

2/18/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
BORDEN CHEMICALS & PLASTICS) Docket No. [CERCLA] EPCRA-003-1992
COMPANY,)
)
Respondent)

ORDER GRANTING PARTIAL ACCELERATED
DECISION CONCERNING LIABILITY

An administrative complaint initiating this proceeding was served on November 19, 1991, by the United States Environmental Protection Agency (sometimes complainant or EPA), charging Borden Chemicals and Plastics Company (respondent) in eight counts with violating the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., and in thirty-two counts with violating the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§ 11001 et seq. The alleged violations concern releases of vinyl chloride from respondent's facility in Illiopolis, Illinois into the atmosphere on eight separate occasions between February 1987 and July 1989. Respondent is charged with failing to report each of these releases to the National Response Center (NRC) as soon as respondent had knowledge of the releases, as required by section 103(a) of CERCLA, 42 U.S.C. § 9603(a). Under EPCRA, respondent is charged with failing to report immediately each of the eight releases to the State Emergency Response Commission (SERC) and to the Local

Emergency Planning Committee (LEPC), as required by section 304(a) of EPCRA, 42 U.S.C. § 11004(a), and with failing to provide written follow-up notice to the SERC and to the LEPC as soon as practicable after the releases occurred, as required by section 304(c) of EPCRA, 42 U.S.C. § 11004(c). The proposed penalty for each of the forty violations alleged in the complaint is \$25,000, resulting in a total proposed penalty under CERCLA of \$200,000, and a total proposed penalty under EPCRA of \$800,000.

Admitting that the releases occurred as alleged in the complaint, respondent's answer denied that it was required to report or provide notice under CERCLA and EPCRA and asserted several affirmative defenses. On April 23, 1992, respondent moved, pursuant to 40 C.F.R. § 22.20(a), for an accelerated decision in its favor or for the complaint to be dismissed, asserting that it was not required to report under CERCLA and EPCRA; that it properly reported the releases pursuant to regulatory requirements under the Clean Air Act (CAA); and that no genuine issue of material fact exists as to these issues.

Complainant opposed respondent's motion, but concurs that this matter is appropriate for an accelerated decision, as no material issues of fact exist on the dispute of whether respondent was required to report under CERCLA and EPCRA. By requesting judgment as a matter of law, complainant in effect submitted a cross-motion for an accelerated decision, although this is not manifest in the title to the document, which is simply entitled as a response to respondent's motion.

Respondent replied to EPA's response, and the latter submitted a surreply. The arguments are well-known to the parties and will not be repeated in detail herein. However, in the interest of clarity and for those who are not familiar with this case, the Administrative Law Judge (ALJ) shall sketch the pertinent statutory and regulatory requirements as well as the nub of the parties' arguments.

Any person in charge of a facility must, as soon as he has knowledge of any release of a hazardous substance from the facility in quantities equal to or above the reportable quantity (RQ), notify immediately the NRC, pursuant to section 103(a) of CERCLA. Vinyl chloride is listed as a hazardous substance in regulations promulgated under CERCLA, 40 C.F.R. § 302.4, with an RQ of one pound.

It is also subject to reporting pursuant to EPCRA, being listed in 40 U.S.C. § 372.65. Under EPCRA, the owner or operator of the facility must provide notice to state and local authorities. Section 304(a) of EPCRA mandates that any release requiring notification under CERCLA, from a facility which produces, uses or stores a hazardous chemical, to be immediately reported to the LEPC and the SERC. EPCRA section 304(c) further requires a written follow-up emergency notice as soon as practicable after such a release.

However, releases falling within the definition of a "federally permitted release" in section 101(10) of CERCLA are excepted from these reporting requirements under CERCLA and EPCRA.

The part of that definition which pertains to air emissions (sometimes referred to herein as the Clean Air Act exemption) is as follows:

any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I Part C . . . Title I Part D . . . or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C. § 7410] . . . including any schedule or waiver granted, promulgated, or approved under these sections.

Respondent's position is that the releases were exempt from the reporting requirements of CERCLA and EPCRA because they were federally permitted releases, falling within the Clean Air Act exemption. Moreover, respondent argues that it complied with the applicable reporting requirement of the National Emission Standards for Hazardous Air Pollutants (NESHAP) program under section 112 of the Clean Air Act. That requirement, 40 C.F.R. § 61.65(a), requires submission of a report within ten days of any relief valve discharge of vinyl chloride. Respondent argues that, having reported the releases, which were relief valve discharges, within ten days pursuant to the NESHAP program, it was not required to report additionally, pursuant to CERCLA and EPCRA.

