UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
LILLY DEL CARIBE, INC.,	**)**	**Docket No. EPCRA-02-99-4001**
	)	
Respondent.	**)**	

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION

I. Background

This proceeding was commenced on February 3, 1999, upon a Complaint filed by the United States Environmental Protection Agency, Region II, pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9609, and Section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11045, against Respondent, Lilly del Caribe, Inc. The Complaint alleges that eighteen (18) 55-gallon drums of propionic anhydride were released from Respondent's facility in Mayaguez, Puerto Rico, on or about September 22, 1998, and that Respondent failed to immediately notify the National Response Center (NRC), the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC) of the release, as soon as Respondent had knowledge of the release, in violation of Section 103(a) of CERCLA, 42 U.S.C. 9603(a), and Section 304(b) of EPCRA, 42 U.S.C. 11004. The Complaint alleges three counts of violation, one count for each of the three entities Respondent allegedly failed to notify. Complainant proposes a penalty of $13,750 for each of the three counts, for a total penalty of $41,250.

On or about February 26, 1999, Respondent answered the Complaint, denying the alleged violations, asserting several affirmative defenses and requesting a hearing. In its Answer, Respondent asserts that there was no "release" as defined by Section 101(22) of CERCLA. Respondent explains that the 18 drums of propionic anhydride, a raw material, were swept off Respondent's property during Hurricane Georges and resultant major flooding, and that the drums were recovered by Respondent sealed and intact. Pursuant to a Prehearing Order, the parties each filed prehearing exchanges.

On October 28 and October 29, 1999, respectively, Respondent and Complainant submitted motions for accelerated decision, each with an attached brief in support ("Respondent's Motion" and "Complainant's Motion"). Complainant's Motion requests an accelerated decision as to Respondent's liability for Counts I through III of the Complaint, on the basis that there are no genuine issues of material fact with respect to Respondent's liability and that Complainant is entitled to judgment as a matter of law on Respondent's liability for failing to immediately notify

the NRC, LEPC and SERC as soon as Respondent had knowledge of a reportable release of propionic anhydride into the environment. Respondent's Motion requests dismissal of the Complaint on the basis that there was no "release" as defined by CERCLA and that the Due Process Clause of the Constitution bars application against Respondent of any new interpretation of "release." Each party submitted an opposition to the opposing party's motion for accelerated decision ("Respondent's Opposition," dated November 17, 1999, and "Complainant's Opposition," dated November 18, 1999), and on December 3, 1999, a reply thereto ("Respondent's Reply" and "Complainant's Reply").

II. Discussion

A. *Standard for Accelerated Decision*

The Rules of Practice, 40 C.F.R. Part 22, as amended, 64 Fed. Reg. 40176 (July 23, 1999), provide as follows with respect to accelerated decision, at 40 C.F.R. § 22.20(a):

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, of no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision under the Rules of Practice. *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact, "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ. Proc. 56(c)). Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company*, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997). An factual issue is "*material* where, under the governing law, it might affect the outcome of the proceeding," and is "*genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Clarksburg Casket*, slip op. at 9. The record must be viewed in a light most

favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

The fact that the parties both have requested accelerated decision does not require that an accelerated decision be granted. "When faced with cross-motions for summary judgment, the court is not required to grant judgment as a matter of law for one side or the other . . . . 'Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993)(*quoting*, *Schwabenbauer v. Bd. of Educ. of City of Olean*, 667 F.2d 305, 314 (2d Cir. 1981)).

B. *Statutory and Regulatory Provisions*

Section 103(a) of CERCLA provides, in pertinent part, that:

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

Section 304 of EPCRA requires the owner or operator of a facility to immediately provide notice to the LEPC and SERC of a release which requires notification under Section 103(a) of CERCLA. The regulations promulgated under Section 102 of CERCLA establish that a release requires such notification as soon as a person in charge of a facility has knowledge of a release in a quantity equal to or exceeding the reportable quantity (RQ) within a 24-hour period. 40 C.F.R. § 302.6. The RQ of propionic anhydride is 5,000 pounds. 40 C.F.R. § 302.4.

Prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA), the term "release" was defined in CERCLA as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment," with certain exceptions not relevant to this proceeding. Section 101(22) of CERCLA, 42 U.S.C. § 9601(22) (1985). The Superfund Amendments and Reauthorization Act of 1986 added to the definition of "release" a parenthetical, so the definition, since 1986, has read as follows:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant)
> * * * *

CERCLA Section 101(22), 42 U.S.C. 9601(22) (exceptions omitted). The definition of "release" in Section 329(8) of EPCRA, 42 U.S.C. 11049(8) is virtually identical: "any spilling, leaking,

pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or toxic chemical." The definition of "release" in the regulations implementing the emergency notification requirements under EPCRA, at 40 C.F.R. Part 355, is identical to the statutory definition except that the term "CERCLA hazardous substance" replaces the term "toxic chemical." 40 C.F.R. § 355.20.

In contrast, the definition of "release" in the regulations implementing the emergency notification requirements under CERCLA, at 40 C.F.R. Part 302, does not include the parenthetical "including the abandonment or discarding of barrels, containers, or other closed receptacles." 40 C.F.R. § 302.3. This regulatory definition was not modified after SARA went into effect, but is identical to the original definition in Section 101(22) of CERCLA which pre-dates SARA.[1]

C. *Arguments of the Parties*

Respondent asserts that there are no genuine issues of material fact as to whether there was a "release." Respondent argues that Complainant does not assert, and cannot assert based on the record, that there was "any spilling, leaking . . . escaping, leaching or disposing" *of propionic anhydride* "into the environment" or that *the drums* containing propionic anhydride were "abandoned" or "discarded." It is undisputed that the drums of propionic anhydride swept away from Respondent's facility were recovered, sealed and intact.

