promulgate a regulation which would define and delineate a federally permitted release subject to CAA controls has nearly a decade of history in the Federal Register.

In a 1983 NPRM,[42] emissions into the air subject to a permit or control regulation under the CAA were discussed in the preamble where EPA stated that it intended "to conduct a more detailed investigation of this issue prior to promulgation of final RQ adjustments to identify the extent of problems and potential solutions."[43] In 1985 EPA published a final rule and a proposed rule on notification requirements and reportable quantity adjustments[44] where it said in the preamble that "[d]ue to the complexity of the issues involved, [with respect to federally permitted releases generally], the Agency has decided to study the scope of this exemption further; today's rule does not resolve the 'federally permitted release' issue."[45]

In 1988 EPA announced that it had "decided to repropose the rule for federally permitted releases[46] . . . rather than publish

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[42]48 Fed. Reg. 23552 (May 25, 1983).

[43]Id. at 23557.

[44]50 Fed. Reg. 13456 (April 4, 1985).

[45]Id. at 13458.

[46]53 Fed. Reg. 27268 (July 19, 1988).

a final rule . . . ." In the preamble to that NPRM EPA reaffirmed its basic position with respect to the federally permitted release exemption in the following language:

> A straightforward interpretation of the statute indicates that if a release exceeds permitted levels, it is not "in compliance with" the permit and cannot be "federally permitted." Therefore, if the amount of the release exceeding the permitted level, i.e., the portion of the release that is not federally permitted, is equal to or exceeds the RQ, the release must be reported immediately to the National Response Center. This approach also avoids the numerous and unnecessary reports that could be generated by the reporting of small permit excursions that are better addressed by the permitting authority.
>
> EPA believes that its interpretation is required by the plain language of the statute and is essential to ensure adequate protection of public health and the environment. The Agency believes that CERCLA reporting and reporting under permit programs is not duplicative because there are significant differences between the purposes served by CERCLA notification and the purposes of permit programs. The permit notification requirements and the information that is reported under permit programs may differ from one program to another. If permit notification requirements were allowed to suffice for CERCLA notification, the information available to the CERCLA program on releases might be inconsistent and incomplete. Permit programs also differ in their reporting mechanisms and do not always require immediate notification. In some cases, releases in excess of permitted levels need only be reported at specific intervals (e.g., monthly). Moreover, releases in excess of permit levels are reported to different Federal and State authorities, depending upon the permit. CERCLA requires immediate notification to a central office, the National Response Center, as soon as the person in charge has knowledge of a release equal to or exceeding an RQ, so that timely response may be initiated if the appropriate government authority determines

> that the release may present substantial danger to public health or the environment.[47]

As for federally exempt emissions subject to CAA permits or control regulations, EPA stated in the preamble to the same NPRM:

> [A]s stated in the preamble to the May 25, 1983 NPRM, for this exemption to apply, any such CAA controls must be "specifically designed to limit or eliminate emissions of a designated hazardous pollutant or a criteria pollutant." (See S. Rep. No. 848, 96th Cong. 2nd Sess. 49 (1980)). The CAA exemption therefore cannot be read broadly to cover any and all types of air emissions. Moreover, as today's proposed rule makes clear, for the exemption to apply, the emission must be in compliance with the applicable permit or control regulation.
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> * * * * * * *
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> EPA does not agree that the broadest interpretations, under which virtually all air emissions including dangerous episodic releases would be exempt from CERCLA reporting requirements, could have been intended by Congress under section 101(10). Moreover, the exemption for "federally permitted releases" under CERCLA section 101(10) also applies to reporting of air releases to State and local governments under Title III of SARA. Title III, which is the Emergency Planning and Community Right-to-Know Act of 1986, was enacted in large part as a response to dangers posed by chemical air releases to surrounding communities, such as the catastrophic release of methyl isocyanate in Bhopal, India. Because Title III was intended to address particularly the dangers of air releases, interpreting the exclusion for federally permitted releases so that accidental air releases would not be reported locally would be directly contrary to the legislative purpose. Similarly, the purpose of notification requirements under section 103 of CERCLA is to ensure that the government is informed of any potentially dangerous releases of hazardous substances to the environment for which timely response may be necessary. Establishing a very

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[47] Id. at 27269.

> broad interpretation of CAA controls, as requested by the commenters, could eliminate virtually any CERCLA reporting of air emissions and, thus, the potential for early Federal responses; such an approach would eviscerate not only the Congressional intent but also the major purpose of the section 103 notification requirement.[48]

EPA went on to solicit public comment on three approaches to distinguishing emissions permitted under the CAA from releases that could create potential hazards to surrounding areas and for which timely notification under CERCLA and Title III is necessary.[49] In 1989, the Agency issued a supplemental notice in which it clarified one of the three approaches or options suggested a year earlier.[50] Since that time the Agency has been silent on the matter; no final rule has yet been published.

