UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	:	
	:	
MOORETON CHEMICAL COMPANY	:	Docket No. EPCRA VIIII-95-08
	:	
Respondent	:	Judge Greene
	:	
	:	

ORDER GRANTING MOTION FOR SUMMARY DETERMINATION AS TO LIABILITY

This matter arises under Sections 325(c) and 312(a) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001-11050 (hereafter "EPCRA" or "the Act").

The complaint charges Respondent Mooreton Chemical Company with violations of EPCRA and implementing regulations published at 40 C.F.R. Part 370 for failure to submit emergency and hazardous chemical inventory forms for certain hazardous chemicals present at its facility to state and local authorities as required by section 312 of the Act (42 U.S.C. 11022).

Specifically, it is alleged that Respondent was required to prepare or have available material safety data sheets for particular hazardous chemicals pursuant to provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, which define and list hazardous chemicals. Members of the regulated community who are required to have such data sheets are also subject to section 312 of EPCRA, 42 U.S.C. § 11022, in that they must prepare and submit to specified authorities inventory forms covering the hazardous chemicals present or in use at their facilities in certain quantities (the "threshold planning quantities" specified in 40 C.F.R. § 355, Appendix A). The complaint alleges that Respondent was required to have material safety data sheets pursuant to the Occupational Safety and Health Act for Roundup, Sonalon E. C., Phorate[(1)], Freedom, diesel fuel, Terbufos[(2)], Eradicane 6.7-E, and Force[(3)] -- all hazardous chemicals as defined under those sections[(4)] -- and that, consequently, Respondent was also required to, but did not, submit completed emergency and hazardous chemical inventory forms for these chemicals to state and local emergency planning groups as well as to the fire department which

has jurisdiction over the facility,[5] pursuant to section 312 of the Act.

In answer to the complaint Respondent admitted, among general denials, that the inventory forms referred to in Counts I, II, and III had not been filed by the due date, but pleaded affirmatively that the forms were filed several months later, soon after Respond-ent was advised of the statutory requirement by a U. S. Environmental Agency (EPA) inspector.[6]

Complainant moved for summary decision. The motion was denied insofar as it sought decision as to the amount of the penalty for the alleged violations, on the grounds that since civil penalties are monetary sanctions, summary decision should be granted with respect to them only in the "fairly unusual circumstances where, for one reason or another, it is clear that nothing useful is to be gained by trying that issue." Further, there was "no indication at this point that information helpful to a determination of an appropriate penalty (if such determination should ultimately need to be made), would not be forthcoming."[7]

In a motion for summary judgment the moving party has the initial burden of establishing that (1) no genuine issue as to any material fact remains to be determined, and (2) the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat the motion, the opposing party must set forth specific evidence, by affidavits or otherwise, which reveals the existence of a material fact to be tried or submitted; such evidence is to be construed in the light most favorable to the opposing party, and all reasonable inferences will be drawn in that party's favor.[8] The determinate question is "whether the evidence [when so viewed] presents a sufficient disagreement as to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986).

Respondent's *Memorandum in Opposition* to the motion takes the position that emergency and hazardous chemical inventory forms were not required to be submitted to the specified authorities pursuant to section 312 of the Act because the chemicals in question are not included in the definition of the term 'hazardous chemical' as set forth at section 311(e), 42 U.S.C. § 11021(e). The definition excludes "any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public," and also excludes "any substance to the extent it is used in routine agricultural operations."[9] Respondent urges that material issues of fact remain to be determined, in that (a) "at least one" of the chemical substances mentioned in the complaint (Roundup®) is present in the same form and concentration as the product is packaged for and use by the general public;[10] and (b) the other chemicals (Sonalon E.C., Freedom, Phorate, Terbufos, Eradicane, and Force[11]) are used in routine agricultural operations.[12]

Section 311(e)(3) -- "present in the same form and concentration".

Section 311(e)(3), 42 U.S.C. § 11021(e)(3), specifies that the term "hazardous chemical" has the meaning given to it by section 1910.1200(c) of title 29 of the Code of Federal Regulations, except that the definition under the Act does not include "any substance to the extent it is . . . present in the same form and concentration as a product packaged for distribution and use by the general public."

Respondent's opposition to the motion contains information to the effect that Roundup is available to the public in the same chemical concentration and form as it is sold to Respondent's customers: 41 percent active ingredient Glyphosate, N-(phosphonomethyl) glycine, in the form of its isopropylamine salt; 59 percent inert ingredients.[13]

Complainant notes that the *Preamble to the Rules and Regulations*, 52 *Federal*

Register 38348, 38364-65 (October 15, 1987), which implement the Act make clear that the word "form" includes packaging:

> 'Present in the same form and concentration as a product packaged for distribution and use by the general public' means a substance packaged in a similar manner and present in the same concentra- tion as the substance when packaged for use by the general public whether or not it is intended for distribution to the general public or used for the same purpose as when it is packaged for use by the general public.

This definition is based upon the concern expressed in the *Preamble* that:

> Even though in the same concentration as the household product, a substance may pose much greater hazards when present in significantly larger quantities. In addition, while the general public may be familiar with the hazards posed by small packages of hazardous materials, they may not be as aware of the hazards posed by or likely locations of the same substances when . . . stored in bulk. As a result, EPA has re- tained the proposed interpretation of the consumer product exemption as more consistent with the community right- to-know purpose of section 311 and the section 311 (e) exemptions.

