UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Nova Chemicals, Inc.	)	**Docket No. CERCLA-01-2005-0051**
	)	
Respondent.	)	
	)	

Order on Motions

This proceeding arises under Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Act"), 42 U.S.C. § 9609, and is governed by the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22. Complainant, EPA, asserts a violation of Section 103(a) of the Act, 42 U.S.C. § 9603(a),[1] because Nova Chemicals, Inc. ("Respondent" or "Nova") allegedly did not immediately notify the National Response Center ("NRC") of a release of a reportable quantity ("RQ") of a hazardous substance from Respondent's Facility. Before the Court are EPA's Motion for Accelerated Decision, EPA's Motion for Leave to Request Production of Documents, and a Motion for Leave to Depose Witness, all dated June 16, 2006.[2] On July 5, 2006, Respondent filed its Response to Complainant's Motion for Accelerated Decision ("Response"). On July 14, 2006, EPA filed a Reply to its Motion for Accelerated Decision. For the reasons that follow, the Court **DENIES** EPA's Motion for Accelerated Decision, **DENIES** EPA's Motion for Leave to Depose Witness, but **GRANTS, *in part,*** EPA's Motion Requesting Production of Documents.

[1] In EPA's original Complaint, it alleged violations of Section 103(a) of CERCLA and of Section 112(r)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(r)(1). The CAA claims had a separate docket number: CAA-01-2005-0050. On May 1, 2006, the Court received a copy of the Consent Agreement and Final Order ("CAFO") settling the CAA claims and a Motion for Leave to File an Amended Administrative Complaint and Notice of Opportunity for a Hearing for the remaining CERCLA action. On June 7, 2006, the Court issued an Order Granting Leave to File Amended Administrative Complaint.

[2] On May 19, 2006, the Court issued a Notice of Hearing stating that "[n]o motions may be filed after June 16, 2006."

EPA's Motion for Accelerated Decision, Respondent's Response and EPA's Reply.

The Complainant asserts that no issue of material fact remains in dispute as Respondent did not immediately notify the NRC of the release of styrene into the environment from Respondent's polystyrene manufacturing facility. ("Facility"). Memorandum at 1. EPA notes that Respondent admits it produces, processes and handles and/or stores styrene, which is a hazardous substance pursuant to Section 101(14) of CERCLA.[1] *Id*. at 2. Further it is uncontested that on January 7, 2004 at 11:28 a.m., a release of approximately 4,500 pounds of styrene occurred at the Facility. *Id*. EPA also observes that, pursuant to Section 103(a) of CERCLA[2] and 40 C.F.R.§ 302.6,[3] a person in charge of a facility is to immediately notify the NRC as soon as there is knowledge of a release of a RQ of a hazardous substance from such facility. *Id*.

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[1] Section 101(14) of CERCLA states "[t]he term 'hazardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the [SWDA] . . . has been suspended by Act of Congress, (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the [CAA] [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15." The Amended Complaint specifically cites to "any substance designated pursuant to 33 U.S.C. § 321(b)(2)(A), any element, compound, mixture, solution or substance designated pursuant to 42 U.S.C. § 9602, and any hazardous air pollutant listed under Section 112 of the Clean Air Act." Amended Complaint at ¶ 7.

[2] "Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State." 42 U.S.C. § 9603(a).

[3] The "Notification requirements," are found at 40 C.F.R. § 302.6. That regulation states, "[a]ny person in charge of a vessel or an offshore or an onshore facility shall, as soon as he or she has knowledge of any release . . . of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the reportable quantity determined by this party in any 24-hour period, immediately notify the National Response Center . . . ." 40 C.F.R. § 302.6(a).

It is the Respondent's position that it attempted to notify the NRC at 12:10 p.m., "immediately after knowledge of a release in excess of a reportable quantity." *Id*. Complainant asserts that in fact the Respondent did not notify NRC until 12:52 p.m., 1 hour and 24 minutes after the release. Even using the time that the Respondent asserts there was an attempt to reach the NRC, EPA notes that the alleged call did not occur until 42 minutes after Respondent admitted knowledge of the release.[4] Despite these arguments, it is interesting that, in the context of a motion for accelerated decision, EPA admits that it "acknowledges that there is a factual dispute as to precisely when Respondent knew or should have known that a reportable quantity of the chemical had been released." Memorandum at 2. This admission alone is enough to defeat EPA's motion. Factual disputes are the death knell for accelerated decision motions.