Absent a final rule or a formal Agency determination as to which of the three suggested approaches (or possibly another approach altogether) which it might take in defining federally exempt CAA releases, only the Agency's interpretation of the statutory definition of a federally exempt release, in general, and of a federally exempt CAA release, in particular, which were published in the preamble to the reproposed rule, are available for guidance. This form of the Agency's interpretation raises some question as to whether deference should apply to it under Chevron. While deference is not limited only to legislative rules, formally

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[48] Id. at 27273.

[49] Id. at 27273-27274.

[50] 54 Fed. Reg. 29306 (July 11, 1989).

promulgated as regulations, it is limited to "interpretations expressed in formats that Congress intended to be used to implement delegated lawmaking authority," according to some expert scholars.[51] Two questions thus arise: the extent to which Congress expressly or impliedly delegated authority[52] for EPA to further define "federally permitted releases," and whether the format of the Agency interpretation at issue here, the preamble to the NPRM, was intended by Congress to be used to implement that authority.

The extent of the Agency's authority in CERCLA to prescribe regulations to further define or interpret terms, such as "federally permitted release," which are defined in CERCLA is not totally clear.[53] However, a general delegation from Congress for EPA "to prescribe such regulations as may be necessary to carry out this chapter [EPCRA]"[54] provides the authority for EPA to further define

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[51]Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and Courts?, Yale J. on Reg. 1, 46, 63 (1990); see also, Cass R. Sunstein, Law and Administration after Chevron, 90 Colum. L. Rev. 2071, 2093-94 (1990).

[52]See, City of Kansas City, Mo. v. HUD, 923 F.2d 188, 191-92 (D.C. Cir. 1991); Linemaster v. U.S. E.P.A., 938 F.2d 1299, 1302-03 (D.C. Cir. 1991).

[53]Section 102 of CERCLA, 42 U.S.C. § 9602, which gives the Administrator of EPA authority to promulgate regulations to designate additional hazardous substances and to adjust all RQ's for hazardous substances, was cited in the preamble of the NPRM. In contrast, see Massachusetts v. Morash, 490 U.S. 107 (1989) where the agency was specifically authorized to define the "accounting, technical and trade terms" in a statute and the agency subsequently published a NPRM in which it explained its intended treatment of "vacation pay" and later proposed regulations and then adopted final regulations in which it adhered to the position announced in the initial NPRM. The Court found the agency's views to be reasonable and entitled to deference under Chevron.

[54]Section 328 of EPCRA, 42 U.S.C. § 11048.

statutory terms, which would include the CERCLA definition of "federally permitted release" by virtue of its incorporation by reference in EPCRA.

Notwithstanding such authority, the Agency has not yet promulgated a final rule as to "federally permitted releases." Authorities on the subject have concluded that even where an agency possesses the power of interpretation through legislative rulemaking, if the agency simply announces its interpretation without going through the rulemaking process, the Agency's interpretation would not be entitled to the deference normally accorded under Chevron.[55] "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound."[56] Whenever an agency circulates a proposal that it has not firmly decided to put into effect and that it may subsequently reconsider in response

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[55]Sunstein, supra note 51, at 2093, n. 106 ("[E]ven if an agency has been given the power of interpretation through rulemaking, it is not entitled to deference if it did not exercise rulemaking power in the particular case . . . . [A]n agency that has been given power to make rules, but that simply announces a view one way or the other without going through the rulemaking process, would not receive deference."); Anthony, supra n. 51, at 46, 62-63; See also, Martinson v. Federal Land Bank of St. Paul, 725 F. Supp. 469, 471 (D.N.D. 1988). Prior to Chevron, authority was divided as to whether an informally expressed agency interpretation may be accorded deference. See, General Electric Co. v. Gilbert, 429 U.S. 125, 140-145 (1976). But see, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566-68 (1980).

[56]Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1985).

to invited public comment, such a proposal does not have the force of law.[57]

In light of the dubiousness of applying Chevron deference to the Agency's interpretation,[58] it will be given the significance it deserves under the Skidmore analysis:[59]

> We consider that the rulings, interpretations and opinions of the Administrator under this

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[57]Wuillamey v. Werblin, 364 F. Supp. 237 (D.C.N.J. 1973).

