

release fell within that category of releases that are excepted from the reporting requirement pursuant to § 103(a) of CERCLA, (42 U.S.C. § 9603) by virtue of being "federally permitted." The rationale for this assertion is that the term "federally permitted" is defined in relevant part as "any emission into the air subject to a permit or control regulation" under listed portions of the Clean Air Act, 42 U.S.C. §§ 7401-7671q, including sections 111 and 112, Title I part C, and Title I part D; and that Respondent's facility is subject to permit or control under one or more of the listed portions of that Act. Further, taking issue with Complainant's construction of "federally permitted," Respondent contends that as a factual matter the vinyl chloride release did not flow through a relief valve as that term is defined ("pressure relief device") at 40 C.F.R. § 61.61(v). Therefore, the release was not subject to the limitations imposed on the vinyl chloride emissions recited at 40 C.F.R. § 61.65(a) of the implementing regulations.

Complainant responded to the effect that the proper interpretation of the language which excepts a "federally permitted release" from reporting requirements excludes the release at issue here, based upon the decision on appeal of *In re Mobil Oil Corporation*⁽³⁾ which specifically addressed, and limited, the broadly stated formal definition of "federally permitted" release.

The parties have stipulated that the January 2, 1992, release flowed ". . . . through a red ball indicator."⁽⁴⁾ However, whether that device is, or is part of, or performed in this instance in the same manner as, a relief valve is the subject of dispute between the parties. Both parties rely upon the definition of the term "relief valve" at 40 C.F.R. § 61.61(v) to support their respective positions.

The regulatory definition of the term "relief valve" is as follows in pertinent part:

Relief valve means each pressure relief device, including pressure relief valves, rupture disks and other **pressure relief systems used to protect process components from over-pressure conditions**. "Relief valve" does not include polymerization shortstop systems, refrigerated water systems or control valves or other devices used to control flow to an incinerator or other air pollution control device. (Emphasis added).

Respondent's position that "on this equipment, only the relief valve itself is used to protect against 'over-pressure conditions' is supported by an affidavit of the Director of Environmental Affairs for the Geon Company⁽⁵⁾ and a pretrial exchange document.⁽⁶⁾

Complainant urges that the definition of "relief valve" is broad, and that the words "pressure relief systems" used in the definition must include the red ball indicator here because it "normally functions as a monitoring device for pressure on the relief valve." Alternatively, it is argued that since the vinyl chloride release flowed through the red ball indicator, it performed the function of a relief valve and "protect(ed) process components from overpressure conditions." This being the case, Complainant argues, the red ball indicator served the purpose of a relief valve in this instance, even if its primary function is not to relieve pressure and even if it was not specifically designed to function in that manner; and this is sufficient in Complainant's view to bring the red ball indicator within the effective meaning of the regulatory definition.

Viewed in the strongest possible light, Complainant's position does raise questions of fact more than adequate to withstand the motion and the supporting evidence. The questions of whether the red ball indicator falls within the broad definition of "relief valve" as part of a "pressure relief system," and/or whether it acted as a relief valve in the circumstances here (thus coming within the definition) are in dispute, and require denial of the motion at this time. Whether Respondent is entitled to prevail as a matter of law in connection with the definition of "relief

valve" must be based upon factual determinations that cannot be made on the record as it stands.

Complainant's response also raises the issue of whether Respondent demonstrated in its motion that the State permit in effect at the time of the release was federally enforceable, and notes that the State of Ohio's Federally Enforceable State Permit Operating Program was not approved conditionally until 1994.⁽⁷⁾ It may well be that the emissions limitations were federally enforceable, but Complainant correctly points out that the basis for a legal conclusion to that effect was lacking in the motion. As the parties are well aware, a summary judgment motion must show not only that all material facts have been determined, but also that the moving party is entitled to decision as a matter of law.

Accordingly, Respondent's motion for summary determination as to count 1 of the complaint must be denied.

Provision is made herein for a renewed filing, in the event that (a) Respondent believes that the record can be supplemented so as to resolve the issues alluded to above, and (b) wishes to renew the motion.⁽⁸⁾

Order

It is ORDERED that Respondent's motion for summary decision as to Count I of the complaint shall be, and is hereby, denied.

And it is FURTHER ORDERED that any renewed motion from Respondent with respect to Count I of the complaint shall be filed no later than June 3, 1998. Complainant shall have through June 12, 1998, in which to respond to any such filing.

And it is **FURTHER ORDERED** that the parties shall confer again for the purpose of exploring the possibility of settlement, and shall report upon status during the week ending June 26, 1998.

J. F. Greene
Administrative Law Judge

Washington, D. C.
April 29, 1998

1. *Order Denying Complainant's Motion for Partial Summary Decision*, March 31, 1998.
2. Section 103(a) of CERCLA 42 U.S.C. §9603(a); and section 304(b) of EPCRA, 42 U.S.C. § 11004(b).
3. EPCRA Appeal No. 94-2, 5 EAD 490, 498-509.
4. Agreed Stipulations of Fact and Law, ¶ 3 at 3.
5. Geon Company is a corporate relative of defendant B. F. Goodrich Company.
6. Document 5.iii of Initial Pretrial Exchange.
7. *Complainant's Response to Respondent's Motion for Partial Accelerated Decision*, ¶ B, at 7-8, citing 59 *Federal Register* 53856 (October 25, 1994). See also Agreed Stipulations of Fact and Law, ¶ 15 at 4.
8. A Notice of Trial will be issued shortly.



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