8/7/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
3M COMPANY (MINNESOTA MINING AND MANUFACTURING),	)	Docket No. TSCA-88-H-06
	)	
	)	
Respondent	)	

Notice of Treatment of Confidential Business Information

Portions of the attached INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION require use of information which Respondent submitted to the United States Environmental Protection Agency (EPA) as Confidential Business Information (CBI). Information in the "Findings of Fact and/or Conclusions of Law" section of the attached Order constituting or based on CBI has been deleted as indicated by the following: (CBI deleted). The complaint, the second amended answer and other documents which are cited in support of the "Findings of Fact and/or Conclusions of Law" contain the deleted CBI material and are filed with the Headquarters Hearing Clerk. The deleted information will itself be treated as confidential unless the Respondent waives confidentiality thereto or EPA releases the information in accordance with 40 C.F.R. Part 2.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
3M COMPANY (MINNESOTA MINING AND MANUFACTURING),	)	Docket No. TSCA-88-H-06
	)	
	)	
Respondent	)	

INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

Complainant has filed a motion, pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, for a partial accelerated decision in favor of the Complainant as to liability in this proceeding without further hearing, contending that no genuine issue of material fact exists and the Complainant is entitled to judgment as a matter of law as to all counts of the complaint.

I. Background - Violations Alleged and Proposed Penalty:

This case arose under the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. ("TSCA" or the Act). An administrative complaint was issued on September 2, 1988 by the United States Environmental Protection Agency ("EPA" or "Complainant" or "Agency"), under Section 16(a) of TSCA, 15 U.S.C. § 2615(a).[1/]

1/ 15 U.S.C. § 2615(a) provides, in pertinent part: "(1) Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation."

Section 16(a) of TSCA provides for the imposition of civil penalties for violations of Section 15 of the Act, 15 U.S.C. § 2614.[2/] The complaint alleges violations of Section 5(a)(1), the premanufacture notification requirements for new chemical substances, and Section 13(b) and rules promulgated thereunder, the import certification requirements for chemical substances.

Counts I and III of the Complaint allege that Respondent, 3M Company, ("Respondent" or "3M") violated Sections 5(a)(1)(B), 15(1)(B) and 15(3)(B) of TSCA by illegally importing the new chemical substances, identified as Chemicals A and B, without having submitted Premanufacture Notices ("PMNs") to EPA at least 90 days prior to commencing manufacture. Counts II and IV allege that Respondent violated TSCA Sections 5(a)(1), 13(b) and 15(3)(B), and rules promulgated thereunder, by falsely certifying to customs officials that the new substances were imported in compliance with TSCA. The proposed total civil penalty for these alleged violations was set at $1,394,500.00.

On December 13, 1988, Complainant filed a Motion to Amend Complaint which motion was granted. As a result, all alleged

---

[2/] 15 U.S.C. § 2614 provides, in pertinent part: "It shall be unlawful for any person to --

(1) fail or refuse to comply with...(B) any requirement prescribed by section...2605 of this title, (C) any rule promulgated...under section...2605 of this title...;

* * * * * * *

(3) fail or refuse to (A) establish or maintain records, (B) submit reports,...or other information,...as required by this chapter or a rule thereunder...."

violations of Section 5(a)(1) of TSCA for the pre-August 30, 1980 import of new chemical substances as part of mixtures were withdrawn and the total proposed civil penalty was reduced to $1,306,500.00.

II. Background - Respondent's Answer:

3M raised several affirmative defenses in its Answer, as amended by an Amended Answer and a Second Amended Answer. As to the issue of liability, 3M contends that claims for many of the allegations in Counts I and III first accrued before September 3, 1983 and hence, proceedings involving those claims are barred by the five-year statute of limitations found at 28 U.S.C. § 2462.

As to the proposed penalties, 3M contends that they are "totally unreasonable and inappropriate." 3M asserts that the application of the Agency's "TSCA Section 5 Enforcement Response Policy," dated August 5, 1988, and the Agency's "Recordkeeping and Reporting Rules, TSCA Sections 8, 12 and 13 - Enforcement Response Policy," dated May 15, 1987, to the alleged violations herein is arbitrary, capricious and unjustified. Further, 3M argues that the application of these policies is inconsistent with EPA's "Policy on Civil Penalties" (EPA General Enforcement Policy #GM-21) and with the Agency's "Framework for Statute - Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties" (EPA General Enforcement Policy #GM-22), both dated February 16, 1984. 3M also maintains that the proposed penalties: (1) were calculated through the appli-

cation of civil penalty policies "as rules without providing notice and comment, in violation of the APA"; (2) violate 3M's substantive due process and equal protection rights under the United States Constitution; and (3) are contrary to the excessive fines clause of the Eighth Amendment to the United States Constitution.

III. Background - Processing of Case:

Following the issuance of the complaint and the answer, a flurry of motions ensued. Complainant filed a "Motion to Strike Affirmative Defense" directed at the statute of limitations defense which Respondent had raised as to its liability for certain claims under Counts I and III. This was followed by a "Second Motion to Strike Affirmative Defenses." This motion was directed at Respondent's defenses that the proposed civil penalties were so unreasonable and excessive as to violate the due process, equal protection and excessive fines provisions of the United States Constitution.

Respondent followed with a "Motion for Prehearing Conference and for Prehearing Briefing," contending that, "with the assistance and direction of the Court, a prehearing settlement is foreseeable." The Complainant properly objected to the participation of the Presiding Officer in settlement negotiations, but indicated a willingness to respond to any concrete settlement proposal. As a consequence, I requested, and, on January 26, 1989, the Chief Administrative Law Judge appointed a Settlement

Judge to conduct settlement negotiations. Further legal proceedings in this matter were suspended by the Chief Judge's order until March 23, 1989, when the appointment of the Settlement Judge was terminated and the matter was returned to me for further proceedings.

Upon further consideration of Complainant's first and second motions to strike affirmative defenses and Respondent's replies thereto, I ordered additional submissions by the parties on the legal issues raised therein. On May 11, 1989, these additional filings were completed by the parties.

In the meantime, on May 2, 1989, Complainant filed a "Motion for Accelerated Decision on All Matters of Liability" to which Respondent filed a reply on May 17, 1989.

IV. The First Motion to Strike:

In considering the motion to strike the statute of limitations defense, it should be noted that the Federal Rules of Civil Procedure (Fed. R. Civ. P.) do not govern the procedure in administrative agencies which are free to fashion their own rules of procedure, so long as those rules satisfy the fundamental requirements of fairness and notice.[3/] Since the Fed. R. Civ. P.

3/ Katzson Bros., Inc. v. U.S.E.P.A., 839 F.2d 1396, 1399 (10th Cir. 1988), citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977) and Hess & Clark v. FDA, 495 F.2d 975, 984 (D.C. Cir. 1974). See also, South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n, 570 F. Supp. 227, 232 (D.C. La. 1983), aff'd 744 F.2d 1107 (5th Cir. 1984) and Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

are not applicable to this proceeding, I am in no way bound to apply and follow Federal judicial practice and precedent concerning motions to strike. Nevertheless, consideration of that practice and precedent may provide some insights which could be helpful in disposing of the motion.

Under Rule 12(f) of the Fed. R. Civ. P., a court may order stricken from the pleadings any insufficient defenses.[4/] The standard for determining the legal sufficiency of a defense under Rule 12(f) is narrow.[5/] A motion to strike will be granted only where the legal insufficiency of the defense is "clearly apparent,"[6/] i.e., if the defense is clearly insufficient as a matter of law.[7/] A motion to strike an affirmative defense will be denied if the defense set forth is sufficent as a matter of law or if it fairly presents a question of law or fact which the Court ought to hear.[8/]

4/ See generally: Wright and Miller Federal Practice and Procedure: Civil § § 1380-1381, pp. 782-805 (1969); 2A Moore's Federal Practice, 12.21, pp. 12-164-12-185 (2d ed. 1978).

5/ Mohegan Tribe v. Connecticut, 528 F. Supp. 1359, 1362 (D. Conn. 1982).

6/ May Dept. Stores v. First Hartford Corp., 435 F. Supp. 849, 855 (D. Conn. 1977); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3rd Cir. 1986).

7/ Index Fund, Inc. v. Hagopian, 107 F.R.D. 95, 100 (S.D.N.Y. 1985).

8/ Lunsford v. United States, 418 F. Supp. 1045, 1051 (D.C.S.D. 1976), aff'd, 570 F.2d 221, 229 (8th Cir. 1977).

Thus, motions to strike are not viewed favorably,[9] and are infrequently granted.[10] For the movant to succeed, the Court must be convinced that there are no questions of fact, and that any questions of law are clear and not in dispute.[11]

Nevertheless, where the merits of a defense have been fully briefed and argued, it is within the discretion of the court to determine its legal sufficiency at a pre-trial stage.[12] Some Federal courts have held that the issue of the applicability of a statute of limitations is one which can and should be resolved before trial on a motion to strike the defense.[13] Other Federal courts, some emphasizing that a motion to strike is not a proper device for placing the actual merits of a defense in issue, have declined to strike a statute of limitations defense on the grounds that the defense presented a mixed issue of fact and law or that movant had failed to show that permitting the defense to stand

---

9/ Index Fund, 107 F.R.D. at 100; Krauss v. Keibler Thompson Corp. 72 F.R.D. 615, 618 (D. Del. 1976).