[58]See, Liegl v. Webb, 802 F.2d 623, 626-27 (2d Cir. 1986), cert. den., 481 U.S. 1035 (1987) (Deference accorded an NPRM, treated as a clarification of prior policy, issued by the Department of Health and Human Services). See also, Anthony, supra note 51 at, 40-42, where the author suggests an innovative approach where the agency, although possessing the authority to interpret with the force of law, has to date expressed its interpretation only informally: "If that informal interpretation becomes the subject of direct review before the agency has taken concrete action based upon it, a different judicial response is appropriate. The nonbinding aspect of the informal interpretation should not entitle the court to tell the agency what definitive view to adopt. The agency should remain untrammeled in its freedom to choose a position anywhere within the zone of indeterminacy. The reviewing court therefore should decide only whether the informally expressed interpretation is invalid on its face, and should reserve its detailed scrutiny for later agency actions that enforce or otherwise execute the interpretation. Meanwhile, the court's determination not to strike down the informal interpretation would not invest that interpretation with the force of law, and would not itself have the same force as would a full judicial interpretation of the statute. In this situation, the agency does not bind the court, and the court does not bind the agency." (Footnote omitted.) Accord, Ayuda v. Thornburgh, 880 F.2d 1325, 1343 (D.C. Cir. 1989) ("[W]hen dealing with an ambiguous statutory term . . . a court should not interpose its own interpretation of the term before the agency has an opportunity to consider the issue and fix its own statutory construction"). The time elasped since the last relevant NPRM should have provided EPA with sufficient opportunity to issue a final regulation.

[59]Martin v. OSHA, 499 U.S. ___, 113 L. Ed. 2d 117, 132 (1991). "As a matter of practical judicial psychology, it may often make little operational difference whether an interpretation is reviewed independently but given Skidmore consideration or is reviewed for reasonableness under Chevron Step 2." Anthony, supra, note 51, at 40.

> Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[60]

Accordingly, the Agency's intepretation as announced in the NPRM is entitled to substantial weight if it meets the tests described above, particularly so long as it is not inconsistent with the Congressional purpose of the statutes.[61]

Under the Skidmore approach the weight to be accorded EPA's interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and its persuasiveness.[62] It will also be considered in conjunction with the broad purposes of the statutes here involved.

EPA has clearly given the complex matter of exemptions for federally permitted releases careful consideration. The generic issue of federally permitted releases has been considered in the

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[60]Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[61]Mallory v. Eichlen, 628 F. Supp. 582, 592-593 (D. Del. 1986) citing Batterton v. Francis, 432 U.S. at 425 n. 9, 97 S. Ct. at 2405 n. 9 and Morton v. Ruiz, 415 U.S. 199, 237, 94 S. Ct. 1055, 1075, 39 L.Ed.2d 270 (1974).

[62]See Diver, Statutory Interpretation in the Administrative State, 133 U.Pa.L.Rev. 549, 562 n. 95; FEC v. Democrative Senatorial Campaign Comm., 454 U.S. 27, 37 (1981); General Electric v. Gilbert, 429 U.S. 125 (1976); Malloy v. Eichlen, 628 F. Supp. 582 (D.Del. 1986).

preambles to four different NPRM's.[63] EPA has itself acknowledged the "complexity of the issues involved"[64] and has solicited comments from the regulated community as well as the general public concerning the manner in which the exemption for CAA federally permitted release will be implemented. While the Agency has proposed three alternative approaches for public consideration and comment, it has emphatically adhered to its position that the "CAA exemption . . . cannot be read broadly to cover any and all types of air emissions" and "for the exemption to apply, the emission must be in compliance with the applicable permit or control regulation."[65]

The position which EPA has taken as to the proper interpretation of section 101(10)(H) in this case is the same position which the Agency took in the NPRM of July 18, 1988, soon after the enactment of EPCRA, and is not inconsistent with the earlier discussions of the subject in the NPRM's published in the Federal Register in 1983 and 1985, following the enactment of CERCLA. Furthermore, given the absence of any applicable judicial precedent, EPA's interpretation cannot be said to be contrary to an interpretation of section 101(10)(H) by a Federal Court.

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[63]See pp. 26-30, supra.

[64]See p. 27, supra.

[65]53 Fed. Reg. at 27273.

I find the validity and persuasiveness of EPA's reasoning to be unassailable, particularly in light of the purposes of the two statutes as reflected in the Congressional deliberations.[66]

A major purpose of the notification requirement in Section 103 of CERCLA is to alert government officials to releases of hazardous substances that may require rapid response to protect public health and welfare and the environment. Under Section 104 of CERCLA, the federal government may respond whenever there is a release into the environment of a hazardous substance which may present an imminent and substantial danger to public health or welfare. Such notification, based upon an RQ of the hazardous substance, constitutes a trigger for informing the government of a release so that the need

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[66]Respondent suggests in its briefs that an examination of purpose is inappropriate to resolving this issue of statutory interpretation. I disagree. As Judge Learned Hand once wrote, "[e]ven though the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabel v. Markham, 148 F.2d 737, 739, affirmed, 326 U.S. 404 (1945). See also, Massachusetts v. Morash, supra, n. 53 ("in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law and ot its object and policy"); Russello v. United States, 464 U.S. 16 (1983) (engaging in detailed analysis of purpose, structure, and legislative history of the federal RICO statute in order to determine the "~~plain~~ meaning" of the word "interest"). I find that an analysis of purpose and legislative history appropriate in determining the use intended by Congress for the "federally permitted release" exception.

