

11

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
 ARKANSAS VALLEY COOPERATIVE) Docket No. CERCLA-VIII-92-20
 ASSOCIATION)
)
 Respondent)

ORDER DISPOSING OF OUTSTANDING MOTIONS

I. Protective Order

There is currently pending a motion filed by the Respondent for entry of a protective order relating to certain confidential information. Complainant has filed no opposition to the motion for a protective order and the motion indicates that the parties desire the information involved to be confidential.

Since there is no opposition and since good cause has been shown, the motion for entry of a protective order is granted and the protective order attached as Exhibit A to the motion will be issued together with this order.

II. Motion to Dismiss

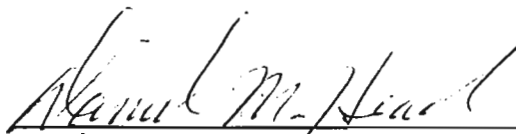
In addition, Respondent has filed a motion to dismiss the Complaint. The basis for the motion is that the substance released, which is the subject of the Complaint, is not a hazardous substance designated in Table 302.4 of Part 302 of EPA's regulations, 40 C.F.R. Part 302, Table 302.4. Respondent requests a hearing on the motion to dismiss.

Complainant filed an opposition to the Respondent's motion to dismiss and argues that an anhydrous ammonia is contained

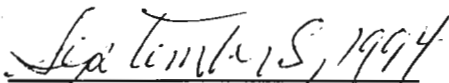
pressurized ammonia which, when released into the atmosphere, is ammonia. Complainant argues that ammonia is listed as a hazardous substance in Table 302.4. Complainant urges that a genuine issue of material facts exists and that, therefore, under Section 22.20 of the EPA Rules of Practice (Rules) 40 C.F.R. §22.20, the motion to dismiss should not be granted.

On analysis, the Complainant's position is better taken. There is a general issue of material fact for trial and, while Respondent has framed its motion as a motion to dismiss, the criteria for such a motion is in Section 22.20 of the Rules, the same Section governing accelerated decision. In that Section, the criteria for dismissal is that the Presiding Judge finds that there has been a failure to establish a prima facie case or finds other grounds which show no right to relief on the part of the Complainant. Since there is a general issue to be tried as to whether this substance involved is a listed hazard substance under EPA Regulations, Respondent has not shown that a prima facie case has not been established. Nor has the Respondent shown other grounds that negate the Complainant's right to relief. Accordingly, Respondent's motion to dismiss is denied.

SO ORDERED.


Daniel M. Head
Administrative Law Judge

Dated:


Washington DC

IN THE MATTER OF ARKANSAS VALLEY COOPERATIVE ASSOC. Respondent
Docket No. CERCLA-VIII-92-20

CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions, dated Sept. 8, 1994, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Joanne McKinstry
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VIII
999 18th Street
Denver, CO 80202-2405


Copy by Certified Mail, Return
Receipt Requested to:

Counsel for Complainant:

Daisy Kathleen Curry, Esquire
Office of Regional Counsel
US EPA, Region VIII
Denver Place, Suite 500
999 18th Street
Denver, CO 80202-2405

Counsel for Respondent:

Ted T. Svitavsky, Esquire
12835 E. Arapahoe Road
Tower One - Suite 100
Englewood, CO 80112


Aurora M. Jennings
Legal Staff Assistant
Office of Administrative
Law Judges

Dated:

Sept. 8, 1994
Washington, DC