UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
	)	Docket No. 5-EPCRA-076-97
Cenex/Land O'Lakes	)	
Agronomy Company	)	
	)	
Respondent	)	

Order Denying Cross-Motions For Accelerated Decision

Emergency Planning, Community Right-To-Know Act ("EPCRA") of 1986. On April 10, 1998, Respondent filed a Motion for Accelerated Decision pursuant to 40 C.F.R. §22.20 of the Consolidated Roles of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits. On April 30, 1998, Complainant filed its Motion for Accelerated Decision and Response. Subsequently, Complainant filed an Amended Motion for Accelerated Decision and Response on May 5, 1998; and Respondent filed its Reply to Complainant's Amended Motion for Accelerated Decision on May 20, 1998. **Held:** Respondent's Motion for Accelerated Decision is **denied**; Complainant's Motion for Accelerated Decision is denied.

Before: Stephen J. McGuire Date: June 29,1998

Administrative Law Judge

Appearances:

For Complainant: Nola M. Hicks
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604- 3590

For Respondent: Carolyn V. Wolski
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Introduction

On September 25, 1997, the United States Environmental Protection Agency (EPA), filed a Complaint against Respondent, Cenex/Land O'Lakes charging two counts of failure to provide immediate notice of the release of a reportable quantity of anhydrous ammonia, an extremely hazardous substance, in violation of EPCRA, 42 U.S.C. § 11004, and the Comprehensive Environmental Response, Compensation, and Liability Act, ("CERCLA") 42, U.S.C. § 9603[(1)] . The two counts listed in the Complaint include: one count for failure to notify the National Response Center of a release, as required pursuant to CERCLA § 103 and one count for failure to notify the State Emergency Response Commission (SERC), as required pursuant to EPCRA § 304. EPA proposed a total civil penalty of $33,000, or $16,500 for each count.

The essential facts in this matter are that Respondent became aware of a hazardous release from a tank at its facility at 8:00 p. m. on February 8, 1996. After subsequent stoppage, Respondent reported the release the next morning, on February 9, 1996, at which time it determined that 720 lbs of ammonia had been released. This amount exceeded the required "reportable quantity" of ammonia, designated at 100 lbs in 40 C.F.R. Appendix A. EPCRA § 304(a)(2)(B).

EPCRA § 304 provides that "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 CERCLA, the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section." Subsection (b) requires a list of information to be transmitted by telephone, radio, or in person, to the extent known at the time of the notice and so long as no delay in responding to the emergency results. This information includes the chemical name or identity of any substance involved in the release, an estimate of the quantity released, the time and duration of the release, the medium or media into which the release occurred, and other information.

The parties dispute the "shall immediately provide notice" requirement under EPCRA § 304. Respondent contends that its report, filed the next morning, 14 hours and 11 minutes after its knowledge of the release, was "immediate" for purposes of satisfying the statutory requirement. On the other hand, Complainant argues that Respondent did not "immediately" notify the National Response Center and State Emergency Commission, as its obligation to notify was triggered sometime prior to the time Respondent filed its notification of the release.

Standard for Accelerated Decision

Section 22.20(a) of the EPA Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), authorizes the ALJ to "render an accelerated decision in favor of the complainant

or respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding". In addition, the ALJ, upon motion of the respondent may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief".

A long line of decisions by the EPA Office of Administrative Law Judges and the Environmental Appeals Board (EAB), has established that this procedure is analogous to the motion for summary judgment under Rule 56© of the Federal Rules of Civil Procedure. See, e.g., In the Matter of CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). See, also Harmon Electronics. Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247,(Order, August 17, 1993).

The burden of showing the absence of genuine issues of material fact rests on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone V. Longmont United Hospital Assoc., 14 F.3d 526,528 (l0th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,256 (1986). Rather, a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In the Matter of Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90, (Partial Accelerated Decision and Order on the issue of Liability, November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones V. Chieffo, 833 F. Supp. 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979).

Discussion

The Motions of both parties are DENIED, as there are material issues of fact in this proceeding which necessitate an evidentiary hearing. The facts and circumstances surrounding the release of hazardous materials and the extent of Respondent's knowledge of such release, are either in dispute or are not sufficiently developed in this case to enable the court to render a decision on the pertinent issues of law. Additional facts are thus necessary to provide the essential nexus as to whether Respondent's notification satisfies the § 304 "shall immediately notify" language in the statute.

In the Matter of Thoro Products, Co. Docket No. EPCRA VIII-90-04, 1992 EPCRA LEXIS 2 (Initial Decision, May 19, 1992), provides that knowledge that a release has occurred is an element essential to the "shall immediately notify" requirement. However, knowledge of the release, by itself, is not sufficient to trigger the reporting requirements under § 304. The release must also be of a "reportable quantity" pursuant to EPCRA § 304(a)(2)(B). A review of the evidence in this case does not clearly establish the point in time that reportable quantities of hazardous materials became known or should have become known to the Respondent.

Under the constructive knowledge doctrine enunciated in Thoro Products, supra, at 14, evidence is necessary to establish *"such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts."* Section 304(a) thus imposes a

reporting requirement immediately after a release reaches a level at or above a reportable quantity and the owner or operator has knowledge, either actual or constructive, that such a release has occurred.

The evidence presented in the instant case fails to establish facts sufficient to make such findings. Among the outstanding factual questions posed by this case are whether indicators and/ or gauges on the tank could have revealed information sufficient to warrant further investigation by the Respondent into the amount of the release; whether the weather conditions on the evening of February 8, 1996, created an inability to make the appropriate determinations as to the amount of the release; and at what point in time, given all the information available to Respondent, should it have been knowledgeable of the full extent of the release. In addition, the statutory penalty criteria, should Respondent's liability be established, requires further development of these and other facts surrounding the release in order to properly determine the extent and gravity of the violations, the degree of culpability and other penalty factors .

The arguments of the parties can be properly measured only against the backdrop of an evidentiary hearing, which is necessary to fully develop the genuine issues of material fact and law that are presented in this matter. Such issues thus preclude granting the parties Motions under the appropriate legal standard for accelerated decision.

Order

For the foregoing reasons, and pursuant to 40 C.F.R. §22.20 of the Consolidated Roles of Practice, both Respondent's and Complainant's Motions for Accelerated Decision are **DENIED**.

_____
Stephen J. McGuire
Administrative Law Judge

Washington D. C.

1. The United States Code sections will be omitted and the citations from this point will be the section number in the original statutes.

In the Matter of Cenex Land O'Lakes, Respondent
Docket No. 5-EPCRA/CERCLA-97-076

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Cross-Motions For Accelerated Decision**, dated June 29, 1998, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to: Sonja R. Brooks
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard

Chicago, IL 60604-3590

Copy by Regular Mail to:

Attorney for Complainant: Nola M. Hicks, Attorney
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_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: June 29, 1998