for response can be evaluated and any necessary response undertaken in a timely fashion.[67]

That Congress conditioned the federally permitted release exemption on the existence of reporting requirements in permit programs is clear from the earliest legislative history of the term. Congress originated the federally permitted release exception in a 1978 amendment to the Clean Water Act (CWA) in which it exempted discharges regulated under the Act from the statute's strict liability spill provision, Section 311, if they were permitted under the statute's Section 402 permit system.[68] When it adopted the federally permitted release provision in CERCLA, Congress intended the exception to correlate with immediate reporting requirements to be incorporated into the relevant permit programs.[69]

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[67]All Regions Chemical Labs, Inc., Docket No. CERCLA-I-88-1089, Initial Decision at 32 (December 1, 1989); affirmed, All Regions Chemical Labs, Inc. d/b/a/ Advanced Laboratory, Final Decision CERCLA Appeal No. 90-1, EPCRA Appeal No. 90-1 (July 2, 1990); affirmed, All Regions Chemical Labs, Inc. v. U.S. EPA, No. 90-1715, slip op. (1st Cir. May 6, 1991).

[68]Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2).

[69]While the exemptions from liability for federally permitted releases are provided to give regulated parties clarity in their legal duties and responsibilities, these exemptions are not to operate to create gaps in actions necessary to protect the public or the environment. Thus the reporting requirements under section 402 should be amended by the EPA to cause owners and operators who release substances designated under section 311 or this bill under circumstances which are now excluded from section 311 to report under section 402 in a manner similar to that required under section 311 so that the appropriate steps may be taken to protect, for instance, drinking water supplies or other downstream resources. The current 24 hour notice period under the NPDES [Section 402] regulations should be amended to provide immediate notice in the event of a failure of a treatment or operating component which results in a release of a hazardous substance. Such a case recently occurred in Orangeburg, South Carolina. While exclusion from

The previously cited passages from the legislative history of CERCLA indicate that Congress intended to avoid gaps in immediate notification requirements. There is no legislative history found, nor any logical reason to believe, that Congress intended to leave gaps in immediate notification requirements for dangerous releases into the air, allowing such releases to go unreported.[70]

EPCRA builds upon the emergency response provisions of CERCLA with the specific purpose of improving the ability of local governments to respond to emergencies caused by the release of dangerous substances into the environment. The report from the Senate Committee on Public Works and the Environment states such purpose clearly.:

> Section 103(a) of CERCLA requires any person in charge of a vessel or facility to notify the NRC as soon as the person in charge has knowledge of any release of a hazardous substance in an amount that equals or exceeds the RQ estab-

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section 311 was claimed, the company's notice, which was filed in a manner consistent with section 402, was too late to protect downstream drinking water sources. This should be repaired by the EPA in the regulations implementing the notice provisions of section 402. S. Rep. No. 96-848, 96th Cong., 2d Sess. 48 (1980). [Emphasis supplied.]

[70] See pp. 23-24, supra. ("[T]hese exemptions are not to operate to create gaps in actions necessary to protect the public or the environment.") ("Accidents, whatever their cause, which result in, or can reasonably be expected to result in releases of hazardous pollutants would not be exempt from the requirements and liabilities of this bill.") ("The laws authorizing permits and regulations that control these releases provide for notification and such notification procedures should provide the same public benefits -- especially regarding timely response -- as would be provided in this substitute bill. Notice is crucial to the timely Government response which is central to the superfund bill. The federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law apply to discharging sources.")

> lished under § 102 [of CERCLA]. These notifications serve as one basis for the Federal government to determine whether response action is appropriate for the release. One problem that has emerged, however, is that notification of the NRC may not be relayed quickly enough back to the State and local authorities who must provide the first line of emergency response. The reported bill corrects the problem by requiring immediate direct notification of State and local emergency response officials for releases of highly toxic substances, and particularly those determined by regulation potentially to require response on an emergency basis. In these emergency situations every minute may count in taking effective action, and immediate notification of local authorities is essential.[71]

As Senator Heinz explained when EPCRA was considered by the Senate: "This amendment will remove the information gap that has thus far hindered our ability to plan for and react to chemical emergencies, and it will establish systems for governments at all levels to cooperate and properly utilize this vital information. It will help us prevent immediate problems from becoming serious and far-reaching disasters."[72] Senator Byrd emphasized that strictly enforced reporting requirements are essential to protect the public and environment from dangerous air releases:

> The lessons of the past year have underscored the importance of effective reporting requirements, and tough penalties for failure to report releases. Nowhere was this clearer than in West Virginia this summer [August 11, 1985] when a toxic cloud of aldicarb oxide from a Union Carbide facility hung over the plant for 20 minutes before response officials were notified. It was another 20 minutes before the local community was notified, at which time the

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[71]S. Rep. No. 99-11, 99th Cong., 1st Sess. 8 (1985).

