UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
United States Leather, Inc.,	)	Docket No. EPCRA-7-99-0048
d/b/a The Lackawanna Leather Co.,	)	
	)	
Respondent	)	

ORDER ON CROSS-MOTIONS
FOR ACCELERATED DECISION

Complainant U.S. Environmental Protection Agency ("EPA") and respondent United States Leather, Inc., d/b/a The Lackawanna Leather Company ("U.S. Leather"), have filed cross-motions for accelerated decision in this matter. 40 C.F.R. 22.20. As explained below, EPA's motion for accelerated decision is *granted*, and U.S. Leather's motion is *denied.* EPA is awarded judgment as to liability only. A hearing will be held on March 8, 2000, to determine the appropriate civil penalty to be assessed against respondent.

I. Background

EPA filed a two-count complaint against U.S. Leather following the release of a hazardous substance at respondent's facility. In each count, EPA alleges that U.S. Leather did not provide notice of the release as required by statute. Count I involves the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. § 9601 *et seq.* Count II involves the Emergency Planning and Community Right-To-Know Act ("EPCRA"). 42 U.S.C. § 11001 *et seq.*

II. Facts

The basic facts of this case are not in dispute.[1] On October 31, 1998, sometime between 4:00 a.m. and 5:00 a.m., U.S. Leather inadvertently spilled approximately 11,648 pounds of sulfuric acid onto a concrete roadway at its Lackawanna Leather Company facility in Omaha, Nebraska. This roadway lies between respondent's Lackawanna facility and the Packers Hide Company.

Sulfuric acid is a hazardous chemical with a reportable quantity of 1,000 pounds.

[1] The parties submitted a joint stipulation of facts on February 10, 2000. In addition to this joint stipulation, the record contains other background facts which are not in dispute, and which are referred to in the text of this order.

40 C.F.R. 302.4, Table 302.4. Respondent "contained, recovered, neutralized and removed" the sulfuric acid from the concrete roadway by approximately 12:00 p.m. on October 31, 1998. Nonetheless, some 488 pounds of the sulfuric acid still made its way through a manhole cover in the roadway and into the publicly owned treatment works ("POTW") for the City of Omaha. It appears that U.S. Leather was able to recover all but the 488 pounds that reached the POTW.

The parties stipulate that no sulfuric acid was released to any water body, surface water, or ground water. They also stipulate that no reportable quantity of sulfuric acid was released or volatilized into the ambient air. Moreover, EPA does not allege that a reportable quantity of sulfuric acid migrated through, under, or off of the concrete roadway, including into the soil or any other subsurface strata. Finally, the parties also stipulate that the 488 pounds of sulfuric acid that reached the POTW had no adverse effect on it, did not result in a treatment process upset or a bypass at the POTW, did not cause the POTW to violate its National Pollutant Discharge Elimination System permit, and did not result in the POTW fining or otherwise penalizing respondent.

This sulfuric acid release was discovered by U.S. Leather at approximately 5:30 a.m. on October 31. Respondent notified the State Emergency Response Commission ("SERC") of the release at 8:30 a.m. on October 31. It notified the National Response Center ("NRC") of the release at 9:00 a.m. the following day, November 1. U.S. Leather, however, apparently did not notify the Local Emergency Planning Commission ("LEPC") of the release.

Claiming that this notification to the NRC and the SERC was untimely, and that there was no justification for not notifying the LEPC at all, EPA filed the present administrative complaint against U.S. Leather. In Count I of the complaint, EPA charges that respondent violated Section 103(a) of CERCLA for failing to immediately notify the NRC of the sulfuric acid release. 42 U.S.C. § 9603(a). In Count II, the agency charges that respondent violated Section 304 of EPCRA for failing to immediately notify the LEPC and the SERC of this release. 42 U.S.C. § 11004.

In responding to the complaint, U.S. Leather asserts that the Lackawanna facility sulfuric acid spill did not constitute a release of a hazardous substance into the environment. Thus, respondent submits that it was under no statutory obligation to report the spill either to the NRC, the LEPC, or the SERC.

III. Discussion

The issue here is squarely presented. Sulfuric acid, a hazardous chemical, was spilled onto a concrete roadway in a reportable quantity. The sulfuric acid was not absorbed into the air, it did not migrate into any body of water, and it did not penetrate the concrete and reach the underlying soil, or run off the concrete into any adjoining soil. The question is whether under these circumstances this sulfuric acid was released "into the environment" within the

meaning of CERCLA and EPCRA. If so, both statutes require that this release be reported immediately. If not, U.S. Leather did not have to notify anyone.

