5/3/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
ALL REGIONS CHEMICAL LABS, INC.,	)	Docket No. CERCLA-I-88-1089
	)	
	)	
Respondent	)	

P.O. 36

INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

Complainant has filed a motion, pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, for a partial accelerated decision in favor of the Complainant as to liability in this proceeding without further hearing, contending that no genuine issue of material fact exists and the Complainant is entitled to judgment as a matter of law as to both counts of the complaint.

In support of this motion, the Complainant contends:

1. Respondent admitted all material facts that constitute the violation of notification requirements of Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603, as set forth in Count I of the complaint.

2. Respondent admitted all material facts that constitute the violation of the written followup notice requirement of Section 304 of the Emergency Planning and Community Right-To-Know Act (EPCRTKA),

[a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. § 11004, as set forth in Count II of the complaint.

Respondent has filed a memorandum in opposition, maintaining that such an accelerated decision would not in any way expedite the disposition of the case and would run contrary to the provisions of both statutes with respect to criteria to be taken into consideration in determining the amount of any penalty.1/

Upon consideration of the pleadings, the prehearing exchanges filed by the parties, the motion and supporting memorandum filed by the Complainant and the memorandum filed by the Respondent, I conclude that the motion should be granted.

I. The Complaint

An administrative complaint was issued on September 30, 1988, under Section 109 of CERCLA, 42 U.S.C. § 9609, and Section 325(b) of Title III of SARA, or EPCRTKA, 42 U.S.C. § 11045(b).

1/ In support of their respective positions, both parties have relied, in part, upon the Federal Rules of Civil Procedure. While the Federal Rules of Civil Procedure may provide useful guidance, it should be noted that they do not govern the procedure in administrative agencies which enjoy "wide latitude" to fashion their own rules of procedure. In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985), citing Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356, n. 3 (E.D.N.Y. 1982). See also, South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n, 570 F. Supp. 227, 232 (D.C. La. 1983), aff'd 744 F.2d 1107 (5th Cir. 1984) and Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

The complaint alleged that Respondent had violated Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRTKA or Title III of SARA, 42 U.S.C. § 11003. Section 103(a) requires a person in charge of a vessel or an offshore or onshore facility, as soon as he or she has knowledge of a release of a hazardous substance from such vessel or facility in an amount equal or greater than the reportable quantity (RQ) of that substance, to notify immediately the National Response Center.[2/] Section 304(c)[3/] requires an owner or operator of a facility, as soon as practicable after a release that requires notice under Section

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2/ Section 103(a), 42 U.S.C. § 9603(a), provides, in pertinent part:

"Any person in charge of...an onshore 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."

3/ Section 304(c), 42 U.S.C. § 11003(c), provides:

"As soon as practicable after a release which requires notice under subsection (a) of this section, such owner or operator shall provide a written followup emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b) of this section, and including additional information with respect to--

(1) actions taken to respond to and contain the release,

(2) any known or anticipated acute or chronic health risks associated with the release, and

(3) where appropriate, advice regarding medical attention necessary for exposed individuals."

304(a),[4/] to provide written followup emergency notice (or notices, as more information becomes available).

II. Findings of Fact and/or Conclusions of Law

Based upon the complaint and the answer, the prehearing exchanges and memoranda filed by the parties, I make the following findings of fact and/or conclusions of law:

As to Count I:

1. Respondent, All Regions Chemical Labs, Inc. (d.b.a. Advanced Laboratory, hereinafter referred to as "Respondent" or as "All Regions") was incorporated under the laws of the State of Massachusetts on November 19, 1986. Complaint, p.2; Answer, p.1.
2. The Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Complaint, p.2; Answer, p.1.
3. Respondent is, or was, in charge during the violation described below of a "facility" as defined in Section 101(9) of

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[4/] Section 304(a)(1), 42 U.S.C. § 11003(a)(1), provides in pertinent part:

"If a release of an extremely hazardous substance referred to in section 11002(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...the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section."