[72]131 Cong. Rec. 24,077 (Sept. 18, 1985).

> cloud had moved through the community, sending more than 130 workers and residents to area hospitals.[73]

Numerous references throughout the legislative history illustrate that it was Congress' intent for EPCRA to address air releases in particular: "We need only remember the recent tragedy in Bhopal, India, and the accidents in Institute, WV to realize how essential it is that we develop the means to respond quickly to the release of hazardous substances into open air.[74] "I requested that this hearing be held in New Jersey to investigate what could be done to minimize the risks associated with chemical releases into the atmosphere."[75] "Both the President and the courts should constantly bear in mind that this is a law directed at all toxic threats, whether air, water, or waste, and without regard to the specific use if any, to which the chemical or organism was to be used; individuals and society are to be protected from all of these and made whole then protection has failed."[76]

Respondent argues that because New Jersey could, and in one case did, bring enforcement actions under other statutes for Respondent's releases, no "gap" in the government's ability to protect the public is created by its broad reading of "federally

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[73]131 Cong. Rec. 23,947 (Sept. 17, 1985).

[74]131 Cong. Rec. 24,339-24,356 (Sept. 19, 1985) (Statement of Senator Heinz) [emphasis added].

[75]131 Cong. Rec. 23,947 (Sept. 17, 1985) (Statement of Senator Lautenberg) [emphasis added].

[76]131 Cong. Rec. 23,943 (Sept. 17, 1985) (Statement of Senator Stafford) [emphasis added].

permitted release." Respondent contends further that requiring a facility to obtain an air emissions permit and also requiring it to adhere to the immediate notice requirements of CERCLA and EPCRA subjects it to double liability. I reject these arguments on two counts. First, I find that in making these arguments Respondent fails to recognize the critical distinction between enforcement actions stemming from the fact of a release, and enforcement actions stemming from a failure to report them to the appropriate response authorities.[77] Enforcement actions brought against Respondent for the fact of excess emissions do not impact the instant action for failing to report them, and therefore, do not subject Respondent to double liability.

Second, and more importantly, I find that Respondent's interpretation of a federally permitted release does create a gap in the government's ability to protect the public and environment from hazardous air releases. Neither the CAA, nor the control regulations, nor the permits issued to Respondent under the CAA, contain immediate reporting requirements of the nature Congress envisioned when it crafted the federally permitted release exception. Respondent's permits do not contain reporting requirements of any kind. And the control regulations at issue, the New Source Performance Standards regulating Respondent's sulfur complex tail gas unit (source of the December 4, 1989, release of hydrogen

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[77] See In the Matter of Thoro Products, [CERCLA/EPCRA] Docket No. EPCRA VIII-90-04 at 40-41 (May 19, 1992) (noting that penalties assessed under EPCRA are based upon the potential consequences of the failure to report a release - not upon the potential consequences of the release itself).

sulfide), only require reporting of excess emissions every three months.[78]

This type of reporting requirement serves a very different purpose than "immediate emergency notification" requirements, and most assuredly does not constitute the kind of reporting Congress envisioned when it enacted Section 103 of CERCLA and Section 304 of EPCRA. These provisions require immediate reporting of releases exceeding permit limits by an RQ to federal and local response authorities. As Congress noted when it enacted EPCRA in 1986, "[u]nlike EPA's existing notification regulations, notification [under EPCRA] must be immediate. This notification must be accompanied by specific information pertaining to the substances released and appropriate response measures."[79] Section 101(10)(H) of the federally permitted release exception allows facilities already subject to immediate reporting requirements under the CAA

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[78]Three types of information are collected under NSPS: monitored parameter data, excess emission data as measured by continuous monitoring systems (CMS), and direct compliance information. The data deemed most important by the EPA, the direct compliance information, is required to be reported on a quarterly basis: "Direct compliance information is most useful to an enforcement agency because the compliance status of the source is evident from the information itself, and no further testing is necessary for documentation. Because these data can be used so quickly, and because it is beneficial to an enforcement action to have the most current data available, sources are required to report this information to EPA on a quarterly basis. Data other than direct compliance information is required to be reported semi-annually." 52 Fed. Reg. 36440-36441 (Sept. 29, 1987) (proposed rule reducing required frequency of submission of excess emission reports from quarterly to semi-annually for Petroleum Refineries -- except sulfur dioxide excess emission data which remained under a quarterly reporting requirement).

