Decisions & Orders
About the Office of Administrative Law Judges
Statutes Administered by the Administrative Law Judges
Rules of Practice & Procedure
Environmental Appeals Board
Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of :	)	
	)	
LILLY DEL CARIBE, INC.,	)	Docket No. EPCRA-02-99-4001
	)	
Respondent	)	

ORDER ON RESPONDENT'S MOTIONS TO DISMISS AND TO STRIKE

I. Background

On February 3, 1999, the Administrative Complaint initiating this proceeding was filed against Respondent, Lilly del Caribe, Inc., pursuant to Section 325 of the Emergency Planning and Community Right To Know Act (EPCRA), 42 U.S.C. § 11045, and Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9609. The Complaint alleges that eighteen (18) 55-gallon drums of propionic anhydride were released from Respondent's facility, and that Respondent violated Section 103(a) of CERCLA, 42 U.S.C § 9603(a) and Section 304 of EPCRA, 42 U.S.C. § 11004, for failing to immediately notify the National Response Center (NRC), State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC) as soon as Respondent had knowledge of the release. The Complaint alleges three counts of violation, one count for each of the three entities Respondent allegedly failed to notify. Complainant proposes a penalty of $13,750 for each count of violation, for a total proposed penalty of $41,250.

On or about February 26, 1999, Respondent answered the Complaint, denying the violations, asserting several affirmative defenses and requesting a hearing. In its Answer, Respondent asserts that there was no "release," as defined by Section 101(22) of CERCLA, explaining that the 18 drums of propionic anhydride, a raw material, were swept off Respondent's property during a hurricane and major flood, and that the drums were recovered by Respondent sealed and intact.

On or about March 16, 1999, Respondent filed a Motion to Dismiss the Complaint with prejudice, with attached Memorandum of Law in Support (Motion to Dismiss), on grounds that the allegations in the Complaint fail to establish a prima facie case, that the Complaint does not show any right to relief on the part of Complainant, and that the Complaint does not meet the requirements of the Rules of Practice, 40 C.F.R. Part 22.

In response, Complainant submitted an "Answer to Motion to Dismiss," dated April 20, 1999 (Response). Respondent then filed a "Reply in Support of Its Motion to Dismiss," dated May 3, 1999 (Reply). On May 12, 1999, Complainant submitted a "Rebuttal to Respondent's Reply in Support of Its Motion to Dismiss" (Rebuttal). On May 28, 1999, Respondent moved to strike the Rebuttal, with a memorandum of law in support (Motion to Strike), on grounds that it is neither permissible nor proper under the Rules of Practice.

II. Motion to Strike

In its Motion to Strike, Respondent requests that the Rebuttal be stricken from the record, or at least formally excluded from consideration. Respondent asserts that the lengthy Rebuttal was filed without leave from the Presiding Judge, and goes beyond the scope of the Reply, seeking to add new legal theories and factual allegations that are not in the Complaint. In order to supplement its Complaint, Complainant must file a motion to amend the Complaint, Respondent argues. Respondent refers to Federal Rule of Civil Procedure 12(b)(6), asserting that only the facts alleged in the pleadings may be considered on a motion to dismiss. Respondent urges that failure to exclude or strike the Rebuttal would encourage *seriatim* filings in perpetuity on other motions in administrative proceedings. Respondent acknowledges its own failure to seek leave to file its Reply, but points out that Complainant has not objected, that "replies are often filed on motions without leave to file," and that Respondent is willing to have its Reply excluded along with the Rebuttal.

The Rules of Practice authorize a motion and a response to the motion, but do not provide for any further documents responsive to the motion. 40 C.F.R. § 22.16(b). Thus, parties are expected to file a motion for leave to file a reply or any further responsive material. *Town of Seabrook, New Hampshire,* 4 E.A.D. 806, 1993 EPA App. LEXIS 34 (EAB, September 28, 1993)(citing *American Cyanamid Co.,* RCRA App. No. 89-8 (Adm'r, August 5, 1991)). In Federal court,[(1)] materials such as sur-replies or rebuttal briefs not authorized by rule or court order may be excluded where leave to file was not sought. *Goltz v. University of Notre Dame Du Lac,* 177 F.R.D. 638, 641 (N.D. Ind. 1997)(citing, *inter alia, Cleveland v. Porca,* 38 F.3d 289, 297 (7th Cir. 1994); *Hartley v. Wisconsin Bell Inc.,* 930 F. Supp. 349 (E.D. Wis. 1996), *aff'd,* 124 F.3d 887 (7th Cir. 1997)). Seeking permission to file such materials has been characterized by a Federal court as "not a mere technicality to be overlooked or indulged by the Court." *Goltz,* 177 F.R.D. at 642 (citing *Miami*