The answer to this question is that the October 31 sulfuric acid spill did constitute a release into the environment. Thus, because a reportable quantity of a hazardous substance was released, U.S. Leather was required by statute to notify immediately the NRC, the LEPC, and the SERC. Respondent did not immediately notify these entities and, therefore, it violated Section 103(a) of CERCLA and Section 304 of EPCRA.

a. CERCLA and EPCRA Reporting Requirements

Section 103(a) of CERCLA requires that the National Response Center be notified whenever there is a release of a hazardous substance in a reportable quantity.[2] Section 103(a) provides:

> Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

42 U.S.C. § 9603(a).

EPCRA Section 304 is titled, "Emergency notification." It supplements CERCLA Section 103(a) and it also requires notification in the event of a hazardous substance release. Section 304(a)(1) provides:

> If a release of an extremely hazardous substance referred to in section 1102(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.A.§ 9603(a)] ..., the owner or operator of the

[2] As discussed, *infra*, when read in conjunction with CERCLA Section 101(22), 42 U.S.C. § 9601(22), the release referred to in CERCLA Section 103(a) is a release into the environment.

> facility shall immediately provide notice as described in subsection (b) of this section.

42 U.S.C. § 11004(a)(1).[3]

Section 304(b)(1) of EPCRA identifies the local and State authorities who are to be notified in the event of such a reportable release. Section 304(b)(1) provides:

> Notice required under subsection (a) of this section shall be given immediately after the release by the owner or operator of a facility (by such means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees, if established pursuant to section 11001(c) of this title, 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 ....

42 U.S.C. § 11004(b)(1).

Thus, assuming that reportable quantities are involved, CERCLA provides that hazardous substance releases are to be reported immediately to the National Response Center. EPCRA, in turn, provides that such releases are to be reported immediately to the Local Emergency Planning Committee and to the State Emergency Response Commission.

b. The Release Into the Environment

In this case, sulfuric acid is the chemical that was spilled. Pursuant to Section 102(a) of CERCLA, 42 U.S.C. § 9602(a), sulfuric acid has been identified as a hazardous substance with a reportable quantity of 1,000 pounds. 40 C.F.R. 302.4, Table 302.4. Sulfuric acid similarly has been listed as an "Extremely Hazardous Substance" at 40 C.F.R. Part 355, Appendix A, likewise with a reportable quantity of 1,000 pounds. Inasmuch as 11,648 pounds of sulfuric acid was spilled onto the Lackawanna facility's concrete roadway, the reportable quantity threshold requirement has been satisfied. The next step is to determine whether there was a release of this hazardous substance "into the environment."

For purposes of this case, CERCLA and EPCRA similarly define the term "release." Section 101(22) of CERCLA states:

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[3] Like CERCLA, the release referenced in EPCRA is a release into the environment. *See* Section 329(8) of EPCRA, 42 U.S.C. § 11049(8), *infra*.

> 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) ....

42 U.S.C. § 9601(22) *(emphasis added)*. *See* Section 329(8) of EPCRA. 42 U.S.C. § 11049(8) (referring to the release into the environment of "any hazardous chemical, extremely hazardous substance, or toxic chemical").

The battleground in this case is over the meaning of the phrase "into the environment." Can the concrete roadway at the Lackawanna facility be considered the "environment?" While the issue presented in this case is more difficult than one might initially have expected, on balance, the position advanced by EPA is more in line with the plain wording of the involved statutes, as well as with their remedial purposes. Accordingly, it is held that the October 31 sulfuric acid spill onto the concrete roadway at the Lackawanna facility was a release into the environment within the meaning of Section 103(a) of CERCLA and Section 304 of EPCRA. It is further held that U.S. Leather violated Section 103(a) and Section 304 by not immediately notifying the NRC, the LEPC, and the SERC of this release.

Of central importance to the analysis of this issue is the meaning of the term "environment." Section 101(8) of CERCLA defines "environment" as "(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States ... and (B) any other surface water, ground water, drinking water supply, *land surface* or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." 42 U.S.C. § 9601(8) *(emphasis added)*. Section 329(2) of EPCRA defines the term "environment" as including "water, air, and *land* and the interrelationship which exists among and between water, air, and land and all living things." 42 U.S.C. § 11049(2) *(emphasis added)*.

Thus, under both CERCLA and EPCRA, the term "environment" is defined in the most general terms. A plain reading of the involved statutory texts supports EPA's position that the concrete roadway at respondent's Lackawanna facility fits within the broad categories of "land surface" and "land." As a result, the sulfuric acid spill onto the roadway was a release into the environment, *i.e.*, a release onto a land surface or land. The fact that Congress did not specifically mention "engineered surfaces or man-made structures" in its definition of environment does not, as U.S. Leather argues, indicate that it intended to exclude concrete roadways. Moreover, respondent offers no explanation for such a narrow construction.

