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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PUERTO RICO AQUEDUCT	)	Docket No. EPCRA-02-99-4003
AND SEWER AUTHORITY	)	
	)	
Respondent	)	

ORDER DENYING MOTION TO DISMISS

I. Background

This proceeding was initiated on February 8, 1999 by the filing of a Complaint 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, Puerto Rico Aqueduct and Sewer Authority (PRASA or Respondent). The Complaint charges Respondent in three counts with failure to immediately notify the National Response Center, the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC) of a release, on or about September 21, 1998, of four 2,000-pound containers of chlorine from its sewage treatment facility, as soon as Respondent had knowledge of the release, in violation of Section 103(a) of CERCLA, 42 U.S.C. 9603(a), and Section 304(b) of EPCRA, 42 U.S.C. 11004. Complainant proposes a penalty of $27,500 for each of the three counts, for a total penalty of $82,500.

Respondent answered the Complaint, denying the alleged violations and requesting a hearing. In its Answer, Respondent asserts that as a result of Hurricane Georges and resultant extensive flooding, chlorine cylinders were buried under the debris

of the concrete building in which they were located at Respondent's facility, that three chlorine cylinders were recovered with their content of chlorine intact, and that no leak or release into the environment occurred. Respondent further asserts in its Answer that a search continues "for a possible and uncertain fourth cylinder."

On July 6, 1999, Respondent filed a Motion to Dismiss (Motion) the Complaint on grounds that Complainant has not alleged facts which, if proven, would establish the occurrence of a release. Complainant submitted an Opposition to Motion to Dismiss (Opposition) on July 15, 1999, to which Respondent replied (Reply). For the reasons set forth below, Respondent's Motion will be denied.

II. Discussion

A. *Statutory provisions*

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

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

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 the reportable quantity of chlorine is ten pounds. 40 C.F.R. § 302.4.

A "release" is defined in Section 101(22) of CERCLA, 42 U.S.C. §9601(22) as "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)." The definition of "release" in Section 329(8) of EPCRA, 42 U.S.C. 11049(8) is virtually identical.

B. *Arguments of the Parties*

Respondent in its Motion asserts that the Complaint merely makes a bare conclusion that four 2,000-pound containers "were released from Respondent's facility," which is devoid of any allegation of fact sufficient to demonstrate a prima facie case that a release occurred. Respondent asserts that the chlorine cylinders could have been "released" within the meaning of Section 101(22) of CERCLA and 329(8) of EPCRA only if they were "abandoned" or "discarded," presumably because the Complaint alleges a release of containers of chlorine rather than a release of chlorine. Respondent points out that the Complaint does not allege that Respondent abandoned or discarded the chlorine cylinders. In footnotes, Respondent asserts that Complainant must, but did not, allege facts sufficient to establish a prima facie case of liability for the release of four cylinders, and that the allegation that there were four cylinders is based on "wholly unsubstantiated information." Motion at nn. 1, 2. Respondent further asserts as follows:

> A review of available information reveals that in all probability only three cylinders were present when the hurricane struck. Furthermore, all three cylinders were recovered from under the debris of the destroyed

> building in which they were housed. There is no reason why a fourth cylinder, if it was present, would not have been found in the same location.

Motion at n. 1.

In its Opposition, Complainant asserts that it does not have to prove that the cylinders were abandoned or discarded, but rather "that they were released under any of the methods described by the statute." Opposition at 7. Complainant asserts further that intent is not an element required to trigger the CERCLA or EPCRA reporting requirements. Complainant points out the case of *United States v. Santa Clara I*, 887 F. Supp. 825 (D. S.C. 1995), which addressed the issue of shipping containers containing barrels of a hazardous substance, arsenic trioxide, falling overboard from a ship into the ocean. The Court in that case stated, "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" and found that "a release occurred when the shipping containers fell into the ocean," and 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." 887 F.Supp. 841. Thus, Complainant argues, it is not necessary for the release to be intentional or for the hazardous substance to escape from the barrels to find a "release" within the meaning of the statute.

Complainant asserts that Respondent had no control over the cylinders and that there was a suspicion on the part of Respondent that the cylinders were emanating gas, referring to two exhibits attached to Complainant's Opposition. Complainant argues that Respondent acquired knowledge after the fact of the release that the three cylinders were found undamaged under the debris of the collapsed building, and such after-the-fact knowledge cannot justify a failure to notify the authorities at the time of the release. As to the fourth cylinder, Complainant argues that documents submitted by Respondent, and attached as exhibits to the Opposition, state that there were four cylinders. Complainant asserts that Respondent had a duty to report since it had knowledge that the cylinders were released, on September 23, 1998.

