

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

TYSON FOODS, INC.

Docket No. EPCRA-91-05-E

Judge Greene

Respondent

ORDER DENYING MOTION FOR RECONSIDERATION

Respondent moves for reconsideration of the order herein which denied its Motion to Dismiss and in the Alternative for Summary Judgment as to two counts of the complaint. It is contended that section 304 (a) (4) of the Emergency Planning and Community Right to Know Act (EPCRA, or "the Act") excludes from the reporting requirements of sections 304(a) and (b) those releases of hazardous chemicals which result in exposure to persons solely on the site where the release occurred, and that the motion to dismiss should have been granted on that ground, even if not on the other grounds urged. Complainant opposes the motion, and states that the statutory provision in question has been interpreted by the Administrator of the U.S. Environmental Protection Agency (EPA) to include releases which traveled off-site -- although the provision is not expressed in that manner -- even where there is no evidence of exposure to persons off-site; in other words, no "off-site risk," much less off-site exposure, need be shown by Complainant.

Section 304 (a) (4) of the Act, 42 U. S. C. § 11004 (a) (4), provides as follows with respect to the reporting requirements set forth in section 304(a) and (b):

This section does not apply to any release which results in exposure to persons solely within the site or sites on which a facility is located.

Although the provision seems clearly to state that a release need not be reported if persons off-site were not exposed, it is true that the Administrator has not so interpreted it. The Environmental Appeals Board (EAB), which has delegated decisional authority from the Administrator to decide appeals on this question, determined that the *Matter of Holly Farms Food, Inc.*, wherein the administrative law judge applied the section 304(a)(4) exclusion to a defendant whose ammonia release went into the air with no evidence of exposure to persons off-site, was "wrongly decided."¹

The EAB, in deciding *In the Matter of Genicom Corporation*, examined portions of the legislative history of the Act and concluded that Section 304 was "intended to require that any facility with a reportable release would have to 'notify the National Response Center, as provided under current law, but also would have to notify [appropriate State and local officials].'" In addition, the EAB pointed to the language of the preamble to EPA final implementing regulations at 52 Fed. Reg. 13380-81 (April 22, 1987). In short, the EAB concluded, with respect to the section 304 (a) (4) exclusionary language,

...all this provision means is that if the release does not extend off-site, and thus the only persons potentially exposed were on-site, the reporting requirement does not apply. This neither imposes nor suggests any requirement for either actual exposure or risk for releases which go beyond the boundaries of the facility.²

Since this tribunal is bound by decisions of the Administrator and its delegates, Respondent's motion for reconsideration based upon the section 304 (a) (4) exclusion must be denied. A copy of the decision on appeal *In the Matter of Genicom Corporation* is attached for the convenience of the parties.

ORDER

The parties shall resume efforts to settle this matter, and shall report again upon the status of such efforts during the week ending August 1, 1997.

And it is **FURTHER ORDERED** that the parties shall make themselves available for a telephone conference call with this office during the week of August 4, 1997. Arrangements for the conference will be made by Legal Assistant Shirley Smith of this office.

J. F. Greene

Administrative Law Judge

June 30, 1997

Washington, D. C.

¹*In the Matter of Genicom Corporation*, EPCRA Appeal No. 92-2(EAB December 15, 1992). *Environmental Administrative Decisions*, Vol. 4, at 426.

² *Id.* at 437

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 30, 1997.

Shirley Smith

Legal Staff Assistant

For Judge J.F. Greene

NAME OF RESPONDENT: Tyson Foods, Inc.

DOCKET NUMBER: EPCRA-91-05-E

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