Valley Contractors, Inc. v. Town of Sunman, Indiana, 960 F. Supp. 1366, 1371 (S.D. Ind. 1977).

As to administrative procedure, the United States Court of Appeals for the Sixth Circuit has recently stated, "it is well established that an agency has the discretion 'to relax or modify its procedural rules adopted for the orderly transaction of business before it when the ends of justice require it.'" *Spitzer Great Lakes, Ltd., v. U.S. EPA,* No. 97-3489, 1999 U.S. App. LEXIS 7185 (April 14, 1999)(quoting *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 539 (1970) and *NLRB v. Monsanto Chemical Co,* 205 F.2d 763, 764 (8th Cir. 1953); *Town of Seabrook, supra* (in interest of full airing of issues, error excused and motion to strike reply brief denied where citizen petitioner who filed reply without requesting leave to file was unrepresented by counsel).

It is noted that in the proposed rule to amend 40 C.F.R. Part 22, the proposed amendment to Section 22.16(b) of the Rules of Practice would authorize a reply to a response to a motion, but would not provide for any further responsive documents. 63 Fed. Reg. 9464, 9485 (February 25, 1998). Nevertheless, under the current Rules of Practice, inasmuch as both parties have erred, both the Reply and Rebuttal may be excluded from consideration.[(2)]

Furthermore, the Reply and Rebuttal step beyond the scope of the Motion to Dismiss. Attached to the Rebuttal are several documents, including Respondent's response to EPA's Request for Information, sworn statements of an EPA inspector, penalty calculation worksheet and narrative statement, and inspection report. These items are not relevant for consideration on Respondent's Motion to Dismiss, which challenges the sufficiency of the Complaint and not the merits of the action. Such documents, and any factual allegations in the Rebuttal, cannot be taken to fill any fatal gaps in the Complaint. *See, Ayres v. City of Chicago,* Civ. No. 97-2176, 1999 U.S. Dist LEXIS 1981 (N.D. Ill., February 22, 1999)(on motion to dismiss under Fed. Rule Civ. Pro. 12(b)(6), "materials such as affidavits which are outside the pleadings of the Complaint must be explicitly excluded from the Court's examination") (*citing*, *Carter v. Stanton,* 405 U.S. 669, 671 (1972)).

Respondent contends that its Reply does not add any new issues or legal theories which would call for a responsive document from Complainant. However, in the Reply, Respondent addresses its argument set forth in its First Affirmative Defense that there was no "release" into the "environment." Respondent argues that in its Answer it "admitted that through dedicated efforts following the hurricane and flood, it located a total of 18 completely sealed and intact drums of valuable raw material propionic anhydride beyond the limits of its plant site . . . [but] under the statute, EPA regulations, and applicable case law, this does not constitute a 'release' to the 'environment'." Reply at 2. In its Motion, Respondent had only challenged the sufficiency of facts alleged in the Complaint, arguing, "[n]o statement . . . is offered by the Complainant in support of its allegation that a release occurred . . . . [n]owhere does the Complaint provide any factual basis as to what constituted the release or how it occurred." Motion at 5.

The issue of whether under the statute, regulations and case precedent, there was a "release" into the "environment" also goes beyond the Motion to Dismiss.[(3)] Before such an issue can be ruled upon, a determination must be made as to whether there are any genuine issues of material fact. Respondent alleges facts but does not assert or establish that no genuine issues of material fact exist. There *may be* genuine issues of fact in regard to whether there existed "any spilling, leaking .

