UNITED STATES OF AMERICA

In the Matter of	:	
B.F. Goodrich Company	:	**DKT. NO. CERCLA/EPCRA-002-95**
Respondent	:	Judge Greene

ORDER

DENYING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

This matter arises under Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," or "the Act"), 42 U.S.C. § 9603(a), and Section 304(a) of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA," or "the Act"), 42 U.S.C. § 11004(a). The complaint herein charges Respondent B. F. Goodrich Company ("Respondent" or "B. F. Goodrich") with failure to notify certain agencies immediately upon becoming aware of releases of vinyl chloride from its facility in quantities that must be reported ("reportable amount" or

"reportable release") to such agencies. A release of vinyl chloride must be reported if it exceeds one pound. 40 C.F.R. § 302.4.

Count I alleges that Respondent failed to notify the National Response Center ("NRC") "immediately" of the release of 81 pounds of vinyl chloride on January 2, 1992, in violation of CERCLA § 103(a). Counts II and III relate to an alleged release of 825 pounds of vinyl chloride from Respondent's facility on November 18, 1992; they charge that Respondent failed to notify NRC of the release "immediately," in violation of CERCLA § 103(a) (Count II); and failed to notify the State Emergency Response Commission ("SERC") "immediately," in violation of EPCRA § 304(a) (Count III).

In answer to the complaint, Respondent argued that under the circumstances of the releases at issue all required notifications had, in fact, been "immediate." In addition it was asserted affirmatively that both releases were federally permitted, as the term "federally permitted release" is defined at section 101(10)(H) of CERCLA, 42 U.S.C. § 9601(10)(H). A release that is "federally per-

mitted," i. e. subject to regulation pursuant to specified statutes and regulations, is exempt from the emergency notification requirements of EPCRA and CERCLA.

Complainant moved for summary decision as to liability for all charges. Respondent's cross-motion, which will be dealt with in a separate opinion, seeks summary determination as to liability for the charge set forth in Count I. Both parties filed additional pleadings.[1]

In a motion for summary judgment the question is whether the moving party has met its burden of establishing that (1) no genuine issue as to any material fact remains to be determined, and (2) the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of showing that no genuine dispute exists as to any material fact, Celotex Corp. v. Catrett, 477 U.S.

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[1] Complainant's *Motion to Strike Respondent's Reply to Complainant's Response to Geon's Motion for Partial Accelerated Decision*; and *Respondent Geon's Combined Motion to Strike Complainant's Reply to Geon's Response to Complainant's Motion for Partial Accelerated Decision, and Response to Complainant's Motion to Strike*. Complainant asserts that Respondent failed to observe time limits set for submission of reply briefs and that Respondent's reply of October 2, 1996, should be stricken as untimely. Respondent states that Complainant failed to request leave to file its reply of September 16, 1996, as ordered, and therefore the reply should be stricken. Assuming, without deciding, that these assertions are true, there is no evidence that either party was prejudiced in such a manner as to warrant the sanctions requested. Both motions will be denied.

317, 323 (1986), and that it is entitled to judgment as a matter of law. To overcome the motion the opposing party must set forth specific evidence, by affidavits or otherwise, which reveals the existence of a material fact to be tried or submitted. The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, 477 U. S. 242, 251-52 (1986).

The purpose of the emergency notification provisions of CERCLA and EPCRA is to minimize harm to public health and welfare and the environment by facilitating rapid responses to accidents involving hazardous chemicals at or in excess of specified amounts. Taken together, CERCLA § 103(a)[2] and EPCRA § 304(a) impose a duty upon facilities that store, use, or produce hazardous chemicals to provide notice

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[2]Section 103 of CERCLA requires that:

> "any person in charge of a . . . facility shall, as soon as he has knowledge of any release (other than a federally permitted 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 . . . ." [Emphasis added]

immediately to certain federal, state, and local authorities in the event of a release of such a chemical in a reportable amount.[3] In order to prove a violation of these provisions, Complainant must show that a facility owner or operator had knowledge of a reportable release (other than a federally permitted release) and failed to give notice to the named authorities immediately upon obtaining such knowledge.

