UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MORTON INTERNATIONAL, INC.,	)	DOCKET NOS.EPCRA/[CERCLA]-VII-96E-218
	)	
	)	CWA-VII-97-W-0008
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL

ACCELERATED DECISION AS TO LIABILITY

ORDER SCHEDULING HEARING

On October 2, 1997, the United States Environmental Protection Agency ("Complainant" or "EPA") filed a Motion for Partial Accelerated Decision as to Liability on all three (3) counts in the Complaint. The Respondent opposes the motion. The Complainant's motion is denied as to Counts I and II in the Complaint and is granted as to Count III in the Complaint.

Background

This proceeding arises under the authority of Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9609, Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045 (Supp. IV 1986), and Section 311(b)(6) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1321(b)(6). These proceedings are governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq.

In the Complaint, the Complainant alleges one (1) violation of the emergency notification requirements of Section 103(a) of CERCLA, 42 U.S.C. § 9603 (Count I), one (1) violation of the emergency notification requirements of Section 304 of EPCRA, 42 U.S.C. § 1104 (Count II), and one (1) violation of Section 311 of the CWA, 33 U.S.C. § 1321. Specifically, the Complainant alleges that on February 4, 1996, there was a release of sodium hydroxide in excess of the reportable quantity designated by 40 C.F.R. §§ 302.4 and 117.3 from the Respondent's onshore facility into the Arkansas River (Count III). The Complainant proposes a civil administrative penalty of $6,900 for this alleged violation. The Complaint further alleges that the Respondent failed to immediately report this release of sodium hydroxide to federal, state, and local authorities (Counts I and II). The total proposed penalty for both these alleged notification violations is $33,000. The total proposed penalty on all three Counts in the Complaint is $39,900.

Standard For Accelerated Decision

The Complainant has filed a motion for partial accelerated decision pursuant to 40 C.F.R. § 22.20, the regulation governing accelerated decisions. Section 22.20(a) provides, in pertinent part, as follows:

The Presiding Officer,[(1)] upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the 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. (emphasis added)(2)

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").(3) Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated

decision. See In the Matter of CWM Chemical Service, Docket No. TSCA-PCB-91-0213, 1995 TSCA Lexis 13, TSCA Appeal 93-1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. Anderson, supra at 248; Adickes, supra, at 158-159. The substantive law identifies which facts are material. Id.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. Id. Further, in Anderson, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. Anderson, supra, at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering

evidentiary material or to file a Rule 56(f) affidavit.(4) Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, supra, at 156.

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra. The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary material needed to defeat a

properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, supra, at 256 (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. Celotex, supra at 322; Adickes, supra. The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, supra, at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or provide examples to illustrate the meaning of the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon any 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 an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an accelerated decision is quite similar to that in the context of a summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, I believe that the standard for that inquiry as enunciated by the Court in Celotex, Anderson, and Adickes is applicable in the accelerated decision context.(5) Compare In the Matter of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 EAD 772, 781 (EAB, Aug. 23, 1993) (wherein the Environmental Appeals Board ("EAB") adopted the standard for summary judgment articulated by the Court in Anderson to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the CWA).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.(6) In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. See Anderson, supra, at 249.

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

Discussion

In the instant matter before me, the Complainant has filed a motion for partial accelerated decision as to liability pursuant to 40 C.F.R. § 22.20(a). The Complainant argues that it is entitled to judgment on liability as a matter of law on all three counts in the Complaint because no genuine issue of material fact exists regarding the Respondent's failure to comply with CERCLA, EPCRA, and the CWA as alleged in the Complaint. The Respondent opposes the motion for partial accelerated decision as to liability on all three counts in the Complaint.

Count III

Specifically, the Complainant asserts that the Respondent, in its Answer to the Complaint, admitted all elements of the violation of Section 311 of the CWA as set forth in Count III in the Complaint and, therefore, the Complainant is entitled to accelerated decision on the issue of liability as to Count III. The Respondent asserts that it has admitted its "responsibility" for the release of a reportable quantity of sodium hydroxide as alleged in Count III of the Complaint and, therefore, there is no need for an accelerated decision as to the Complainant's claims under the CWA (Count III). Respondent's Memorandum in Opposition to EPA's Motion for Partial Accelerated Decision ("Respondent's Memorandum") at p. 2. I disagree with this assertion by the Respondent and fail to understand the reasoning behind the assertion. Although granting the motion for partial accelerated decision as to liability on Count III may appear to be stating the obvious, such action is appropriate and necessary under the governing regulation. The purpose of an accelerated decision is to eliminate the unnecessary adjudication of undisputed facts and issues and to narrow the facts and issues for determination on a full evidentiary hearing.