In its Reply,[(1)] Respondent argues that an allegation of a "release" is "wholly conclusory." Respondent asserts that a release requiring notification under Section 103 of CERCLA must be "into the environment," and that the escape of a container is not a release because no hazardous substances have entered into the environment, citing to *Fertilizer Institute v. U.S. EPA,* 935 F.2d 1303 (D.C. Cir. 1991) and *Nostru, Inc. v. Township of Castleton,* No. 93-CV-71480 DT, 1998 U.S. Dist. LEXIS 7556 (E.D. Mich. 1998). Respondent states, "[t]he mere exposure of a hazardous substance into the environment, i.e. because a container containing hazardous substances enters the environment, is not sufficient for there to be a release." Reply at 3. Respondent gives an example of a chlorine cylinder slipping through a worker's hands and falling to the ground while being unloaded from a truck. Such an escape of the chlorine cylinder would not be a release, Respondent argues, unless it were abandoned. If abandoned, the cylinder may over time actually release a hazardous substance into the environment, Respondent suggests, referencing *A & W Smelter v. Clinton,* 146 F.3d 1107 n. 9 (9th Cir. 1998). Respondent argues that the definition of "release" does not address loss of control of a container, and asserts that *Santa Clara I* was decided wrongly. Respondent argues further that it had insufficient notice of the nature of Complainant's claim because it is not clear nor can it be inferred whether the claim is premised on mere release of containers (by loss of control, abandonment or discarding) or release to the environment of chlorine gas.

Respondent requests exclusion from consideration on the Motion the allegations, made in Complainant's Opposition, that the chlorine cylinders escaped from Respondent's facility and were out of Respondent's control, and that Respondent had a suspicion that the cylinders were emanating gas. Respondent also requests that the exhibits attached to the Opposition in support of the latter allegation be

excluded from consideration on the Motion.[(2)]

C. *Analysis and Conclusions*

As the parties are aware, the undersigned has addressed the issue of the sufficiency of pleading a claim under Section 103(a) of CERCLA and Section 304 of EPCRA for failure to notify authorities of a release in *Lilly del Caribe, Inc.*, EPA Docket No. EPCRA-02-99-4001 (Order Denying Motion to Dismiss, June 21, 1999). The following discussion included therein is reiterated here:

> The Rules of Practice require a complaint to set forth factual allegations that if proven establish a prima facie case against the respondent. *Commercial Cartage Company, Inc.*, 5 E.A.D. 112, 117, 1994 EPA App. LEXIS 58 (EAB, February 22, 1994). If a complaint fails to allege a prima facie case, it may be dismissed upon motion under 40 C.F.R. § 22.20(a), which provides as follows:
>
> > the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional 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 complainant.
>
> In determining whether to dismiss an administrative complaint, all facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in favor of the complainant . *Commercial Cartage, supra* (citing, *Bank v. Pitt*, 928 F.2d 1108, 1109 (11th Cir. 1991). This is the standard used under FRCP 12(b)(6), which the Environmental Appeals Board (EAB) has found to be instructive in analyzing motions to dismiss. *Id.* n. 9 (citing *Asbestos Specialists, Inc.*, TSCA App. 92-3 n. 20 (EAB October 6, 1993)).
>
> On motions to dismiss, Federal courts draw all inferences and resolve all ambiguities in the plaintiff's favor and assume that all well-pleaded facts are true. *Mallett v. Wisconsin Div. of Voc. Rehab.*, 130 F.3d 1245, 1248 (7th Cir. 1997); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1428 (7th Cir. 1996); *Dimmig v. Wahl,* 983 F.2d 86, 87 (7th Cir. 1993). Federal courts have stated that the "complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory. *Griffin v. Sheahan,* Civ. No. C 2398, 1999 U.S. Dist. LEXIS 7899 (N.D. Ill., May 12, 1999); *Peaceful Family Limited Partnership v. Van Hedge Fund Advisors, Inc.,* Civ. No. C 1529, 1999 U.S. Dist. LEXIS 1838 (N.D. Ill., February 17, 1999); *Chawla v. Klapper,* 743 F. Supp. 1284, 1285 (N.D. Ill. 1990). However, "the court will not strain to find inferences that do not appear from the face of the complaint." *Griffin , supra; Peaceful Family, supra* (citing, *Lindgren v. Moore,* 907 F. Supp. 1183, 1186 (N.D. Ill. 1995).
>
> If any element of a claim is not alleged, or if the plaintiff can prove no set of facts in support of its claims which would entitle it to relief, then the complaint may be dismissed. *Commercial Cartage, supra* (complaint against carrier for violating fuel volatility regulations under Clean Air Act dismissed for failure to allege element of causation or of detection of violations at carrier's facility); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)(complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Thomas v. Harvard,* Civ. No. 1:98-CV-0946-JOF (N.D. Ga.., March 17, 1999)(dismissing claim under 42 U.S.C. § 1983, where alleged facts would not establish element, loss of tangible interest, for a claim for deprivation of a liberty interest).

