3/8/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matters of	)	
	)	
SALEM TUBE, INC. P.O. Box 144 Fourth Street (REYNOLDS DEVELOPMENT) Greenville, PA 16125	)	Docket No. EPCRA-III-090
	)	
and	)	
	)	
SALEM LIQUIDATING CORP. United States Corporation Company 32 Lookerman Square, Suite L-100,	)	
	)	
Respondents	)	

ORDER DENYING MOTION FOR ACCELERATED DECISION

Respondent Salem Tube, Inc. (sometimes New Salem) filed a motion for summary judgment (accelerated decision) dated July 1, 1993 to be dismissed as a respondent in this proceeding. Complainant (sometimes EPA) served a response in opposition to the motion on July 22, 1993. The arguments of the parties, treated thoroughly in their submissions, are well-known to them; they will not be restated here, except to the extent deemed necessary by this order.

The pertinent section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.20(a), states that the Administrative Law Judge (ALJ) may dismiss an action at any time:

> without further hearing or upon such limited additional evidence, such as affidavits, as he may require, <u>if no genuine issue of material fact exists</u> and a party is entitled to a judgment as a matter of law . . . . In addition, the Presiding Officer . . . may at any time dismiss an action . . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant. (Emphasis added.)

The ALJ may look to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance in interpreting the Rules. Here, the equivalent of an accelerated decision is Fed. R. Civ. P. 56 addressing summary judgment, which permit a final decision to be rendered without the time or expense of an evidentiary hearing, provided there are no genuine issues of material fact in controversy. Material facts are those which establish or refute an essential defense asserted by a party.[1] Although reasonable inferences may be drawn from the evidence, they must be viewed in the light most favorable to the party opposing the motion.[2] Once it is determined that there is an issue of material fact, the inquiry ends; the ALJ may not resolve that issue or weigh the evidence supporting each argument.[3]

With the above backdrop, the ALJ now turns to the motion. The question involved in the motion is whether New Salem should continue to be held as a respondent in this case under a corporate

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[1] <u>Words and Phrases</u>, "Material Fact."

[2] United States v. Diebold, 369 U.S. 654, 655 (1962). <u>See also</u>, 6 Moore's Federal Practice Par. 56.15[1-00].

[3] In the Matter of Western Technologies, Inc., Docket No. TSCA-09-90-0017, Order Denying Motion for Accelerated Decision, January 24, 1992 at 1-2.

successor liability theory as set forth in complainant's motion to amend complaint to add party, filed on September 25, 1992, and in complainant's first amended complaint. Significantly, New Salem did not oppose EPA's motion to amend the complaint. Rather, New Salem answered the amended complaint, but alleged that the corporate successor liability theory submitted by EPA is "unwarranted, arbitrary and capricious."[4]

The ALJ's task of determining the merits of a corporate successor liability concept is hampered because, as the parties argue in their respective motions, the courts have used various tests to determine the necessary conditions for the theory. However, one aspect of the successor liability theory is clear no matter which test is applied; successor liability issues are complicated and fact intensive. Therefore, before entering into this thicket, the facts must be undisputed and clear to survive a motion to dismiss. This matter does not present such clarity.

Determining whether New Salem, Old Salem or both entities were responsible for filing the Form Rs under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11023, as alleged in the amended complaint, is unintelligible from the facts as set forth by the parties who are both aware of the criteria various courts have used to determine corporate successor liability. To avoid prejudicing the parties, the ALJ will not speculate on which factors have been established

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[4] Respondent Salem Tube, Inc. (New Salem) first amended answer at 1-2.

to prove or disprove the theory as applied to this matter. Rather, the parties should be prepared at the evidentiary hearing to clarify the facts.

This matter appears to be fraught with questions involving material facts. For example, issues which complicate the matter include the myriad of corporate entities involved and the sharing of the corporate name "Salem Tube," and key management personnel, including Alastair Turner (the president of both entities) and Marco Zrile (environmental manager). It is impossible to tell from the pleadings in which capacity Mr. Turner and Mr. Zrile were acting when the forms were filed; it is unclear whether or not these two individuals were employees of Old Salem at the time of the filing. A more complete explanation is needed for, among other things, what appears to be a ten-day flurry of activity beginning where: STI Acquisition Corp. purchased the assets of Old Salem, allegedly a wholly-owned subsidiary of Andal Corp., on June 18, 1991;[5] "New Salem" changed its name to "Salem Tube" on June 24, 1991;[6] and Mr. Zrile and Mr. Turner filed forms for "Old Salem" on June 28, 1991.[7] Identifying the respective shareholders and directors of both entities and the remaining assets and debts of both Old Salem and New Salem after the sale would be useful, as

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[5] Respondent's memorandum in support of motion for summary judgement at 2.

[6] Id. at 3.

[7] Id. at 7.

would be determining the relative powers of Mr. Turner while president of both entities.

Respondent states that: "Based on the information available to New Salem, it appears Old Salem has complied with all state and Federal regulations pertinent to the facility."[8] Whether or not this is true, it would be useful to know if New Salem was aware of EPA's inspection of Old Salem which occurred on April 17, 1991, approximately two months prior to the purchase of Old Salem by New Salem. According to respondent, Mr. Zrile for the first time was informed that Old Salem was not in compliance with EPA filing requirements.[9]

With regard to the affidavits, attached to the motion, and concerning affidavits generally, the issues of credibility cannot be resolved unless there is a hearing. A piece of paper cannot be cross-examined. This recognition gives further support for resolving the successor liability issues at an evidentiary hearing.

Incidentally, the respondents should be aware that an administrative hearing is not the proper forum to issue a decision on an indemnification agreement between two private parties.[10] Such an agreement is between the parties and is beyond the jurisdiction of EPA.

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[8] Respondent's memorandum in support of motion for summary judgement at 7-8.

[9] Id. at 6.

[10] See respondent's memorandum in support of motion for summary judgment at 4. See also complainant's memorandum in opposition of accelerated decision at 6.

Finally, it is emphasized that a case should not be made hard by deciding difficult or doubtful questions that might not survive factual determination. Even where it is technically proper to grant a motion for summary judgment, "sound judicial policy and the proper exercise of judicial discretion" may permit the denial of the motion and allow the case to be fully developed at the hearing. Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979). This is such a case.

IT IS ORDERED that:

1. Respondent's motion for an accelerated decision be **DENIED**.

2. The parties continue good faith efforts to settle this matter.

3. In the event this matter is not settled within **30** days from the service date of this order, complainant shall arrange for a telephone prehearing conference between the parties and the ALJ in order that a hearing date may be marked.

Frank W. Vanderheyden
Administrative Law Judge

Dated: March 8, 1994

IN THE MATTERS OF SALEM TUBE, INC. AND SALEM LIQUIDATING CORP.,
Respondents,
Docket No. EPCRA-III-090

Certificate of Service

I certify that the foregoing Order, dated 3/8/94, was sent this day in the following manner to the below addressees.

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Dated: March 8, 1994