10/ Lunsford, 570 F.2d at 229.

11/ Carter-Wallace, 47 F.R.D. at 368; Lunsford, 418 F. Supp. at 1051.

12/ Mohegan Tribe, 528 F. Supp. at 1362.

13/ Angel v. Ray, 285 F. Supp. 64, 66 (E.D. Wis. 1968); Furman v. General Dynamics Corp. 377 F. Supp. 37, 45 (S.D.N.Y. 1974).

would prejudice him.[14/]

In the present case, both parties have fully briefed the merits of statute of limitations defense. The Complainant extensively briefed the statute of limitations defense in a memorandum which accompanied its motion to strike and in a reply to Respondent's response to the motion. Likewise, Respondent has, in detail and at some length, in both its response to Complainant's motion and in its response to Complainant's reply to Respondent's initial response, thoroughly briefed and argued the defense. As Respondent said in the latter document, "3M herein responds to Complainant's Reply....When read in conjunction with 3M's Response memorandum, the following analysis provides a solid legal basis upon which this Court should, if it reaches the merits of Complainant's Motion to Strike, find that 28 U.S.C. § 2462 applies to administrative enforcement actions for the assessment of civil penalties under TSCA § 16(a)(2)."[15/] The statute of limitations defense poses a legal question, namely, whether 28 U.S.C. § 2462 applies to administrative proceedings for the assessment of civil penalties under TSCA. Hence, it would appear appropriate under some Federal court precedent to reach the merits of the statute of

---

14/ Oliver v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (S.D.N.Y. 1985); United States v. Hardage, 116 F.R.D. 460, 466-467 (W.D. Okla. 1987); Zappala v. Hub Foods, Inc., 683 F. Supp. 127, 131 (W.D. Pa. 1988).

15/ Respondent's "Response to Complainant's Reply to Response to Complainant's First Motion to Strike Affirmative Defense," (May 1, 1989) at 6.

limitations defense under the motion to strike.16/

However, I need not rely upon the practice and precedent under Rule 12(f) of the Fed. R. Civ. P. to reach the merits of the statute of limitations defense.

V. The Motion for a Partial Accelerated Decision:

Complainant, as noted previously, has filed a "Motion for Accelerated Decision on All Matters of Liability" pursuant to 40 C.F.R. § 22.20(a) which provides, in pertinent part:

> "The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits,

---

16/ Indeed, some Federal Courts will "convert" a Rule 12(f) motion to strike an insufficient defense into a Rule 56 motion for summary judgment, especially where the challenge is directed at the substance, rather than at the form of defendant's pleading. Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204, 213 (N.D. Ill. 1985) and cases cited therein; Furman v. General Dynamics Corp., 377 F. Supp. at 43. However, other courts have concluded that a motion to strike an affirmative defense can be considered only as a Rule 12(f) motion and cannot properly be treated alternatively as a motion for partial summary judgment under Rule 56. Krauss v. Keibler-Thompson Corp., 72 F.R.D. 615, 616-617 (D.C. Del. 1976). However, no such "conversion" is required herein because a separate motion for a partial accelerated decision has been filed by Complainant. A motion for an accelerated decision under 40 C.F.R. § 22.20(a) is analagous to a motion for summary judgment under the Fed. R. Civ. P.

> as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

Respondent, itself has conceded: "there are no material facts at issue with respect to 3M's alleged liability. 'Further, only one of 3M's affirmative defenses addresses liability (that being the Company's statute of limitations defense)."17/

Subsequently, Respondent stated that "3M does not contest its liability, except with regard to those of EPA's claims which accrued more than five years prior to EPA's issuance of the complaint. Even with regard to those claims, 3M is willing to stipulate that it would be liable, but for the statute of limitations defense."18/

Finally, in its response to Complainant's motion for an accelerated decision, 3M said that it "does not object to Complainant's motion to the extent that it applies solely to 3M's liability for the alleged violations which are not subject to the Company's statute of limitations defense."19/

17/ Respondent's "Motion for Prehearing Conference and for Prehearing Briefing," (January 12, 1989) at 2.

18/ Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," (January 24, 1989) at 6 [emphasis in original].

19/ Respondent's "Response to Complainant's Motion for Accelerated Decision on All Matters of Liability" (May 16, 1989) at 3.

The question which remains to be resolved under 40 C.F.R. § 22.20(a) is whether Complainant is entitled to judgment on the issue of Respondent's liability as a matter of law. The answer to that question, of course, turns upon the issue of whether the statute of limitations in 28 U.S.C. § 2462 applies to administrative proceedings for the assessment of civil penalties under TSCA. If § 2462 applies, Complainant is entitled to a judgment on the issue of Respondent's liability for the alleged violations which are not subject to the statute of limitations defense. If § 2462 does not apply, Complainant is entitled to a judgment on the issue of Respondent's liability for all violations alleged in the amended complaint.

VI. The Statute of Limitations Defense

A. Introduction

The issue is whether the statute of limitations in 28 U.S.C. § 2462 applies to administrative proceedings for the assessment of civil penalties under section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2).20/ Section 2462 provides as follows:

20/ 15 U.S.C. § 2615(a)(2) provides:

(2)(A) A civil penalty for a violation of section 2614 of this title shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of Title 5. Before issuing such an order, the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order. (Continued on page 12.)

§ 2462. Time for commencing proceedings

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Federal courts "have long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise."[21/] This "derives from the common law principle that immunity from limitations periods is an essential prerogative of sovereignty."[22/] The "doctrine remains viable today

---

20/ Continued from page 11.

(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

(C) The Administrator may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

21/ United States v. City of Palm Beach Gardens, 635 F.2d 337, 339 (5th Cir. 1981) cert. denied 454 U.S. 1081 (1981), and cases cited therein.

22/ Id. at 339.

because it furthers the public policy objective of protecting rights vested in the government for the benefit of all from the inadvertence of the agents upon which the government must necessarily rely."23/

The Supreme Court has pronounced the standard for the proper construction of a statute of limitations. "'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.'"24/

Applying these principles to the issue herein, I conclude that 28 U.S.C. § 2462 does not apply to an administrative proceeding for the assessment of a civil penalty under section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2). This conclusion is supported by the literal language of section 2462 and the legislative history of the provision. It is also consistent with the purposes of TSCA and with any decisional precedent on point.

B. Literal Language of 28 U.S.C. § 2462

The pertinent language of section 2462 says, "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil...penalty...shall not be entertained unless commenced within five years from the date when the claim first accrued...."

23/ Id. at 340.

24/ Badaracco et al. v. Commissioner of Internal Revenue, 464 U.S. 386, 391 (1984) (quoting E.I. du Pont de Nemours Co. v. Davis, 264 U.S. 456, 462 (1924).

The introductory phrase, "[e]xcept as otherwise provided by Act of Congress" compels an examination of the provisions of TSCA to ascertain whether Congress has "otherwise provided" a statute of limitations therein. The parties are in agreement that there is no statute of limitations provision within TSCA[25/] and I so find that TSCA itself prescribes no limit on the time within which either an administrative complaint to impose a civil penalty under section 16(a)(2) or a judicial action to recover such a penalty under section 16(a)(4) must be brought.[26/]

Respondent contends that "inasmuch as the Congress did not include a specific statute of limitations provision in TSCA, Congress thus has not 'otherwise provided' for a statute of limitations, and the five-year period specified in 28 U.S.C. 2462 applies to TSCA administrative civil penalty actions." This interpretation must be rejected. Since Congress has not "otherwise provided" for a statute of limitations, the five-year period in 28 U.S.C. 2462 applies to "an action...or proceeding for the enforcement of any civil...penalty...." To equate an action for enforcement of a penalty with "TSCA administrative civil penalty actions" begs the question.

25/ Complainant's "Motion to Strike Affirmative Defense" (December 29, 1988), at 11; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense" (January 24, 1989) at 6.

26/ United States v. N.O.C., Inc., Slip Op. No. 87-3539 (CSF) (D.N.J. Oct. 14, 1988), 1988 U.S. Dist. Lexis 11526 at 14.

An "action" or "proceeding" which may be commenced "for the enforcement of any civil penalty" under 28 U.S.C. § 2462 is one which seeks to enforce a civil penalty. Proceedings for the enforcement of civil penalties under TSCA are provided for in section 16(a)(4) of the Act.[27/] After a final order by the Administrator of EPA assessing a civil penalty (or after a final judgment in favor of the Administrator where judicial review of the Administrator's order has been sought), an action may be brought by the Attorney General in Federal district court to recover the penalty which was previously assessed. It is to such an action for the enforcement of the civil penalty that 28 U.S.C. § 2462 clearly applies.[28/]

27/ 15 U.S.C. § 2615(a)(4) provides:

If any person fails to pay an assessment of a civil penalty--

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (3), or

(B) after a court in an action brought under paragraph (3) has entered a final judgment in favor of the Administrator,

the Attorney General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 30-day period referred to in paragraph (3) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

28/ United States v. N.O.C., Inc., 1988 U.S. Dist. Lexis 11526 at 14-15. See also United States v. Meyer, 808 F.2d 912, 913 (1st Cir. 1987), (for the applicability of 28 U.S.C. § 2462 to the enforcement of civil penalties imposed under the antiboycott regulations of the Export Administration Act).