. . escaping, leaching, dumping or disposing into the environment" or "abandonment or discarding of . . . containers," as the term "release" is defined in CERCLA § 101(22). *See e.g., A & W Smelter and Refiners, Inc., v. Clinton,* 146 F.3d 1107 (9th Cir. 1998)(summary judgment is premature where facts were not clear that substance was "released" by "abandonment" under CERCLA, where drums of a hazardous substance were confiscated by Mexican and Federal authorities); *Notru, Inc. v. Township of Castleton,* Civ. Nos. 93-CV-71480 DT, 93-CV-72343 DT, 1998 U.S. Dist. LEXIS 7556 (E.D. Mich. March 31, 1998)(complaint dismissed after trial for failure to demonstrate "release" into the "environment" where substance was contained in drums or tanks, and there was no evidence of any leakage into the air, floor or ground).

The "ends of justice" do not require consideration of the Reply and Rebuttal in order to rule on the Motion to Dismiss. The Reply and Rebuttal, which were filed without leave from the Presiding Judge, and which encompass arguments that cannot be decided at this point in the proceeding, are excluded from consideration on the Motion to Dismiss.

II. Motion to Dismiss

A. Arguments of the Parties

Respondent asserts that Complaint fails to allege a prima facie case, fails to state a claim upon which relief may be granted, and fails to comply with the Rules of Practice, 40 C.F.R. Part 22. First, Respondent asserts that the Complaint does not allege all of the required elements of a violation under Section 103(a) of CERCLA, which provides as follows, in pertinent part:

> 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 . . . of such release.

Respondent refers to a regulation promulgated by EPA to implement Section 9602 of CERCLA, 40 C.F.R. § 302.6(a), providing as follows, in pertinent part:

> 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 a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period, immediately notify the National Response Center.

Respondent asserts that the Complaint does not allege that the release of propionic anhydride occurred within a 24-hour period, and does not otherwise indicate the duration of the alleged release. [(4)] A release that only exceeds the reportable quantity in more than a 24-hour period is not reportable, Respondent argues, and the failure of the Complaint to reference the 24-hour period requires dismissal of the Complaint. Such failure, Respondent asserts, violates the requirement of 40 C.F.R. Section 22.14(a)(2) for each complaint to include a "specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated."

Second, Respondent asserts that the Complaint violates 40 C.F.R. § 22.14(a)(3), which requires each complaint to include "a concise statement of the factual basis for alleging the violation." Respondent argues that the Complaint does not provide a factual statement as to what constitutes the "release" or how it occurred. Respondent argues further that the Complaint does not provide a factual basis for any allegation that Respondent had "knowledge" of the release required to trigger the reporting obligation.

Third, Respondent asserts that the Complaint fails to explain the reasoning behind the proposed penalty, as required by 40 C.F.R. § 22.14(a)(5). The Complaint merely states that Respondent is determined to be subject to penalties under EPCRA and CERCLA and lists the statutory factors to be taken into account in determining the penalty. Merely parroting the statutory language is insufficient, Respondent urges.

Finally, Respondent asserts that the proposed penalties were not calculated in accordance with applicable penalty guidelines, namely the Final Interim Enforcement Response Policy for Sections 304, 311 and 312 of EPCRA and Section 103 of CERCLA, dated January 3, 1998 (ERP). Respondent points out that the ERP provides that a Notice of Noncompliance is the appropriate enforcement response for first-time violators, provided certain conditions are met. Respondent asserts that it met those conditions. Therefore, Respondent urges, no basis existed under the ERP for issuing the Complaint. The ERP also requires consideration of "extenuating circumstances," which, Respondent adds, Complainant did not consider.

Responding to the Motion to Dismiss, Complainant cites, *inter alia,* to the following statements in the Complaint:

> On or about September 22, 1998, a 'release,' as defined in Section 101(22) of CERCLA . . . of 18 drums of propionic anhydride occurred . . . . These drums, with a capacity of 55 gallons each, were released from Respondent's Facility in to the environment. On September 29, 1998, one (1) of the drums was recovered
> * * * *
> greater than one but less than five times the reportable quantity for propionic anhydride was released from Respondent's Facility
> * * * *
> on October 2, 1998, approximately four days after the Respondent had knowledge of the release, Respondent notified the NRC * * * *.