Facts Not in Dispute.[4]

The undisputed facts are as follows. On January 2, 1992, at 5:40 a.m. Respondent discovered a release of vinyl chloride at its Avon Lake, Ohio, General Chemical Facility.

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[3]EPCRA § 304(a) requires that:

> If a release of an extremely hazardous substance referred to in section 11002(a) of this title occurs from 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 of the facility shall immediately provide notice** as described in subsection (b) of this section. [Emphasis added]
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> Subsection (b) of Section 304 directs that:
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> **Notice . . . shall be given immediately after the release** by the owner or operator of a facility . . . to the community emergency planning committees . . . for any area likely to be affected by the release and to the State emergency planning commission of any state likely to be affected by the release . . . . [emphasis supplied]

[4] See generally the parties' *Agreed Stipulations of Fact and Law* attached hereto and made a part hereof as Appendix A .

This release was through a "red ball" indicator, a relief valve monitoring device.[5] Although the release was originally thought to be 500 pounds, Respondent subsequently calculated the amount at 81.4 pounds. A release of 81.4 pounds is in excess of the one pound reportable quantity established by CERCLA § 102 and regulations issued pursuant thereto. See 40 C.F.R. § 302.4. Respondent reported the release to the Avon Lake Fire Department at 5:55 a.m. (fifteen minutes after the release was discovered); to SERC at 6:30 a.m. (fifty minutes after discovery); and to the Lorain County Emergency Management Agency at 6:20 a.m. (forty minutes later). NRC, however, was not notified until 8:42 a.m. on January 2, 1992, three hours after discovery of the release. (See Count I).

On November 18, 1992, between 3:00 a.m. and 3:15 a.m. a loss of electric power resulted in a relief valve discharge of 825 pounds of vinyl chloride at the Avon Lake facility. Respondent discovered this release at approximately 3:20

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[5] According to a calculations sheet contained in Respondent's pretrial exchange document 5.iii, "the liquid discharge occurred via the bypass line on the red ball assembly."

six hours after the release was discovered, at 9:10 a.m. and 9:13 a.m. respectively.[6] (Counts II and III).

* * * *

Complainant urges that stipulated facts, pretrial exchange documents, and admissions dispose of all issues of material fact concerning liability, and relies upon the following with respect to the January 2, 1992, release:

1. Documents 5.i - 5.iii of Respondent's initial pretrial exchange, including "Emergency Notification Form" of January 2, 1992, indicate that 500 pounds (later corrected to 81.4 pounds of vinyl chloride were released at 5:40 a.m.

2. Calculations attached to the January 9, 1992 SARA[7] follow-up report (Respondent's pretrial exchange Document 5.iii) indicate that at 5:40 a.m. on January 2, "Frost is observed on the tail pipe of the Relief Valve. This indicates a liquid discharge."

3. *Agreed Stipulations of Fact and Law*, paragraph 10, which states, "On January 2, 1992, at 5:40 a.m. B. F. Goodrich discovered a release of vinyl chloride" at the Avon Lake facility.

As to the November 18, 1992, release (Counts II and

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[6] *Agreed Stipulations of Fact*, Appendix A.

[7] Superfund Amendments and Reauthorization Act of 1986.

3. *Agreed Stipulations of Fact and Law*, paragraph 10, which states, "On January 2, 1992, at 5:40 a.m. B. F. Goodrich discovered a release of vinyl chloride" at the Avon Lake facility.

As to the November 18, 1992, release (Counts II and III), Complainant urges that Respondent's pretrial exchange documents establish Respondent's knowledge of a reportable release at the time alleged, i. e. 3:00 a.m.[8] Specifically, Complainant relies upon the following:

1. Narrative of the release where Respondent recorded that a power outage occurred at 3:00 a.m. and that "[a]t 3:15 the operators heard P202 discharge into the atmosphere via one of the two relief valves and rupture disks on the poly."[9] (This release was calculated subsequently to be 825 pounds).