No action or proceeding in the district court to recover a civil penalty can be commenced under section 16(a)(4) of TSCA unless and until the penalty has first been assessed in administrative proceedings under section 16(a)(2) of TSCA and section 554 of the Administrative Procedure Act.[29/] As the Court said in Meyer, "a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced....The use of the word 'enforcement' in 28 U.S.C. § 2462 is not without significance; the noun by definition ('compulsion...forcible urging...the compelling of the fulfillment,' Webster's Third New International Dictionary 751 (1981)) presupposes the existence of an actual penalty to be enforced."[30/] Until a civil penalty has been assessed through administrative proceedings under section 16(a)(2) of TSCA, there is no civil penalty to be enforced under section 16(a)(4) of TSCA.

As Judge Vanderheyden said in his recent Order in Tremco [31/] wherein he ruled that 28 U.S.C. § 2462 did not apply to administrative proceedings under section 16(a)(2) of TSCA:

29/ 5 U.S.C. §§ 551 et. seq.

30/ United States v. Meyer, 808 F.2d at 914-915.

31/ In the Matter of Tremco, Inc., Incon Division, Docket No. TSCA-88-H-05 (April 7, 1989) at 3-4.

> An administrative proceeding is not one which enforces a civil fine, penalty, or forfeiture; rather it merely assesses a fine or penalty. While administrative hearings are denominated "enforcement proceedings," they comprise merely the initial stage of a possibly larger enforcement process. For example, where the assessment of the penalty assessed at the administrative level is not paid, the administrative proceeding does not involve any actual enforcement to recovery of the penalty.
>
> . . . .
>
> It is a district court proceeding which compels, or enforces, the payment of the penalty that was assessed at the administrative level. Compelling payment, as opposed to assessing payment, is what characterizes "enforcement."

Since 28 U.S.C. § 2462 literally applies only to an action or proceeding for the enforcement of a civil penalty, it does not, by its specific terms, apply to administrative proceedings for the assessment of such penalties. The "United States is not bound by any limitations period unless Congress explicitly directs otherwise,"32/ and "statutes of limitation sought to bar rights of the government, must receive a strict construction in favor of the government."33/

C. Legislative History of 28 U.S.C. § 2462

Respondent disagrees with the view that 28 U.S.C. § 2462 applies only to an action or proceeding for the enforcement of a civil penalty and does not, by its literal terms, apply to

---

32/ See supra note 21.

33/ See supra note 24.

administrative proceedings for the assessment of such penalties, contending that this is a "strained reading of the relevant statutory language."[34/] Both Respondent and Complainant turn to the legislative history of 28 U.S.C. § 2462 for support of their respective interpretations of that provision.

In construing a statute which arguably is subject to more than one possible interpretation, examination of legislative history is of paramount importance. "The general rule of statutory construction in questions of federal law is to look first to the language of the statute and then to the legislative history if the statute is unclear."[35/]

The earliest form of the present 28 U.S.C. § 2462 statute of limitations appeared in 1799, in an Act to regulate the collection of duties on imports and tonnage, Act of March 2, 1799, Ch. 22, § 89, 1 Stat. 627, 695-696. Section 89 of the Act provided, in pertinent part:

34/ Response to Complainant's Reply to Response to Complainant's First Motion to Strike Affirmative Defense (May 1, 1989) at 16-17.

35/ United States v. Mottolo, 605 F. Supp. 898, 901-902 (Citing Blum v. Stenson, 465 U.S. 886 (1984), Russello v. United States, 464 U.S. 16 (1983).). See also 82 C.J.S. Statutes § 354, p. 745 (1955): "...The motive which led to the making of the statute is one of the most certain means of establishing the true sense," and 82 C.J.S. Statutes § 355, p. 746-748: "In order to determine the legislative intent in case of ambiguity, resort may be had to the history of the statute, and, more specifically, resort may be had to its legislative history or history of the proceedings attending its actual passage through the legislature."

> That all penalties, accruing by any breach of this act, shall be sued for...in the name of the United States of America, in any court competent to try the same; and the trial of any fact, which may be put in issue, shall be within the judicial district in which any such penalty shall have accrued
>
> * * * * * * *
>
> And provided, that no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred.

[emphasis in original]

When the Judicial Code was revised in 1874, the statute of limitations contained therein, U.S. Rev. Stat. § 1047(1874), provided as follows:

> No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued.

Court decisions considering section 1047 in the context of judicial enforcement of federal government agency orders, or actions brought by government agencies before district courts, are few in number and none reached the issue herein. An example is a case in which the Supreme Court held that section 1047 does not govern a reparation action brought under the Interstate Commerce Act of February 4, 1887, 24 Stat. 379, ch. 124. In that case, a railroad company refused to comply with an order of the Interstate Commerce Commision. The individual Complainant who had brought the complaint before the I.C.C. sought to have it

enforced in district court. The defendant railroad company argued that section 1047 barred the proceeding. However, the court declined to apply section 1047 for the reason that the action was not punitive in nature as section 1047 required, but was remedial.36/

In 1911, the section 1047 statute of limitations was recodified as 28 U.S.C. § 791, with no revision. Federal court decisions addressing the issue of whether to apply section 791 in the context of enforcing administrative orders or of adjudicating cases brought by federal government agencies are still not numerous. No decision has been found that held that the general statute of limitations applies to administrative proceedings before a federal government agency, as contrasted with enforcement proceedings in United States district courts. At least one decision mentions the question of whether the statute of limitations applies to administrative proceedings, but does not actually reach it, finding that the district court actions were filed within five years of the acts giving rise to the violations at issue.37/

36/ Meeker v. Lehigh Valley Railroad Company, 236 U.S. 644, 654 (1914). See also Chattanooga Foundry and Pipe Works, 203 U.S. 390 (1906) (anti-trust violation), O'Sullivan v. Felix, 233 U.S. 318 (1914) (civil rights case involving an assault), Brady v. Daly, 175 U.S. 148, 154 (1899) (action to recover damages for copyright infringement), all holding that section 1047 does not apply because the action was not for a penalty or forfeiture, but was remedial in nature.

37/ Lancashire Shipping Co. v. Durning, 98 F.2d 751, 753 (2nd Cir.), cert. denied, 305 U.S. 635 (1938).

In other cases, federal courts have declined to apply section 791, but for reasons unrelated to the case at hand.38/

In other cases involving the applicability of section 791, the issue facing the courts was the application of section 791 to district court proceedings, and not whether section 791 applies to proceedings before an administrative agency.39/ For instance, in Smith v. United States,40/ the court held that section 791 does not apply to the enforcement of a penal judgment, but does apply to the "time...within which prosecutions must be commenced by indictment, information, or suit." The court stated that the "time when the penalty...accrued" language in section 791 refers to the time of the commission of the offense or doing of the act by which the penalty was incurred. However, this was

---

38/ Keen v. Mid-Continent Petroleum Corporation, 58 F. Supp. 915, 919 (N.D. Iowa 1945), holding that § 791 is applicable only where recovery is by way of public punishment, and does not apply to suits under the Fair Labor Standards Act which are for private compensation; and Durning v. McDonnell, 86 F.2d 91, 92-93 (2nd Cir. 1936), cert. denied, 300 U.S. 682 (1937), holding that section 791 does not apply to a district court action on a bond since the action was not upon statutory liability of general agents, but on a promise to pay penalties for which agents should be determined to be liable by the Secretary of Labor.

39/ Some of these cases were cited in United States v. Core Laboratories, 759 F.2d 480,482 (5th Cir. 1985) for the concept that the statute of limitations begins to run on the date of the act giving rise to the violation at issue, which concept forms a major basis for Respondent 3M's argument that section 2462 applies to administrative assessment proceedings. See "Response to Complainant's First motion to Strike Affirmative Defense," pp. 10, 29-31, and "Response to Complainant's Reply," p. 34.

40/ Smith v. United States, 143 F.2d 228, 229 (9th Cir.) cert. denied, 323 U.S. 729 (1944).

a district court action for the recovery of a fine imposed by a district court for criminal violations of the Tariff Act, and did not involve the enforcement of an administrative order of a federal agency.