Complainant's evidence shows that the packages of Roundup available for sale at the retail store mentioned by Respondent were in pint and quart amounts, whereas Respondent stored or had it packaged in bulk containers of at least 1400 gallons.[(14)]

Accordingly, since there has been no showing that Roundup is available to the public in the same or similar packaging as the Roundup sold by Respondent to its customers, since the *Preamble* and definition referred to therein leave no room for interpretation, and since Respondent is bound by the contents of the *Federal Register*, the holding with respect to this point must be that Roundup falls within the definition of "hazardous chemical" for which inventory forms are required to be submitted to the authorities specified in section 312(a)(1) of the Act, 42 U.S.C. §11022(a)(1).[(15)]

Section 311(e)(5), "used in routine agricultural operations."

The *Preamble* to the implementing rules and regulations also clarifies the meaning of the section 3ll(e)(5) exemption at 52 *Federal Register* 38349 and leaves no doubt that the agricultural chemicals exemption does not apply to pesticides. The chemical substances which are the subject of the complaint are pesticides, and, as noted by Complainant, are subject to the OSHA hazard communication standard. Accordingly, there is no question that the chemicals in question are covered by the definition of "hazardous chemical" found in section 311 of the Act.

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In conclusion, it is determined that, even viewing Respondent's case in the strongest possible light, no material issues of fact remain to be decided with respect to liability for the violations charged. The legal questions raised by the exemption arguments having been decided, the matter is ripe for trial on the penalty phase of the proceedings.

It is found and concluded that Respondent is a retailer of farm supplies, including pesticides; that Respondent is subject to the Act and implementing regulations; that the chemicals referred to in the complaint as of October 28, 1996, following withdrawal of the charges which pertained to diesel oil, are "hazardous chemicals" as defined by 42 U.S.C. § 11021(e), section 3ll(e); that Roundup is not sold to the public in packaging similar to the packaging in which it is found at Respondent's facility, and therefore is not subject to the exemption created by subparagraph (3) of section 311(e); that none of the chemical substances mentioned in the complaint are exempted by subparagraph (5) of section 3ll(e); that Respondent was required to submit emergency and hazardous chemical inventory forms for the chemicals set out in the complaint to the authorities specified at section 312 (a)(1); and that Respondent did not submit such forms to the specified authorities in a timely

manner.

It is also found that Respondent did submit the required inventory forms within ten days of learning of the requirements.

In view of the above, the following Order is entered.

ORDER

It is ordered that Complainant's motion for summary decision as to liability for the violations charged in the complaint shall be, and it is hereby, granted.

J. F. Greene
Administrative Law Judge

Washington, D. C.
June 30, 1998

1. CAS # 298-02-2.

2. CAS # 13071-79-9.

3. GFU524.

4. General Allegations of the complaint, ¶¶ 12-27, at 3-6.

5. Counts I, II, and III of the complaint, ¶¶ 28-93, at 6-18 of the complaint.

6. *Respondent's Memorandum in Opposition*, Affidavit of Mr. Wayne Ward, ¶ 5 at 2, indicates that the forms were filed ten days later.

7. *Order Denying Motion for Summary Decision as to Penalty*, October 28, 1997. Respondent's *Memorandum in Opposition,* at 3-8, vigorously opposed summary decision as to the penalty issue, and urged that issues surrounding the assessment of civil penalties (a) remain controverted, and (b) should be scheduled for hearing.

8. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157-59 (1970), construing Fed. R. Civ. P. 56.

9. Sections 311(e) (3) and (5), of the Act, 42 U.S.C. §§ 11021(e)(3) and (5).

10. *Respondent's Memorandum in Opposition*, at 3, and affidavits of Mr. Wayne Ward and Mr. Mark B. Bring, both attached thereto.

11. The charges relating to diesel fuel were withdrawn, pursuant to unopposed motion granted October 25, 1996.

12. *Respondent's Memorandum in Opposition* at 3, and affidavit of Mr. Ward attached thereto.

13. Affidavit of Mr. Ward at 2.

14. *Complainant's Reply to Respondent's Memorandum in Opposition to Accelerated Decision*, at 7; Complainant's exhibit 2, Affidavit of Cheryl Turcotte, October 15, 1996, at 1-2, ¶¶ 2-3.

15. *Respondent's Memorandum in Opposition* suggests that persons who reside in the surrounding agricultural areas are familiar with chemical substances used for agricultural purposes, and "would be familiar with the type of chemicals that would be stored and kept by facilities such as [Respondent] which supply these chemicals to area farmers." This is not a matter of which judicial notice can be taken, and, in any case, it does not constitute a defense to the charges. Moreover, if the

Court were persuaded that the argument reflected the situation in Respondent's area, there would be no showing that it is true elsewhere. Exceptions for locality are not made by the Act or regulations for liability, although arguments could be made that locality is relevant to the penalty issue. Last, if the Court did find in Respondent's favor with respect to this argument, against the clear dictates of the *Preamble* and *Federal Register,* the Court would be reversed.