2. *Stipulated Facts and Law*, paragraph 18: "B. F. Goodrich discovered the November 18, 1992, release at approximately 3:20 a.m." (Complainant considers this statement an admission that Respondent had knowledge of a reportable release at the time alleged in the complaint.)

According to Complainant, the above evidence shows that

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[8] Respondent's first pretrial exchange, Documents 6i-iii.

[9] Respondent's pretrial exchange, Document 6.iii at 3.

Respondent had sufficient information to constitute knowledge that reportable releases had occurred at the times charged in the complaint,[10] based upon the holding at the trial level in In the Matter of Genicom Corporation et al., EPCRA-III-057 (July 16, 1992) where the appropriate inquiry in determining "knowledge" (of a reportable release) for purposes of CERCLA § 103/EPCRA § 304 notification was said to be "when [Respondent had] enough information that it could reasonably be said that it knew the releases were at or above the reportable quantities even though it did not know the exact quantities released." See also In re Mobil Oil Corp., EPCRA Appeal No. 94-2, 5 E.A.D. 490, 509-10 (Sept. 29, 1994). In other words, Complainant equates discovery of the releases with "knowledge" for purposes of giving the required notice based upon the language in

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[10] Complainant argues that Respondent's answer to Complainant's charge in paragraph 12 of the complaint that "[r]espondent had knowledge of a release of a hazardous substance at approximately 5:40 a.m. on January 2, 1992" is likewise an admission that Respondent had knowledge of a reportable release at the time charged. In its Answer respondent states that it admits "generally the allegations set forth in numbered paragraphs 12, 19, and 27 of the Complaint, but reserves the right to submit evidence of greater specificity or detail."

Genicom and Mobil Oil.[11] Since Respondent had sufficient information when the releases were discovered to conclude that they must be reported, Respondent's duty to report arose at those times. Complainant's view comes close to the proposition that discovery of a release of vinyl chloride in any amount constitutes knowledge of a reportable release at the time of discovery.[12] However, nowhere in the moving papers or reply is it fully explained why discovery must be equated with knowledge of a reportable release in this case.

In addition, Complainant argues that a delay of more than fifteen minutes in notifying the appropriate authorities after learning of a reportable release violates the immediate notice provisions of CERCLA and EPCRA, based upon

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[11]It is argued that the facts surrounding the two releases at issue are analogous to those found to constitute knowledge in Genicom. Genicom, Complainant asserts, was held to have knowledge of a reportable release upon becoming aware that a break in a pipe carrying cyanide waste had taken place, that liquid cyanide waste was on the floor of a containment area, and that the effluent carried in the pipe contained a high concentration of cyanide. Genicom at 9-10.

[12] See, for instance, Complainant's reliance upon the statement "Frost is observed on the tail pipe . . . (T)his indicates a liquid discharge" in Respondent's pretrial document 5.iii.

legislative history.[12] Complainant also cites administrative decisions where delays in notification of two hours (Genicom) and eight hours [Great Lakes Division of National Steel Corp., EPCRA Appeal No. 93-3, 5 E.A.D. 355 (1994)] respectively were found to violate the statutory requirements of "immediate" notice.

Respondent takes the position that Complainant misinterpreted the stipulations of fact concerning the discovery of the releases, and that discovery does not constitute knowledge for notification purposes. With respect to the January 2 release, Respondent stipulated, as noted above, that the time of discovery was 5:40 a.m. However, the release continued for nearly five hours. Further investigation and detailed calculations had to be performed in order to establish that a reportable release had occurred. As support for its argument Respondent points to the same follow-up report relied upon by Complainant. See Respondent's first pretrial exchange, Doc. 5.iii.

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[12]See Complainant's *Memorandum in Support of Its Motion for Partial Accelerated Decision* at 5-6 (quoting S. Rep. No. 11, 99th Cong., 1st Sess., at 8-9 (1985)).

