UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	*	
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HOLLY FARMS FOOD, INC.,	*	Docket No. CERCLA-III-007
	*	
Respondent	*	

1. CERCLA - data provided to government - The respondent is not bound by estimates of released amounts of chemical previously given to federal, state and local agencies, but will be allowed to produce evidence as to the inaccuracy of such previously given data.

2. CERCLA - evidence - Evidence of record demonstrates that it would have been physically impossible for Respondent to have released the quantity of ammonia previously admitted.

3. CERCLA - evidence - The Agency failed to rebut credible evidence provided by the Respondent that the amount of ammonia released was below the reportable minimum.

Appearances:

For Complainant: Dean Jerrehian, Esquire
U.S. Environmental Protection Agency - Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

For Respondent: Timothy G. Hayes, Esquire
Clayton L. Walton, Esquire
HAZEL & THOMAS, P.C.
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P.O. Box 3-K
Richmond, Virginia 23206

Before: Thomas B. Yost
Administrator Law Judge

INITIAL DECISION

FACTUAL BACKGROUND

This matter was instituted by the filing of two Complaints */ against this Respondent, one under CERCLA and one under EPCRA based on alleged failure to report a release of ammonia at Respondent's Glen Allen, Virginia facility. Based upon a motion made at the close of Complainant's case and upon briefs filed following the hearing, the Court by order dated April 23, 1992 dismissed the EPCRA Complaint. This order prompted motions by the Complainant to re-consider and/or certify the ruling to the Administrator on an interlocutory appeal. These motions were denied by order dated May 14, 1992. There then followed a briefing exercise on the remaining CERCLA Complaint which has now concluded.

The Respondent owns and operates a chicken processing plant in Glen Allen, Virginia. On August 21, 1989, a release of ammonia occurred there which was contained without incident and was subsequently reported to local, state and federal officials. Two years later, EPA filed the subject Complaints.

The release was first detected by a maintenance worker early in the morning on August 21, 1989. The detection was occasioned by a loud whistling noise in the vicinity of the refrigerator condenser units located on the roof of the plant. The detection was not based on anyone smelling ammonia, which all parties agree has a strong pungent odor. The work immediately reported this

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*/ Later consolidated for trial.

event, by phone, to Mr. Jim Gibson, refrigeration supervisor, who arrived at the facility at approximately 5:30 a.m. Since the whistling indicated a leak in the system, Mr. Gibson first checked the pressure of ammonia in the system and seeing that it was normal, proceeded to the roof to locate the source of the noise. He quickly found the noise source, which turned out to be a leaking pressure relief valve and he tapped it with a piece of pipe, the valve snapped shut and the release ended.

A meeting was held at the plant later that morning attended by several plant supervisors. The main purpose of the meeting was to determine the amount of ammonia released so that it could be reported to the required government officials. Elmore Hall, the plant safety director, who had convened the meeting, proposed a figure of 4,000 pounds. This was based on no investigation and was without objective basis. No one in attendance agreed with this number. Some had no opinion and others thought it was too high. In any event, the 4,000 pounds number was chosen and Mr. Hall reported this figure to Mr. Ed Mulholland, the company's safety coordinator located in Wilkesboro, North Carolina. Mr. Mulholland is the company officer vested with the responsibility of reporting such releases to the various government offices. He made his reports on August 23, 1989. He reported to the Virginia Emergency Response Council and the Hanover County Hazardous Materials Coordinator saying that the 4,000 pounds number was the company's "best engineering estimate." Mr. Mulholland conducted no independent investigation to verify this figure but relied entirely

on Mr. Hall's say so.

On January 18, 1990, the EPA sent the Respondent an "Accidental Release Prevention Questionnaire." The Respondent filled it out and once again stated that it thought the release was about 4,000 pounds but provided a caveat to that number stating that it "may be grossly overstated." (See my February 5, 1992 order for a discussion of this form and the Respondent's answers.) In its post-hearing briefs, the Respondent makes much about the fact that nothing on the form suggested that the answers provided could be used as the basis for a future enforcement action. I don't accord this argument much weight. Nothing in the law suggests that the EPA must provide a "miranda warning" when it sends out such questionnaires. I suppose it is Respondent's position that had they known of EPA's intended use of this information, they would have undertaken a thorough investigation prior to filling it out. Ignorance and naivete are rarely rewarded in our society and even less so in the legal world.

DISCUSSION

It is clear from this record that the following facts are not in controversy: (1) ammonia is an extremely hazardous material under the Act; (2) a release of ammonia occurred at Respondent's plant on August 21, 1989; (3) the Respondent did not "immediately" notify the National Response Center as the Act requires.