Complaint ¶¶ 4, 7, 8. Complainant asserts that these statements fulfill the requirements for a prima facie case under CERCLA § 103(a). Complainant explains that September 29, 1998 is the date Respondent acquired knowledge of the release.

As to the Rules of Practice, Complainant asserts that the Complaint satisfies each provision of 40 C.F.R. § 22.14(a). The references to violations of Section 103(a) of CERCLA and Section 304 of EPCRA fulfill the requirement of Section 22.14(a)(2), and the allegations quoted above fulfill Section 22.14(a)(3). As to the statement explaining the reasoning behind the proposed penalty, Complainant attaches a copy of the ERP, pointing out that Respondent already had a copy and that Complainant will provide more information on the penalty in the prehearing exchange.

As to Complainant's decision to issue the Complaint rather than a Notice of Noncompliance (NON), Complainant points out the conditions for a NON include an exception, "where the facts and circumstances warrant the imposition of civil penalties." Complainant emphasizes the serious risk to health and safety by pointing out hazardous characteristics of propionic anhydride, the fact that it was

recovered in residents' backyards, and that the statutes require immediate notification, but Respondent provided notification to the NRC four days after it had knowledge of the release, to the SERC seven days after such knowledge, and to the LEPC twenty days after such knowledge.

B. Discussion

The Rules of Practice require a complaint to set forth factual allegations that if proven establish a prima facie case against the respondent. *Commercial Cartage Company, Inc.,* 5 E.A.D. 112, 117, 1994 EPA App. LEXIS 58 (EAB, February 22, 1994). If a complaint fails to allege a prima facie case, it may be dismissed upon motion under 40 C.F.R. § 22.20(a), which provides as follows:

> the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant.

In determining whether to dismiss an administrative complaint, all facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in favor of the complainant, *See, Commercial Cartage, supra* (citing, *Bank v. Pitt,* 928 F.2d 1108, 1109 (11th Cir. 1991). This is the standard used under Fed. Rule Civ. Pro. 12(b)(6), which the Environmental Appeals Board (EAB) has found to be instructive in analyzing motions to dismiss. *Id.* n. 9 (citing *Asbestos Specialists, Inc.,* TSCA App. 92-3 n. 20 (EAB October 6, 1993)).

On motions to dismiss, Federal courts draw all inferences and resolve all ambiguities in the plaintiff's favor and assume that all well-pleaded facts are true. *See, Mallett v. Wisconsin Div. of Voc. Rehab.,* 130 F.3d 1245, 1248 (7th Cir. 1997); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1428 (7th Cir. 1996); *Dimmig v. Wahl,* 983 F.2d 86, 87 (7th Cir. 1993). Federal courts have stated that the "complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory. *Griffin v. Sheahan,* Civ. No. C 2398, 1999 U.S. Dist. LEXIS 7899 (N.D. Ill., May 12, 1999); *Peaceful Family Limited Partnership v. Van Hedge Fund Advisors, Inc.,* Civ. No. C 1529, 1999 U.S. Dist. LEXIS 1838 (N.D. Ill., February 17, 1999); *Chawla v. Klapper,* 743 F. Supp. 1284, 1285 (N.D. Ill. 1990). However, "the court will not strain to find inferences that do not appear from the face of the complaint." *Griffin , supra; Peaceful Family, supra* (citing, *Lindgren v. Moore,* 907 F. Supp. 1183, 1186 (N.D. Ill. 1995).

If any element of a claim is not alleged, or if the plaintiff can prove no set of facts in support of its claims which would entitle it to relief, then the complaint may be dismissed. *Commercial Cartage, supra* (complaint against carrier for violating fuel volatility regulations under Clean Air Act dismissed for failure to allege element of causation or of detection of violations at carrier's facility); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)(complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Thomas v. Harvard,* Civ. No. 1:98-CV-0946-JOF (N.D. Ga.., March 17, 1999) (dismissing claim under 42 U.S.C. § 1983, where alleged facts would not establish element, loss of tangible interest, for a claim for deprivation of a liberty interest).