Likewise, with respect to the November 18 release, it is asserted that although the release was discovered at 3:20 a.m., substantial further investigation and complicated mass balance calculations were required before a determination could be made that a reportable release had occurred. Respondent's pretrial exchange (document 6.ii) sets out the actions taken, and alludes to reasons why these actions were thought necessary.

Respondent argues that case law cited by Complainant acknowledges that a facility may need time after a release is discovered to acquire "knowledge" that a reportable release has occurred. In particular it is urged that the circumstances attending the two releases at issue here resemble those in Genicom in certain respects. There, a determination as to the quantities of cyanide released could not be made readily, and a delay of seven hours was found necessary for investigation and to perform calculations. Respondent contends that substantial investigation and detailed calculations had to be made in order to determine that a reportable release had occurred, yet it managed to

report the releases to all relevant agencies within 3 hours on January 2 and within 6 hours on November 18. Respondent notes that in In re Mobil Oil Corp. the appellate board allowed that in a case involving a reporting delay of ten days, five of those days were necessary to determine that a reportable release had occurred; in In re: Great Lakes Division of National Steel Corp., EPCRA Appeal No. 93-3, 5 E.A.D. 355, the parties stipulated that the facility operator did not have knowledge of a reportable release until nineteen hours after the release began.[13]

Respondent views Complainant's burden of proof in connection with the alleged failure to give immediate notice as requiring a showing that Respondent's delay was unreasonable under the circumstances. The arguments here are that (1) Complainant's reliance upon legislative history to establish an acceptable definition of "immediate" for purposes of CERCLA/EPCRA notifications is misguided; (2) the Senate report cited pertained to a bill that was never

[13] Of course, what parties may stipulate to, each for its own reasons, in a particular case is not really helpful here in determining when "knowledge" was obtained.

enacted; (3)even if the report had pertained to enacted legislation, it does not create a rule upon which liability can be imposed; (4) as in Genicom, the delay between discovery of the releases and notification of the appropriate authorities was an unavoidable consequence of the investigation and complicated calculations that were required to determine that a reportable quantity had been released. Under the circumstances, Respondent believes that notice to authorities only three and six hours, respectively, after the releases occurred was "immediate."

* * * *

Neither Act contains a definition of "immediate." The definition suggested by Complainant -- fifteen minutes at most, ordinarily -- may not be imposed based upon the legislative history cited by Complainant. It is obvious that (1) circumstances surrounding accidental releases -- including the identity or nature of the chemical involved -- are likely to be too varied for a specific meaningful definition; (2) Congress could have defined "immediate" if it had been so inclined; and (3) the enforcing agency could

have defined the term by regulation if it had chosen to do so.[14] "Immediate" notification must in this and many other cases be determined by reference to circumstances.

It is noted that Respondent did notify the Avon Lake Fire Department only fifteen minutes after discovering the January 2, 1992, release, and the Lorain County Emergency Management Agency within forty minutes of the release. Following the November 18, 1992, release, Respondent notified the local fire department within ten minutes, and the Lorain County agency fifteen minutes after the release was discovered, apparently because Respondent believed they were the authorities best qualified to deal with the releases.view.[15]

In the case of vinyl chloride, where a release of only one pound requires notice to the appropriate agencies, a prudent facility operator might consider that almost any release of this substance comes too close to the line not to

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[14] As Respondent observes, EPA has not published a policy statement (which, in the absence of abuse of discretion, would be binding at the administrative trial level) or a guidance document. *Memorandum in Response to Complainant's Motion,* at 3.

[15] This determination, however, has already been made ; the agencies to be notified are set forth in the Acts and implementing regulations. Clearly, it was not anticipated that a particular facility operator should decide for itself, in the event of a release, which agencies are best qualified to deal with it.

report, whatever subsequent calculations and investigations might reveal the actual release to have been. The January 2 release was originally thought to be *500 pounds*, later calculated at 81 pounds. Both amounts so far exceed the reportable quantity as to suggest the prudence of early notice to appropriate authorities on the ground that Respondent *should have known* the release was going to be reportable whatever the final calculation of the actual quantity. Notices given of the November 18 release of 825 pounds of vinyl chloride may be viewed similarly.