POSITION OF THE PARTIES

EPA's position is that the release in question involved a quantity of ammonia far in excess of the reportable quantity

("RQ") set forth in the regulations, i.e. 100 pounds. The Agency further asserts that the Respondent is bound by its previous statements that 4,000 pounds was released and cannot now recant such admissions. Additionally, the Agency argues that the evidence in this case clearly shows that more that 100 pounds of ammonia was released, independent of Respondent's prior admissions. To all of this Respondent argues that: (1) it is not bound by the previously stated 4,000 pounds figure since it represented a pure guess on its employee's part; (2) forensic studies conducted prior to the hearing clearly show that considerably less than 100 pounds was released and (3) since less than the RQ was released it had no duty to "immediately" notify the Federal Response office.

Let's address the 4,000 pounds issue first. The Complainant argues that the Respondent is forever bound by its admission not only on the questionnaire but on five other occasions in written and oral communications with state and local government entities. The Respondent states that in almost every case it advised the government entities that the 4,000 pounds figure was an "estimate" and, in the case of the questionnaire, warned that that number may be "grossly overstated." It argues that the Agency has the burden of proof, based upon "substantial evidence", to prove the violations and that they failed to do so here.

The issue here is can the Respondent now "take back" what it said in the past. Happily there is a recent opinion which answers this question. In the case of U.S. Aluminum, Inc., No. EPCRA-89-0124, November 26, 1991, an almost identical situation was

presented. In that case the Respondent failed to timely report the usage of a reportable amount of aluminum dust. Following an EPA inspection, which revealed this failure, the Respondent upon EPA's advice filed a late report (Form R) stating that it did use aluminum dust in reportable amounts. In response to a motion for an accelerated decision, the Respondent presented evidence that it produced aluminum "flake" rather than "dust" and that flake is not required to be reported.

EPA argued that the Respondent is bound by the assertions made in its untimely filed report and that for the Court to rule otherwise "would severely impede the government's ability to rely on such information." The Court held that the admissions made on the form constitute "simply a piece of evidence" and as such is not conclusive but is ultimately to be weighed along with all other evidence that the parties may introduce. The Court ruled that the Respondent may "take back" its Form R, not in the sense that it is seeking to deny that it ever filed the form, but in the sense that it is allowed to present evidence challenging the correctness of the information reported on the Form R. In making its decision, the Court also relied on the case of In Re, Pitt-Des Moines, Inc., Docket No. EPCRA-VIII-89-06 (July 24, 1991), which similarly allowed the Respondent to introduce evidence to refute the answers previously provided in a Form R submittal. Accordingly, I am of the opinion that the Respondent is not bound by the 4,000 pound figure previously provided and may introduce evidence to show that the number is incorrect.

As previously noted, the Complainant rested its case entirely on the information provided by the Respondent and conducted no independent investigations and did not visit the plant despite the assertion by the Respondent in January of 1990 that the reported number was highly suspect.

The evidence produced by the Respondent was intensive and in some cases highly technical involving forensic studies laboratory experiments with identical relief valves, mass balance evaluations and circumstantial evidence.

The circumstantial evidence consists of the testimony of several plant officials. Mr. Gibson testified that just prior to the release, the system was due for an ammonia recharge and therefore it was operating with a low level of ammonia. As previously discussed in my earlier order, the system routinely looses ammonia in the course of normal operations. Mr. Gibson testified that given that situation, if 1,000 pounds of ammonia had been released the system would have automatically shut down. This did not occur. Mr. Gibson also checked the ammonia head pressure and noted that it indicated 110 pounds well within the normal operating range of from 80 to 120 pounds. From these observations Mr. Gibson concluded that only a minimal release was occurring.

Also the relief valve in question is designed to open at a pressure of 250 pounds. However, the system is designed to automatically shut down when pressure reaches 220 pounds. During the release the system was functioning normally. From these facts, the Respondent argues that (1) the release was of a minimal amount

and (2) the relief valve could not have been wide open.

The evidence shows that the leak was detected somewhere between 5:15 a.m. and 5:30 a.m. and was stopped no later than 6:10 a.m. Assuming that the valve can release no more than 1,497 pounds per hour of ammonia in a wide open position, a release of 4,000 pounds was physically impossible. I agree. However, the reportable amount is only 100 pounds.

To further bolster its case, the Respondent hired Mr. James V. Powell, a consulting forensic engineer, to conduct failure analysis tests on three old relief valves which were on the same manifold as the one that leaked and one new valve of the same manufacture and specification. The leaking valve had been discarded and subsequent to this release all of the old valves on the manifold had been replaced with new ones.

In any event, Mr. Powell tested the valves using water and/or nitrogen to see if he could get them to whistle and at what pressure. He testified that he could get them all to whistle and one of the old valves would whistle consistently at about 190 P.S.I. He also testified that a whistle demonstrates that the valve was not wide open but merely a little off its seat. A fully open valve would produce a loud roar and not a whistle. He also testified that a wide open valve would not snap shut upon being hit with a piece of pipe but a partially unseated valve would.