In Respondent's view, the definitions of "release" in CERCLA and EPCRA are "two-pronged," that is, Respondent argues that the definition establishes two alternative scenarios which constitute a "release;" *either* (a) there must be an actual release of the hazardous substance *itself* into the environment; *or* (b) there must be an abandonment or discarding of a *closed receptacle* containing the hazardous substance. As to the first "prong," Respondent cites to *Fertilizer Institute v. U. S. EPA*, 935 F.2d 1303, 1310 (D.C. Cir. 1991), in which the D.C. Circuit stated, "nothing less than an actual release of a hazardous material into the environment triggers the reporting requirement." As to the second "prong," Respondent asserts that there is no release of a closed receptacles, unless and until they have been deemed "abandoned" or "discarded" by the owner or operator. Respondent cites to a guidance document prepared by EPA and made available to the public, entitled "Questions and Answers on Release Notification Requirements

[1] It is observed that the regulations promulgated under Section 105 of CERCLA, governing the National Oil and Hazardous Substances Pollution Contingency Plan, were updated with SARA. The definition of "release" in 40 C.F.R. § 300.5 is identical to the current statutory definition in Section 101(22) of CERCLA, except that it states, "[f]or purposes of the NCP [National Oil and Hazardous Substances Contingency Plan], release also means threat of release."

and Reportable Quantity Adjustments" (Questions and Answers document) (Respondent's Prehearing Exchange Exhibit 17), which states, in pertinent part, as follows:

> **Is the release of an RQ [reportable quantity] or more of a CERCLA hazardous substance in encapsulated form reportable?**
>
> * * * * even if the CERCLA hazardous substance is in encapsulated form, or is otherwise in a closed receptacle, reporting is required when the closed receptacles are abandoned or discarded and the amount of a CERCLA hazardous substance contained within the released material equals or exceeds an RQ. The legislative history makes it clear that the definition applies even to receptacles that have not broken open and are not leaking hazardous substances. Exhibit 4 provides an example of a reporting scenario for encapsulated releases.
> * * * *
>
> Exhibit 4
> Reporting Scenario for Encapsulated Releases
>
> * * * * **Would the spilling of PCB [polychlorinated biphenyl]-containing light ballasts constitute a release?**
>
> The spilling of the light ballasts would be considered a "release" under CERCLA section 101(22) if an "abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant," occurred. Therefore, under CERCLA section 103, persons in charge of facilities that spill and ultimately abandon or discard flourescent light ballasts would be required to notify the NRC if the amount of PCBs contained in the released ballasts equals or exceeds [the RQ of] one pound.* * * *
>
> **If a facility is in the process of removing old light ballasts containing PCBs, would CERCLA reporting be required any time one pound of PCB has been moved in a 24-hour period? Would the same interpretation hold if the objects being moved were mercury-containing lamps?**
>
> * * * * Because light bulbs and lights ballasts may contain mercury, PCBs, or other CERCLA hazardous substances, the abandonment or discarding of such closed containers could constitute a release under CERCLA, depending upon what happened to the containers after they were moved. The moving of one pound or more of PCBs . . . contained in lights ballasts, could, if the ballasts were then abandoned or discarded, constitute a release that must be reported to the NRC. If hazardous substance-containing ballasts, lamps, or both are moved without being abandoned or discarded, no release has occurred. * * * *

See, Question and Answers document pp. 15-17.

Respondent asserts that through this guidance, EPA clearly informed the regulated community that reporting with respect to closed receptacles is required only when it can be established that the closed receptacles have been either "abandoned" or "discarded." Respondent argues that a finding of "abandonment" requires an intent to abandon, referring, *inter alia,* to *A & W Smelter v. Clinton*, 146 F.3d 1107, 1111-1112 (9th Cir. 1998)(finding no "release" under CERCLA where the defendant had no intent to abandon drums of hazardous waste, but noting, "[w]hen hazardous waste presents a serious, immediate threat and the waste's owner is not present to take control, it may be reasonable for the EPA to declare the waste abandoned and take appropriate steps to dispose of it safely").

Respondent believes that in this enforcement proceeding, Complainant is relying upon a broader, novel interpretation of "release," one that would include closed containers which have neither been disposed of or abandoned, and that such an interpretation cannot be reconciled with the statutory definition of "release," EPA's implementing regulations or Agency guidance to the regulated community, cited above. Respondent argues that EPA did not provide Respondent with fair notice of Complainant's interpretation, and that it is a violation of due process for Complainant to develop a new interpretation of a regulatory requirement and impose that interpretation retroactively in an enforcement context.

For its part, Complainant in its Motion argues that the definition of "release" has previously been interpreted to include closed barrels containing a hazardous substance separated from their owner and/or facility under circumstances analogous to those in this case, citing *United States v. M/V Santa Clara I,* 887 F.Supp. 825 (D.S.C. 1995). In that case, shipping containers containing hundreds of barrels of toxic chemicals, including arsenic trioxide, were swept overboard a ship, the M/V Santa Clara I, as a result of a violent storm at sea. *Id*. at 829-30. The lost barrels were the subject of a search and location effort, and were retrieved intact from an underwater debris field approximately six weeks after their loss pursuant to an EPA-issued Administrative Order. *Id*. In *Santa Clara I*, it was held as follows:

> [T]his court finds the loss overboard of the arsenic trioxide approximately thirty miles off the New Jersey coast constituted a release of a hazardous substance into the environment. . . . . This court finds that release occurred when the shipping containers fell into the ocean. Further, it is clear from the evidence that the shipping containers were damaged and the barrels containing the arsenic trioxide separated from the containers when they came to rest on the ocean floor. . . .

Id. at 841.

Complainant points out that in the instant case, as in the *Santa Clara I case*, control over the closed receptacles was lost for a significant period of time. In this case, control over the drums was lost from September 22, 1998, when the drums were swept away by the storm, until after September 29, 1998, when the first drum was found. Complainant argues that a release within the definition of Section 101(22), 42 U.S.C. 9601(22), occurred when the 18 drums were

carried off by wind and water from Respondent's facility into the environment, during the hurricane on September 21-22, 1998, regardless of whether they were recovered sealed , or whether Respondent intended to discard or abandon them.