In the Respondent's Answer to the Complaint, the Respondent admits the following facts: The Respondent is a person as defined by Section 101 (21) of CERCLA, Section 329 (7) of EPCRA, and Section 311(a)(7) of the CWA; at all times relevant hereto, the Respondent owned and operated and was in charge of Morton Salt, Division of Morton International, Inc. located at 1000 Morton Road, South Hutchinson, Kansas ("Facility"); the Facility is a facility as defined by Section 101 (9) of CERCLA and Section 329 (4) of EPCRA; and the Facility is an onshore facility within the meaning of Section 311(a)(10) of the CWA. Answer at ¶¶ 2, 12. The Respondent admits that sodium hydroxide is a hazardous substance as defined by Section 101 (4) of CERCLA and Section 311 of the CWA, with a reportable quantity of 1,000 pounds, as designated by 40 C.F.R. §§ 302.4, 116.4, and 117.3. Answer at ¶¶ 2, 12. The

Respondent, in its Answer to the Complaint, further admits that there was a release of sodium hydroxide from its Facility in excess of the reportable quantity into an outfall stream that flows into the Arkansas River between 6:05 a.m. and 6:25 a.m on February 4, 1996.(7) Answer at ¶¶ 3, 4, 12, 13.

With regard to Count III in the Complaint, no material facts are disputed and the Respondent has admitted its liability. Accordingly, the Complainant's motion for partial accelerated decision as to liability on Count III is Granted.

Counts I and II

Count I in the Complaint alleges that the Respondent did not immediately notify the National Response Center ("NRC") of the release of sodium hydroxide in question as soon as it had knowledge of the release in violation of Section 103(a) of CERCLA. Count II in the Complaint alleges that the Respondent did not immediately notify the State Emergency Response Commission ("SERC") or the Local Emergency Planning Committee ("LEPC") of the release in violation of Section 304 of EPCRA. The Respondent maintains that it timely notified all appropriate agencies of the release of sodium hydroxide under both CERCLA and EPCRA.

First, I turn to the statutory provisions of CERCLA and EPCRA regarding the emergency release notification requirements. Section 103(a) of CERCLA provides that any person in charge of an onshore facility shall, as soon as he has knowledge of any release of a listed hazardous substance from such facility in a reportable quantity, immediately notify the NRC of such release. Sodium hydroxide is listed as a "hazardous substance" for purposes of CERCLA emergency notification requirements and the reportable quantity for sodium hydroxide is 1,000 pounds. Therefore, in the instant matter, the emergency notification requirements of Section 103(a) of CERCLA are applicable.

Section 304(a)(3) of EPCRA provides that if a release of a substance which is not on the list of extremely hazardous substances referred to in Section 302(a)(2) of EPCRA occurs at a facility at which a hazardous chemical is produced, used, or stored and such release requires notification under Section 103(a) of CERCLA for a substance for which a reportable quantity has been established under CERCLA, the owner or operator of such facility shall give notice immediately after the release to the community emergency coordinator for the local emergency planning committees for any area likely to be affected by the release and to the State emergency planning commission on any State likely to be affected by the release. This notification requirement does not apply to any release which results in exposure to persons solely within the sites on which a facility is located. Section 103(a)(4) of EPCRA.

Sodium hydroxide is not included on the list of extremely hazardous substances published by the Administrator pursuant to Section 302(a)(2) of EPCRA but, as noted above, a release of sodium hydroxide at a quantity of 1,000 pounds or more requires notification under Section 103(a) of CERCLA. The Facility in the instant matter is a facility at which a hazardous chemical is produced, used, or stored and sodium hydroxide is a substance for which a reportable quantity has been established under section 102(a) of CERCLA. Accordingly, the emergency notification requirements of Section 304(b) of EPCRA are for application in the instant matter.

With regard to Counts I and II in the Complaint, the Respondent acknowledges that it had a statutory duty to report the above described release of sodium hydroxide to the proper federal, state, and local authorities under CERCLA and EPCRA. Respondent's Memorandum at 2. Both parties agree that the only remaining issue on motion for partial accelerated decision as to liability is whether the Respondent "immediately" notified the appropriate agencies under CERCLA and EPCRA.