Complainant maintains that releases of vinyl chloride in violation of applicable federal regulatory requirements are not federally permitted releases and are therefore subject to the reporting requirements of CERCLA and EPCRA. Complainant emphasizes the different purposes served by reporting required under the NESHAP program and that required under CERCLA and EPCRA. The

purpose of NESHAP reporting is to monitor releases of hazardous pollutants for determination whether certain emissions warrant imposition of regulatory controls. In contrast, the purpose of reporting releases under CERCLA and EPCRA is to control the release and allow for emergency response action to protect public health and the environment.

Complainant interprets the Clean Air Act exemption as only including releases which are in compliance with a permit or control regulation. Respondent's broader interpretation of the exemption would include all releases which are the focus of an applicable control regulation, whether or not they are in compliance with the regulation. Thus, the core of the controversy surrounds the words "subject to a permit or control regulation."

Complainant supports its interpretation with several passages of legislative history of EPCRA which emphasize the importance of immediate reporting of hazardous chemical releases into the air, and with the preamble to a Notice of Proposed Rulemaking which expounds the EPA's interpretation of the Clean Air Act exemption as only including releases which are in compliance with a permit or control regulation.

Complainant argues that the releases at issue were not in compliance with the NESHAP regulations for vinyl chloride. The pertinent regulation prohibits discharges to the atmosphere from relief valves of equipment in vinyl chloride service, except for an emergency relief valve discharge, defined as one which "could not have been avoided by taking measures to prevent the discharge."

40 C.F.R. § 61.65(a). Therefore, under the NESHAP regulations, no discharges of vinyl chloride from relief valves are allowed unless they were not preventable. Complainant asserts, without any argument or authority in support, that the releases at issue were preventable. Therefore, they were not emergency relief valve releases, and were not within the federally permitted release exemption.

Respondent argues that EPA is improperly and unfairly trying to expand the reporting requirements beyond the language of the statutory definition of federally permitted releases. If EPA wants immediate reporting of air releases, it should revise the reporting requirement in the NESHAP regulations. Respondent asserts that factual issues preclude any judgment for complainant on liability, such as the issue that the release was preventable and thus in violation of the NESHAP regulations.

Complainant replies that the issue of whether the vinyl chloride release is preventable cannot be determined until after the release, so a presumption must be made that it was preventable, and any release over the threshold quantity of one pound must be reported immediately.

DISCUSSION

It is undeniable that the expression, "any emission . . . subject to a permit or control regulation" can conceivably be interpreted so broadly as to include every emission in any amount of a chemical which is included as a subject of a permit or control

regulation. That would mean that every such emission, regardless of whether it exceeded limits stated in a regulation or permit, would be exempt from the reporting requirements of EPCRA and CERCLA. In that the CAA and the federal regulations issued thereunder do not include requirements for immediate reporting of hazardous chemical releases, and regulations and permits of the state may not include such requirements, such interpretation would result in glaring omissions in the legal requirements for immediate reporting of dangerous air emissions. In the event of such releases, emergency response personnel would not be able to evaluate the health and safety of the surrounding community and take any action to protect human health and the environment.

Certainly Congress could not have intended such a result. Legislative history of CERCLA concerning federally permitted releases, as pointed out by complainant, indicates, "these exemptions are not to operate to create gaps in actions necessary to protect the public health or the environment." S. Rep. No. 848, 96th Cong., 2d Sess. 47 (1980). Further, "The laws authorizing permits and regulations that control these [federally permitted] releases [i.e., as listed in the definition (CERCLA § 101(10)), provide for notification and such notification procedures should provide the same public benefits -- especially concerning timely response -- as would be provided in [CERCLA § 103(a)]. . . . [t]he federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law to apply to discharging sources." 126 Cong. Rec. S14964-65 (Nov. 24,

1980). The regulation applicable here, 40 C.F.R. Part 61, does not contain a provision for immediate reporting of relief valve discharges which is substantially equivalent to CERCLA § 103(a), and cannot be considered as a law which provides the same public benefit.