In general, the elements of a violation of Section 103(a) of CERCLA are: (1) that the respondent is a "person in charge of . . . an onshore facility"; (2) that a hazardous substance was released from such facility in quantities equal to or greater than those determined pursuant to Section [102 of CERCLA]; and (3) that the person failed to notify immediately the NRC of such release as soon as he had knowledge of any release in such quantities. *See,* 40 C.F.R. § 302.7(a)(3). The regulations promulgated by EPA under Section 102 of CERCLA provide that the notification requirement is triggered as soon as the person has "knowledge of any release . . . of a hazardous substance from such . . . facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period." 40 C.F.R. § 302.6. The regulations under Section 102 of CERCLA establish that the reportable quantity of propionic anhydride is 5,000 pounds. 40 C.F.R. § 302.4.

Thus, the regulations establish that in order to state a claim under Section 103(a) of CERCLA for failure to report a release of propionic anhydride, the elements are: (1) that the respondent is a "person in charge of . . . an onshore facility"; (2) that propionic anhydride was released from such facility in a quantity equal to or greater than 5,000 pounds in a 24-hour period; and (3) that the person failed to notify immediately the NRC as soon as he had knowledge of a release in such quantity.

The parties do not dispute that the Complaint meets the first element. As to the second element, the issue is whether the Complaint properly alleges a "release" of 5,000 pounds or more of propionic anhydride within a 24 hour period. As to the third element, the issue is whether the Complaint properly alleges Respondent's "knowledge" of such a release.

Federal courts have held that "[a] CERCLA complaint which alleges a release or threatened release need not specifically allege the manner in which the release occurred. *Pape v. Great Lakes Chemical Co.,* Civ. No. 93 C 1585, 1993 U.S. Dist. LEXIS 14674 * 15 (N.D. Ill., Oct. 19, 1993)(allegation in complaint that releases were discovered in or about the facility sufficiently pleads a release into the environment); *Ascon Properties, Inc. v. Mobil Oil Co.,* 866 F.2d 1149, 1153 (9th Cir. 1989)("the purpose of notice pleading is to give general notice to the defendant of the nature of plaintiff's claim. . . . [t]he allegation that there is a release . . . of hazardous substances from a particular 'facility' provides such general notice").

The Complaint alleges in Paragraph 4, "[o]n or about September 22, 1998, a 'release,' as defined in Section 101(22) of CERCLA . . . of 18 drums of propionic anhydride . . . with a capacity of 55 gallons each, were released from Respondent's Facility into the environment."

It may be inferred, or consistent with this allegation Complainant may be able to prove, that the release occurred within a 24 hour period on September 22, 1998.[(5)] Complainant also may be able to prove that the amount of propionic anhydride in the 18 drums was 5,000 pounds or more, and indeed, specifically alleges that the reportable quantity is 5,000 pounds and that "greater than one but less than five times the reportable quantity for propionic anhydride was released." Complaint ¶¶ 6, 7. Therefore, the Complaint sufficiently alleges that a "release" of 5,000

pounds or more of propionic anhydride occurred within a 24 hour period.

As to whether a complaint properly alleges "knowledge"of a release, the notification provisions of CERCLA and EPCRA require knowledge that there has been a release of a reportable quantity of the substance. *Mobil Oil Corp.,* 5 E.A.D. 490, 509 (EAB Sept. 29, 1994)(the duty to report arises as soon as personnel have knowledge that a reportable release has occurred). EPA has interpreted CERCLA and the implementing regulations in a preamble to a rule as follows:

> EPA wants to clarify that when the amount of a CERCLA hazardous substance release equals or exceeds the reportable quantity, the person in charge, once he or she knows of the release, must immediately notify the National Response Center. The 24 hour period refers to the period within which a reportable quantity of a hazardous substance must be released for the release to be considered reportable; it does not refer to the time available for a person to report a release. Such reporting must occur immediately.

Notification Requirements; Reportable Quantity Adjustments, 50 Fed. Reg. 13456 (April 4, 1985).

The factual basis alleged in the Complaint for Respondent's "knowledge" of the release are the allegations that "[o]n September 29, 1998, one (1) of the drums was recovered," "[a]t approximately 5:26 p.m. on October 2, 1998, approximately four days after Respondent had knowledge of the release, Respondent notified the NRC . . . ," "[o]n October 5, 1998, and approximately 7 days after the Respondent had knowledge of the release, Respondent notified the SERC . . . of the release . . . ," and "[o]n October 19, 1998, and approximately 20 days after the Respondent had knowledge of the release, Respondent notified the LEPC of the release . . . ." Complaint ¶ 4, 8, 14, 18.