Section 791 was revised in 1948 to its present form in 28 U.S.C. § 2462. This was two years after the enactment of the Administrative Procedure Act on June 11, 1946. Respondent 3M appears especially impressed with the addition of the words "action" and "proceeding" in the revision, interpreting this language to be an expansion of the statute's scope to include proceedings on an administrative complaint.41/ However, there is no indication in the legislative history of section 2462 or in the Reviser's Notes or in any legislative proceedings accompanying the passage of the statute that any substantive change occurred by the addition of the words "action" and "proceeding." The Reviser's Notes to the 1948 Judicial Code Amendments, which "explain in detail every change made in the text,"42/ comment only very briefly concerning the revision of 28 U.S.C. § 2462, that "[c]hanges were made in phraseology."43/

41/ Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," pp. 7-8.

42/ H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947), reprinted in the U.S. Code Congressional Services' Special Pamphlet of the New Title 28, U.S. Code/Judiciary and Judicial Procedure/With Official Legislative History and Reviser's Notes (1948) ("Special Pamphlet"), at 1699.

43/ Special Pamphlet, Reviser's Notes, Ch. 163, Section 2462, p. 1920.

The Reviser's Notes were prepared by the persons who assisted in drafting the Judicial Code of 1948, and are considered a primary authority concerning the intent of Congress in revising the Code. The Special Pamphlet, which includes the Reviser's Notes, contains the description, "this pamphlet includes the most authoritative and complete legislative history yet published in connection with a Federal law."44/ Moreover, the Supreme Court has described the Reviser's Notes as "obviously authoritative in perceiving the meaning of the Code," basing its decision to extend the doctrine of forum non conveniens to antitrust suits on the 1948 Judicial Code Reviser's Notes.45/ Similarly, the Supreme Court emphasized the importance of the Reviser's Notes in its analysis of legislative history extending the 28 U.S.C. § 1404(a) doctrine of forum non conveniens to suits under the Federal Employer's Liability Act.46/

Aside from the Reviser's Note quoted above, there is no explication of the change in phraseology from section 791 to section 2462, or what specific types of legal proceedings "action, suit or proceeding" encompasses in the context of 28 U.S.C. § 2462, in the legislative history of the Judicial Code of 1948.

44/ Special Pamphlet at i.

45/ United States v. National City Lines, 337 U.S. 79, 81 (1948).

46/ Ex Parte Collett, 337 U.S. 55, 68-71 (1948).

It has been noted by the Fifth Circuit, in the context of another statute which was revised in 1948 with merely "changes in phraseology," that such a modification was made "without affecting any change of substance."47/ It would seem that if the scope of coverage of a particular statute was increased, that would be a substantive change, worthy of an explanation in the Reviser's Notes. For instance, for 28 U.S.C. § 2403 (1948), the Reviser's Notes state that "'action' was added before 'suit or proceeding' in view of Federal Rule of Civil Procedure 2. Since this section applies to all Federal Courts, the word 'suit' was not required to be deleted by such rule."48/ Thus, even where a small but significant change was made, it was explained in some detail.

The changes made in the Judicial Code of 1948 were carefully considered. The Supreme Court noted that the Judicial Code as it was revised in 1948 "was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code.49/ Congressman John F.X. Finn remarked, "[t]his Code is a progressive Code, a wise Code, a flexible Code, and a cautious Code."50/

47/ United States v. INSCO, 496 F.2d 204, 207 (5th Cir. 1974), referring to the revision of 18 U.S.C. § 612.

48/ Special Pamphlet, Reviser's Notes, p. 1920.

49/ Ex Parte Collett, 337 U.S. at 65.

50/ Hearing before Subcommittee No. 1, H.R. Rep. No. 2055, 80th Cong. 1st Sess. (1947), reprinted in Special Pamphlet at 1985.

Administrative proceedings were considered by Congress in enacting the Code, since they were referred to in contexts tangential to the operation of the judiciary in the particular code sections in which mentioned.[51/] Congress even had sought the views of federal agencies in enacting the Judicial Code of 1948.

> As the work of the revision progressed, the advice of Government officials was sought regarding problems affecting particular departments or agencies. It was found advisable to submit the text of proposed sections and prepare inquiries concerning them. The officials in charge of the respective department or agency which might be affected by this revision were kept fully informed. Copies of the several drafts were sent to them from time to time.[52/]

Clearly, Congress must have been aware of the relationship of the 1948 Judicial Code revisions to administrative proceedings, especially in light of the fact that the APA had just recently been enacted in 1946, establishing the quasi-judicial administrative proceedings with rules of procedure that are less traditional than those applying to the federal judiciary.[53/] Yet

---

51/ For example, 28 U.S.C. § 2347(c) allows an appeals court, in an ongoing judicial action, to simultaneously retain jurisdiction over the case and require the administrative agency responsible for the underlying decision to take additional evidence and modify or set aside original findings of fact or order; 28 U.S.C. § 2672 authorizes heads of agencies to settle claims for monetary damages, in accordance with prescribed regulations, without the necessity for a judicial proceeding; and 28 U.S.C. § 2675 provides that a judicial action for the recovery of a claim against the United States for monetary damages for certain injuries is unripe until presented to, and denied by, the agency.

52/ Report No. 308 to accompany H.R. Rep. No. 3214, 80th Cong., 1st Sess. (1947), reprinted in Special Pamphlet at 1695-1696 (1948).

53/ See 5 U.S.C. §§ 554, 556, 557.

there is no suggestion, in the legislative history or in the history of the proceedings attending the passage of section 2462, of any intent by Congress to include proceedings on an administrative complaint within the parameter of section 2462.

While there is some legislative authority of dubious weight for applying section 2462 specifically to administrative proceedings under the Export Administration Act,54/ there is nothing in the legislative history that I have reviewed that would support the conclusion that Congress explicitly intended section 2462 to apply to administrative proceedings in general. In neither the House and Senate Reports nor in the congressional debates and discussions published in the Special Pamphlet, is there any explanation of the revision of section 2462 or its impact on federal government agencies.55/ I must conclude that the changes were only "in phraseology."

D. Purposes of TSCA

Congress enacted TSCA in response to the dangers associated with the use of toxic chemicals. Congress found that human beings and the environment are being exposed each year to a large number of chemical substances and mixtures, some of which

---

54/ S. Rep. No. 363, 89th Cong., 1st Sess. 7, reprinted in 1965 U.S.Code Cong. & Ad. News, 1826, 1832; H.R. Rep. No. 434, 89th Cong., 1st Sess. 5 (1965); see infra, pp. 38-41.

55/ See 1947 U.S.Code Cong. & Ad. News 945-1717; 1948 U.S. Code Cong. & Ad. News 983-2388; Special Pamphlet, pp. 1940-2040.

may present an unreasonable risk of injury to health or the environment. Congress established, as a policy of the United States, the provision of adequate authority for the regulation of chemical substances and mixtures which present an unreasonable risk of injury to health or the environment and adequate authority for action to protect human beings and the environment from those chemical substances and mixtures which are imminent hazards.56/

As one of the two sponsors of the bill (S.3149) said during Senate consideration:

> "S.3149 will close major gaps in the law that leave the public inadequately protected against the unregulated introduction of hazardous chemicals into the environment. S.3149 will assure that chemicals will receive careful premarket scrutiny before they are manufactured or distributed to the public. This provision will end the present situation where chemicals can be marketed without notification of any governmental body and without any requirement that they be tested for safety. Thus, this legislation will no longer allow the public or the environment to be used as guinea pigs in order to determine the safety of the chemicals and products.
>
> * * * * * * *
>
> In order to provide EPA adequate regulatory authority, the Toxic Substances Control Act will provide a mechanism to insure that that information with respect to health and environmental effects of chemicals can be collected from manufacturers and processors of chemical substances prior to manufacture. The bill contains the following important provisions:

56/ TSCA Section 2, 15 U.S.C. § 2602.

> First, manufacturers of new chemical substances must give notification to EPA 90 days in advance of first manufacture and, if required by EPA, include test data along with such notification [Sec. 5]."57/

The second sponsor voiced similar views when he said that the "premarket notification for new chemical substances...is [the] provision which offers the greatest potential for discovering the threats from chemical substances at a very early date and providing a sufficient data base to take appropriate early action....In fact, this is probably the most important provision of the act, for it will enable us to limit chemical threats before they become manifest, not after."58/

On the House side, the Committee reporting out the bill said in its report where it addressed the purpose of the legislation that:

> "The Committee bill takes a major step forward in providing urgently needed authority to protect health and the environment from dangerous chemicals....For example, through its testing and premarket notification provisions, the bill provides for the evaluation of the hazard-causing potential of new chemicals before commercial production begins. Thus, in addition

---

57/ Senate Consideration of S.3149 [Excerpt from the Congressional Record, Mar. 26, 1976, Senate, pp. S4397-S4432] reprinted in Legislative History of the Toxic Substances Control Act...Prepared by the...Library of Congress for the House Comm. on Interstate and Foreign Commerce, 207-208 (Comm. Print 1976).

58/ Id. at 216.

to the authority to take action against a chemically-caused harm after its occurrence, there will be authority to prevent such harm from occurring."[59/]

Finally, the Conference Report[60/] stated:

"Section 5 sets out the notification requirements with which manufacturers of new chemical substances and manufacturers and processors of existing substances for significant new uses must comply. The requirements are intended to provide the Administrator with an opportunity to review and evaluate information with respect to the substance to determine if manufacture, processing, distribution in commerce, use or disposal should be limited, delayed or prohibited because data is insufficient to evaluate the health and environmental effects or because the substance or the new use presents or will present an unreasonable risk of injury to health or the environment.