This plain reading of CERCLA and EPCRA is consistent with the notion that these statutes are remedial in nature and, therefore, are to be broadly and liberally construed. For

example, in *General Elec. Co. v. AAMCO Transmissions, Inc.,* 962 F.2d 281(2nd Cir. 1992), the Court observed that "CERCLA is a broad, remedial statute enacted by Congress to enable the Environmental Protection Agency ... to respond quickly and effectively to hazardous waste spills that threaten the environment ...." 962 F.2d at 285, *citing* S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), U.S. Code Cong. & Admin. News 1980, 6119. While the *General Elec. Co.* case may have involved a private action to recover response costs for the cleaning up of hazardous waste, there is no sound reason not to similarly recognize CERCLA's broad and remedial nature in the notification context of the present case as well. *See Lincoln Properties, LTD. v. Higgins*, 823 F. Supp. 1528, 1536 (E.D.Calif. 1992)("Courts have given the term 'release' a liberal reading, and have consistently rejected attempts to limit CERCLA's reach - or expand its narrow defenses - through restrictive interpretations of the term 'release.' [*Citations omitted.*]"

The remedial nature of EPCRA also has been recognized by the courts. In *Huls America Inc. v. Browner,* 83 F.3d 445, 446 (D.C. Cir. 1996), the Court commented that "[t]he purpose of EPCRA was to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control any accidental releases. (*Citation to legislative history omitted.)" See Citizens For A Better Environment v. Steel Co.,* 90 F.3d 1237, 1238-39 (7th Cir. 1996)("the 'Emergency Planning' component, is to use the reported information to formulate emergency response plans, again at the local level, in order to limit damage resulting from the accidental release of toxic chemicals"), *cert granted* 137 L.Ed.2d 214, *vacated* 140 L.Ed.2d 210.

The statutory interpretation offered by respondent ignores the remedial purposes of both the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-To-Know Act. Moreover, adoption of respondent's interpretation could lead to absurd enforcement situations. For example, under U.S. Leather's reasoning, the notification provisions of CERCLA and EPCRA would not be triggered if a reportable quantity of sulfuric acid spilled onto a concrete roadway, busy with life's daily commerce, so long as the spill remained on that concrete roadway. Yet, the same type of spill would be reportable if the spill occurred on a remote, untraveled concrete roadway, as long as the hazardous substance found its way into the adjoining or underlying soil. It is hard to believe that Congress intended application of the subject notification requirements to hinge on the nature of the surface onto which a substantial quantity of a hazardous substance (such as sulfuric acid) was spilled, with no attention at all paid to the hazards presented by the spill.

c. <u>Respondent's Case Law and Rulemaking Arguments</u>

U.S. Leather cites several court decisions to support its interpretation of the CERCLA and EPCRA reporting requirements. One of these cases is *Fertilizer Institute v. U.S. E.P.A.,* 935 F.2d 1303 (D.C. Cir. 1991). That case arose under CERCLA and, like the present case, it involved the notification provisions of Section 103(a). Specifically, EPA had promulgated a

rule regulating the reporting requirements for the release of radionuclides, otherwise known as radioactive elements. The preamble to EPA's final rule stated in part that "any activity that involves the placement of a hazardous substance into any unenclosed containment structure wherein the hazardous substance is exposed to the environment is considered a release." 935 F.2d at 1307, *citing* 54 *Fed.Reg.* at 22,526. The D.C. Circuit rejected this interpretation of CERCLA's reporting requirements as being contrary to the plain meaning of the statute.

In so holding, the Court stated that CERCLA provides that EPA must be notified when a hazardous substance is "actually" released into the environment, and not when there is only a "threatened" release. The Court concluded, "[u]nder CERCLA's provisions, nothing less than the actual release of a hazardous material into the environment triggers its reporting requirement." 935 F.2d at 1310.

U.S. Leather essentially argues that the facts of the present case and the facts of *Fertilizer Institute* are the same, inasmuch as both cases involve (in its view) a threatened release and not an actual release. It reasons, therefore, that the D.C. Circuit's holding in that case should be controlling here.

U.S. Leather's argument ignores a critical difference between the context of the regulatory challenge in *Fertilizer Institute* and the context of the present enforcement proceeding. In that regard, the EPA rule challenged in *Fertilizer Institute* involved the intentional placement of a hazardous substance in an "unenclosed containment structure." In other words, the regulation provided for the storage of hazardous waste in a controlled situation. In this case, however, the situation was anything but controlled. Here, more than 11,000 pounds of sulfuric acid spilled not into any containment structure, but rather onto a roadway whose function apparently was to serve pedestrian and vehicular traffic. The difference between these two cases could not be more dramatic; one case involves the intentional storage of hazardous substances and the other involves an accidental spill on a publicly accessible roadway. This is a significant factual difference that strongly works against the application of the D.C. Circuit's holding to the facts of this case.