As both parties in the instant matter point out in their supporting memorandums on motion for partial accelerated decision, the EAB has held that the duty to immediately report a release under EPCRA, as well as CERCLA, arises as soon as the facility personnel have knowledge that a reportable release has occurred, or should know of such a release. In re Mobil Oil Corporation, EPCRA Appeal No. 94-2, 5 EAD 490, 509 (EAB, Sept. 29, 1994); In re Genicom Corp., EPCRA-III-057 (ALJ, July 16, 1992), aff'd In re Genicom Corp., EPCRA Appeal No. 92-2, 4 EAD 426 (EAB, Dec. 15, 1992); 52 Fed. Reg. 13,378, 13,393 (Apr. 22, 1987) (explaining that "knowledge" of a release under EPCRA includes constructive knowledge as well as actual knowledge). As noted by the EAB in Mobil Oil Corp., "knowledge" does not necessarily mean conclusive knowledge of the exact quantity of a release. As the EAB in Mobil Oil Corp. quoted the Administrative Law Judge ("ALJ") from the ALJ's decision in Genicom:

What is at issue is when did Genicom have enough information that it could reasonably be said that it knew that the releases were at or above reportable quantities even though it did not know the exact quantities released. A company should be given some latitude about how it interprets the information it has. At some point, however, the nature of the information can be such that the failure to give notice is indicative of the company not knowing the requirements or being hostile or indifferent to them, rather than of any uncertainty that a release in reportable quantities had taken place.

Genicom, EPCRA-III-057 at 13.

The EAB noted, however, that EPCRA does not require reporting before a facility has some degree of certainty that a reportable release has occurred. Mobil Oil Corp., EPCRA Appeal No. 94-2, at 512. The EAB rejected the notion that facilities are free to place the acquisition of certainty on a timetable that is convenient for the facility.

In support of their opposing positions on motion for accelerated decision, both parties' memorandums in the instant matter refer to the Chief ALJ's interpretation of constructive knowledge as set forth in In re Thoro Products Co., EPCRA Docket No. VII-90-04 (May 19, 1992).(8) In that decision, Chief ALJ Frazier stated:

Constructive knowledge neither indicates nor requires actual knowledge but means knowledge of 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..... The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.

Thoro, EPCRA Docket No. VII-90-04.

Thus, the determinative questions before me in the instant matter are when did the Respondent have knowledge of the release and was the notice of the release by the Respondent to federal, state, and local authorities "immediate" as required by CERCLA and EPCRA. Initially, I note that in the Complaint, the Complainant alleges that the Respondent discovered the release at approximately 6:30 a.m. on February 4, 1996, but the Complainant does not allege the approximate time the Respondent had knowledge of the release. Complaint at ¶ 14. On motion for partial accelerated decision, the Complainant argues that the Respondent had actual knowledge of the release at 9:00 a.m. Complainant's Memorandum in Support of Motion for Partial Accelerated Decision ("Complainant's Memorandum") at p. 2. In its Answer, the Respondent maintains that it did not have knowledge of the release until 10:45 a.m. Answer at ¶¶ 4-5.

Both parties agree that the release of sodium hydroxide in question occurred on February 4, 1996, from approximately 6:05 a.m. to 6:25 a.m. Complaint at ¶ 13. Answer at ¶ 3-5. Both parties agree that on the day of the spill, February 4, 1996, at about 11:20 a.m., the Respondent advised the Kansas Department of Emergency Preparedness (the SERC for Kansas) of the release, and then at about 11:30 a.m. the Respondent notified the NRC. Answer at ¶¶ 5, 10; Respondent's Memorandum at 3, 9; Complainant's Memorandum at pgs. 2, 10, 14. The Respondent claims that several other state agencies were notified between 11:30 a.m. and 12:30 p.m. Answer at ¶ 5; Respondent's Memorandum at 3.

The Complainant claims that the Reno County Emergency Preparedness Coordinator was not notified until 12:15 p.m. but the Respondent claims that notice to the Reno County Emergency Preparedness Coordinator was completed by 11:55 a.m. Answer ¶¶ 5, 10; Complainant's Memorandum at 14. In addition, the Respondent claims that on February 4, 1996, the South Hutchinson Police Department was on-site at the Facility by 11:00 a.m. Answer at ¶ 5. This claim is attested to by E. M. Willse, the manufacturing manager at the Respondent's Facility, in an affidavit dated October 23, 1997, which was proffered by the Respondent in support of its opposition to the motion for accelerated decision.