In its Opposition to Respondent's Motion, Complainant asserts that the plain language of CERCLA and EPCRA constitutes fair notice to the regulated community of the conduct expected, and that EPA is not required to issue specific guidance. Referring again to the 1995 decision in *Santa Clara I,* Complainant maintains that the sweeping away by force of nature of drums containing hazardous substance into the environment was found to be a "release" and not a "threat of release,"and, thus, that its interpretation is not new.

In its Reply, Respondent again asserts that Complainant's definition of "release" in this proceeding has never before been advanced by EPA, that it had neither fair notice nor actual notice of such interpretation, and that it cannot be reconciled with EPA's interpretation in the Question and Answer document.

Complainant, in its Motion for Accelerated Decision, similarly asserts that there are no disputes of fact as to whether a "release" occurred from Respondent's facility, but goes on to further assert the absence of genuine issues of material fact as to each and every element of Respondent's liability for the three violations alleged in the Complaint. Complainant takes the position that Respondent had knowledge of the release on September 29, 1998, based on the facts presented in the exhibits and documents submitted to the record. Specifically, Complainant asserts that during the period from September 23 through 29, 1998, Respondent had knowledge of such facts that would ordinarily lead a prudent person to investigate with reasonable diligence and acquire knowledge that a release of an RQ of propionic anhydride occurred from its facility. Thus, Complainant argues, Respondent had constructive knowledge of a reportable release on September 29, 1998. Since Respondent did not report the release to the NRC until October 2, 1998, and to the SERC until October 5, 1998, and to the LEPC until October 19, 1998, Respondent did not "immediately notify" as required by Section 103(a) of CERCLA and Section 304 of EPCRA, Complainant concludes. As to Respondent's contention that the LEPC was not fully operational, Complainant asserts that Respondent has recognized the existence of the LEPC according to certain documents presented as exhibits to Complainant's Motion (Exhibits 17, 18, 19, 21, 22), and in any event did not notify local emergency response personnel.[2]

Opposing Complainant's Motion, Respondent makes several major points. First, Respondent disagrees that a "release" may occur solely by virtue of a temporary loss of control of closed receptacles containing hazardous substances. Respondent points out that the third-party plaintiff in *Santa Clara I* had argued that liability under CERCLA § 107 was triggered by the threat of release, and not necessarily an actual release, from the barrels having fallen overboard. (Respondent's Motion, Exhibit 1). Respondent argues that the recitation of facts in that opinion

[2] The regulations provide, "If there is no local emergency planning committee, notification shall be provided . . . to relevant local emergency response personnel." 40 C.F.R. § 355.40(b)(1).

suggests that the barrels were abandoned, and further argues that the opinion did not offer any analysis of the statutory definition of "release."

Second, Respondent asserts that as a matter of law, only actual knowledge and not constructive knowledge triggers the notification requirements of CERCLA and EPCRA. Respondent contrasts Congress' use of the word "knowledge" in Section 103(a) of CERCLA with the expanded language in Section 101(35) of CERCLA, "defendant did not know and had no reason to know . . . " and in Section 122(g)(1) of CERCLA, that "subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge . . . ." Respondent cites to *Russello v. United States*, 464 U.S. 16, 23 (1983), "Where 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 purposefully in the disparate inclusion or exclusion."

Third, Respondent asserts that Complainant has not established that Respondent had constructive notice of a reportable release on September 29, 1998, and that a number of genuine issues of material fact exist which preclude an accelerated decision in Complainant's favor. Respondent points out that EPA's Administrative Law Judges have consistently denied motions for accelerated decision involving a fact-intensive issue such as constructive knowledge, *citing, Cenex/Land O' Lakes Agronomy Co.*, EPA Docket No. 5-EPCRA-076-97, 1998 WL 422203 (ALJ, June 29, 1998); *Morton International*, EPA Docket Nos. EPCRA/CERCLA-VII-96R-218, CWA -VII-97-W-0008, 1997 WL 821128 (ALJ, Dec. 12, 1997); *B.F. Goodrich*, EPA Docket No. CERCLA/EPCRA-002095, 1998 WL 220026 (ALJ, March 31, 1998). As to Complainant's allegations proffered to show that Respondent had constructive knowledge of a reportable release on September 29, 1998, Respondent disputes them with affidavits of Mr. Luis Laboy, Environmental Leader of Respondent's facility, and Ms. Lydia Tur, Materials Team Leader of Respondent's facility.

Fourth, Respondent argues that Complainant has not established that the eighteen drums were swept off the facility in a twenty-four hour period, as required by 40 C.F.R. § 302.6 to trigger the notification requirement. Complainant relies upon the Sworn Statement of Mr. Anibal Roman Morales, Director of the Mayaguez Municipal Civil Defense, in asserting that the eighteen drums were swept off the facility between 8:00 p.m. on September 21, 1998 until 5:30 p.m. on September 22,1998. Respondent contends that Mr. Morales' Sworn Statement does not support that assertion, but merely states that "between 5:00 p.m. and 5:30 p.m., road access on Highway No. 2, from Mayaguez to Anasco, was limited." Complainant's Motion, Exhibit 7, Sworn Statement of Mr. Morales ¶ 8.

Finally, Respondent argues that it notified the NRC on October 2, 1998, when it obtained preliminary information that ten to fifteen drums of propionic anhydride were unaccounted for in its inventory. Respondent also contends that it contacted SERC (the Environmental Quality Board) and left a detailed message on October 2, "describing how ten to fifteen drums of propionic anhydride were preliminarily unaccounted for in its inventory." Respondent's

Opposition at 24. As to the LEPC, Respondent asserts that it made "repeated attempts" to contact Mr. Luis Rodriguez, the Environmental Quality Board Mayaguez, Emergency Response Coordinator.