The provisions of the section reflect the conferees recognition that the most desirable time to determine the health and environmental effects of a substance, and to take action to protect against any potential adverse effects, occurs before commercial production begins. Not only is human and environmental harm avoided or alleviated, but the cost of any regulatory action in terms of loss of jobs and capital investment is minimized. For these reasons the conferees have given the Administrator broad authority to act during the notification period.

Any person who intends to manufacture a new chemical substance or manufacture or process a chemical substance for a use which the Adminis-

---

59/ H.R. Rep. No. 1341, 94th Cong., 2d Sess. 1, reprinted in Legislative History of the Toxic Substances Control Act... Prepared by the...Library of Congress for the House Comm. on Interstate and Foreign Commerce, 409 (Comm. Print 1976).

60/ H.R. Rep. No. 94-1679, 94th Cong., 2d Sess. 65-66, reprinted in Legislative History of the Toxic Substances Control Act...Prepared by the...Library of Congress for the House Comm. on Interstate and Foreign Commerce, 678-679 (Comm. Print 1976).

> trator, by rule, has determined is a significant new use, must give the Administrator at least 90 days notice before beginning such manufacture or processing. The 90-day period shall begin upon receipt of the notice by the Administrator or the Administrator's duly designated representative."

It is clear from the legislative history that one of the most important and significant purposes, if not the most important and significant purpose, of TSCA was to ensure that EPA would receive advance notice before a new chemical substance or mixture was introduced into the environment in the United States. Congress intended, through the PMN requirement, to increase the likelihood that any unreasonable risk of injury to health or the environment which might result from the introduction of a new chemical substance or mixture would be brought to the attention of EPA in a timely manner prior to its introduction so that EPA could act to protect human beings and the environment from any risks presented.

Respondent contends that 28 U.S.C. § 2462 applies to TSCA Section 16(a)(2) administrative proceedings and that the limitation period begins to run ("the claim first accrues") on the date of the act which gives rise to the violation (and to the attendant liability) and not on the date the government becomes aware of the violation.

In analyzing the relationship between TSCA and the general statute of limitations in 28 U.S.C. § 2462, I am guided not only by the admonition of the Supreme Court that statutes of limitation sought to be applied against the government must be strictly con-

strued in favor of the government, but also by its admonition that statutes protecting the public health and safety are to be construed liberally.61/

There is no question that Congress could make a policy determination that the value of a statute of limitations of five years (or of some other period, greater or lesser) outweighs the value of TSCA, the purposes it was intended to achieve and the litigation of administrative complaints thereunder. In other words, Congress could make a legislative judgment that "the right to be free of stale claims in time comes to prevail over the right to prosecute them"62/ and prescribe a limitations period for the filing and litigation of administrative complaints under section 16(a)(2). However, there is no provision in TSCA itself nor is there any explicit or implicit indication in the legislative history of TSCA to demonstrate that Congress has made a policy determination that the purposes of TSCA are, at some point in time, outweighed by the desirability of a statutory limitations period. I must, therefore, conclude that there is nothing in the legislative history of TSCA to support an interpretation and application of 28 U.S.C. § 2462 that goes beyond the literal language of that section.

61/ Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

62/ Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944).

Moreover, under Respondent's suggested interpretation and application of 28 U.S.C. § 2462 to administrative civil penalty proceedings brought under section 16(a)(2) of TSCA, the goals of the PMN requirement would be frustrated since a manufacturer could violate the reporting requirement without fear of punishment if it succeeded in concealing its failure to file a PMN for five years.63/ Such a result would defeat the purposes of TSCA. I reject such a result.

E. Judicial and Administrative Precedent

1. Judicial Precedent

There are no Federal court decisions directly on point. To support their respective positions, the parties have cited several decisions which address the applicability of 28 U.S.C. § 2462 to the enforcement of previously assessed administrative civil penalties. The decisions so cited include those in N.O.C.,64/ Old Ben,65/ Meyer 66/ and Core Labs.67/

63/ See United States v. Advance Machine Company, 547 F. Supp. 1085, 1090 (D. Minn. 1982).

64/ See supra note 26.

65/ United States v. Old Ben Coal Co., 676 F.2d 259 (7th Cir. 1982).

66/ See supra note 28.

67/ United States v. Core Laboratories, Inc., 759 F.2d 480 (5th Cir. 1985).

In the only Federal court decision to address the question of whether 28 U.S.C. § 2462 applies to any proceeding under TSCA, the Court, in N.O.C.,[68] found that the general statute of limitations in 28 U.S.C. § 2462 applies to the adjudication of an enforcement action for an assessed civil penalty under Section 16(a)(4) of TSCA, 15 U.S.C. § 2615(a)(4).[69] The Court in N.O.C. held that the section 2462 statute of limitations began to run on the enforcement of the civil penalty on the date of a final judgment by a court of appeals affirming "the agency's attribution of liability" and not on the date of the violations forming the basis for the determination of liability and assessment of a civil penalty therefor.[70]

---

[68] United States v. N.O.C. Inc., 1988 U.S. Dist. Lexis 11526 at 14-15.

[69] Section 16(a)(4) of TSCA provides:

"If any person fails to pay an assessment of a civil penalty--

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (3), or

(B) after a court in an action brought under paragraph (3) has entered a final judgment in favor of the Administrator,

the Attorney General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 30-day period referred to in paragraph (3) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review."

[70] United States v. N.O.C. Inc., 1988 U.S. Dist. Lexis 11526 at 29.

The court in N.O.C. expressly disclaimed addressing "whether the EPA's assessment proceeding was barred by section 2462, for that examination would touch the validity of the assessment, and is beyond the court's jurisdiction."71/ However, in obiter dicta, the Court stated that "section 2462 must be applied separately to both the assessment and the enforcement of TOSCA penalties."72/ The Court noted that this conclusion "is countenanced by the language of section 2462 itself. The statute applies to both 'proceedings' and 'actions' to enforce civil penalties....Surely, Congress did not employ two separate terms to describe a single object; Congress intended that section 2462 apply separately to discrete procedures directed at the collection of civil penalties. The court's decision merely recognizes that the assessment of a TOSCA penalty is a 'proceeding' within section 2462, while the instant enforcement action is an 'action,' and that both merit a distinct application of the time bar."73/

The Respondent urges me to adopt this reasoning as to applicability of Section 2462 to administrative proceedings for the assessment of civil penalties under Section 16(a)(2) of TSCA. With all due respect to the court in N.O.C., I decline to do so for several reasons. First, this reasoning in N.O.C. is obiter dicta and addresses an issue that was not before the court.

71/ Id. at 29, n. 11.

72/ Id. at 23.

73/ Id. at 25-26.

Second, the court's reasoning presumes to rely upon Congressional intent without a single citation to any legislative history pertaining either to section 2462 or to TSCA. The court's statement of Congressional intent is purely conclusionary and is without any foundation in the legislative history of section 2462.74/

Finally, the court's emphasis upon the distinction which it perceives between a "proceeding" and an "action" is undermined by the court itself in its own decision where it uses the terms interchangeably. Thus, the Court states "that Congress intended TOSCA to create two separate actions....Hence the first action, which is to determine the rights and liabilities of a defendant, is triggered by TOSCA violations. The second is triggered by the court of appeals' affirmance of the defendant's liability, which confers a right to seek enforcement of this judgment on the United States."75/ And "such proceedings comprise distinct causes of action."76/ Later, "TOSCA creates two distinct causes of action. Naturally, an administrative assessment action is not commenced under TOSCA merely to declare liability; such actions are necessary predicate to judicial enforcement of TOSCA claims....Each TOSCA proceeding is triggered by separate events...."77/ These passages from the court's decision demon-

---

74/ See supra pp. 17-26.

75/ Id. at 5 (emphasis supplied).

76/ Id. at 6, n. 3 (emphasis supplied).

77/ Id. at 23 (emphasis supplied).

strate the futility in the court's attempt to attribute separate, discrete and distinctly different meanings to the two terms, attaching to one administrative cases under section 16(a)(2) and to the other judicial cases under section 16(a)(4).

The holding in N.O.C. that the limitations period in 28 U.S.C. § 2462 begins to run on the enforcement of the civil penalty when the administrative order becomes final is consistent with a decision of the Seventh Circuit under the Federal Coal Mine Health and Safety Act. In Old Ben Coal Company,78/ ("Old Ben") the Court, in "one of a matched set of alternate holdings,"79/ stated:

> "A statute of limitations cannot begin to run until there is a right to bring an action....The statute of limitations at 28 U.S.C. § 2462 does not begin to run until 'the date when the claim first accrued.' In the context of the Coal Act the district court claim accrues only after the adminis-

---

78/ United States v. Old Ben Coal Co., 676 F.2d at 261.