CERCLA, 42 U.S.C. § 9601(9). The facility is located at One Allen Street, Springfield, Massachusetts 01108. Complaint, p.3; Answer, p.1; Respondent's Pre-Hearing Statement, p.5.

4 At approximately 10:00 a.m. on June 17, 1988, chlorine was discharged from the facility. Local officials, as well as the Western Region of the Massachusetts Department of Environmental Quality Engineering (DEQE) arrived at the facility and shortly thereafter evacuated between 1000 and 2000 residents and school children from the nearby area. A second fire at the facility was discovered at approximately 11:00 p.m. on June 17, 1988. This chemical fire required the evacuation of 6,000 residents from within a one-quarter mile radius of the facility. At approximately 1:00 a.m. on June 18, 1988, EPA received a request for assistance and notice of the release from DEQE. An estimated 180,000 pounds of chlorine were released during this incident. Complaint, p.3: Answer, pp.1-2; Respondent's Pre-Hearing Statement, p.5.

5. During the time Respondent was in charge of the facility there was a "release" from the facility within the meaning of 101(22) of CERCLA, 42 U.S.C. § 9601(22), of chlorine, a "hazardous substance," within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), in a quantity equal to or greater than the RQ for chlorine as specified in 40 C.F.R. § 302.4. Complaint, pp.3-4; Answer, p.2; Respondent's PreHearing Statement, p.5.

6. Respondent did not immediately notify the National Response Center of the release as soon as it had knowledge of the release, in violation of the notification requirements of Section 103 of CERCLA, 42 U.S.C. § 9603. Complaint, p.4; Answer, p.2.

As to Count II:

1. Respondent is, or was, the owner or operator during the violation described below of a "facility" as defined in Section 329(4) of Title III of SARA, or EPCRTKA, 42 U.S.C. § 11049(4). The facility is located at One Allen Street, Springfield, Massachusetts 01108. Complaint, p.4; Answer, pp.2-3.
2. A "hazardous chemical" as defined in Section 329(5) of Title III of SARA, or EPCRTKA, 42 U.S.C. §11049(5), was, or is, produced, used or stored at the facility. Complaint, p.4; Answer, pp.2-3.
3. At approximately 10:00 a.m. on June 17, 1988, chlorine was discharged from the facility. Local officials, as well as the Western Region of DEQE, arrived at the facility and shortly thereafter evacuated between 1000 and 2000 residents and school children from the nearby area. A second fire at the facility was discovered at approximately 11:00 p.m. on June 17, 1988. This chemical fire required the evacuation of 6,000 residents from within a one-quarter mile radius of the facility. An estimated 180,000 pounds of chlorine were released

during this incident. Complaint, p.5; Answer, p.3; Respondent's Pre-Hearing Statement, p.5.

4. During the time respondent operated the facility, there was a "release" from the facility of chlorine, an "extremely hazardous substance," within the meaning of Sections 329(8) and (3) and 302(a) of Title III of SARA, or EPCRTKA, 42 U.S.C. §§ 11049(8) and (3) and 11002(a). Complaint, p.5; Answer, p.3.

5. The release required notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a). Complaint, p.5; Answer, p.3.

6. Respondent did not provide written followup emergency notice (or notices, as more information became available) as soon as practicable after the release in violation of the notification requirement of Section 304 of Title III of SARA, or EPCRTKA, 42 U.S.C. § 11004. Complaint, pp.5-6; Answer, p.3.

7. As of September 30, 1988, ninety-nine (99) days had elapsed since written followup emergency notice was practicable. Complaint, p.6; Answer, pp.3-4.

III. Discussion and Conclusions

Respondent, in its memorandum in opposition to the motion for a partial accelerated decision, says that "[i]t is undisputed that Respondent itself was not the party which gave the notices required by the two statutes cited above." Nevertheless, Respondent contends that "the pre-trial evidence to date creates factual issues as to whether, in the total context of this case, there was a vio-

lation of the statutes. In short, is there a violation of the statute when appropriate authorities receive notice even though, in this case, it was not the Respondent who gave the notice."