[79]131 Cong. Rec. 24,061 (Sept. 18, 1985).

to avoid duplicative requirements and double liability. Respondent has not acted in compliance with any immediate reporting requirements under the CAA,[80] and it may not, therefore, claim exemption from the CERCLA or EPCRA notification and reporting requirements. Interpreting the exclusion for federally permitted releases, as Respondent advocates, so that accidental air releases would not have to be reported locally would be directly contrary to EPCRA's legislative purpose. Such an approach would similarly frustrate the purpose of Section 103 of CERCLA, requiring that accidental air releases be reported to a federal response entity. As Complainant has argued, it is difficult to imagine a reading of the statute further out of line with the intention and purpose of its authors. The notification and reporting requirements of EPCRA and CERCLA are designed to ensure that in the event of a hazardous chemical release, emergency response officials can respond immediately to protect nearby communities. Given this statutory history, Respondent's interpretation of the federally permitted release exemption, as it relates to releases exceeding their permitted levels of emission by an RQ, undermines the purposes of the statutes. I find that Respondent's interpretation of a federally

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[80]In fact, Respondent claims it reported the releases at all out of an abundance of caution, and because a New Jersey statute could be read to require immediate reporting to the state. In either case, Respondent did not report pursuant to the CAA. Mobil claims it made immediate notificaton "out of an abundance of caution" (Ans. 91-120 at 4, 91-0122 at 4, 91-0123 at 4), and because "state air law could be read to require reporting odors even if an emission limit has not been exceeded." The state air law Mobil speaks of is the New Jersey Toxic Catastrophe Prevention Act (TCPA). See Respondent's PHE 91-0120 Ex. 7 at 7, 91-0122 at 6-7, 91-0123 at 7.

permitted release, in direct contradiction of the purposes and goals of EPCRA and CERCLA, leaves the public and the environment dangerously unprotected from harm inherent to toxic chemical air releases. I reject it accordingly.

Instead, I find that Complainant's interpretation of Section 101(10)(H) of CERCLA to be eminently reasonable and consistent with the purposes of both CERCLA and EPCRA. Therefore, I conclude that if a release into the air exceeds a permitted level and if the amount exceeding the permitted level is an RQ or more, the release is not subject to the federally permitted release exception in Section 101(10)(H) and must be reported in accordance with CERCLA and EPCRA.

As I have found that Respondent's releases do not qualify as "federally permitted releases," and therefore are not exempt from the requirements of EPCRA and CERCLA, I must determine whether Respondent has complied with the statutes' notification and reporting provisions. Contrary to Respondent's contentions, the issues raised here are legal issues and not factual ones. Under the provisions of 40 C.F.R. § 22.20(a), such legal issues are precisely the issues which I, as Presiding Officer, am authorized to resolve in an accelerated decision.[81]

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[81] In the Matter of All Regions Chemicals Labs, Inc., Docket No. CERCLA-I-88-1089, Initial Decision (May 3, 1989).

B. Immediate Notification to the National Response Center

Count I of Complaint No. 91-0122 alleges that Respondent failed to notify the NRC of its December 4, 1989 release of hydrogen sulfide as required by CERCLA Section 103(a), which states in pertinent part:

> Any person in charge of a vessel or . . . an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or 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.

Section 103(a) requires "immediate" notification to the NRC "as soon as" the person in charge of the facility has knowledge that an RQ or more of a hazardous substance has been released. Having found that the release in question was not a "federally permitted release," I now turn to the question of whether the notification was made to the NRC as required by CERCLA Section 103(a).

As to whether the Respondent had knowledge that a release occurred that would require a report to the NRC, the record in this case is clear. Respondent admitted that it had knowledge[82] that its release of hydrogen sulfide exceeded the RQ for that substance

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[82]Such knowledge of a release may be actual, or it may be constructive. Constructive knowledge may be found upon a showing that Respondent possessed knowledge of such circumstances that would ordinarily lead, upon the exercise of reasonable diligence which a prudent person ought to exercise, to knowledge of a release of an RQ of a hazardous substance. In the Matter of Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA VIII-90-04, at 21-22 (May 19, 1922). Here, Respondent's knowledge was actual.

at 12:40 p.m. on December 5, 1989.[83] Further, Respondent admitted that it did not report the release to the NRC until more than a day later delaying the reporting to approximately 2:50 p.m. of the following day, December 6, 1989.[84]

Congress has stated explicitly that delays in making notification pursuant to Section 103(a) of CERCLA "should not exceed 15 minutes after the person in charge has knowledge of the release, and 'immediate notification' requires shorter delays whenever practicable."[85]

I conclude that under Section 103(a) of CERCLA immediate notification to the NRC was not made by Respondent Mobil Oil Corporation. Respondent delayed approximately 26 hours after the Respondent possessed knowledge that the release of hydrogen sulfide met or exceeded the RQ. By any objective standard, Respondent's notice to the NRC was not immediate. Respondent knew, or should have known, that immediate notification was required of it in this circumstance. In light of the umambiguous language in the statute requiring immediate notification to the NRC as soon as the person in charge possesses the requisite knowledge, as well as the clear intent of Congress in defining the word "immediate" under the circumstances, I find that Respondent failed to comply with the Section 103(a) requirement for immediate notification. Respondent

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[83]Finding of Fact 14, supra.