Putting aside for the moment the problem with EPA's admission concerning the presence of a factual dispute, EPA also concedes that, ultimately, the determination of what constitutes 'immediate' notification "is based on the circumstances of the situation." *Id*. at 5. However, EPA also notes that Respondent's prehearing exchange consists of a "Site Emergency Plan Response Manual." It points out that the Manual itself recommends that releases be reported within 15 minutes of the occurrence.[5] Applying the 15 minute standard for reporting, EPA asserts that the 42 minute delay before calling is *per se* not immediate and demonstrates that NOVA failed to immediately notify the NRC of the release.[6]

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[4] Respondent submitted an affidavit from Michael Garvey, Environmental Specialist for Nova. According to that affidavit, Rene Garza informed the incident commander of the release at 12:07 p.m. Respondent maintains that its first attempt to contact NRC was at 12:10 p.m., but the call was not answered. Respondent then tried again at 12:52 p.m. and at this time, was able to notify NRC. Answer at 5, ¶49.

[5]EPA notes that the 15 minute reporting standard set forth in EPA's ERP is available to the public on EPA's website. The EPA penalty policy may be useful in assessing a penalty but the issue at this juncture is liability, not the appropriate penalty. Although EPA also contends that it compelling to note that the 15 minute standard is included in Respondent's internal instruction manual, this ignores that the standard's application is utilized in the context of penalty considerations, and that the 15 minute standard does not control the factual determination of whether notification was immediate.

[6]Complainant provides Committee Reports, case law, the Site Emergency Plan Response Manual, and EPA's 1999 Enforcement Response Policy ("ERP") governing violations of Section 103(a) of CERCLA ("ERP") to support its argument. Complainant notes that the Senate Environmental and Public Works Committee Report for the 1986 amendments to CERCLA requires that delays in notification "*should* not exceed 15 minutes *after the person in charge has knowledge of the release*, and 'immediate notification' requires shorter delays whenever practicable." *Id*. at 4-5 (citing Senate Comm. on Environment and Public Works, Superfund Amendments and Reauthorization Act of 1986, S. Rep. No. 99-11, 99th Cong. (1985) at 9)(emphasis added). However, Complainant acknowledges that appropriate notification is determined on a case by case basis and that the duty to report begins when personnel has

While Respondent does not challenge the test for timely notification – namely, that one must notify the NRC once it has knowledge of the release in excess of a reportable quantity – it contends that, factually, it did immediately attempt to notify as soon as it had knowledge of the release. Respondent's Response at 4. Thus Respondent argues that EPA's evidence to support its legal conclusion is inaccurate. *Id*.

Respondent also agrees with EPA that there is no definition for "immediate" and that case law supports the conclusion that the determination is dependent upon the circumstances of each case.[7] Respondent's Response at 5. Since it attempted to report the release only a few minutes after the calculation, Complainant's motion should be denied. *Id*. at 6-7. Respondent then cites to the affidavit of Michael Garvey to show an attempt was made to notify the NRC minutes after actual knowledge, arguably disproving EPA's contention that an attempt was not made. *Id*.

In its Reply Complainant asserts that none of the arguments proposed by Respondent "affects EPA's contention that the undisputed facts of this case support EPA's claim that

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knowledge. *Id*. at 5 (citing *Mobil Oil Corp.*, EPCRA No. 94-2, 5 E.A.D. 490 (EAB 1994)) ("*Mobil Oil* "). EPA also points to cases which have classified certain responses as not immediate. S*ee In re Genicom Corp.*, 4 E.A.D. 426 (EAB 1992) ("*Genicom*")("Releases in reportable quantities which were not reported until two hours after respondent acquired knowledge of them were not reported 'immediately.'"); *In re United States Leather, Inc.*, Docket No. EPCRA-7-99-0048 (ALJ, February 23, 2000) (Respondent's notification to NRC four hours after spill "does not constitute immediate notification as required by Section 103(a) of CERCLA."). *Id*. However, the Court notes, and EPA has conceded, that determining immediacy is a case-by-case determination.

[7]Responding to EPA's citation to *Genicom*, Respondent asserts the case also holds that knowledge of a release may be determined by how a company interprets the information it has before it and that the case recognizes the difference between a company being hostile or indifferent to the release and any uncertainty that a release in reportable quantities [has] taken place. Respondent also notes that in *Mobil Oil* the court found that a report seven days later after the release qualified as "immediate." In that case, the respondent initially thought the release was merely steam. Thereafter, upon performing calculations, which took some time but followed the emergency response procedures, the respondent had knowledge of the release. In a similar fashion Respondent argues that it too should be given enough time to do such calculations before any knowledge of a release in excess of an RQ can be imputed to it.

