2/2/94

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| In the Matter of | : | |
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| **TYSON FOODS, INC.** | : | Docket No. EPCRA-91-05 E |
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| | : | |
| | : | Judge Greene |
| Respondent | : | |
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**ORDER DENYING MOTION TO DISMISS AND, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

**ORDER DENYING MOTION TO STRIKE**

This matter arises under sections 103(a) and 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," or "the Act") [42 USC §§ 9603(a), 9609]; sections 304(a) and 325(c) of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA") [42 U.S.C. §§ 11004(a), 11045(c)], and regulations issued pursuant to authority.

The complaint charges respondent with failing to report a release of at least 150 pounds of ammonia and failing to notify appropriate local and state authorities in connection with the alleged release in violation of EPCRA. Respondent denied the

charges in its answer. The parties have been unable to settle.[1] Respondent moved to dismiss or, alternatively, for summary judgment on the ground that complainant had failed to state a claim upon which relief can be granted. Complainant asserts that its evidence establishes a prima facie case against respondent, and that facts remain at issue.

Specifically, Count I of the complaint charges that on the evening of June 26, 1990, at least one hundred and fifty pounds of ammonia were released from a chicken processing plant in respondent's charge, and that, although respondent knew of the release, it was not reported to the National Response Center as soon as respondent learned about the release, in violation of the notification requirements of section 103(a) of CERCLA, 42 U.S.C. § 9603(a).[2] In its Amended Answer to the complaint[3] respondent denied that at least one hundred fifty pounds of ammonia were released, and stated that the quantity was approximately thirty-three pounds. Respondent further denied that it had failed to notify the National Response Center, and stated that it "immediately notified the NRC on June 28, 1990, although respondent was not required to do so" because the amount of the release was less than the reportable quantity of one hundred pounds.

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[1] Complainant's status report of January 27, 1994.

[2] **First Amended Administrative Complaint**, May 29, 1992, at 2-3.

[3] Leave to amend the complaint was granted on May 22, 1992. As a result of the amendments, Counts IV and V were withdrawn, and the total civil penalty requested was reduced accordingly. See **Motion for Leave to Amend Complaint and to Withdraw Portions of Complaint**, May 4, 1992.

Section 103(a) of the Act, 42 U.S.C. § 9603(a), provides in pertinent part as follows:

> 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 established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release.

Under regulations established pursuant to authority for this part, ammonia is a hazardous substance the release of which must be reported if the released quantity is 100 pounds or more.[4] Accordingly, if complainant's evidence reveals a prima facie case with respect to its allegation that at least 100 pounds was released, and if there is a factual dispute as to the quantity released, respondent's motion must be denied.

In its motion, respondent relies upon an affidavit from an independent chemical consultant who visited the facility on March 2 and 9, 1992, nearly two years after the incident, and inspected the equipment. The affidavit states that "(B)ased upon the type of equipment involved, the design of the refrigeration system at the time of the release, and the thermodynamic properties of ammonia," the expert was able to calculate the amount of ammonia released on June 26, 1990, and that ". . . . the maximum amount of ammonia that could have been released (taking into account a significant margin

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[4] **40 C.F.R. § 302.4 and Table 302.4 -- List of Hazardous Substances and Reportable Quantities.**

for error) would have been forty-eight pounds (48 lbs.)"[5]

Complainant points out that other materials submitted as part of respondent's motion indicate that the release was significantly greater than the reportable quantity, including the affidavit of the manager of the facility, who estimated a 200 pound release at the time but later determined the quantity to have been a maximum of 150 pounds (thirty gallons).[6] In addition, complainant notes that its expert, who visited the facility a few days after the release, calculates the release at 290 to 348 pounds, based upon the assumption that the release had not been partly liquid ammonia.[7]

Complainant's expert's affidavit is the subject of a motion to strike on the ground that Federal Rule of Civil Procedure 56(e) requires that affidavits offered in opposition to a motion for summary judgment ". . . . shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify

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[5] **Affidavit of Robert A. Wiesboeck, Ph.D.** attached to respondent's **Motion to Dismiss and, in the Alternative, Motion for Summary Judgment**, paragraphs 4 and 5.