Respondent also cites *Yellow Freight System, Inc. v. ACF Industries, Inc.,* 909 F.Supp. 1290 (E.D.Mo. 1995), *Premium Plastics v. LaSalle Nat'l Bank,* 904 F. Supp. 809 (N.D.Ill. 1995), and *Amland Properties Corp. v. Aluminum Company of America,* 711 F.Supp. 784 (D.N.J. 1989), for the general proposition that the courts have recognized "that concrete is not the 'environment,' and that a release to the environment does not occur until the hazardous substance migrates *through* the concrete and into the underlying soils." Resp. Br. at 6 (*Resp.'s emphasis*).

As U.S. Leather acknowledges, none of the cases upon which it relies involve the notification provisions of CERCLA Section 103 or EPCRA Section 304. Rather, all three cases involve owners of facilities seeking contributions, *i.e.,* private response costs under CERCLA, from the previous owners as a result of environmental contamination. Thus, in

order to recover in those cases, it was sufficient for the plaintiff to show only that there was a "threat" of a release. The plaintiffs did not have to prove an actual release in order to prevail.

In *Yellow Freight System*, the Court held that asbestos discovered outside of certain buildings constituted a release, or a threat of a release, and that the unsecured presence of "PCBs" in sumps, machinery, pits and "soils" on floors constituted a threatened release. The court also referenced the fact that it has been held in other jurisdictions "that PCBs on concrete flooring, if left unremedied, can eventually leach through to the soil." 909 F.Supp. at 1297 (fn. stating that there was no such evidence in that case). The court in *Yellow Freight System,* however, did not specifically hold that the hazardous substances on the floor could not be considered to be a release unless the hazardous substances penetrated the floor. The *Amland Properties Corp.* case likewise involved "PCBs." There, while noting that there need be no showing under CERCLA that an actual release had occurred, the Court concluded that the presence of PCBs in the concrete flooring of a plant constituted a threatened release. As for the *Premium Plastics* case, respondent merely cites to pages 811 to 813 for the proposition that a discharge of hazardous substances to concrete "*could* enter the environment." Resp. Br. at 6 *(Resp.'s emphasis)*. A reading of the cited pages, however, does not yield the persuasive, or even supporting, analysis that respondent suggests is the case. In sum, these three cases do stand for the proposition that a hazardous substance must penetrate a concrete surface before it can be deemed to be released into the environment.

Finally, U.S. Leather argues that through rulemaking EPA has "expressly recognized that a release to concrete is not a release to the environment, unless the substance actually 'enter[s] the environment, *e.g.,* seeps into the ground or volatilizes into the atmosphere.'" Resp. Br. at 7, *citing* 48 *Fed.Reg.* 23552, 23555. In response, EPA acknowledges that the agency makes a distinction between spills wholly contained within a facility and spills that occur outside a facility. In that regard, EPA submits that it "has consistently taken the position that releases that are wholly contained within enclosed buildings are not releases into the environment." EPA Reply at 3 (fn. omitted).

The fact that EPA does not consider a hazardous substance spill that is contained in a building to be a release into the environment has nothing to do with the facts of this case. While the regulations cited by both U.S. Leather and EPA certainly evidence this agency view as to spills wholly contained within a facility, this is not the case being tried. The circumstances surrounding the outdoor spill in this case already have been examined and it has been determined that the spill qualified as a release of a hazardous substance into the environment. Accordingly, U.S. Leather's reliance upon EPA's rulemaking record is misplaced.

d. The Failure to Immediately Notify

U.S. Leather stipulates that the sulfuric acid spill occurred on October 31, 1998, between approximately 4:00 a.m. and 5:00 a.m. It also stipulates that it did not notify the NRC of this release until 9:00 a.m. on November 1, 1998. This does not constitute immediate notification as required by Section 103(a) of CERCLA.

In addition, U.S. Leather states that it notified the SERC of the October 31 release "within several hours after the incident occurred." Resp. Br. at 1. Respondent does not take issue with EPA's assertion that it provided no such notice to the LEPC. Either of these events sufficiently shows that respondent did not satisfy the immediate notification requirement of EPCRA Section 304.

IV. Order

For the reasons mentioned above, EPA's motion for accelerated decision is *granted* as to liability only. Accordingly, respondent is held to have violated Section 103(a) of CERCLA and Section 304 of EPCRA as alleged in the complaint. Correspondingly, U.S. Leather's motion for accelerated decision is *denied.* A hearing will be held to determine the civil penalty to be assessed for the two violations found.

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Carl C. Charneski
Administrative Law Judge

Issued: February 23, 2000
Washington, D.C.