Contrary to Respondent's contention, the issue which Respondent here raises is a legal issue, not a factual issue. Under the provisions of 40 C.F.R. § 22.20(a), such legal issues are precisely the issues which I, as Presiding Officer, am authorized to resolve in an accelerated decision.

Respondent contends that the purposes of both statutes were accomplished, "even though, admittedly, the Respondent was not the party which 'made the phone calls,'" because DEQE gave notice to the National Response Center of the incidents in question and because the Community Emergency Coordinator (the "CEC") and EPA "were kept constantly apprised of all activities at the facility through contacts with state and local authorities and Respondent's personnel dealing with the release."

Complainant contends that "notice" by DEQE does not constitute notice to the National Response Center by the person in charge. I agree with Complainant. Under Section 103(a) of CERCLA, the person in charge of a facility is required to report immediately to the National Response Center as soon as he or she has knowledge of a release of hazardous substance in an amount equal to or greater than the reportable quantity (R.Q.) for that substance. It further provides that, "the National Response Center shall convey the noti-

fication expeditiously to all appropriate government agencies including the Governor of any affected State."[5/]

As the Complainant contends, it is the purpose of the National Response Center, as the central notification unit, to alert the appropriate Federal and State government agencies and authorities once it has been notified of a release and not vice-versa. Notification requirements under CERCLA cannot be satisfied if the State provides such notice, as alleged. Therefore, Respondent's asserted defense to Count I under Section 103(a) of CERCLA must be rejected.

As for the Second Count of the Complaint, Section 304(c) of Title III of SARA, or EPCRTKA, 42 U.S.C. §11004(c), requires an owner or operator of a facility to provide "written followup emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b), and including additional information with respect to -

(1) actions taken to respond and contain the release;

(2) any known or anticipated acute or chronic health risks associated with the release, and

(3) where appropriate, advice regarding medical attention necessary for exposed individuals."

Respondent admittedly did not file such written notice (or notices). Even though the CEC and EPA may have been kept constantly apprised of all activities at the facility, that does not constitute a valid

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[5/] Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

defense to the failure to comply with Section 304(c) of Title III of SARA, or EPCRTKA, and, consequently, Respondent's asserted defense to this violation must be rejected.

In rejecting Respondent's legal defenses to the violations alleged in the Complaint, I make no determination as to whether such contentions would constitute mitigating circumstances in determining what amount of civil penalty, if any, may be appropriate in this case. Indeed, I make no judgment as to what criteria should be taken into consideration in determining the amount of any penalties. I leave the question of what penalty, if any, may be appropriate, for further proceedings in this matter. Consequently, I reject Respondent's contention that to grant Complainant's motion for a partial accelerated decision on the question of liability would somehow run contrary to the provisions of Section 109 of CERCLA, 42 U.S.C. § 9609(b) and Section 325 of Title III of SARA, or EPCRTKA, 42 U.S.C. § 11045(b)(2), which govern the enforcement of civil penalties for the violations found herein.

In summary, I conclude that no genuine issue of material fact exists as to question of liability and Respondent is entitled to judgment as a matter of law. I find that Respondent, All Regions Chemical Labs, Inc., has violated Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of Title III of SARA, or EPCRTKA, 42 U.S.C § 11004, as alleged in the Complaint. Consequently, Complainant's motion for partial accelerated decision should be, and it is hereby, granted. Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that

the issue of the amount, if any, of the civil penalties, which appropriately should be assessed for the violations found herein, remains controverted and the hearing requested shall proceed for the purpose of deciding that issue.

So ORDERED.

Henry B. Frazier, III
Administrative Law Judge

DATED: May 3, 1989
Washington, D.C.

SUBJECT: All Regions Chemical Labs, Inc.
Docket No. CERCLA-I-88-1089

CERTIFICATE OF SERVICE

I hereby certify that the original of this INTERLOCUROTY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION was mailed to the Regional Hearing Clerk, United States Environmental Protection Agency, Region I and copies were mailed CERTIFIED MAIL--RETURN RECEIPT REQUESTED to counsel for Complainant and Respondent in this proceeding.

Gladys A. Bryant
Secretary

DATED: May 3, 1989