79/ United States v. Meyer, 808 F.2d at 918, n.5 where the court said:

> "We find no merit in the appellee's suggestion that this aspect of Old Ben amounts to mere dicta. To be sure, the Seventh Circuit's interpretation of 28 U.S.C. § 2462 was one of a matched set of alternate holdings--the other being that § 2462 is inapplicable to Coal Act cases. Old Ben, 676 F.2d at 261. Were the independent legal sufficiency of one holding enough to transform a second holding into dictum, however (under a kind of 'but for' analysis), then both 'holdings' could arguably be read as dicta and thereby avoided altogether. Such sophistry deserves no further response."

> trative proceeding has ended, a penalty has been assessed, and the violator has failed to pay the penalty....Therefore, if 28 U.S.C. § 2462 applies to the district court proceeding the limitations period begins to run when the administrative order becomes final."

Whether the statute of limitations in 28 U.S.C. § 2462 begins to run on the initiation of administrative proceedings when the violation giving rise to the penalty occurs or whether it applies to initiation of the administrative proceeding at all was not in issue in Old Ben and was not addressed by the court.

The holding in N.O.C. that the limitations period in 28 U.S.C. § 2462 begins to run on the enforcement of the civil penalty when the administrative order becomes final is also consistent with a decision of the First Circuit under the Export Administration Act's (EAA) antiboycott regulations. In Meyer,[80/] the Court held that under the EAA final assessment of an administrative penalty is a statutory prerequisite to the bringing of an action judicially to enforce such penalty, and consequently, the five-year statute of limitations for enforcement of civil penalties in 28 U.S.C. § 2462 is triggered on the date the administrative proceeding becomes final and not on the date the predicate violation occurs.

The issue of whether 28 U.S.C. § 2462, as applied to the EAA, requires that an administrative action aimed at im-

---

80/ United States v. Meyer, 808 F.2d at 913.

posing a civil penalty be brought within five years of the alleged violation was not before the Court in Meyer. The Court noted that both parties conceded that 28 U.S.C. § 2462 applied to the administrative proceedings which preceded the judicial proceedings to enforce the penalty. The Court had a mixed reaction to the concession. It described "the analytical underpinnings of this interpretation...[as] somewhat wobbly" but said that "the view is eminently reasonable as a matter of policy and is supported by two distinct pronouncements of subsequent legislative committees that chose to comment on the matter."81/ However, the Court concluded that it need not be further detained by the question because the administrative proceedings had been initiated against Meyer well within five years of the alleged violation.

Clearly, the views expressed by the Meyer court, like the views expressed by the N.O.C. court, cannot be considered controlling in the present case. First, whether § 2462 applied to the antecedent administrative proceeding was not before the court in Meyer and hence, the Court's views on the issue are merely obiter dicta. Second, the Court's observation that the parties' concession that 28 U.S.C. § 2462 applied to the administrative proceedings under EAA "is eminently reasonable as a matter of policy," is more appropriately a matter for the legislative branch of government to determine. It is for Congress to make the policy judgment as to whether a limitations period should

---

81/ Id. at 914.

apply to civil penalty administrative proceedings and Congress has made no such policy judgment with respect to TSCA concurrent with, or subsequent to, its enactment. The court's "policy" views here amount to little more than editorializing. Finally, the "two distinct pronouncements of subsequent legislative committees" to which the Meyer court refers are pronouncements concerning the EAA, not TSCA, and amounted, in the words of the court itself, "to little more than an opinion registered by the committee on how it believed that § 2462 would be interpreted by the courts in the context of EAA enforcement actions--a 'legislative dictum,' to coin a phrase. Realistically, such speculation cannot carry much cargo."82/

The "two distinct pronouncements of subsequent legislative committees" refers, in part, to the legislative history of the 1965 amendments by which civil penalty provisions were added to the EAA. The Senate report stated:

> "Under that section [28 U.S.C. § 2462] the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings."83/

82/ Id. at 915.

83/ S. Rep. No. 363, 89th Cong., 1st Sess. 7, reprinted in 1965 U.S. Code Cong. & Adm. News 1826, 1832; see H.R. Rep. No. 434, 89th Cong., 1st Sess. 5 (1965) for substantially the same statement.

In the Core [84/] decision, the Fifth Circuit had placed a great deal of reliance upon this statement from the legislative history of the EAA in reaching its conclusion (and minority view) that, in a judicial proceeding to enforce an administrative civil penalty, the limitations period in § 2462 commenced on the date of the underlying violation(s) rather than on the date of the final administrative order assessing the penalty.

No such reliance upon this passage from the committee report is called for here. As the Meyer court noted, "as an interpretation of the effect of 28 U.S.C. § 2462 on EAA enforcement actions, the committee report is a rather slender reed....As the Supreme Court has admonished, 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"[85/] The Meyer court continued: "Under ordinary circumstances, 'post hoc statements of a congressional committee are not entitled to much weight'....Such maxims apply with particular force when a congressional committee offers what amounts to an advisory opinion of a purely legal nature--an opinion on the meaning, intendment, and applicability of a gene-

---

84/ United States v. Core Laboratories, Inc., 759 F.2d at 482. As was true with N.O.C., Old Ben and Meyer, the issue of the applicability of § 2462 to the antecedent administrative proceedings was not before the court in Core.

85/ United States v. Meyer, 808 F.2d at 915, quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980).

ral statute enacted many years before." These maxims apply with even greater force here where the issue does not arise under the EAA but under TSCA. If these legislative pronouncements which were made during the process of amending the EAA provided only a slender reed in an EAA proceeding, the reed has given way altogether here in the context of a TSCA proceeding.86/

In summary, in none of these cases were the Federal courts presented with the question of whether 28 U.S.C. § 2462 applies to an administrative action aimed at imposing a civil penalty under TSCA or under any other statute, for that matter. To the extent that the courts addressed the question, their views must be rejected for the reasons given.

In each of these cases, the courts addressed the question of when the limitations period in 28 U.S.C. § 2462 began to run on the judicial enforcement of previously assessed administrative civil penalties. The majority view is that final assessment of an administrative penalty is a statutory prerequisite to bringing a judicial action for enforcement of the penalty. Hence, the limitations period in 28 U.S.C. § 2462 begins to run on the

---

86/ The other legislative pronouncement to which reference is made in Meyer was a 1985 Conference Report (filed after the decision in Core) regarding additional amendments to the EAA where the conferees reiterated Congress' intention that "the Commerce Department must bring its administrative case within 5 years from the date the violation occurred." H.R. Rep. No. 180, 99th Cong., 1st Sess., reprinted in 131 Cong. Rec. H4905, H4923 (daily ed. June 26, 1985). As the Meyer court said, "as a matter of juris prudence this committee language is entitled to no weight (for the same reasons as we have stated in the text)...." United States v. Meyer, 808 F.2d at 916, n. 3.

enforcement of the civil penalty on the date the administrative proceeding becomes final.

This conclusion is clearly supported by the Supreme Court's decision in Crown Coat.[87] In that case, a private party brought suit to adjust a contract with the government. The right to bring the suit was subject to the exhaustion of administrative procedures. The statute of limitations which applied stated that the civil action "shall be barred unless the complaint is filed within six years after the right of action first accrues...."[88] The Court said:

> "the 'right of action' of which § 2401(a) speaks is not the right to administrative action but the right to file a civil action in the courts against the United States.... [T]he...claim was subject only to administrative, not judicial, determination in the first instance, with the right to resort to the courts only upon the making of that administrative determination.
>
> * * * * * * *
>
> It is only then [upon the making of the final administrative determination] that his claim or right to bring a civil action against the United States matures...."[89]

Hence, the "right of action" referred to in § 2401(a), like the "action, suit or proceeding for the enforcement of any civil...penalty" in § 2462, refers not to the right to bring an

---

[87] Crown Coat Front Co. v. United States, 386 U.S. 503 (1967).

[88] 28 U.S.C. § 2401(a).

[89] Crown Coat Front Co. v. United States, 386 U.S. at 511, 514.

administrative action, but to the right to bring a judicial action after the administrative proceedings have been completed.[90/] The decision in Crown Coat lends further weight to the conlcusion reached herein that 28 U.S.C. § 2462 applies not to administrative proceedings aimed at imposing civil penalties but to judicial actions to enforce those penalties once imposed.

2. Administrative Precedent

In support of their respective positions, the parties cite several orders by Administrative Law Judges in other TSCA proceedings. Respondent relies principally upon the conclusion of Administrative Law Judge Thomas B. Yost in his Order on Motion to Dismiss captioned In Re Commonwealth Edison Company, No. TSCA-V-C-133 (December 1, 1983) wherein Judge Yost held that the statute of limitations in 28 U.S.C. § 2462 applied to an administrative action for the assessment of a civil penalty under Section 16(a)(2) of TSCA. Certainly, Judge Yost's determination is entitled to my careful consideration.

However, Administrative Law Judge Frank B. Vanderheyden has reached a contrary result in Tremco.[91/] Subsequently,

---

90/ See United States v. Meyer, 808 F.2d at 916-918. As the court in Meyer declared: "We find the Crown Coat analogy to be compelling in interpreting the parallel precincts of 28 U.S.C. § 2462 and its application to the EAA...."