Although the parties do not dispute the facts of what transpired during the crucial period between the release of sodium hydroxide, which ended at about 6:25 a.m., and the notification of the SERC at 11:20 a.m. and the NRC at 11:30 a.m., they disagree as to the reasonable inferences that may be drawn from these undisputed facts. The undisputed facts are as follows: On Sunday, February 4, 1996, at 6:30 a.m. the Respondent's production manager reported steam rising from the pipeline area at the Facility and at approximately 7:00 a.m. the Respondent's utility operator discovered a broken pipeline. Answer at ¶ 5. Apparently, the break in the pipeline was due to subfreezing temperatures.

Following several telephone calls to the on call foreman, the production foreman, the manufacturing manager, and the Facility manager, the manufacturing manager, Mr. Ed Willse, arrived at the Facility at approximately 8:00 a.m. and convened an internal investigation. Testing of the water leaving the Facility at 8:00 a.m. showed the pH was 11.4. Complainant's proposed Exhibit 2, p. 8. Facility production records showed that shortly before the discovery of the broken pipeline sodium hydroxide had been pumped to

a 400,000 gallon tank of brine to treat out the magnesium in the brine. In order to determine whether any sodium hydroxide pumped had been released and the quantity thereof, Mr. Willse ordered a chemical analysis of the brine in the tank to determine how much of the sodium hydroxide pumped had reached the brine treating tank. While quality control technicians performed this task, Mr. Willse inspected the one-half mile length of the outfall path to the Arkansas River for signs of the sodium hydroxide and sampled the outfall for pH. At approximately 9:00 a.m. when Mr. Willse returned to the Facility, the analysis of the brine in the brine tank showed that little or no sodium hydroxide made it to the tank. Answer at ¶ 5.

Shortly after 9:00 a.m., the Facility's gas company informed the Respondent that gas to the Facility was being curtailed, and the Respondent claims that this unusual event temporarily postponed the Respondent's internal investigation. According to the Respondent, the decision was made to continue production by switching to a more expensive fuel, in part, in order to continue the discharge of 3,800 gallons of cooling water per minute in an attempt to further dilute any sodium hydroxide in the outfall ditch. The Respondent claims that at approximately 9:30 a.m. Mr. Willse resumed his investigation by performing calculations to determine how much sodium hydroxide was released. Answer at ¶ 5. Reportedly, Mr. Willse's calculations included data on how much sodium hydroxide was pumped, how much was captured on the property, and how much was neutralized by the magnesium in the carrier effluent before discharge. As part of Mr. Willse's assessment, he drove to a bridge located downstream of the outfall to sample the Arkansas River directly. Answer at ¶ 5.

According to the Respondent, Mr. Willse completed his investigation at approximately 10:45 a.m. and Mr. Willse telephoned the Respondent's manager of environmental affairs in Chicago, Illinois, to "confer" with him. Answer at ¶ 5. After the environmental manager agreed with the results of the investigation and confirmed that proper notification was required, notification was commenced. As noted above, the Respondent claims that the local police authorities arrived at the Facility by 11;00 a.m., the SERC was notified at 11:20 a.m., and the NRC was notified at 11:30 a.m. Answer at ¶ 5.

The Complainant argues that based on the test results showing that the pH level of the water leaving the Facility at 8:00 a.m. was 11.4 and the analysis completed at 9:00 a.m. showing that little or no sodium hydroxide made it to the brine tank, the Respondent had knowledge of a release of a reportable quantity at 9:00 a.m. Complainant's Memorandum at 10. The Respondent counters that this conclusion on the part of the Complainant is erroneous and rests upon the lack of understanding of plant processes and the relevant facts. Respondent's Memorandum at p. 6. The Respondent argues that the Complainant incorrectly assumed that the lack of sodium hydroxide in the brine tank automatically meant that the sodium hydroxide had been released to the environment. Rather, the Respondent contends that Mr. Willse correctly recognized that further data was required to determine the amount of sodium hydroxide released to the environment. The Respondent admits that at 9:00 a.m. the Respondent knew that some sodium hydroxide had not reached its destination but it does not follow that the Respondent knew that a reportable quantity of sodium hydroxide was released into the environment. Respondent's Memorandum at pgs. 6-7. The Respondent points out that pursuant to the ALJ's decision in Genicom, EPCRA-III-057 at 13, the source should be given some latitude in interpreting the available information.

At this juncture, I believe that the Respondent has adequately raised a genuine issue of material fact that only can be properly adjudicated following a full evidentiary hearing. The Respondent, through the affidavit of Mr. Willse, has raised under the preponderance of the evidence standard a genuine dispute of material fact as to the issue of when the Respondent had knowledge of a release of sodium hydroxide in a reportable quantity. In particular, I note that under the standard for adjudicating motions for accelerated decisions, discussed above, the evidentiary material proffered by the moving party must be viewed in the light most favorable to the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter but have simply determined that the Respondent has adequately raised a genuine issue of material fact for evidentiary hearing. Further, I note that the file before me does not properly establish the identity of the LEPC in this matter or the time that the LEPC was notified of the release of sodium hydroxide in question.