In its Reply in support of its Motion, Complainant asserts that Respondent's assertions, conclusory allegations and suspicions are insufficient to raise a genuine issue of material fact. Complainant asserts further that good faith efforts on the part of Respondent to reach the LEPC, SERC and NRC do not serve the purpose enunciated in CERCLA and EPCRA, *citing*, *Industrial Scrap Corp.*, EPA Docket No. EPCRA-V-15-1991, 1996 EPA ALJ LEXIS 83 (ALJ, February 8, 1996).

D. *Analysis and Conclusions*

1. *Whether a "release" occurred*

The elements of liability under Section 103(a) of CERCLA and the implementing regulations are: (1) that the respondent is a "person in charge of . . . an onshore facility"; (2) that a hazardous substance was released within a 24 hour period from such facility in quantities equal to or greater than the reportable quantity; and (3) that the person failed to notify immediately the NRC of such release as soon as he had knowledge of any release in such quantities. *See*, 40 C.F.R. §§ 302.6, 302.7(a)(3). Respondent concedes the first element, and does not raise any dispute as to any particular individual(s) being in charge of the facility.

As to the second element, the parties agree that there are no genuine issues of material fact relevant to the legal question of whether the loss and later recovery of the eighteen drums of propionic anhydride constitutes a "release." It is undisputed that eighteen drums of propionic anhydride were swept off of the facility premises during Hurricane Georges, that Respondent recovered all of the drums, and that they were sealed and intact when recovered.

Thus, the pivotal question raised by the Motions is one of law: whether there was a "release" within the meaning of the definition of that term set forth in Section 101(22) of CERCLA and Section 329(8) of EPCRA (and in the regulations at 40 C.F.R. §§ 302.3 and 355.20). The parties each maintain that the plain language of the statute supports its interpretation of whether or not a "release" occurred.

Interpretation of any statute always begins with an examination of the plain language of the statute itself. *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999); *Lewis v. United States*, 445 U.S. 55 (1980); *see, Hughey v. United States*, 495 U.S. 411, 415 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In addition to the particular statutory language, the "design of the statute as a whole" must be considered. *Crandon v. United States*, 494 U.S. 152, 158 (1990). "Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *United States v. Lewis*,

67 F.3d 225, 228-229 (9th Cir. 1995)(quoted in *Hanousek*, 1176 F.3d at 1120. The Supreme Court has stated, "we must not be guided by a single sentence or member of a sentence, but look to the provision of the whole law, and to its object and policy." *U.S. National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 455 (1993)(internal citations omitted).

The statutory provision at issue here, as set forth above, states in pertinent part:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any hazardous substance or pollutant or contaminant). . . .

CERCLA Section 101(22), 42 U.S.C. 9601(22) (exceptions omitted).[3]

The laundry list of terms (12 in total) in the definition given to "release" is certainly suggestive of a broad construction. The terms encompass not only intentional human conduct (*i.e.*, pouring), but also passive migration (*i.e.*, leaching) and accidents (*i.e.*, escaping), involving hazardous substances. *See, United States v. CDMG Realty Co.*, 96 F.3d 706, 714 -715 (3d. Cir. 1996); *United States v. Amro Realty Corp.*, 806 F.Supp. 349 (N.D. NY 1992). And, indeed, Federal courts have held repeatedly that the definition of "release" in CERCLA Section 101(22) should be construed broadly. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989), *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1152 (1st Cir. 1989); *Nutrasweet Co. v. X-L Engineering Corp.*, 993 F. Supp. 1409, 1419 (N.D. Ill. 1996). S*ee also, State of Colorado v. United States Dep't of Interior*, 880 F.2d 481, 487 (D.C. Cir. 1989)("a broad definition of terms such as . . . 'release' was necessary to provide for diverse matters such as notification requirements"); *United States v. Union Gas Co.*, Civ. No. 83-2456, 1992 WL 277647 * 7 (E.D. Pa,. Sept. 30, 1992)(CERCLA definitions of "release" and "environment" are extremely broad) ; *Rhodes v. County of Darlington, S.C.*, 833 F. Supp. 1163, 1178 (D.S.C. 1992)("Clearly, this definition contemplates a broad, remedial view of how hazardous substances can find their way into the environment without their affirmative discharge by an owner or operator of a facility").

Furthermore, each term listed in a statutory provision should be construed as having a meaning distinct in some way from the other terms, in accordance with the well-settled rule of statutory construction that courts should disfavor interpretations of statutes that render statutory language superfluous. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999); *United States v. Victoria Peguero*, 920 F.2d

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

77, 81 (1st Cir. 1990); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985)("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous").

Among the twelve terms used to define "release" in the statute is the word "escaping." The word "escaping" is not defined in CERCLA or EPCRA, so it is appropriate to look to its common meaning. The dictionary definition of "escape" is "to get away, " "to issue from," or "to issue from confinement." *Webster's Ninth New Collegiate Dictionary* 423 (1990). The word "issue," in turn, is means "to go, come, or flow out" or "to come forth: emerge." *Id.* at 642. The term "escaping" is similar in meaning to the terms "leaking," "leaching" and "emitting," and all of these terms would cover situations of liquids or gases moving by accident into the air, water or soil. Thus, the term "escaping" would be redundant if it did not also include a meaning distinct from the other terms. The only distinction that comes to mind is a release to an *unknown or unsupervised location*, by action of the thing itself or as assisted by, for example, a force of nature not under the control of the owner or operator. Indeed, Respondent refers to the drums of propionic anhydride as having "escaped from the facility" (Respondent's Opposition at 16).

As seen in the *Santa Clara I* case, a container of a hazardous substance, as well as the substance itself, may "escape," by extreme weather conditions from storage at a facility to a water body or land beyond the facility -- thus, "into the environment." The term "environment" is defined broadly in Section 329(2) of EPCRA as including "water, air, and land and the interrelationship which exists among and between water, air and land and all living things," and in Section 101(8) of CERCLA as "the navigable waters . . . and . . . any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States . . . ." *See also,* 40 C.F.R. §§ 302.3, 370.2.