> In general, the elements of a violation of Section 103(a) of CERCLA are: (1) that the respondent is a "person in charge of . . . an onshore facility"; (2) that a hazardous substance was released from such facility in quantities equal to or greater than those determined pursuant to Section [102 of CERCLA]; 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. § 302.7(a)(3).[(3)]
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> * * * *
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> Federal courts have held that "[a] CERCLA complaint which alleges a release or threatened release need not specifically allege the manner in which the release occurred." *Pape v. Great Lakes Chemical Co.,* Civ. No. 93 C 1585, 1993 U.S. Dist. LEXIS 14674 * 15 (N.D. Ill., Oct. 19, 1993) (allegation in complaint that releases were discovered in or about the facility sufficiently pleads a release into the environment); *Ascon Properties, Inc. v. Mobil Oil Co.,* 866 F.2d 1149, 1153 (9th Cir. 1989) ("the purpose of notice pleading is to give general notice to the defendant of the nature of plaintiff's claim. . . . [t]he allegation that there is a release . . . of hazardous substances from a particular 'facility' provides such general notice").

Respondent challenges the sufficiency of the allegation of a "release" in the Complaint, distinguishing *Pape* and *Ascon* on the basis that they do not involve releases of containers of hazardous substances, and that they involve private litigants in cost recovery actions, in which the presence of substances in the environment and clean-up costs trigger liability, and do not involve a government penalty assessment action, in which the fact of a release is the fundamental basis for liability. Respondent's distinctions of *Pape* and *Ascon* are unpersuasive. In those cases, the element of "release or threatened release" under CERCLA is a required element of the claim, and the holdings in those cases were based on general principles of notice pleading.

Respondent correctly points out that mere conclusory allegations set forth in a complaint are insufficient to state a claim. *Palda v. Central Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995)("[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)"); *Brisco v. LaHue,,* 663 F.2d 713 (7th Cir. 1981)("conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss"), *aff'd on other grounds,* 460 U.S. 325 (1983). Courts have held that they are not required to accept legal conclusions, whether alleged or inferred, as true. *Chawla v. Klapper,* 743 F.Supp. at 1285; *Papasan v. Allain,* 478 U.S. 265, 286 (1986) ("we are not bound to accept as true a legal conclusion couched as a factual allegation"). However, it does not follow that a court cannot accept a legal conclusion as true in appropriate circumstances, such as where sufficient factual allegations are stated or may be inferred in regard to each element of the claim. A claimant is "not required to set out in detail the facts upon which he bases his claim." *Canadyne-Georgia Corp. v. Nationsbank, N.A.,* 183 F.3d 1269 (11th Cir. 1999) (holding that the allegation that defendant acted negligently is sufficient) (*quoting, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993)).

Complainant has alleged facts in support of the allegation of a release, identifying the date of the release, the objects released (containers of chlorine), the number of objects released, the hazardous substance contained therein, the quantity of substance contained therein, and the source of the release (Respondent's facility).[(4)] Complaint ¶ 4. These facts are sufficient to put Respondent on notice of the nature of the claim asserted, and are sufficient to meet the requirement of the Rules of Practice of a "concise statement of the factual basis" for the violation alleged. 40 C.F.R. § 22.14(3), as amended, 64 Fed. Reg. 40138 (July 23, 1999).

It is not necessary for Complainant to identify which method or methods of release occurred, such as spilling, leaking, escaping, disposing into the environment or abandonment or discarding of containers or other closed receptacles. It is sufficient that the Complaint alleges a release as defined in Section 101(22) of EPCRA and 329(8) of EPCRA, as those definitions list the various methods of release. A release may include more than one method, and any of those methods of release triggers the requirement to notify the authorities under Section 103(a) of CERCLA and Section 304 of EPCRA..