The Complainant also argues that as a matter of law, a delay of about two and one-half hours in reporting the release is not "immediate" notification as contemplated under CERCLA and EPCRA. In support of this argument, the Complainant cites the legislative history of CERCLA and EPCRA. A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499) Vol. 2 at 1038 (Comm. Print 1990); see also In re Mobil Oil Corp., Docket Nos. EPCRA Appeal No. 91-0122, 91-0123, at 45 (1992) (Interlocutory Order Granting Complainant's Cross-Motion for Partial Accelerated Decision); Genicom, EPCRA Appeal No. 92-2, 4 EAD 426 (EAB, Dec. 15, 1992). I note that legislative history, although an excellent source for guidance, is not authoritative. Moreover, I do not find legislative history to be authoritative when determining whether a party moving for accelerated decision has established that it is entitled to judgment as a matter of law.

The Complainant also cites Mobil Oil Corp., EPCRA Appeal No. 94-2, 5 EAD 490 (EAB, Sept. 29, 1994) and Genicom, EPCRA-III-057, for the proposition that a delay of two and one-half hours fails to meet the requirement for immediate notice. These cited cases involved reporting delays of 3 days and 2 hours, respectively. I note that the Genicom decision, although an excellent source for guidance, is not precedent and that the issue of whether the reporting delays negated a finding of "immediate notice" was not directly addressed by the EAB on appeal in precedent decision. Thus, based on the arguments and briefs on file, I do not find that the Complainant has sufficiently established that it is entitled to judgment as a matter of law for accelerated decision purposes.

Conclusion

In view of the foregoing determinations that the Respondent has adequately raised a genuine issue of material fact and that the file before me does not establish that the Complainant is entitled to judgment as a matter of law, I conclude that the Complainant's Motion for Partial Accelerated Decision as to liability on Counts I and II in the Complaint must be denied. 40 C.F.R. § 22.20(a).

No genuine issue of material fact exists as to liability as alleged in Count III in the Complaint. The Respondent has admitted liability as to Count III in the Complaint and the Complainant is entitled to judgment as a matter of law as to Count III. The Complainant's motion for partial accelerated decision as to liability on Count III is granted. 40 C.F.R. § 22.20(a).

Orders

The Complainant's Motion for Partial Accelerated Decision as to Liability on Counts I and II is Denied.

The Complainant's Motion for Partial Accelerated Decision as to Liability on Count III is Granted.

The Hearing in this matter will be held beginning at 9:30 a.m. on Wednesday, April 8, 1998, in Kansas City, Kansas, continuing if necessary on April 9 and 10, 1998.(9) The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Original signed by undersigned

_____

Barbara A. Gunning

Administrative Law Judge

Dated: 12-12-97

Washington, DC

1. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

2. 40 C.F.R. § 22.20(a) further provides: "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited 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 the complainant."

3. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB, Feb. 24, 1993).

4. Rule 56(f) states:

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

5. An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56© FRCP; 40 C.F.R. 22.20(a).

6. Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. See 40 C.F.R. §§ 22.04(c), 22.20, 22.26.

7. The Complaint does not specify the amount of sodium hydroxide in excess of the reportable quantity allegedly released, but the Respondent admits, in its Answer, that the amount of sodium hydroxide released exceeded the reportable quantity. Answer at ¶ 13. In Complainant's proposed Exhibit 4, the Respondent reports that the amount of sodium hydroxide released was 6,898 pounds, and the Respondent does not dispute this amount.

8. The EAB's decision in Mobil Oil Corp., supra, and the ALJ's decision in Thoro Prods., supra, concerned the release of an extremely hazardous substance under EPCRA. The instant matter concerns the release of a hazardous substance under EPCRA.

9. Count III of the Complaint proposes the assessment of a civil administrative penalty in the amount of $6,900 under Section 311(b)(6)(B)(ii) of the CWA (class II civil penalty). A hearing on the record in accordance with Section 554 of Title 5 shall be held in class II civil penalty cases. Sections 311(b)(6)(C)(I) and (ii) of the CWA provide that before issuing an order assessing a class II civil penalty, the Administrator shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order and that any person who comments on a proposed assessment of a class II penalty shall be given notice of any hearing and of the order assessing such penalty. The file before me contains proof of the public notice but there is no information as to whether any comments were received.