The exemption for federally permitted releases of hazardous chemical emissions into the air was construed in a recent decision of the Chief Administrative Law Judge, In re Mobil Oil Corporation, Docket Nos. EPCRA-91-0120, -91-0122, -91-0123 (Interlocutory Order Granting Complainant's Cross-Motion for Accelerated Decision). After an exhaustive analysis of the pertinent legislative history of EPCRA and CERCLA, and of EPA policies and interpretations, the conclusion was reached that the exemption is not to be construed broadly. The term "subject to" must be interpreted as "in compliance with," otherwise most air releases would go unreported, which does not comport with the purposes of the release reporting provisions of CERCLA and EPCRA. The ALJ concurs for the reasons stated in that decision.

In this proceeding, however, an additional argument is presented. Respondent claims that it was in compliance with the applicable control regulation at 40 C.F.R. Part 61, specifically 40 C.F.R. section 61.65(a), which provides, in pertinent part:

An owner or operator of an ethylene dichloride, vinyl chloride and/or poly vinyl chloride plant shall comply with the requirements of this section.

(a) Relief valve discharge. Except for an emergency relief valve discharge, and except as provided in § 61.65(d) [relief valve discharges that are ducted to a control

device], there is to be no discharge from any relief valve on any equipment in vinyl chloride service. An emergency relief valve discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any relief valve discharge, except for those subject to § 61.65(d), the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing

Respondent asserts that its releases were unpreventable emergency relief valve discharges. As such, they are allowed under the NESHAP program and are thus "in compliance with" the regulation.

However, this provision does not establish that emergency relief valve releases meet any emission standard under the NESHAP. It establishes that the emission standard is 0. So, any and all relief valve discharges of vinyl chloride into the atmosphere do not meet the NESHAP standard. In other words, such discharges are not subject to an allowance of certain maximum emissions in the regulations.¹

Unpreventable emergency relief valve releases are stated as an exception, but not for purposes of providing an unlimited emissions allowance. By definition such emergencies are not controllable, so prohibiting them or permitting them to some certain extent would serve no useful purpose. Rather, unpreventable emergency discharges are excepted for purposes of distinguishing them from

¹ Relief valve discharges are distinguished from leaks through a relief valve, which are treated separately in the regulations, with a standard of no detectable emissions as indicated by an instrument reading of less than 500 ppm above background. 40 C.F.R. §§ 61.61(y) 61.65(b)(4), 61.242-4.

releases which may be the subject of an enforcement action under NESHAP regulations for operating a vinyl chloride plant without taking measures to prevent a discharge from a relief valve. To illustrate, an accidental explosion at a hazardous chemical plant resulting in large amounts of poisonous gases being released would not be "in compliance with" any emission standard, and should be reported immediately to protect human health and the environment. However, a separate issue is whether the accident was preventable, i.e., involving any reprehensible conduct in operating the plant, warranting sanctions against the plant owner or operator. Thus, the issue of whether a release exceeds or is not "in compliance with" an emission standard is distinct from whether the plant was being operated properly. The former is that which is contemplated by the federally permitted release exemption for air releases, and which is relevant to reporting violations. The latter is relevant to a different type of violation, that of failure to prevent releases under the NESHAPs regulations.

The parties are apparently confusing these two concepts, in that they argue that respondent could or could not have prevented the discharges at issue. Reporting of a relief valve discharge under EPCRA and CERCLA should not have anything to do with whether the discharge was preventable or not; regardless of the cause, it should be reported immediately in order to protect human health and the environment. Noting the problem that preventability is not determined until a while after the release, complainant's solution, which circumvents the notion that the emergency relief valve

discharges may be deemed in compliance with a control regulation, is to apply a presumption that notification is required any time there is a release of vinyl chloride above the RQ. This is unnecessary, as the language and purpose of 40 C.F.R. § 61.65(a) does not indicate that emergency relief valve discharges are in compliance with or subject to a control regulation as contemplated by the federally permitted release exemption.

Furthermore, such a presumption would be inappropriate. Assuming *arguendo* that unpreventable emergency relief valve discharges are deemed "subject to a control regulation," that presumption would implicate another supposition, that all relief valve discharges are preventable, unless and until later determined not to be. Presumptions are generally rebuttable, and if a discharge is not reported, and the facility owner or operator rebuts the presumption by later demonstrating to EPA that the release was unpreventable, it would seem that enforcement action against the facility for failure to report would be in vain. A party who failed to report a dangerous release of vinyl chloride from a relief valve should not be able to escape liability merely because it can demonstrate the essentially irrelevant issue that the discharge was not preventable. That would significantly impair EPA's ability generally to enforce the release reporting requirements of EPCRA and CERCLA.