Respondent violated the notification requirement of Section 103(a) of CERCLA."[8] EPA's Reply at 1.

The Rules of Practice provide that the Presiding Officer "*may* render an accelerated decision . . . as to any or all parts of the proceeding . . . if no genuine issues of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a) (emphasis added). In this instance, the Court finds that there are genuine issues of material fact. Respondent's affidavit from Mr. Garvey is sufficient to raise a factual issue as to whether there was an immediate attempt to reach the NRC. In making this determination, denying the motion for accelerated decision, which determination involves the exercise of discretion, the Court notes the solemnity of the affidavit[9] (albeit unsigned) and the responsibility of counsel for the Respondent, as an officer of the Court, to assure that such representations were made in good faith. Accordingly, upon consideration of the motion and replies, the Court believes that a hearing is necessary to determine the particular facts surrounding the release.

EPA's Motion to Depose

Pursuant to 40 C.F.R. §§ 22.16(a) and 22.19(e), EPA filed a Motion to Depose the employee of the Respondent who was operating the Facility's polystyrene production process at the time of the release. According to EPA, the witness has not been identified in Respondent's Prehearing Exchange. Complainant maintains that this request will not unreasonably delay the proceeding because the witness can be deposed well in advance of the hearing, and because the deposition will only take one day. EPA's Motion to Depose at 2, ¶ 2. Complainant contends that

[8]Complainant argues that the Affidavit of Michael Garvey, which was not notarized, does not prove that Respondent immediately notified the NRC. Complainant also maintains that the allegations in the Motion are not based on constructive knowledge of the reportable release, but on Respondent's actual knowledge. *Id*. at 2. Complainant also contends that Respondent "mischaracterizes the holding and outcome" of the case in *Mobil Oil*, asserting that the holding dealt with "when the facility should have known that the release had exceeded the RQ," not what constituted "immediate notification," and that those are distinct issues. Reply at 4-5.

[9] The Court recognizes that Michael Garvey claims that his first attempt to contact the NRC after knowledge of the release occurred at 12:10, which was only three minutes after he was advised of the release. According to his unsworn affidavit, no one answered the phone for 45 seconds. Following the alleged failed attempt, Mr. Garvey's affidavit relates that he "suspended [his] attempt so that [he] could continue to notify the local community of the details of the incident and to participate in other pressing emergency response efforts." Unsworn affidavit of Michael Garvey at ¶ 5. The problem with this contention is that the affidavit also admits that the release occurred at "approximately 11:28 a.m." Thus the determination of whether there was immediate notification must be measured from the time of the release and upon evaluation of the attendant facts and circumstances leading up to the alleged first, unsuccessful, attempt to make a telephone call to the NRC and the second, successful, call, made some 32 minutes later.

the deposition is necessary to establish the factual basis for the alleged violation[10] and that the information sought cannot be obtained by alternative methods of discovery because of the witness's involvement and role in operating the polystyrene process. *Id.*, ¶ 4 and ¶ 5.

The standards for ruling on depositions are found at Rules 22.19(e)(1) and (e)(3). Rule 22.19(e)(1) sets forth three criteria in deciding whether or not the Presiding Officer *may* order a deposition – specifically that: the deposition will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; that the information is reasonably obtainable from the non-moving party, and which the non-moving party has refused to voluntarily provide; and that the information sought has significant probative value on a disputed issue of material fact. 40 C.F.R. § 22.19(e)(1). In addition to those criteria, where depositions are sought the Court must also find that the information cannot reasonably be obtained by alternative methods of discovery or upon the finding that there "is a substantial reason to believe that relevant and probative evidence may not be preserved for presentation by a witness at the hearing." 40 C.F.R. §22.19(e)(3).