Moreover, the plain meaning of the statutory text does not restrict the meaning of "escaping . . . into the environment" or "escaping . . . into the environment . . . of any hazardous chemical" to the mixing or direct contact *of the hazardous substance with soil, air, or water*. As the parties acknowledge, *Santa Clara I* held that a "release" occurred when shipping containers, containing barrels of a hazardous substance, fell into the ocean, and subsequently the barrels separated from the containers; and the court did not find that the barrels were leaking. 887 F.2d at 841. Thus, "escaping . . . into the environment" may be construed as encompassing unbroken containers coming to rest in a location on land surface or in water which is unsupervised by or unknown to the persons in charge of the hazardous substance. *Cf., Nortru, Inc. v. Township of Castleton,* Nos. 93-CV-71480 DT, 93-CV-72343 DT, 1998 U.S. Dist. LEXIS 7556 (E.D. Mich 1998)(hazardous substance was not "released into the environment" by abandonment, having been contained, "stored safely and appropriately" and "closely supervised and monitored" at all times, despite being removed from drums, blended with other materials, transported by truck and rail to other facilities, and then returned); *A & W Smelters & Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1111 (9th Cir. 1998)(no "release into the environment" where drums of a hazardous substance were left in the possession of Federal and Mexican government authorities who had confiscated

it).

Furthermore, I find that any doubt as to whether the definition of "release" can include the releases of hazardous substances in closed containers is resolved by reference to the parenthetical text, which was added to the definition by SARA: "including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance. . . ." Clearly, such releases do not connote the mixing of the hazardous substance with soil, air or water.

The D.C. Circuit's opinion in *Fertilizer Institute* is not inconsistent with this conclusion. The D.C. Circuit addressed the issue of placement of hazardous substances into an "unenclosed containment structure," *i.e*, a facility that is not sealed off from surrounding air, water or soil, and that is in a location owned or operated, or at least supervised, by the persons in charge of the hazardous substance. That is only a *threatened* release "into the environment," the court concluded. In that context, the D.C. Circuit made the statement, "nothing less than the actual release of a hazardous material into the environment triggers its reporting requirements." 935 F.2d at 1310. The Court did not address the issues of a hazardous substance in a container which is abandoned or discarded at, or swept away to, a location unknown to or unsupervised by the persons in charge of the hazardous substance.[4] Nevertheless, the D.C. Circuit's statement must apply to such "actual releases" of a hazardous material -- in a closed container -- "into the environment," *i.e*., a location on land surface or water which is unsupervised by or unknown to the persons in charge of the material. Otherwise, that statement would be inconsistent with the statutory language in the parenthetical phrase, "including the abandonment or discarding of barrels . . . ."[5]

Respondent, however, strongly argues for a narrower definition of "release," in which the parenthetical phrase ("*including the abandonment or discarding of barrels . . . .*") limits releases of closed containers to those which were either "abandoned" or "discarded." Respondent's position presumes that the parenthetical text expands, albeit only narrowly, the pre-SARA definition to allow for the release of closed containers, *but only if* they are abandoned or discarded. However, I find that neither the statutory text of the definition nor its legislative history supports such a narrow definition.

The word "includes" is generally synoymous with "comprehends" or "embraces," but may also be synonymous with "means." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 124 (1934); *see,*

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[4] The D.C. Circuit's quotation of the definition of "release" in Section 101(22) of CERCLA omits with an ellipsis the parenthetical text, "including the abandonment or discarding . . . ."935 F.2d at 1309.

[5] The D.C. Circuit did not limit its statement in *Fertilizer Institute* to the first "prong" of the definition of "release" (the text preceding the parenthetical "including . . .), as Respondent suggests (Respondent's Motion at 15).

Webster's Ninth New Collegiate Dictionary 609 (1990). Thus, the term "including" signifies that it clarifies or further defines the preceding terms. Furthermore, the use of parenthesis signifies that the parenthetical phrase clarifies or further defines the preceding list of terms. If Congress intended the definition to be interpreted as Respondent urges, Congress would have omitted the parenthesis and phrased it as "any spilling leaking, pumping . . . or disposing into the environment, **or** the abandonment or discarding of barrels . . . ." Thus, construing CERCLA Section 101(22) as a whole, its grammatical structure does not support Respondent's interpretation that the parenthetical phrase constitutes a separate "prong" or alternative type of "release."

Closer analysis of the term "including," evidences that it is usually a term of enlargement, indicating that other terms are includable. The Supreme Court stated decades ago, "the term 'including' is not one of all-embracing definition, but connotes simply *an illustrative application* of the general principle." *Federal Land Bank v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941)(italics added); *see also, Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 188 (1941). More recently, the Supreme Court opined that the word "including" made clear that the statutory language was not limited to the specified terms mentioned after the word "including." *West v. Gibson,* __ U.S. __, 119 S.Ct. 1906, 1909 (June 14, 1999). *See also, Jones v. American Postal Workers Union, National,* 192 F.3d 417, 426 (4th Cir. 1999); *P.C. Pfeiffer v. Ford,* 444 U.S. 69, 77 n. 7 (1979)(the term "including" means the enumerated items are part of a larger group); 2A Norman J. Singer, Sutherland Stat. Construction § 47.23 (5th ed. 1992)("When 'include' is utilized [in a statute], it is generally improper to conclude that entities not specifically enumerated are excluded."). Applying those authorities here, the phrase "including the abandonment or discarding of barrels . . ." does not limit "releases" of closed containers to those which are either abandoned or discarded.[6]

The statutory definitions of "release" also must be construed in light of CERCLA and EPCRA as a whole, and their object and policy. A construction of Section CERCLA 101(22) to include cases where a closed container has escaped by force of nature to an unknown or unsupervised location is consistent with the purpose and policy of the EPCRA and CERCLA notification requirements. The purpose of these statutes is to protect the public in the event of releases of hazardous substances. H. Conf. Rep. No. 962, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 3276. Specifically, their purpose is "to minimize harm to public health and welfare and the environment by facilitating rapid response to accidents

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[6] *See, Ruiz v. Estelle,* 161 F.3d 814, 820 (5th Cir. 1998)(construing the phrase "including a legislator" expansively, noting that it was added by amendment, the obvious purpose of which was to clarify what was previously doubtful); *Argosy, Ltd. v. Hennigan,* 404 F.2d 14, 20 (5th Cir. 1968)(The word "includes" "conveys the conclusion that there are other items includable, though not specifically enumerated," and this conclusion is "commensurate with the proposition that when Congress amends a law the amendment is made to effect some purpose.").

