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 FOR INTERLOCUTORY APPEAL

On January 18, 2000, Respondent filed a Motion for Interlocutory Appeal (Motion), requesting certification of the Order on Cross Motions for Accelerated Decision for immediate appeal to the Environmental Appeals Board (EAB), under the Consolidated Rules of Practice, 40 C.F.R. § 22.29(b). For the reasons stated below, the Motion is denied.

The Complaint in this matter was filed on February 8, 1999, alleging that Respondent failed to immediately notify authorities of a release of a hazardous substance, chlorine gas, from its facility, as required by Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Section 304 of the Emergency Planning and Community Right-To-Know Act (EPCRA). Respondent filed a Motion to Dismiss five months later, and after it was denied, filed a Motion for Interlocutory Appeal, which was also denied. On November 1 and November 12, 1999, respectively, Complainant and Respondent submitted Motions for Accelerated Decision. Thereafter, upon Respondent's request, the hearing of this matter scheduled to begin on January 10, 2000 was postponed until February 1, 2000. The Order on Cross Motions for Accelerated Decision (Order) was issued on January 4, 2000, granting Complainant's Motion for Accelerated Decision in part, on the issue of whether a "release" within the meaning of Section 101(22) of CERCLA occurred from Respondent's facility. Respondent requests interlocutory appeal on that issue.

Respondent asserts that the issue is "one of overriding importance," and that it is a novel question in fact and law (Motion at 1-2). Respondent believes that the conclusion that a release occurred from Respondent's facility is "not in accordance with law" because, Respondent asserts, it is based on an interpretation of "release" which is not included within the clear definition of "release" in CERCLA and EPCRA. The definition of "release" in Section 101(22) of CERCLA reads as follows, 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) . . . .

Specifically, Respondent believes that the definition of "release" does not encompass a hazardous substance in a container whose whereabouts become unknown as a result of flooding and/or winds of a hurricane, because the definition does not specifically include the term "lost." Respondent does not accept the interpretation in the Order of the word "escaping," which is listed within the definition of "release," to comprehend such a situation, *i.e.*, a container of hazardous substance "escaping . . . into the environment."

In its Motion for Interlocutory Appeal, Respondent challenges the analysis of the grammatical structure of the statutory definition of "release" in the prior Order, arguing, without citing any supporting authority, that the first clause of the definition of "release" relates only to hazardous substances that themselves enter "into the environment," and that the parenthetical clause that follows relates specifically to closed containers, which are deemed to be "releases" if, and only if, they are "abandon[ed] or discard[ed]." Respondent believes that such releases of closed containers do not enter "into the environment," and that only an uncontained hazardous substance itself can enter "into the environment." Ignoring the meaning of the first word in the parenthetical, "including," Respondent suggests that Congress "specifically separated" releases of closed containers into the parenthetical clause, adding to the definition of "release" the discarding and abandonment of closed containers of hazardous substances. Motion at 6.

However, as detailed in the prior Order, the legislative history of the parenthetical clearly shows that by its addition Congress merely sought to "*confirm[] and clarif[y] 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*." Proceedings and Debates of 99th Cong., 2nd Sess., Conf. Rep. on HR 2005 (SARA of 1986), 132 Cong. Rec. 28266 (Oct. 3, 1986). There is no support in the legislative history for Respondent's proposition that by adding the parenthetical Congress sought to add to the definition a wholly new type of release, that was not previously encompassed by the existing definition. Thus, Congress' addition of the parenthetical in the definition of "release" sought to confirm the scope of the list of terms preceding it, to clarify that those terms -- *e.g.*, ". . . discharging, . . . escaping, . . . dumping, or disposing into the environment" -- also encompasses releases of closed containers, although the concept of a closed container may not fit within the most common or strict meaning of the terms used to define a release. Thus, Congress intended to specifically confirm that abandoned or discarded closed receptacles are also deemed to have entered "into the environment."

Respondent further argues that the "existing law," mentioned in the legislative history of the parenthetical quoted above, does not refer to Section 101(22) of CERCLA, but rather refers to Section 106 of CERCLA, which authorizes EPA to take response action not only in the event of a "release," but also a "threatened release." Respondent asserts that Congress meant to clarify that such threatened releases were sufficient to trigger Section 106 response action. Congress, however, was specifically amending the definition of the term "release," not "threatened release,"

and presumably was aware of the distinction between these two critical terms used separately and in conjunction in the statute.

Moreover, as indicated in the prior Order, CERCLA and EPCRA are remedial statutes whose purpose is "to minimize harm to public health and welfare and the environment by facilitating rapid response to accidents 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). Accepting Respondent's statutory interpretation of the definition of "release" would lead to the untenable result that when a container is deemed "lost," by its owner, regardless of the possibility that it is leaking hazardous substances and presenting a risk of harm to human health and the environment, it would not need to be reported under CERCLA Section 103 or Section 304 of EPCRA, until such time, *if ever*, that the container is recovered *and* discovered to be leaking. By that time, human health or the environment may have already been harmed or it would be too late for the Federal, State and local authorities to take prophylactic measures to protect the surrounding community. Furthermore, Respondent's interpretation would mean that if the owner fails to find the container, it need not *ever* be reported. The regulated community would thus have little incentive to hasten and expend resources to find "lost" containers. Moreover, Respondent's interpretation would mean that the surrounding community may never become aware of, and be able to exercise precautions to avoid, the risks of a leak, for example resulting from heat, impact or flame. Respondent's interpretation, therefore, is not consistent with the precautionary and expedient purposes of the reporting provisions at issue, which are triggered as soon as the person has knowledge of a release.

In short, Respondent has not satisfactorily established that the issue satisfies the first criterion for interlocutory appeal, that the "order or ruling involves an important question of law or policy concerning which there is *substantial* grounds for difference of opinion." 40 C.F.R. § 22.29(b), 64 Fed. Reg. 40186 (July 23, 1999).

Furthermore, even assuming *arguendo* that Respondent established that the issue met the first criterion for interlocutory appeal, Respondent has not satisfied the second criterion, which is:

> Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

Id.

Respondent argues that postponing review until after the final order is issued will be inadequate and/or ineffective, given the threshold nature of the issues involved. However, this proceeding, which has been already pending for almost a year, would be significantly postponed

if interlocutory review was granted. Due to the pending caseload of the Environmental Appeals Board, it is likely that its decision on the interlocutory appeal in this case would not be issued until at least a year hence. If Complainant prevails before the Board and this case is remanded, a hearing to conclude this matter would not be scheduled until some months thereafter, with the intervening year or more creating the potential loss of witnesses and relevant documents, and the inevitable fading of witnesses' memories. If the hearing proceeds as planned, beginning on February 1, 2000, an initial decision would likely be rendered within six months. At that point, if the Respondent remains unsatisfied with the outcome, it can then take one appeal to the Board and have the case resolved. The hearing in this matter, being held in Puerto Rico, would not involve significant expense to Respondent's witnesses, as they are located in Puerto Rico, and would memorialize the witnesses' testimony and collect exhibits for use by all parties at all levels of proceedings in this case.

Accordingly, the Motion for Interlocutory Appeal is **DENIED.** The hearing will proceed as scheduled, absent a fully executed Consent Agreement and Consent Order filed in advance thereof.

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Susan L. Biro
Chief Administrative Law Judge

Dated: January 24, 2000
Washington, D.C.