Respondent's argument that a release must involve a hazardous substance - rather than a container of a hazardous substance - entering into the environment, is unavailing. First, the plain language of Section 101(22) establishes that a release into the environment occurs when a closed receptacle containing a hazardous substance is abandoned or discarded, that is, when the closed receptacle enters the environment. Second, the cases cited by Respondent involve containers which were not lost, abandoned or discarded but were in custody of known entities, and thus did not go "into the environment." *Nortru* involves an oil, contaminated with a hazardous substance, which "was contained at every stage," and closely supervised, and monitored, having been delivered to plaintiff, mixed with other fuel by plaintiff and sent to other facilities, returned to plaintiff, and stored in tanks at its facility. *Fertilizer Institute* involves the placement of hazardous substance into an unenclosed containment structure without an actual release of the substance into the environment. Stating that "nothing less than the actual release of a hazardous material into the environment triggers [CERCLA's] reporting requirement," the D.C. Circuit in *Fertilizer Institute* did not address the issue of closed receptacles which are abandoned or discarded. 935 F.2d at 1310. *A & W Smelter* involves drums containing a hazardous substance which were confiscated by authorities at the Mexican border.

The Ninth Circuit's dicta in *A & W Smelter* (146 F.3d 1107, n.9) that leaving the drums "in the middle of the Mojave [Desert]" would constitute abandonment "because, over time, there could be a release into the environment," is inconsistent with the D.C. Circuit's distinction in *Fertilizer Institute* between threatened releases and actual releases. However, the Ninth Circuit recognized that where the hazardous substance presents a serious, immediate threat to health or the environment, and the owner is not present, EPA would be justified in declaring the waste abandoned. 146 F.3d at 1112. Consistent with the latter rationale, containers of hazardous substances which are lost, abandoned or discarded may pose a serious, immediate threat to health or the environment because it is not known whether the containers are damaged or leaking.

Respondent points out that it is known that three of the cylinders were not damaged or leaking, as three cylinders were later found and recovered intact. However, it is not necessary to determine on this Motion the question of whether there was a "release" where those containers were lost and then found intact two weeks to four months later. Respondent has not established a failure to state a claim as to the fourth container referenced in the Complaint. It is alleged to have contained 2,000 pounds of chlorine, exceeding the reportable quantity of ten pounds, and thus a release concerning the fourth container alone may provide a basis for a finding of liability. For example, Complainant may be able to prove, consistent with the allegations in the Complaint, that the fourth container of chlorine gas in fact discharged chlorine gas into the environment, or in fact was abandoned or discarded. Respondent's lack of knowledge as to the existence of a fourth container cannot be taken as an impossibility of its existence; rather, Complainant's allegation of four containers must be taken as true for purposes of the present Motion. Therefore, Respondent has not established that Complainant could not prove its claim under any set of facts consistent with the allegations.

ORDER

1. Respondent's Motion to Dismiss is **DENIED.**

2. Complainant's Motion to File Translations to Exhibits is **GRANTED.** Each party shall submit a certified translation into English for each document that it submits which contains Spanish text.

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 4, 1999
Washington, D.C.

1. Concurrently with its Reply, Respondent filed a Motion for Leave to File the Reply, on grounds, *inter alia*, that the Rules of Practice were recently amended to allow filing a reply to a response to a motion as a matter of right. 64 Fed. Reg. 40137, 40182 (July 23, 1999). The Motion for Leave to File the Reply is hereby GRANTED.

2. Respondent's point is well taken and its request is granted. Materials outside the pleadings of the Complaint are not considered on motions to dismiss for failure to state a claim. *Ayres v. City of Chicago,* No. 97-2176, 1999 U.S. Dist. LEXIS 1981 (N.D. Ill. February 22, 1999). Similarly, any "available information" upon which Respondent relies in asserting that "in all probability only three cylinders were present" is not considered.

3. The regulations promulgated by EPA under Section 102 of CERCLA provide that the notification requirement is triggered as soon as the person has "knowledge of any release . . . of a hazardous substance from such . . . facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period." 40 C.F.R. § 302.6.

4. It is noted that Paragraph 4 of the Complaint is not grammatically correct, as it states:

> On or about September 21, 1998, a "release," as defined in Section 101(22) of CERCLA . . . of four (4) two thousand (2,000) pound containers of chlorine (CLCS) were released from Respondent's facility.

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Last updated on March 24, 2014