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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
INDUSTRIAL SCRAP CORPORATION	:	Dkt. No. EPCRA-V-15-1991
	:	Judge Greene
Respondent	:	

ORDER UPON MOTIONS FOR PARTIAL JUDGMENT

This matter arises under Sections 103 and 109 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended, 42 U. S. C. §§ 9603 and 9609; and under Sections 301(a), 304(a) and (c), and 325 of the Emergency Planning and Right to Know Act (EPCRA), 42 U. S. C. §§ 11001(a), 11004(a), (c) and 11045.

The complaint charges Respondent Industrial Scrap Corporation with failures under the above Acts to notify certain state and local authorities both immediately and subsequently in writing following a release of chlorine at its facility in East Chicago, Indiana on November 21, 1990. Respondent answered that

it is not a "facility" as that term in defined in the Acts, and consequently is not subject to notification requirements; and answered further that it had no knowledge of the quantity of chlorine gas release on the date in question. Lack of knowledge must be taken as a denial of the charge.[1]

Complainant moved for and was granted summary determination respecting the question of whether Respondent's facility is a "facility" within the meaning of the statutes,[2] based upon the broad definition of "facility" at Section 101 (9)(B) of CERCLA and Complainant's credible evidence that hazardous materials had been stored at Respondent's facility. In any event, Respondent did not respond to the motion.

Complainant then moved for judgment as to the issue of whether a "reportable quantity[3]" of chlorine gas had been released at the Respondent's facility on November 21, 1990; shortly thereafter, Complainant moved for judgment as to liability for all charges alleged in the complaint except for those in Count II.

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[1] 40 C.F.R. § 22.15(b).

[2] See Order Granting Motion of January 7, 1992, and Memorandum Opinion of January 14, 1992.

[3] "Reportable quantity" is defined at 40 C.F.R. § 302.3 as "that quantity, as set forth in this part, the release of which requires notification pursuant to this part." The reportable quantity for chlorine gas is ten pounds, 40 C.F.R. § 302.4, Table 302.4. See also 42 U.S.C. §§ 9603(a) and 9602.

Motion for Judgment as to Release of a Reportable Quantity of Chlorine Gas.

Complainant's motion for judgment as to whether a release of chlorine gas in an amount equal to or greater than the quantity required to be reported upon release, to which Respondent did not respond, is supported by affidavits of federal, state, and local officials. Specifically, the Staff Director of the Indiana Emergency Response Commission stated that the release of chlorine was ten pounds[4]; the Lake County, Indiana, Local Emergency Planning Coordinator stated that an amount of chlorine equal or greater than the reportable quantity had been released[5]; the Director of the East Chicago Department of Air Quality Control stated that in his opinion "at least ten (10) pounds" of chlorine was released[6]; and a U. S. Environmental Protection Agency Technical Assistant stated, based upon computer modelling, that the release had to have been at least 100 pounds to produce the effects seen in the area (including the hospitalization of twenty-nine to thirty-one persons).[7]

In the face of a well-supported motion for summary judgment, Respondent must produce material sufficient to demonstrate that a factual issue exists with respect to whether a reportable

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[4] Attachment 10 to the motion.

[5] Attachment 9 to the motion.

[6] Attachment 6 to the motion.

[7] Attachments 7-8 and 3-5 to the motion.

quantity of chlorine gas released. Here, nothing has been produced other than statements that must be taken as denials, and it is well settled that mere denials in the pleadings are inadequate to defeat summary judgment.[8] Accordingly, no material facts remain to be determined with respect to this central issue.

Motion for Judgment for Liability as it Relates to Count I.

Count I charges that Respondent failed to report a release of at least ten pounds of chlorine gas to the National Response Center, in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603. In its answer, Respondent admitted that it was in charge of the facility where the release occurred, and that it had not notified the National Response Center. It has already been determined that a reportable quantity of chlorine was released, and that the site in question was a "facility" as defined by CERCLA. Accordingly, no material issues of fact remain to be determined with respect to Count I.

Motion for Judgment for Liability as it Relates to Counts III and V.