[84]Finding of Fact 15, supra.

[85]S. Rep. No. 99-11, 99th Congress, 1st Sess. 8-9 (1985).

did not even come close to meeting this requirement under the circumstances presented in this case.

C. Written Follow-up Notice to the State Emergency Response Commission

The final issue that I find appropriate for accelerated decision in this case concerns Complainant's allegations in all three complaints that Respondent failed to comply with Section 304(c) of EPCRA, requiring that a written follow-up notification be sent to the SERC as soon as practicable after a reportable release occurs.

Respondent submits that this issue is not appropriate for accelerated decision because " . . . unlike the federally-permitted release issue, which arises solely as a matter of law, whether Mobil satisfactorily provided the [written follow-up] notices turns on questions both of law and fact. That Mobil provided the notices is not at issue; rather the dispute centers on the adequacy of the notices Mobil submitted and made."[86]

The issuance of an accelerated decision is appropriate when there are no material facts in dispute and the matter may be resolved as a matter of law. The Consolidated Rules of Practice, 40 C.F.R. § 22.20, provide in pertinent part:

> (a) General. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . .

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[86] Respondent's Reply at 10.

The concept of an accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The existence of minor factual disputes does not preclude the issuance of an accelerated decision. To have such an effect, the disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue.[87]

The essential facts are not contested as to the controlling issue, which is whether Respondent provided follow-up notification to the SERC as required by the statute.

Section 304(c) of the EPCRA requires specifically that:

> As soon as practicable after a release which requires notice under subsection (a) of this section, such owner or operator shall provide a written follow-up emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b) of this section [which requires an immediate phone call to the SERC], and including additional information with respect to:
>
> (1) actions taken to respond to and contain the release,
> (2) any known or anticipated acute or chronic health risks associated with the release, and
> (3) where appropriate, advice regarding medical attention necessary for exposed individuals.[88]

Although Respondent made a genuine attempt to comply with this requirement, Respondent failed to comply adequately. Respondent sent notices on three separate occasions to the wrong address. This

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[87] Environmental Protection Agency vs. Streeter Flying Service, Inc., Docket No. IF&R VII-612C-85P (July 27, 1985).

[88] 42 U.S.C. § 11004(c).

was done despite the fact that the proper address was published in the New Jersey Register.[89]

A notice published in the New Jersey Register on August 17, 1987, provided specific instructions to the regulated community, stating in part:

> 5. The statewide notification point for the State Emergency Response Commission has been designated as the New Jersey Department of Environmental Protection 24 hour Environmental Action Line (609) 292-7172. Follow-up written emergency notice shall be provided to the following address:
>
> Department of Environmental Protection
> Division of Environmental Quality
> Bureau of Communications and Support Services
> CN-411
> Trenton, New Jersey 08625[90]

Respondent, however, sent its written follow-up notices to the following address:

> N.J. Department of Environmental Protection
> Division of Environmental Quality
> Bureau of Hazardous Substance Information
> CN-405
> Trenton, New Jersey 08625[91]

Respondent argues that its notices should be deemed made in full compliance with Section 304(c) of EPCRA because they were merely sent to the wrong bureau within the NJDEP. Respondent contends that the Bureau of Communications and Support Services, the entity to which Respondent should have addressed its follow-up

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[89]Finding of Fact 18, supra.

[90]Complainant's PHE 91-0120, Exh. 4; 91-0122, Exh. 6; 91-0123, Exh. 4.

[91]Findings of Fact 19, 20 and 21, supra.

notifications is "nothing more than a mail room whose responsibility it is to direct follow-up notices and other mail to the appropriate location."[92] Respondent argues that it is the Bureau of Hazardous Substance Information and the Bureau of Emergency Response that actually receive notice and take appropriate follow-up action. Thus, Respondent contends, it was complying with the purpose of the statute by directly notifying a bureau which might actually respond.[93]

I find it unnecessary to address any of Respondent's arguments involving either the structure and functions of the New Jersey SERC and Department of Environmental Protection, or any confusion which Respondent may have possessed as to the EPCRA reporting requirements. Notice was published in the New Jersey Register a full year prior to Respondent's first release. This notice designated the Bureau of Communications and Support Services as the entity to which all follow-up notifications under EPCRA Section 304(c) were to be sent.

The Supreme Court has stated in Federal Crop Ins. v. Merrill, 332 U.S. 380 at 384-385 (1947), that "[j]ust as everyone is charged

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[92]Respondent's Reply at 12.