As concluded in Mobil Oil, *supra*, the federally permitted release exception to reporting air emissions must not be interpreted broadly in such a way that air releases exceeding the

control regulation or permit limits would go unreported. For the same reasons, it should not be read broadly in conjunction with the emergency relief valve discharge provision of 40 C.F.R. § 61.65(a). The same policies, EPA interpretations and legislative history of EPCRA and CERCLA supporting the interpretation in Mobil Oil of the federally permitted release exemption, also buttress the interpretation that emergency relief valve discharges are not included in that exemption.

Therefore, the discharges at issue were not exempt from the release reporting and notice requirements of CERCLA and EPCRA, regardless of whether they were emergency discharges as provided in 40 C.F.R. § 61.65(a). Each of the eight discharges alleged in the complaint were required to be reported immediately to the NRC under section 103(a) of CERCLA, and to the LEPC and SERC under section 304(a) of EPCRA, and follow-up notices were required to be submitted to them under section 304(c). Respondent does not dispute that it failed to do so, and as a matter of law is liable for the violations alleged in the complaint.

A prerequisite to granting an accelerated decision in favor of complainant, however, is a finding that no genuine issues of material fact exist with respect to liability. As noted above, the parties agree that no such issue exists with respect to the discussion above concerning whether the discharges were exempt from the reporting requirements of CERCLA and EPCRA as federally permitted releases. However, several affirmative defenses were asserted and the possibility that they raise genuine issues of

material fact must be ruled out before a motion for accelerated decision for complainant may be granted.

The record at this point in the proceeding is largely undeveloped, prehearing exchange documents not yet having been filed. It is not necessary for prehearing exchange documents to be exchanged in EPA administrative proceedings prior to accelerated decision on liability. See, 40 C.F.R. § 22.20.(a).

The parties for the most part ignored the affirmative defenses in their motions and replies concerning accelerated decision. Complainant does not specifically state that the affirmative defenses raise no such issues of fact, and respondent did not specify any factual issues that exist with regard to the affirmative defenses. Complainant argues only against the first two affirmative defenses: that emergency relief valve releases are exempt as federally permitted releases and that respondent cannot be held liable because it was in compliance with 40 C.F.R. § 61.65(a). Those defenses do not involve contested issues of material fact and as discussed above are rejected as a matter of law.

Respondent states simply that factual issues must be resolved before complainant could be entitled to judgment on liability, without specifying any such issues except that of whether each release was preventable. That issue is now moot, as discussed above, supra at 9-10.

However, respondent has asserted other affirmative defenses, namely waiver, estoppel, laches, and statute of limitations.² An analysis of whether or not genuine issues of material fact exist begins generally in federal court with the question of whether the movant for summary judgment (which is analogous to accelerated decision) has carried its initial burden in the motion, upon which the burden shifts to the non-movant to present specific facts showing that a genuine dispute of material fact exists. United States v. Ownbey Enterprises, Inc., 789 F. Supp. 1145, 1148 (N.D. Ga. 1992).

The movant's initial burden is met if the movant states that there is no genuine dispute of material fact and identifies that part of the record which supports this assertion; it need not support its motion with evidence negating the opposing party's claim. Mitchell v. Mills County, Iowa, 847 F.2d 486, 489 (8th Cir. 1988); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 876 (9th Cir. 1987), cert. denied, 488 U.S. 827. In this case, only the respondent's answer, motion for accelerated decision and reply could possibly be identified as showing that no disputed questions of fact exist as to the affirmative defenses. The answer is the only document which refers to those affirmative defenses, so there is not much significance in complainant pointing it out.

More significant is the fact that respondent, who has the burden of proof on those affirmative defenses, has not provided any

² Excessive penalties was also asserted as an affirmative defense, but it is not relevant to the issue of respondent's liability for the alleged violations.

supportive argument or factual background on them in opposing complainant's request for accelerated decision. In federal court, where a party files a motion for summary judgment, the opposing party is under an obligation "to place before the court all materials it wishes to have considered when the court rules on the motion." Cowgill v. Raymark Industries, Inc., 780 F.2d 324, 329 (3rd Cir. 1985), appeal after remand, 832 F.2d 798. Summary judgment has been granted where affirmative defenses were not addressed by either party in motions for summary judgment, and defendants failed to point to any specific facts that would raise a genuine dispute as to affirmative defenses. Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076, 1090 (D. Del. 1990), affirmed, 932 F.2d 959 (3rd Cir. 1991). Ortiz v. Eichler, 616 F. Supp. 1046, 1059 n.7 (D.C. Del. 1985), on reargument, 616 F. Supp. 1066, affirmed, 794 F.2d 889 (claims not argued in briefs on a motion for summary judgment were deemed abandoned for summary judgment purposes). Where respondent clearly addressed complainant's motion for an accelerated decision but utterly failed to raise any argument or facts regarding the affirmative defenses, respondent should not be indulged the opportunity to later unearth what it has conspicuously abandoned.