It is observed that Congress did not choose to insert the word "either" after the word "including," which could have suggested an intent to include only the two conditions for closed containers, "abandonment" and "discarding."

involving hazardous chemicals at or in excess of specified amounts." *B.F. Goodrich Co.,* EPA Docket No. CERCLA/EPCRA-002-95, slip op. at 4, 1998 ALJ LEXIS 28 (ALJ, Order Denying Complainant's Motion for Partial Summary Judgment, March 31, 1998). The notification must be immediate, *i.e.*, should not exceed 15 minutes after knowledge of the release. S. Rep. No. 99-11, 99th Cong. 1st Sess. 8-9 (1985). "The fundamental concern underlying release reporting is the danger associated with the release of a listed hazardous waste." *United States v. MacDonald & Watson Waste Oil Co.,* 933 F.2d 35, 57 (1st Cir. 1991). Even in the context of criminal violations of environmental statutes, "[p]ublic welfare statutes . . . are not to be construed narrowly but rather to effectuate the regulatory purpose." *Id.* at 46 (citing, *United States v. Johnson & Towers, Inc.,* 741 F.2d 662, 666 (3d. Cir. 1984).

It is unreasonable to assume that a closed container which has escaped by force of nature -- such as a hurricane or storm at sea – to an unknown or unsupervised location, presents less danger than a closed container which is by act of man abandoned or discarded to a known location. It is even more unreasonable to assume that it presents no danger to the public or to the environment. A container closed before it escaped is just as likely, or more likely (due to the severity of the action which allowed it to escape) to be damaged or opened, exposing the hazardous contents, as a container closed at the time it is abandoned or discarded. One or more of Respondent's drums of propionic anhydride were in an unknown, unsupervised location for several weeks, from September 22, 1998 through October 13, 1998, when the last of the 18 drums was recovered (*see*, Answer, Attachment), during which time there was a danger of the drums leaking or being opened. To wait until the lost container is recovered in order to determine whether its contents have spilled or leaked - or worse, to provide no notification if the container is not found at all, as suggested by Respondent's statutory analysis - obviously defeats the purpose of the notification requirements. To construe the definition of "release"as Respondent urges would not only require ignoring both the structure of CERCLA Section 101(22) and the meaning of the word "including," but would also weaken the protection against the danger that most concerned Congress in enacting the notification requirements of CERCLA and EPCRA.

Any doubts as to whether Congress intended to limit the definition of "release," as applied to closed containers, to those that are either "abandoned" or "discarded," are put to rest by the legislative history of SARA, amending the definition:

> The House amendment proposes to amend section 101(22) of CERCLA, which is the definition of "release," to explicitly incorporate "the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant."
>
> Conference substitute - The conference substitute adopts the House proposal. This amendment to CERCLA **confirms and clarifies the President's *present authority under existing law* to take response action with regard to such receptacles, whether or not they have broken open and are currently leaking hazardous substances, pollutants or contaminants.** The phrase "containing any

> hazardous substance or pollutant or contaminant" includes residues of such hazardous substance or pollutant or contaminant.

Joint Explanatory Statement, 99th Cong., 2nd Sess., Conf Rep. on HR 2005 (SARA of 1986), 132 Cong. Rec. 28266 (Oct. 3, 1986)(emphasis added). This legislative history makes clear Congress' intent that the definition of "release,"even before the addition of the parenthetical phrase, encompassed releases of closed, intact containers of hazardous substances under the other twelve enumerated terms. Thus, resort to Agency guidance interpreting the statutory text is unnecessary.[7] Congress' intent being clear, from the language and structure of the statutory definition of "release" and its legislative history, fair notice and due process issues do not arise.

Accordingly, it is concluded as a matter of law that there was a "release," within the meaning of Section 101(22) of CERCLA, from Respondent's facility when the eighteen drums of propionic anhydride were swept away from Respondent's facility.

2. *Whether the release was "reportable"*

Having concluded that the escape of the drums was a "release," the next question is

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[7] Several observations are noteworthy here. First, the Question and Answer document at page 15 refers apparently to the quoted legislative history, "[t]he legislative history makes it clear that the definition applies even to receptacles that have not broken open and are not leaking . . . ." (Respondent's Prehearing Exchange Exhibit 17). Second, the Question and Answer document simply does not address the issue of a lost or escaped container of hazardous substance, and therefore is neither persuasive in this proceeding nor worthy of reliance by the regulated community on that issue. Third, the Agency has addressed the issue in a preamble to the final rule, 40 C.F.R. Part 302, concerning releases of radionuclides under Section 103(a) of CERCLA:

> Under the CERCLA definition [of release], radionuclides are released when they are exposed to the environment or when they are enclosed in barrels, containers, or other closed receptacles that are discarded, **lost** or abandoned. Thus, if only the containers are exposed to the environment, but not the radionuclides that they contain, no report under CERCLA is necessary, unless those containers have been **lost**, discarded or abandoned.

54 Fed. Reg. 22524 (May 24, 1989)(emphasis added). Fourth, while the D.C. Circuit in *Fertilizer Institute, supra,* addressed that preamble and concluded that EPA's interpretation of "release" as including placement of a substance into an unenclosed containment structure was contrary to the plain meaning of the statutory definition, the D.C. Circuit did not address the issue of containers which are "lost," or which have escaped by force of nature.

whether Respondent was required to report it pursuant to Section 103(a) of CERCLA, that is, whether the propionic anhydride was released within a 24 hour period from such facility in quantities equal to or greater than the reportable quantity. It is undisputed that the amount of propionic anhydride in the eighteen drums exceeded the RQ of 5,000 pounds; the parties agree that a total of approximately 9,108 pounds of propionic anhydride were contained in the drums.