[6] **Affidavit of Mr. Samuel Mart Massey**, Exhibit D attached to respondent's motion, at 3. Mr. Massey's affidavit goes on to state that "(A)s a result of subsequent investigation and analysis by numerous persons familiar with this refrigeration process, including an independent chemical consultant, it has been determined that the amount of ammonia release was actually less than fifty (50) pounds."

[7] **Affidavit of Charles R. Cartwright**, B.Ch.E., attached to complainant's **Response to Respondent's Motion to Dismiss and in the Alternative Motion for Summary Judgment**, at 2. Mr. Cartwright notes that if the release were partly liquid ammonia, as he believes, the amount would be "much higher."

to the matters stated therein,"[8] and on the ground that complainant's affiant based his opinion upon speculation and conjecture. For example, respondent states, complainant's affiant based his calculations in part upon erroneous information to the effect that the release had lasted for twelve minutes, whereas in fact the release lasted for only forty to fifty seconds.[9] However, another affidavit in support of respondent's motion to dismiss or for summary judgment states that the release began at ". . . . approximately 8:20 p.m. on June 26, 1990 . . . and ended at approximately 8:32 p.m."[10] While it is noted that the affiant does use the words "approximately," and that respondent now says the release lasted for only forty to fifty seconds, it is clear that significant portions of complainant's affiant's calculations are based upon information in the record. In any case, it would appear that respondent's independent consultant's affidavit is not entirely based upon personal knowledge, just as complainant's affiant's is not, in that -- among other things -- neither individual was present during the release. Consequently, neither of them has first hand information as to -- for instance -- the duration of the release, which it is reasonable to suppose any

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[8] **Brief in Support of Respondent's Motion to Strike**, at 2.

[9] **Id** at 5.

[10] **Affidavit of Mr. Jay Timmons Rice**, who was shift manager at respondent's facility and who was on duty at the time of the release, at 1-2. Mr. Rice states that his affidavit is based upon " . . . a review of my records and my personl knowledge of the release . . . ." and that the release occurred during the performance of routine maintenance of the refrigeration system.

calculation as to the quantity released must take into account, although respondent's consultant's affidavit does not mention duration of the release in setting forth the factors used in his calculation. Where affidavits appear relevant, are based upon information of record which will undoubtedly be offered in evidence if the matter goes to trial, come from affiants who appear qualified to offer the opinions contained in the affidavits, and are material, they should be admitted. Respondent's motion to strike is denied.[11]

Accordingly, it is clear and it is concluded that complainant has shown a prima facie case regarding Count I of the complaint, and that an issue of fact remains with respect to the central matter of whether the release in question was at least 100 pounds. Since the issue of size of the release essentially controls the violations alleged in Counts II and III, respondent's motion to dismiss or for summary judgment as to those counts need not be reached. Respondent's motion is hereby denied.

And it is **FURTHER ORDERED** that the parties shall continue their effort to reach an agreed disposition, and shall report upon

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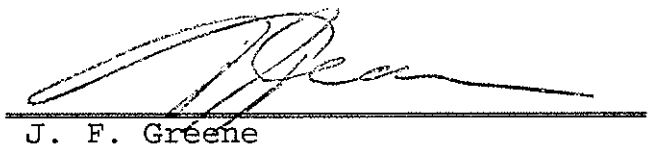
[11] Complainant opposed the receipt of respondent's Brief in Support of Motion to Strike, and, in the alternative, requested an opportunity to respond to the brief. If respondent asks for reconsideration of the denial to strike, complainant will be given an opportunity to brief the question.

the status of their effort during the week ending March 5, 1994. If no progress is shown to have been made by the date of the report, an order for pretrial exchange will issue.



J. F. Greene
Administrative Law Judge

Washington, D. C.
February 2, 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on February 3, 1994.

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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