The statute of limitations and laches defenses are listed unaccompanied by any supporting facts, without even a specification of which statute of limitations applies. One cannot glean any disputes of fact from a mere listing of a legal term. In a similar situation in a federal court, where laches was raised as an

affirmative defense in the answer but defendant in its cross-motion for summary judgment failed to address laches, it was deemed to have been abandoned. Research, Analysis and Development, Inc. v. United States, 8 Cl. Ct. 54 (1985). Furthermore, there is no statute of limitations that the undersigned is aware of which has been held to apply to administrative enforcement actions for failure to notify under CERCLA and EPCRA, and laches cannot be asserted against the government when it acts in its sovereign capacity to assert public rights. United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984).

Similarly, waiver cannot usually be asserted against the government, because "generally speaking, public officers have no power or authority to waive enforcement of the law on behalf of the public." Id. At least, it must be shown that the government waived its rights clearly, decisively and unequivocally. U.S. v. N.O.C., 28 ERC 1460, 1469 (D. N.J. 1988). Estoppel asserted against the government requires a showing of reasonable reliance on some affirmative misconduct on the part of the government. Amoco Oil, 580 F. Supp. at 1050; United States v. Ven-Fuel, Inc., 758 F.2d 741, 761 (1st Cir. 1985).

Those defenses, waiver and estoppel, are claimed with respect to two fact situations. The first is that in connection with the settlement of a suit filed by Illinois Environmental Protection Agency against respondent arising out of the same vinyl chloride releases at issue in this matter, EPA informed respondent that such settlement resolved all issues of concern pertaining to those

releases. These defenses, even if those facts are taken as true, could not relieve respondent of liability in this proceeding, for the following reasons.

The elements of an estoppel defense cannot be established because there is no real possibility that respondent acted in reasonable reliance on that information to its detriment with regard to this proceeding. The notification requirements of CERCLA and EPCRA would have already been triggered and violated by the time respondent received such information. If respondent means by this defense that it would not have settled the suit as it did if EPA had not given such information, this defense still could not excuse liability in this proceeding. It is safe to assume from the facts given that EPA was not a party to the settlement agreement, so it would have been unreasonable for respondent to have relied on any such information from EPA.

The second fact situation is that EPA had notice of the alleged violations yet did not timely inform respondent of a possible violation, allowing it to continue such violations. However, neither carelessness nor a reluctance to be of assistance constitute affirmative misconduct. Ven-Fuel, 758 F.2d at 761. There is no legal statutory or regulatory requirement cited by respondent or found by the ALJ that EPA must provide timely warning to prevent violations from continuing or recurring. This defense is therefore not material to a finding of respondent's liability for the alleged violations, but it could be relevant to the penalty issue.

It is concluded that there exists no genuine issue of material fact concerning liability in this matter, and that complainant is entitled to an accelerated decision as a matter of law with respect to respondent's liability for the violations alleged in the complaint. It is concluded that respondent has violated section 103(a) of CERCLA, 42 U.S.C. § 9603, and sections 304(a) and (c) of EPCRA, 42 U.S.C. §§ 11004(a) and (c), as charged in the complaint. However, respondent is entitled to a hearing on the issue of the amount of civil penalty to be assessed.

ORDER

IT IS ORDERED that:

1. Respondent's motion for accelerated decision be DENIED.
2. Complainant's cross-motion for accelerated decision be GRANTED on the issue of liability.
3. The parties shall submit their prehearing exchanges within 30 days of the service date of this order.
4. The parties engage in good faith settlement negotiations concerning the amount of the civil penalty in this matter.
5. Complainant submit a status report to the undersigned no later than April 1, 1993.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated: February 18, 1993

IN THE MATTER OF BORDEN CHEMICALS & PLASTICS, Respondent,
Docket No. [CERCLA] EPCRA-003-1992

Certificate of Service

I certify that the foregoing Order, dated 2/18/93, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Michelle Winston
Regional Hearing Clerk
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Dated: Feb. 18, 1993