91/ See supra, p. 16-17.

Administrative Law Judge Marvin E. Jones relied upon Judge Vanderheyden's ruling in ENSCO [92] wherein Judge Jones decided that 28 U.S.C. § 2462 did not bar a TSCA administrative complaint.

Chief Administrative Law Judge Harwood had touched upon the issue in his earlier ruling in Union Carbide where he said:

> "The question immediately raised is the validity of Union Carbide's assumption that 28 U.S.C. § 2462 applies to the institution of proceeding on an administrative complaint before an agency, as distinguished from a court proceeding to assess a penalty or to enforce an administratively imposed penalty. Since Title 28 applies to proceedings in the United States courts, it would seem that it would not."[93]

However, Judge Harwood proceeded to assume, for purposes of argument in Union Carbide, that 28 U.S.C. § 2462 applied to administrative proceedings and concluded that "it still would not operate to bar this proceeding."

Like Judge Yost's view in Commonwealth Edison, the view espoused in these orders by Judges Harwood, Vanderheyden and Jones, and especially the supporting analysis contained in Judge

---

92/ "Order Denying Respondent's and Complainant's Motions for Discovery and Striking Affirmative Defenses," In the Matter of: Energy Systems Company (ENSCO), Inc., TSCA Docket No. VI-408C (June 16, 1989).

93/ "Memorandum and Order" in In the Matter of Union Carbide, Docket No. TSCA-85-H-02 (October 3, 1985), at 6.

Vanderheyden's exposition on the question, are entitled to my careful consideration. However, I am not bound to adopt either the majority view or Judge Yost's view. After careful analysis, I have reached the same conclusion as the majority of Administrative Law Judges who have considered the question.

F. Summary

I conclude that the statute of limitations in 28 U.S.C. § 2462 does not apply to administrative actions for the assessment of civil penalties brought under Section 16(a)(2) of TSCA. This conclusion is based upon the literal language of 28 U.S.C. § 2462 and its legislative history, the provisions of TSCA, its purposes and legislative history and relevant judicial and administrative precedent.

However, even if one assumes, for the purposes of argument, that 28 U.S.C. § 2462 does apply to administrative proceedings for the assessment of civil penalties brought under Section 16(a)(2) of TSCA, it would not operate to bar those alleged violations which first occurred more than five years prior to EPA's issuance of the complaint in this matter.

Counts I and III of the complaint allege that Respondent has violated, inter alia, Sections 15(1)(B) and 15(3)(B) of TSCA. Counts II and IV of the complaint allege that Respondent has violated, inter alia, Section 15(3)(B) of TSCA. Section 16(a)(1) of TSCA provides, in part, that "[a]ny person who violates a provision of [Section 15]...shall be liable....Each day such a viola-

tion continues shall, for purposes of this subsection, constitute a separate violation of [Section 15]. Therefore, I must conclude that each day Respondent failed to comply with any requirement prescribed by Section 15(1)(B) or failed to submit notices or other information as required by TSCA or a rule thereunder in violation of Section 15(3)(B), Respondent committed a separate violation of Section 15.94/ For that reason, 28 U.S.C. § 2462 would not operate to bar those alleged violations which first occurred more than five years prior to EPA's issuance of the complaint.

Having concluded that § 2462 does not apply (or even if it does, it does not operate to bar this proceeding), Complainant is entitled, pursuant to 40 C.F.R. § 22.20(a), to a judgment on the issue of Respondent's liability for all violations alleged in the amended complaint since Respondent has conceded that "there are no material facts at issue with respect to 3M's alleged liability."95/

94/ See Chief Judge Harwood's "Memorandum and Order" In the Matter of Union Carbide Corporation, Docket No. TSCA-85-H-02 (October 3, 1985) at 7.

95/ See supra, p. 10. Having determined that administrative proceedings brought under Section 16(a)(2) are not subject to 28 U.S.C. § 2462 (or even if they are, § 2462 does not operate to bar this proceeding because of the provision in Section 16(a)(1)), it is unnecessary to pass upon Complainant's contention that if 28 U.S.C. § 2462 applies, the statute of limitations therein did not begin to run until the government became aware of the facts establishing the violations herein (the "equitable tolling" doctrine).

VII. Findings of Fact and/or Conlusions of Law

Based upon the complaint, as amended, the second amended answer, and the motions, replies and responses thereto, and in view of Respondent's concessions as to the absence of any material factual issues and as to its liability,[96/] I make the following findings of fact and/or conclusions of law:

As to Count I:

1. On (CBI deleted), Respondent voluntarily provided EPA with written records indicating that Respondent had imported a new chemical substance, (CBI deleted), hereinafter designated as Chemical A. Amended Complaint, p. 2; Second Amended Answer, p. 2.

2. An examination of Respondent's submitted information indicated that beginning on (CBI deleted), and continuing to (CBI deleted), Respondent imported Chemical A. Amended Complaint, p. 2; Second Amended Answer, p. 2.

3. During the period between (CBI deleted), and (CBI deleted), the chemical substance, Chemical A, did not appear on the list of chemical substances maintained by the Administrator pursuant to 15 U.S.C. § 2607. Amended Complaint, p. 2; Certified Statements of Director of IMD of OTS, dated Sept. 23, 1986 and October 21, 1986.

4. Chemical A was imported for use in the United States. Amended Complaint, p. 2; Second Amended Answer, p. 2.

96/ See supra, p. 10.

5. Respondent failed to submit a premanufacture notification notice to the Administrator of EPA at least 90 days before the importation of Chemical A. However, on (CBI deleted), Respondent submitted to EPA a (CBI deleted) for Chemical A. Amended Complaint, p. 3; Second Amended Answer, pp. 2-3.

6. Section 5(a)(1) of TSCA, 15 U.S.C. § 2604(a)(1), provides that no person may manufacture a chemical substance which does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing such substance.

7. Section 3(7) of TSCA, 15 U.S.C. § 2602, provides that the "term 'manufacture' means to import into the customs territory of the United States..., produce, or manufacture."

8. Section 15(1)(B) of TSCA, 15 U.S.C. § 2614(1)(B), provides that it is unlawful for any person to fail to comply with any requirement prescribed by Section 5. Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), provides that it is unlawful for any person to fail to submit information required by the Act.

9. The importation of Chemical A, on or after August 30, 1980, by Respondent was in violation of Sections 5(a)(1), 15(1)(B) and 15(3)(B) of TSCA in that Respondent failed to submit a premanufacture notification notice to the Administrator of EPA at least 90 days before the importation of the Chemical A, as required. Amended Complaint, p. 3; Second Amended Answer, p.3; Order Granting Motion to Amend Complaint;

Motion to Amend Complaint, p. 3; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

As to Count II:

1. On (CBI deleted), Respondent voluntarily provided EPA with written records indicating that Respondent had imported a new chemical substance, (CBI deleted), Chemical A. Amended Compliant, p. 4; Second Amended Answer, p. 3.

2. An examination of Respondent's submitted information indicated that beginning on (CBI deleted), and continuing to (CBI deleted), Respondent imported Chemical A. A written statement was filed with the U.S. Customs Service by the import broker acting on behalf of Respondent certifying that Chemical A was not being offered for entry in violation of TSCA. Amended Complaint, p. 4; Second Amended Answer, p. 4; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

3. Respondent failed to submit a premanufacture notification notice to the Administrator of EPA of its intention to import Chemical A at least 90 days before its importation. However, on (CBI deleted), Respondent submitted to EPA a (CBI deleted) for Chemical A. Amended Complaint, p. 4; Second Amended Answer, pp. 4-5.

4. The written statements filed with the U.S. Customs Service at the port of entry did not constitute an accurate or

proper certification as to compliance requirements for Chemical A. Amended Complaint, p. 4; Second Amended Answer, p. 4; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

5. Section 5(a)(1) of TSCA, 15 U.S.C. § 2604(a)(1), provides that no person may manufacture a chemical substance which does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing such substance.

6. Section 3(7) of TSCA, 15 U.S.C. § 2602, provides that the "term 'manufacture' means to import into the customs territory of the United States..., produce or manufacture."

7. Section 13(b) of TSCA, 15 U.S.C. § 2612(b), requires the Secretary of the Treasury to issue rules for the administration of Section 13(a) which provides for the entry of chemical substances into the customs territory of the United States. The Customs rule at 19 C.F.R. Part 12, §§ 12.118 through 12.127, issued under § 13(b) provides that the importer of a chemical substance shall certify to the district director at the port of entry that the chemical substance being offered for entry is not in violation of TSCA or any applicable rule thereunder.

8. Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), provides that it is unlawful to fail to submit information as required by this Act or rule thereunder.