[93]Respondent argues that "in two of the three cases, the follow-up notification letters were proven to have been routed to the particular office which is ultimately responsible, the Region II Office of the Bureau of Emergency Response." Respondent's Reply at 13. I find the fact that two follow-up notices reached a response office is irrelevant to the issue of whether Respondent complied with the statute in question. The availability from alternative sources of information required to be reported may be considered in assessment of a penalty, but is not relevant for purposes of determining liability. In the Matter of All Regions Chemical Labs, Inc., Docket No. CERCLA-I-88-1089 at 36-37 (December 1, 1989).

with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives notice of their contents."[94] The same principle extends to state law[95] and the publication of information and directives in the New Jersey Register. Residents and those who do business within the state of New Jersey, including Respondent, are charged with notice of the laws of the state of New Jersey and must be held accountable for same.[96]

Respondent argues that it relied upon the representations of NJDEP operators in providing information on the filing of its follow-up notification, and offers evidence on "instructions regarding reporting received from NJDEP Hotline Operators and Bureau of Emergency Response Operators." Under the Supreme Court's decision in Federal Crop, supra, a government employee's indication of the law cannot displace a person's responsibility under or liability to the law. "It is a well established rule that the United States is neither bound nor estopped by acts of its officers

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[94]See also, Yakus v. United States, 321 U.S. 414, 435 (1944). ("Notice published in the Federal Register is sufficient, under the Federal Register Act, to afford notice to all affected pers ns.")

[95]Everyone is charged with knowledge of the laws of the state in which they reside or do business. In the Matter of Fair Haven Plastics, Inc. and Fair Haven Investment Associates, Docket No. V-W-88-R-00 (April 27, 1989); Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982); International Milling Co. V. Columbia Transportation Co., 292 U.S. 511, 520-21 (1934); Loftin v. United States, 6 Cl. Ct. 596, 608, n. 8 (1984), affirmed, 765 F.2d 1117 (1985); 31A C.J.S. Evidence § 132(1) pp. 245-52, 255 (1955).

[96]Kessler v. Tarrats, et al., 191 N.J. Super. 273; 466 A.2d 581, 583 (1983); Gilbraltar Factors Corp. v. Slapo, 41 N.J. Super. 385 (App. Div. 1956); aff'd. 23 N.J. 459 (1957), app. dism., 355 U.S. 13 (1957).

or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit . . . . Those dealing with an officer or agent of the United States must be held to have had notice of the limitations upon his authority."[97]

These principles concerning reliance upon the oral representations of government officials also apply to those of state government officials. Respondent should have known the applicable sections of New Jersey law as set forth in the New Jersey Register concerning the proper filing of these notifications. In failing to follow this notice's explicit direction, Respondent failed to comply with the strict letter of the law.

With regard to the issue of whether or not the Respondent complied with the requirements of EPCRA Section 304(c) in properly providing written notice to the SERC, no genuine issue of material fact exists to bar an accelerated decision as to liability on this issue. As a matter of law, I hold that Respondent Mobil Oil Corporation failed to properly notify the SERC by misaddressing its follow-up notification to the SERC.

In summary, I conclude that no genuine issues of material fact exist as to the question of liability as to Count III in case 91-0120, Counts I and II in case 91-0122 and Count II in case 91-0123 and Complainant is entitled to judgment as a matter of law as to those counts. I find that Respondent, Mobil Oil, has violated Section 103(a) of CERCLA, 42 U.S.C. § 9603, as alleged in Count I of case 91-0122, and Section 304(c) of EPCRA, 42 U.S.C. § 11004(c),

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[97] Id. at 384.

as alleged in Count III in case 91-0120, Count II in case 91-0122 and Count II in case 91-0123. Consequently, Respondent's motions to dismiss should be and hereby are denied and Complainant's cross-motions for partial accelerated decision should be and hereby are granted. I do not make a finding of the issue of liability as to Counts I and II in case 91-0120 or Count I of case 91-0123 and a hearing will be scheduled for the purpose of resolving liability as to those counts.

Pursuant to 40 C.F.R. Section 22.20(b)(2) I further find that the issue of the amount, if any, of the civil penalties, which appropriately should be assessed for the violations found herein, remains controverted and hearing should be scheduled for the purpose of deciding that issue as well.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: September 30, 1992
Washington, DC

IN THE MATTER OF MOBIL OIL CORPORATION, Respondent,
Docket Nos. EPCRA-91-0120, EPCRA-91-0122 and EPCRA-91-0123

Certificate of Service

I hereby certify that this Interlocutory Order Granting Complainant's Cross-Motion for Partial Accelerated Decision, dated SEP 30 1992, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region 2
26 Federal Plaza
New York, NY 10278

Copy by Certified Mail,
Return Receipt Requested to:

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Doris M. Thompson
Secretary

Dated: SEP 30 1992