Section 304(a)-(b) of EPCRA, 42 U.S.C. 11004(a)-(b) requires

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[8] See *First National Bank of Arizona v. Cities Service Co., Inc.*, 391 U. S. 253, 289 (1968); *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co., Inc.*, 149 F. 2d 359, 362 (5th Cir. 1945). See also *Beal v. Lindsay*, 468 F. 2d 287, 291 (2d Cir. 1972), to the effect that the evidence manifesting the dispute must be "substantial," going beyond the allegations of the complaint.

that the "community emergency coordinator for the local emergency planning committees for any area likely to be affected by the release. . ." must be notified "immediately after the release". Section 304(c), 42 U.S.C. 11004(c), requires that written follow-up notice must be given "as soon as practicable after the release." Respondent was charged in Count III with failure to notify the emergency coordinator of the local committee -- in this case the Lake County, Indiana, Emergency Planning Committee -- immediately; in Count V Respondent was charged with failure to provide followup notice as soon as practicable. In support of the motion respecting these counts, Complainant points to Respondent's admission that notice was not given to the local committee for several days, and urges that Respondent's references to "confusion" after the release, the Thanksgiving holiday, and its attempt to reach the local committee do not constitute a defense.[9]

In its response, Respondent counters that there is a "genuine issue of fact" as to whether it made good faith efforts to notify the local planning committee, based upon its office manager's attempt to reach the local committee by telephone (it is stated that the office manager got a wrong number, but then tried to get a correct number from other government agencies). The fact that there was "no emergency situation on Friday, November 23, 1990," caused Respondent's president to wait until

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[9] Complainant's Motion for Partial Summary Judgment on Liability, at 3-4.

Monday, November 26, 1990, to notify the local committee. Respondent points out that on that day, its president spoke personally to the local coordinator.[10]

While there may exist an issue as to whether Respondent made a good faith effort to contact the local committee on the day of the incident, there is no question that defendant did not "immediately provide[d] notice" to the local committee. 42 U.S.C. § 11004(a) and (b) specify that notice must be provided immediately:

> § 11004. Emergency notification
>
> (a) Types of releases
>
> (1) If a release . . . requires notification under section 103(aa) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.A. § 9603(a)] . . . the owner or operator of the facility **shall immediately provide notice** as described in subsection (b) of this section.
>
> (b) Notification
>
> (1) Recipients of notice
>
> Notice required under subsection (a) of this section **shall be given immediately after the release** by the owner or operator of a facility (by such means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees . . . for any area likely to be affected by the release . . . . [Emphasis added]

It is obvious that good faith efforts to reach local emergency

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[10] Exhibits A and B to Respondent's Response to Motion. See also pp. 5-6 of the Response.

planning committees do not serve the statutory purpose enunciated in the Act. The charge here, after all, was filed pursuant to the Emergency Planning and Community Right to Know Act. If local emergency committees are not notified, they cannot perform the function for which they were created. In short, good faith efforts to give notice don't count, except, possibly, in connection with the amount of penalty to be assessed for the violation. The statute simply cannot be read in the manner contended for when its requirements, and the language in which such requirements were expressed, leave no room for interpretation.[11] Considering that immediate notice is mandatory, prudent members of the regulated community cannot afford to wait until a reportable release has occurred to find the necessary telephone numbers and addresses -- even if they are sure such a release will never occur.

As for Respondent's alleged failure to provide follow-up written notice to the local committee (Count V of the complaint), the record discloses Respondent's assertion that it sent written information to the local committee, and that it did this by sending a copy of Respondent's president's November 30, 1990,

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[11] Respondent also states that "there is a genuine issue of material facts as to whether . . . contacting the LEPC on Monday November 26, 1990, constitutes compliance with the CERCLA regulations." Response to Motion, at 6. This, however, is not a question of fact but a question of law. As a matter of law, notice six days later must be held not to constitute "immediate" notice.

letter to an attorney.[12] The letter does contain information relating to the release, but does not include significant items that are required by the statute to be included in the written follow-up notice.

42 U.S.C. § 11004(c) requires that "written followup emergency notice . . . setting forth and updating the information required under § (b), 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, advise regarding medical attention necessary for exposed individuals.

Information required to be given pursuant to §§ (a)-(b), which must also be set forth in the written follow-up emergency notice includes, *inter alia*, an estimate of the quantity of the substance released into the environment, the duration of the release, and an indication of whether the substance is on the

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[12] Respondent's Exhibit C attached to Response to Motion, letter dated November 30, 1990, addressed to "Mr. Mort Efron, Efron and Efron Professional Corporation" on Respondent's letterhead. Page 8 of the letter shows "cc: Mr. Robert Lamprecht, Lake County Office of Emergency Management."

list referred to in 42 U. S. C. § 11002(a).