The parties do not agree, however, that any release occurred within a 24-hour period. Complainant asserts that the drums were swept away from Respondent's facility within a 24-hour period, carried away by the "overflow" or flooding of the Anasco River. Specifically, and citing to maps and exhibits, Complainant asserts that the flood waters flowed westward from the river across Respondent's facility, then passed across State Road Number 2, and then entered the sugar cane fields and Santa Rosa de Lima community where the drums were found by Respondent (Respondent's Motion , Exhibits 4, 7, 23 and Map 1 attached thereto). Complainant points out Lilly del Caribe's Response to Request for Information pursuant to CERCLA § 104 and the Clean Water Act § 308, dated November 13, 1998, in which Respondent states, "we can only theorize that the flood waters or the hurricane carried them [drums of propionic anhydride] away." (Complainant's Motion , Exhibit 4, p. 7). Complainant asserts that the duration of the "overflow" of the Anasco River occurred in a period of time less than 24 hours, specifically from 8:00 p.m. on September 21 until 5:30 p.m. on September 22, citing to Paragraphs 6 through 8 of Anibal Morales' Sworn Statement (Complainant's Motion, Exhibit 7), in which he states in pertinent part:

> On September 21, 1998, approximately between 4:00 p.m. and 8:00 p.m., we sent motor vehicles through State Road Number Two (2) . . . to pick up people and drop them off in established shelters. . . . . Approximately after (sic) 8:00 p.m., I gathered with the rest of the emergency personnel in the offices of the Mayaguez Municipal Civil Defense.
>
> * * * *
>
> I . . . immediately headed toward the area in from of the area in front of the El Mani Airport through State Road Number Two (2), and around 3:20 a.m. on September 22, 1998 we were able to rescue three (3) people . . . . While undertaking this rescue my vehicle was caught by the currents of the Anasco Grande River on State Road Number Two (2), and we had to conduct the rescue in a "loader."
>
> On September 22, 1998, roughly between 5:00 p.m. and 5:30 p.m., road access on Highway No. 2, from Mayaguez to Anasco, was limited . . . ..

Respondent makes a valid point, that the Sworn Statement is not clear that the flooding ended at 5:30 p.m. on September 22, 1998. However, documents submitted by Respondent in this proceeding indicate that the storm ended early in the day on September 22. On page 2 of Respondent's letter, dated November 13, 1998, enclosing its Response to Request for Information, and attached to its Answer, Respondent states "Hurricane Georges hit the Mayaguez area beginning at approximately 8:00 p.m. on Monday, September 21, 1998 and continued to rage

for 12 hours until approximately 8:00 a.m. on Tuesday, September 22, 1998" (Complainant's Motion, Exhibit 4; Answer, Attachment). [8] The Affidavit of Jose Quinones in Support of Respondent's Motion indicates, in Paragraph 3 therein, that Mr. Quinones, who remained at the facility during the hurricane, was able to leave the facility "late on September 22, 1998."

In support of its Motion, Complainant has identified portions of the record which it believes demonstrate the absence of a genuine issue of material fact, and the burden thus shifts to Respondent to establish the existence of a factual issue which is both genuine and material. Respondent has not pointed to any document which disputes Complainant's assertion that the overflow of the Anasco River, and thus the release, occurred in a period less than 24 hours, but merely asserts that Mr. Morales' Sworn Statement suggests a genuine issue of material fact. Viewing the record in a light most favorable to Respondent, reasonable inferences cannot be drawn from Mr. Morales' Sworn Statement that the flooding did not subside, and thus that the release continued, until after 8:00 p.m. on September 22, 1998. The evidence is not such that a reasonable finder of fact could return a verdict in Respondent's favor on the issue of whether the release of propionic anhydride exceeding 5,000 pounds occurred in a 24-hour period. Therefore, there is no genuine dispute of material fact, and Complainant is entitled to judgment as a matter of law, that a release from Respondent's facility of propionic anhydride in an amount exceeding the RQ occurred within a 24-hour period.

3. *"Knowledge" of the release*

The person in charge of a facility is required to notify the NRC under Section 103(a) of CERCLA "as soon as he has knowledge of any release . . . ." In order to grant Complainant's Motion, a determination must be made that no genuine issues of material fact exist and Complainant is entitled to judgment as a matter of law that Respondent failed to notify the NRC "as soon as he ha[d] knowledge" of the release.

The parties dispute the meaning of the term "knowledge" in Section 103(a) of CERCLA. Respondent insists that "actual knowledge" is required. Complainant relies on administrative case precedent holding that "knowledge" under Section 103(a) includes either actual knowledge or constructive knowledge. *Mobil Oil Co.*, 5 E.A.D. 490, EPCRA App. 94-2 (EAB, Sept. 29, 1994)("The duty to report under EPCRA arises as soon as the facility personnel have knowledge that a reportable release has occurred, or should know of such a release"); *citing Genicom Corp.*, EPA Docket No. EPCRA -III-057 (ALJ, July 16, 1992, *aff'd*, EPCRA App. 92-2 (EAB, Dec. 15,

[8] It is observed in Respondent's Prehearing Exchange that a Preliminary Storm Report of Hurricane Georges prepared by the National Weather Service states, "By 1 AM AST Tuesday, September 22nd the center of the eye of Hurricane Georges had left the island of Puerto Rico . . ." and "The hurricane warning was discontinued for . . . Puerto Rico at 11 AM AST Tuesday, September 22nd," and reports 24 hour rainfall in Puerto Rico at 4.32 inches on September 21 and 0.94 inches on September 22, 1998 (Respondent's Prehearing Exchange, Exhibit 19 pp. 10, 13).