Respondent's position as to when it had knowledge (or should have had knowledge) that the releases were of such magnitude as to require notice must be considered in the strongest possible light for purposes of deciding the motion. A trier of fact must view the non-movant's case as true in determining whether a material fact has been raised. Here, a clear explanation may well exist as to why, although the releases were so far in excess of one pound as to make final calculations almost beside the point in terms of notice, no appreciation whatsoever for the size of the

releases could be gained until three hours (January 2) or six hours (November 18) after discovery of the releases, and why, if there is such an explanation, Respondent notifed some authorities quickly but not others. The issues of when Respondent had or should have had knowledge[17] of the reportable nature of the releases is obviously central to this matter.

Neither has Complainant shown that it is entitled to judgment as a matter of law. As noted above, Complainant's basis for equating discovery of the releases with knowledge of a reportable release for notice purposes is the language in Genicom and a reference to fifteen minutes in legislative history. However, the two, even taken together, do not add up to discovery constituting knowledge of a reportable release here. Complainant has not made the connection, and has not shown why these two factors alone are sufficient to confer liability in this case.

Accordingly, Complainant's motion for judgment as to

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[17] See Mobil Oil Corporation, 5 Environmental Administrative Decisions 490, 509-510 (September 29, 1994).

liability must be denied on the narrow basis that it remains to be determined how Respondent could not have known or reasonably suspected that the releases were in excess of one pound at the times they were discovered. Respondent's pretrial exchange and response to the motion allude to factors that appear to bear on this issue -- such as the differences between circumstances of the release in Genicom and the releases here. These allusions substantially exceed "mere promises" to produce evidence.

For purposes of making this ruling the following arguments are specifically rejected at this time:

(1) A release of vinyl chloride is "reportable" ***as soon as it is discovered.*** (This argument is premature for reasons set out herein).

(2) A facility operator needs to know, or should know, or may take whatever time is needed to calculate, the amount of a release before the reqirement to report arises. (Rather, the requirement to report arises as soon as the facility operator has reason to believe that the release is or will become large enough to exceed the reportable amount).

(3) Releases that, *in the facility operator's*

view, pose " . . . no threat to public health or safety . . . (and) were contemplated by and provided for in . . . local response planning" require no response on the part of state or federal agencies.[17] (The trial judge is not free to ignore statutory requirements that state and federal agencies are to be notified in the event of a reportable release. However, it can be argued that such matters as potential threat to the community and need for cleanup or emergency response[18] might conceivably go to the amount of penalty to be assessed if violations are found).

The following arguments are specifically rejected:

(1) Only those authorities best prepared and situated to respond to any emergency need be notified of a release.[19]

(2) Whether a release was larger than expected for the facility under normal operations is material to a determination as to whether notice following a particular release was given "immediately" upon acquiring "knowl-

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[17] Respondent's *Memorandum in Response to Complainant's Motion for Partial Accelerated Decision*, at 6.

[18] Id. at 7-8.

[19] Id. at 8.

edge" that the release was reportable.[20]

ORDER

It is ORDERED that Complainant's motion for partial summary decision is denied for the reasons set out above.

And it is FURTHER ORDERED that the parties' motions to strike shall be, and are hereby, denied.

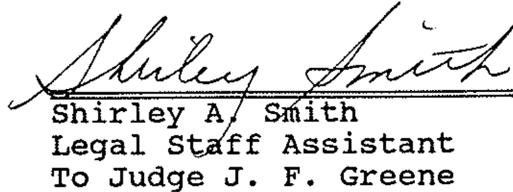
J. F. Greene
Administrative Law Judge

Washington, D. C.
March 31, 1998

[20] Id. at 7.

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER**, copies were sent to the counsel for the complainant and counsel for the respondent on April 3, 1998.



Shirley A. Smith
Legal Staff Assistant
To Judge J. F. Greene

Name of Respondent: B. F. Goodrich Company
Docket Number: [CERCLA]/EPCRA-002-95

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