The Court notes that depositions are not a routine part of these administrative adjudicatory proceedings and consequently the showing required to justify depositions is substantial. There is nothing preventing the Complainant from calling this person as a witness for the hearing nor is there a barrier to seeking a voluntary interview with the polystyrene process operator.[11] Thus, EPA has failed to satisfy either of the other required findings where depositions are sought. Accordingly, the Court denies Complainant's Motion to Depose.[12]

EPA's Motion for the Production of Documents

Pursuant to Sections 22.16(a) and 22.19(e) of the Consolidated Rules of Practice, Complainant requests production of nine enumerated documents as set forth in its Production Request. EPA's Motion for Production of Documents at 1-2. Complainant contends that the information sought will neither delay the proceeding nor unreasonably burden Respondent. As

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[10]The Court notes that this contention is antithetical to EPA's claim that there are no issues of material fact. This motion further undercuts EPA's Motion for Accelerated Decision, which motion the Court disposed of earlier in this Order.

[11] The Court also notes that if the witness does not consent to an interview, and does not commit to appearing voluntarily at the hearing, EPA may seek to compel the witness' attendance at the hearing by means of a subpoena. Should there be *any* doubt about the witness' voluntary appearance, a subpoena, issued pursuant to 42 U.S.C. § 9609(a)(5), would be the safest course of action.

[12]*See In the Matter of Safety-Kleen Corp*, Docket No. RCRA-1090-11-10-3008(a), 1991 EPA ALJ LEXIS 21, *13 (ALJ, December 1991); *In the Matter of ICC Industries, Inc.*, Docket No. II TSCA-8(a)-90-0212, 1992 EPA ALJ LEXIS 190, *4 (ALJ, August 4, 1992). A motion to depose may be denied where witnesses may testify at hearing. *See In the Matter of StanChem, Inc.*, Docket No. CWA-2-I-95-1040, 1998 EPA ALJ LEXIS 117, *21.

the documents are in the possession of Respondent, they are most reasonably obtained from it. EPA asserts that the documents have "significant probative value on a disputed issue of material fact relevant to the liability of Respondent." *Id*. at 1. It is noted that the Respondent has not opposed the production of these documents, but the lack of an opposition does not translate automatically into the granting of a motion. The motion must be appropriate in its own right.

The Court observes that in this litigation only one issue regarding liability has been identified. As noted earlier in this Order, the Complaint consists of a single count, alleging that the Respondent failed to immediately notify the NRC of the release of styrene from its facility. The Respondent has not challenged the fact of release. Rather, it challenges only the contention that failed to make an immediate notification. In making its request, EPA has failed to explain how the information it seeks has "significant probative value *on a disputed issue* of material fact relevant to liability or the relief sought." Therefore unless it such factors are obvious from the nature of the request, the request must be denied. Viewed in this light, requested items 1 through 4 must be denied.[13] However, items 5 through 9 are self-explanatory in their relevance as to liability or the relief[14] sought. Accordingly, Respondent is directed to immediately provide EPA with the information identified in items 5 through 9.

Conclusion

Accordingly, upon consideration, the Court **DENIES Complainant's Motion for Accelerated Decision** because there appear to be genuine disputed issues of material fact. The Court **DENIES Complainant's Motion to Depose,** because there are other reasonable options for Respondent to obtain the information and **GRANTS *IN PART* Complainant's Motion for Production of Documents**. The hearing remains scheduled to commence on Monday, September 18, 2006 and will not be postponed.

[13]Without a contrary explanation offered, it seems that the first four items merely serve as a tool to burden the Respondent in this litigation. Item 1 seeks "[s]tandard operating procedures and/or protocols for the polystyrene process. Item 2 seeks the "[c]hemical recipes and formulations, including without limitation copies of batch sheets and/or batch runs, used in the polystyrene process. Item 3 seeks "[p]rocess and control equipment specifications for the polystyrene process, while Item 4 seeks [c]opies of any and all Process Hazards Analysis reports on the polystyrene process prepared within the last five years." On their face, none of these have any detectable relevance to determining whether there was immediate notification following the release, nor can the Court discern how the information relates to any penalty consideration. Accordingly, as each of these requests are without any accompanying explanation from EPA, they have the aura of simply being for the purpose of burdening the Respondent and by that process indirectly forcing settlement.

[14]The relief sought pertains, in this instance, to the appropriate penalty, should liability be established.

So ordered.

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William B. Moran
United States Administrative Law Judge

Dated: August 2, 2006
Washington, D.C.

In the Matter of Nova Chemicals, Inc.
Docket No. CERCLA-01-2005-0051

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Motions,** dated August 2, 2006, was sent this day in the following manner to the addressees listed below:

Original and One copy by Pouch Mail to:

Wanda Rivera
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A Copy sent by Facsimile and Pouch Mail to:

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_____
Knolyn Jones
Legal Assistant

Dated: August 2, 2006