1992)("[a]t some point . . . the nature of the information can be such that the failure to give notice is indicative of the company not knowing the requirements or being hostile or indifferent to them, rather than an uncertainty that a release in reportable quantities has taken place"); *see also, Thoro Products Co.*, EPA Docket No. EPCRA VIII-90-04, 1992 EPCRA LEXIS 2 (ALJ, May 19, 1992)("under Section 304(a) of EPCRA, if the owner or operator of a facility personally possesses either actual knowledge or constructive knowledge of a release . . . the immediate reporting requirements of the section must be met")(quoting 52 Fed. Reg. 13378, 13393 (April 22, 1987)("if the facility owner/operator should have known of the release, then the fact that he or she was unaware of the release will not relieve the owner/operator from the duty to provide release notification" under EPCRA)). Respondent argues that these holdings, based on use of the term "knowledge" in other legal contexts, have been incorrectly applied to CERCLA and EPCRA notification requirements without critical review.

Complainant does not specifically claim that Respondent had actual knowledge -- but rather, claims that Respondent had constructive knowledge -- of a reportable release on September 29, 1998 (Complainant's Motion at 29-30; Complainant's Reply at 5). Respondent disputes several statements of fact asserted by Complainant in support of that position. For example, Complainant contends that Respondent knew on September 24, 1998 that drums had escaped from a warehouse through openings in the wall, and submits the Sworn Statement of Margaret Chong, an Environmental Engineer at EPA Region II, stating that during her visit to the site on October 15, 1998, Respondent's "Mr. [Luis] Laboy informed EPA that on September 24, 1998, Lilly observed that a number of 55 gallon drums had escaped the facility through openings on the raw material chemical warehouse wire mesh wall" (Complainant's Motion, Exhibit 11 ¶ 4).[9] Attached to Respondent's Opposition is an Affidavit of Luis Laboy, in which he denies that he made "any such statement," and asserts, "[o]n September 24, 1998, neither I, nor to the best of my knowledge anyone at Lilly, knew or had any indication that drums of raw material had been swept out of the warehouse – much less off the facility property." (Respondent's Opposition, Affidavit of Luis Laboy, dated November 15, 1999, ¶ 12). While the parties do not dispute Respondent's discovery of a drum of propionic anhydride in a resident's yard on September 29, 1998, Respondent asserts that it did not have knowledge of an escape of a reportable quantity, *i.e.* 5000 pounds, of propionic anhydride. One 55-gallon drum of propionic anhydride has a net weight of approximately 463 pounds (Respondent's Motion, Affidavit of Luis Laboy, dated October 19, 1999 ¶ 7). Lydia Tur, Materials Team Leader at Respondent's facility, states in her Affidavit that upon being informed on September 29, 1998 that a drum of propionic anhydride was retrieved from a resident's yard that day, "[t]his is the first time that we had any idea that a drum was missing from the facility premises – or for that matter from a warehouse."

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[9] Attached to Ms. Chong's Sworn Statement, and to the Sworn Statement of Michael Hodanish (Complainant's Motion, Exhibits 9 and 11), were black and white copies of photographs. By Order dated November 9, 1999, Complainant was directed to submit to the Administrative Law Judge color versions of these pictures. On November 30, 1999, Respondent submitted a Motion to Submit to the Honorable Court Color Version of the Attachments to Exhibits 9 and 11, with attached color pictures. The Motion is hereby granted.

(Respondent's Opposition, Affidavit of Lydia Tur ¶ 6). It is concluded that Respondent has presented evidence which raises genuine issues of fact material to the issue of when Respondent had constructive knowledge of a reportable release.

Regardless of whether the term "knowledge" in Section 103(a) of CERCLA encompasses constructive knowledge, Complainant's Motion must be denied as to the issue of "knowledge." If administrative precedent is followed, holding that constructive knowledge is sufficient, Respondent's showing of genuine issues of fact material to the issue of "knowledge" defeats Complainant's Motion. If, on the other hand, it is concluded that Complainant must establish actual knowledge of the release, Complainant has not carried its burden to show that material facts are undisputed and that it is entitled to judgment as a matter of law on the issue of "knowledge," which is an element of its case. Consequently, it is not necessary in this Order to address the issue of whether "knowledge" under Section 103(a) of CERCLA encompasses constructive knowledge.

Because Complainant's Motion must be denied on the issue of "knowledge," the issues as to whether Respondent failed to notify the NRC "as soon as he ha[d] had knowledge of" the release exceeding the RQ, and as to whether Respondent failed to "immediately provide notice" to the SERC and LEPC as required under EPCRA, are not reached and are reserved for further proceedings.

4. *Summary*

In summary, Complainant has established, on undisputed facts and as a matter of law, that a release of a reportable quantity of a hazardous substance, propionic anhydride, occurred from Respondent's facility within a 24-hour period on or about September 21-22, 1998. Accordingly, it is concluded that Respondent was required to provide notice of the release in accordance with Section 103(a) of CERCLA and Section 304 of EPCRA. Complainant has not, however, established the absence of genuine issues of material fact as to whether Respondent failed to provide such notification as required under those provisions. The issue of Respondent's liability for the three counts of violation alleged in the Complaint, and if liability is found, the issue of any penalty to impose against Respondent, remain in controversy.

ORDER

1. Respondent's Motion for Accelerated Decision is **DENIED.**

2. Complainant's Motion for Accelerated Decision is **GRANTED in part,** on issues as to whether a "release," within the meaning of CERCLA Section 101(22), of a reportable quantity of propionic anhydride, a hazardous substance, occurred from Respondent's facility on or about September 21-22, 1998, within a 24 hour period, and **DENIED in part**, on issues as to whether Respondent provided notice of the release to the NRC, SERC and LEPC as required by Section 103(a) of CERCLA and 304 of EPCRA..

3. The parties shall in good faith attempt to negotiate as settlement of this case. Complainant shall report on the progress of settlement thirty (30) days from the date of this Order.

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: December 14, 1999
Washington, D.C.