9. The importation of Chemical A without a proper or accurate

certification having been filed with the U.S. Customs Service and without the submission of a premanufacture notification notice at least 90 days before such importation was in violation of Section 13(b) and Section 15(3)(B) of TSCA in that Chemical A was offered for entry in violation of Section 5(a)(1) and in violation of the Customs rule issued under Section 13(b). Amended Complaint, p. 5; Second Amended Answer, pp. 4-5; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

As to Count III:

1. On (CBI deleted), Respondent voluntarily provided EPA with written records indicating that Respondent had imported a new chemical substance, (CBI deleted), hereinafter designated as Chemical B. Amended Complaint, p. 6; Second Amended Answer, p. 5.

2. An examination of Respondent's submitted information indicated that beginning on (CBI deleted) and continuing to (CBI deleted), Respondent imported Chemical B on (CBI deleted) different days. The total importation during this period was (CBI deleted). Amended Complaint, p. 6; Second Amended Answer, p. 5.

3. During the period between (CBI deleted) and (CBI deleted), the chemical substance, Chemical B, did not appear on the list of chemical substances maintained by the Administrator pursuant to 15 U.S.C. § 2607. Amended Complaint, p. 6;

Certified Statements of Director of IMD of OTS, dated Sept. 23, 1986 and October 21, 1986.

4. Chemical B was imported for use in the United States. Amended Complaint, p. 6; Second Amended Answer, p. 5.

5. Respondent failed to submit a premanufacture notification notice to the Administrator of EPA at least 90 days before the importation of Chemical B. However, on (CBI deleted), Respondent submitted to EPA a (CBI deleted) for Chemical A. Amended Complaint, p. 7; Second Amended Answer, pp. 5-6.

6. Section 5(a)(1) of TSCA, 15 U.S.C. § 2604(a)(1), provides that no person may manufacture a chemical substance which does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing such substance.

7. Section 3(7) of TSCA, 15 U.S.C. § 2602, provides that the "term 'manufacture' means to import into the customs territory of the United States..., produce, or manufacture."

8. Section 15(1)(B) of TSCA, 15 U.S.C. § 2614(1)(B), provides that it is unlawful for any person to fail to comply with any requirement prescribed by Section 5. Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), provides that it is unlawful for any person to fail to submit information required by the Act.

9. The importation of Chemical B by Respondent was in violation of Sections 5(a)(1), 15(1)(B), and 15(3)(B) of TSCA in that Respondent failed to submit a premanufacture notifica-

tion notice to the Administrator of EPA at least 90 days before the importation of Chemical A as required. Amended Complaint, p. 7; Second Amended Answer, p. 6; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

As to Count IV:

1. On (CBI deleted), Respondent voluntarily provided EPA with written records indicating that Respondent had imported a new chemical substance, (CBI deleted), Chemical B. Amended Complaint, p. 8; Second Amended Answer, p. 6.

2. An examination of Respondent's submitted information indicated that beginning on (CBI deleted) and continuing to (CBI deleted), Respondent imported Chemical B on (CBI deleted) different days. A written statement was filed with the U.S. Customs Service by the import broker acting on behalf of Respondent certifying that Chemical B was not being offered for entry in violation of TSCA. Amended Complaint, p. 8; Second Amended Answer, p. 6; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

3. Respondent failed to submit a premanufacture notification notice to the Administrator of EPA of its intention to import Chemical B at least 90 days before its importation. However, on (CBI deleted), Respondent submitted to EPA a (CBI deleted) for Chemical B. Amended Complaint, p. 8;

Second Amended Answer, p. 7.

4. The written statements filed with the U.S. Customs Service at the port of entry did not constitute an accurate or proper certification as to compliance requirements for Chemical B. Amended Complaint, p. 8; Second Amended Answer, p. 7; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

5. Section 5(a)(1) of TSCA, 15 U.S.C. § 2604(a)(1), provides that no person may manufacture (import) a chemical substance which does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing (importing) such substance.

6. Section 3(7) of TSCA, 15 U.S.C. § 2602, provides that the "term 'manufacture' means to import into the customs territory of the United States..., produce or manufacture."

7. Section 13(b) of TSCA, 15 U.S.C. § 2612(b), requires the Secretary of the Treasury to issue rules for the administration of Section 13(a) which provides for the entry of chemical substances into the customs territory of the United States. The Customs rule at 19 C.F.R. Part 12, §§ 12.118 through 12.127, issued under § 13(b) provides that the importer of a chemical substance shall certify to the district director at the port of entry that the chemical substance being offered for entry is not in violation of TSCA or any applicable rule thereunder.

8. Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), provides that it is unlawful to fail to submit information as required by this Act or rule thereunder.

9. The importation of Chemical B without a proper or accurate certification having been filed with the U.S. Customs Service and without the submission of a premanufacture notification notice at least 90 days before such importation was in violation of Section 13(b) and Section 15(3)(B) of TSCA in that Chemical B was offered for entry in violation of Section 5(a)(1) and in violation of the customs rule issued under Section 13(b). Amended Complaint, p. 5; Second Amended Answer, pp. 4-5; Respondent's "Response to Complainant's First Motion to Strike Affirmative Defense," p. 6.

VIII. Conclusion

I conclude that no genuine issue of material fact exists as to the question of liability and that Complainant is entitled to judgment as a matter of law. I find that Respondent has violated Section 5(a)(1), Section 13(b) (and rules promulgated thereunder) and Section 15(1)(B) and Section 15(3)(B) of TSCA as variously alleged in Counts I, II, III and IV of the amended complaint. Consequently, Complainant's motion for partial accelerated deci-

sion should be, and it is hereby, GRANTED.[97]

Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that the issue of the amount of the civil penalties which appropriately should be assessed for the violations found herein remains controverted.

Complainant has filed a "Second Motion to Strike Affirmative Defenses" directed at Respondent's defenses that the proposed civil penalties were so unreasonable and excessive as to violate the due process, equal protection and excessive fines provisions of the United States Constitution.[98] Respondent objects to my granting the motion, contending that "if the penalties proposed by Complainant were to be assessed on 3M, they would be constitutionally infirm"[99] and that the motion must be denied because the questions of law relating to these defenses are unclear and in dispute.[100]

---

[97] An appeal from this interlocutory order "shall lie only if the Presiding Officer..., upon motion of a party, certifies such orders or rulings to the Administrator on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal." 40 C.F.R. § 22.29(a).

[98] See supra at 4.

[99] Respondent's "Surreply to Complainant's Reply to 3M's Response to Complainant's Second Motion to Strike Affirmative Defenses," (May 9, 1989) at 12.

[100] Respondent's "Response to Complainant's Second Motion to Strike Affirmative Defenses" (January 23, 1989) at 3.

As previously noted, motions to strike are not viewed favorably and are infrequently granted.[101] The general policy is against denying a party the opportunity to support his contention in more depth at trial.[102] If there are either questions of fact, mixed questions of law and fact, or disputed questions of law pertaining to the defense, the motion must be denied.[103] For the movant to succeed, the Court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed.[104] A motion to strike is ordinarily granted only where the language of the pleading at issue has no relation to the controversy and is clearly prejudicial to the movant. A motion to strike is not the proper device for placing the actual merits of the party's pleadings in issue.[105] I find that Complainant's "Second Motion to Strike Affirmative Defenses" fails to meet the necessary tests, and it is hereby, DENIED.

101/ See supra, at 6-7.

102/ Wohl v. Blair, 50 F.R.D. 89, 91 (S.D.N.Y. 1970).

103/ Carter-Wallace, 47 F.R.D. at 368; May Dept. Stores, 435 F. Supp. at 855.

104/ Carter-Wallace, 47 F.R.D. at 368; Lunsford, 418 F. Supp. at 1051.

105/ Zappala, 683 F. Supp. at 131.

The parties are directed to confer as to the amount of civil penalties which should be assessed for each of the violations found and report the results of their attempt to reach an agreement thereon. The report should be submitted to the Presiding Officer thirty (30) days after this order is filed. If the parties have been unable to agree upon the total penalty amount to be assessed herein, the hearing requested by the Respondent shall be scheduled for the purpose of deciding that issue.106/

So ORDERED.

Henry B. Frazier III
Henry B. Frazier, III
Administrative Law Judge

DATED: August 7, 1989

106/ Respondent filed a Motion for Prehearing Conference and for Prehearing Briefing (supra at 4-5). In response thereto, a Settlement Judge was appointed to conduct settlement negotiations which negotiations were unproductive. If a hearing is held on the amount of civil penalty to be assessed, a prehearing conference will be scheduled prior to the hearing to consider the matters outlined in 40 C.F.R. § 22.19(a), including the possibility of scheduling additional prehearing submissions on the issues which remain to be resolved.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of "Interlocutory Order Granting Complainant's Motion For Partial Acelerated Decision" dated and filed August 7, 1989 by Administrative Law Judge Henrry B. Frazier, III in the matter of 3M Company (Minnesota Mining and Manufacturing), Docket No. TSCA-88-H-06 was mailed to the following as indicated below:

(Interoffice) Jon D. Silberman, Esq.
Toxics Litigation Division (LE-134P)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

(Certified Mail) Blake A. Biles, Esq.
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088

Bessie L. Hammiel, Hearing Clerk
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dated: August 7, 1989