The Complaint does not specifically allege that Respondent had knowledge that a reportable release occurred on September 29, 1998. However, the Complaint does claim that Respondent had "knowledge of the release" and that four days later, on October 2, 1998 notified the NRC, so an obvious inference may be drawn that Respondent had such knowledge of a release of propionic anhydride on September 29, 1998. Consistent with that claim, Complainant may be able to prove that Respondent had the requisite knowledge of a reportable release,[(6)] namely a release of 5,000 pounds or more of propionic anhydride, on September 29, 1998. Therefore, a dismissal of the Complaint on the basis that it fails to include the required element of "knowledge," is not warranted.

As to the claim that the Complaint does not comply with the requirement of 40 C.F.R. § 22.14(a)(5) to include a "statement explaining the reasoning behind the proposed penalty," my learned colleague, Judge Nissen, has noted, the "notion that the rote recitation of the statutory penalty factors constitutes compliance with the requirements of the rule for a statement of the reasoning behind the proposed penalty renders the rule requirement meaningless and is rejected." *Stanchem, Inc.,* 1998 EPA ALJ LEXIS 11 (ALJ, Order on Motions to Compel and For Discovery, Feb. 13, 1998). Here, the Complaint did not refer to or attach a copy any penalty policy used to calculate the penalty. However, EPA's administrative appellate tribunal has held that failure to fully comply with Section 22.14(a)(5) of the Rules of Practice does not warrant dismissal of the complaint. *Environmental Protection Corporation (East Side Disposal Facility),* 3 E.A.D. 318, 1990 EPA App. LEXIS 88 (CJO, September 12, 1990). Therefore, and because dismissal is a drastic remedy, amendment of a complaint is an alternate remedy, and Complainant in the prehearing exchange will be required to provide a detailed explanation of the reasoning behind the proposed penalty, the Complaint will not be dismissed for failure to comply with 40 C.F.R. § 22.14(a)(5).

Finally, as to Respondent's argument that a Notice of Noncompliance (NON) is the appropriate enforcement response under the ERP for first-time violators, and that Respondent met the conditions for a NON, issues of fact and discretion are raised which are not appropriate for resolution on a Motion to Dismiss for failure to state a claim or any right to relief.

ORDER

1. Respondent's Motion to Strike the Region II "Rebuttal" From the Record is **GRANTED** to the extent that the Rebuttal is excluded from consideration on the Motion to Dismiss. The Reply is also excluded from consideration on the Motion to Dismiss.

- Respondent's Motion to Dismiss is **DENIED.** A prehearing order directing the parties to exchange prehearing documents will be forthcoming.

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: June 21, 1999
Washington, D.C.

1. Administrative tribunals may look to the Federal courts for guidance on procedural issues.

2. Complainant has not moved to strike or exclude the Reply. Consideration of the Reply does not change the outcome of the ruling on the Motion to Dismiss.

3. It is noted that Respondent does not cite to any case law on the issue, but that Complainant's Rebuttal cites *United States v. Santa Clara I,* 887 F. Supp. 825 (D. S.C. 1995).

4. Not only Count I, which alleges a violation of Section 103(a) of CERCLA, but also Counts II and III of the Complaint depend on this provision. Counts II and III allege that Respondent failed to notify the SERC and LEPC, as required by Section 304 of EPCRA, where notification is required under Section 103(a) of CERCLA.

5. There is some ambiguity created by the last sentence in Paragraph 4 of the

Complaint, "[t]he release ended when the other seventeen (17) drums were recovered by October 13, 1998," which may be construed as a continuous release occurring from September 22 until October 13, 1998. However, this ambiguity will be resolved in favor of Complainant for purposes of ruling on the Motion to Dismiss, particularly because the first sentence of the paragraph alleges that the release occurred on one specific date.

6. It is noted that "knowledge" has been held to include both actual and constructive knowledge. *Mobil Oil Corp., supra (citing* 52 Fed. Reg. 13378, 13393 (April 22, 1987)).