Mr. Powell ran the valves in whistling mode for one hour and calculated that only 1.85 pounds of ammonia would be released, assuming that the system was operating at 110 P.S.I., which is what

the gauges indicated to be the case during the release. At 190 P.S.I. the system would have released three pounds of ammonia in one hour.

Another piece of evidence is that, after the release, the system was re-charged and the amount needed to complete the re-charge was less on a calculated daily basis than needed during the previous ten years, indicating that a minimal amount of ammonia was lost during the accidental release.

As their final witness, the Respondent produced Dr. Robert Wiesboeck, a chemical consultant. Dr. Wiesboeck was accepted by the Court as an expert in ammonia releases and dispersion characteristics of ammonia when released under pressure into an open environment.

Dr. Wiesboeck produced a table of physiological responses to ammonia concentrations in the ambient air which was accepted by all parties as being authoritative. This chart shows that ammonia is detectable to humans at five parts per million (ppm), will cause complaints at 20 ppm and cause health effects at 400 ppm.

With that backdrop Dr. Wiesboeck, through the use of charts and graphic illustrations took us through a variety of scenarios assuming different release amounts. At the time of the release workers were reporting to work from and through the parking lot and prior to the shutting of the leaking valve, about 160 persons were on the premises. Following the questioning of most of them as well as U.S.D.A. inspectors on the scene, it was determined that no one reported the smell of ammonia that day. Mr. Gibson testified that

when approaching the leaking valve, he did not detect the smell of ammonia until he was within reaching distances of its.

Dr. Wiesboeck then testified that if the valve had been wide open during the release, Mr. Gibson would have been exposed to 400 ppm as he approached the valve which would have caused choking and irritation. He also testified that had the valve been wide open, persons in the parking lot would have been subjected to concentrations of ammonia approaching 214 ppm or almost ten times the complaint level.

Dr. Wiesboeck also stated that if 100 pounds of ammonia had been released over a 40-minute period, Mr. Gibson would have been subjected to 122 ppm as he approached the valve. Since Mr. Gibson was able to approach the valve without detecting an odor, Dr. Wiesboeck was of the opinion that the release was less than 100 pounds.

The primary rebuttal witness offered by the Complainant was Hironmoy Sikdar who is an employee of the C.C. Johnson Company, a contractor to EPA Region III. Mr. Sikdar is a mechanical engineer. His testimony was directed at the report done by Mr. Powell and his valve testing experiments. Mr. Sikdar's testimony was, at best, confusing and at worst incomprehensible. His main criticism involved the fact that the actual valve which leaked was not used in the lab tests. At the beginning of the hearing, counsel for the Respondent moved to exclude the witnesses. No one objected and the Court granted the motion. Had EPA's counsel advised that he planned to call rebuttal witness concerning the Mr. Powell's

testimony, I would have allowed Mr. Sikdar to be present during Mr. Powell's testimony. Since the only document that Mr. Sikdar was rebutting was the Mr. Powell's three-page report he was not cognizant of Mr. Powell's oral testimony and cross-examination at the hearing. This situation put Mr. Sikdar at a disadvantage since many of his concerns would have been addressed had he heard the testimony. Also his presence would have been of great value to EPA counsel during his cross-examination of Mr. Powell. Unfortunately, I am not allowed to help counsel in the conduct of their advocacy although I do not hesitate to point out their mistakes. Being able to critique fellow lawyers with relative impunity is one of the non-taxable perks of my job. I am consequently of the opinion that Mr. Sikdar's testimony did little to diminish the validity of Mr. Powell's testimony.

CONCLUSION

Based upon this entire record, I am of the opinion that:

1. There is no credible evidence to support the allegation that 4,000 pounds of ammonia was released by the Respondent.
2. There is ample evidence to conclude that the valve in question was not fully open during the release.
3. The evidence demonstrates that the valve was merely off-center during the release.
4. Given the above and the essentially unrefuted testimony of Respondent's witnesses, the release involved less than 100 pounds of ammonia.

Based upon these findings, I am of the opinion that the Respondent had no legal duty to report the release to the National Center and thus the Complaint must be and is hereby DISMISSED.

Dated: 7/27/92

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing **INITIAL DECISION** of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Lydia A. Guy, Regional Hearing Clerk, United States Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said **INITIAL DECISION** to the Administrator.

Dated: 7/27/92

Jo Ann Brown
Secretary, Hon. Thomas B. Yost

Certificate of Service

I hereby certify that copies of the Initial Decision in the Matter of Holly Farms Food, Inc., Docket No. CERCLA-III-007, was served to all parties involved. The original of the decision along with the record of the proceedings has been delivered to the Headquarters Hearing Clerk.

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Lydia A. Guy
Regional Hearing Clerk