Taking the record in the best light for Respondent, it is assumed that a copy of the letter was in fact sent to the local committee, and it is assumed further that November 30, 1990, was the soonest practicable date upon which the written follow-up could be furnished nevertheless, the letter does not contain significant information required by the statute. An estimate of the amount of the release was not set out; neither were the duration of the release and an indication of whether the substance is on the 42 U. S. C. § 11002(a) list; nor were any known or anticipated acute or chronic health risks associated with the emergency included.[13] The question of substantial compliance raised by Respondent is a matter of law, not fact, and in any event need not be reached because of the clarity and specificity of the requirements set forth in the statute itself. Accordingly, it is held that no material facts remain to be determined with respect to the allegations of Count V.

Motion for Judgment for Liability as it Relates to Count IV.

Count IV of the complaint alleges that as of April 1, 1991, Respondent had not provided written follow-up notice as soon as practicable to the Indiana Emergency Response Commission (the

[13] 42 U. S. C. § 11004(b)(1)(F); and subsection (c)(2).

"State emergency planning commission"[14]) as required by 42 U. S. C. § 11004(c).[15] In answer, Respondent denied the allegation that it had not, as of April 1, 1991, provided such notice, and asserted affirmatively that it "did provide follow-up notice to the Lake County Emergency Management Director . . . on November 30, 1990 and to the United States Environmental Protection Agency Region 5, on December 27, 1990." Respondent's response to the motion states that it was unaware of the requirement that written follow-up notice be provided to the State commission, and that it did not provide such notice. Accordingly, no material facts remain to be determined with respect to Count IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "person" within the meaning of the Acts; it owns or operates a "facility" as defined by CERCLA and EPCRA, located at 425 West 152nd Street, East Chicago, Indiana. Respondent is subject to both EPCRA and CERCLA.

2. On November 21, 1990, a release of chlorine gas in excess of ten pounds, the reportable quantity for chlorine gas, occurred at Respondent's facility.

3. Respondent failed to notify immediately the National

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[14] See 42 U. S. C. § 11004(b).

[15] Complaint at 5, ¶¶ 30-34.

Response Center, in violation of Section 103(a) of CERCLA, 42 U. S. C. § 9603(a); and failed to notify immediately the State emergency response commission and the emergency coordinator for the local emergency planning commission for Respondent's area, all in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

4. As of April 1, 1991, Respondent had not provided written follow-up emergency notice to the State emergency planning commission, and as of February 26, 1991, had not provided written follow-up emergency notice to LEPC, in violation of Section 304(c) of EPCRA, 42 U. S. C. § 11004(c).

5. Complainant is entitled to judgment as a matter of law with respect to Counts I, III, IV, and V of the complaint.

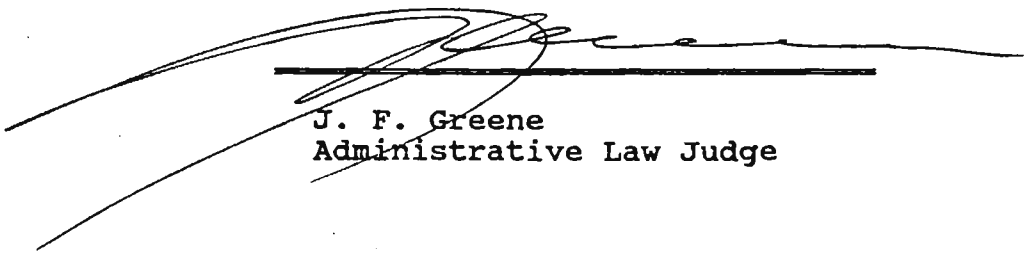
6. Respondent is liable for civil penalties pursuant to Section 109 of CERCLA, 42 U.S.C. 9609; and Section 325 of EPCRA, 42 U. S. C. § 11045.

6. Remaining to be determined herein are the issues of liability for the charge alleged in Count II of the complaint, and the amounts of penalty to be assessed with respect to violations found herein.

ORDER

Accordingly, it is ordered that Complainant's motions for partial accelerated decision are granted.

And it is FURTHER ORDERED that the parties shall attempt to settle the matters remaining herein, and shall report upon the status of their effort during the week ending March 15, 1996.



J. F. Greene
Administrative Law Judge

Washington, D. C.
February 8, 1996

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 8, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF CASE: Industrial Scrap Corporation
DOCKET NUMBER: EPCRA-V-15-1991

Jodi L. Swanson-Wilson
Regional Hearing Clerk
Region V - EPA
77 West Jackson Blvd
Chicago, IL 60604-3590

Thomas C. Nash, Esq.
Office of Regional Counsel
Region V - EPA
77 West Jackson Blvd
Chicago, IL 60604-3590

Nanette K. Raduenz, Esq.
5246 Hohman Avenue
Hammond, Indiana 46320