UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BIDDLE SAWYER CORPORATION,	)	Docket No. II TSCA-TST-88-0244
	)	
Respondent	)	

TSCA: SUBMISSION OF LETTER OF INTENT TO TEST OR EXEMPTION APPLICATION: 15 U.S.C. § 2603:

The requirement contained in 40 C.F.R. § 766.35(a)(1)(i) that persons who have manufactured or imported chemical substances listed under Section 766.25 between January 1, 1984 and the effective date of Part 766, i.e., July 6, 1987, must submit a letter of intent to test or an exemption application, does not apply to persons who ceased such manufacturing or importation prior to the effective date of Part 766, i.e., prior to July 6, 1987 and do not plan to resume such activity.

APPEARANCES:

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BEFORE: Henry B. Frazier, III
Chief Administrative Law Judge

ACCELERATED DECISION

I. Background

A. Violation Alleged and Penalty Proposed

This proceeding arose under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (TSCA or the Act). An administrative complaint was issued on September 27, 1988 by the United States Environmental Protection Agency (the EPA or Complainant), against Biddle Sawyer Corporation (Biddle Sawyer or the Respondent), pursuant to Section 16(a) of the Act, 15 U.S.C. § 2615(a).[1] The Respondent was charged in the complaint with violations of Section 4 of TSCA, 15 U.S.C. § 2603 and of rules promulgated pursuant to Section 4. The complaint alleged that Biddle Sawyer had violated 40 C.F.R. Part 766 - Dibenzo-Para-dioxins/Dibenzofurans (Part 766), and more specifically, 40 C.F.R. § 766.35(a)(1) which requires any persons who have manufactured or imported a chemical substance identified in 40 C.F.R. § 766.25

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[1] 15 U.S.C. § 2615(a) provides, in relevant part: "(1) Any person who violates a provision of section 2614 [Prohibited acts] 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."

15 U.S.C. § 2614 provides, in relevant part: "It shall be unlawful for any person to---

(1) fail or refuse to comply with (A) any rule promulgated or order issued under section 2603 [Testing of chemical substances and mixtures] of this title . . .;

* * * * * * *

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

between January 1, 1984 and July 6, 1987, the effective date of the Part, to submit a letter of intent to test or an exemption application no later than September 3, 1987. More particularly, the complaint alleged that Respondent had imported the chemical substance 2,3,5,6-Tetrachloro-2,5-cyclohexadiene-1,4-dione (chloranil or Tetra) for commercial purposes, during the period in question, and Respondent had failed to submit the required letter of intent to test or an exemption application to the EPA. The complaint concluded that Biddle Sawyer's alleged conduct was, as a result, in violation of Section 4 and Section 15(1)(A) and (3)(B) of TSCA, 15 U.S.C. §§ 2603, 2614(1)(A), 2614(3)(B). For the alleged violation, the EPA proposed a civil penalty of $5,000.

B. Respondent's Answer

In its answer, Biddle Sawyer admitted that it did not file either a letter of intent to test or an exemption application pursuant to 40 C.F.R. § 766.35(a)(1);[2] Biddle Sawyer denied, however, that it was liable to the EPA for any civil penalty inasmuch as the facts did not indicate a violation of Section 4 and Section 15(1)(A) and (3)(B) of TSCA.[3]

In further answer to the Complainant's allegation, the Respondent raised five affirmative defenses, namely that: (1) the Respondent did not import or manufacture Tetra including and subsequent to July 6, 1987, the effective date of Part 766; (2) the

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[2]Answer at 2, In re Biddle Sawyer Corp., Docket No. II TSCA-TST-88-0244 (dated January 30, 1989) [hereinafter Answer].

[3]Id. at 3.

Complainant has unclean hands and, therefore, is precluded from obtaining relief from the Respondent; (3) the Complainant informed the Respondent months prior to the filing of the complaint that the Respondent was not subject to the requirement and, therefore, is estopped from claiming relief from the Respondent; (4) the requirement is impermissibly vague and, therefore, is on its face unconstitutional; and (5) the requirement is unconstitutional, as applied to the Respondent.

C. Processing of the Case

Following several unsuccessful attempts by the parties to settle the case throughout most of 1989, the Respondent submitted, on January 31, 1990, a motion for accelerated decision dismissing the complaint. The Complainant filed a response to this motion on March 21, 1990, and on April 12, 1990, the Complainant, in turn, submitted a motion for accelerated decision finding liability and a memorandum in opposition to the Respondent's motion for accelerated decision. In addition, the Respondent filed a reply to the Complainant's response to the Respondent's motion for accelerated decision (dated April 3, 1990) and a response to the Complainant's motion for accelerated decision (dated April 23, 1990). The Complainant filed a reply to the Respondent's response to the Complainant's motion for accelerated decision (dated May 29, 1990). Both parties filed prehearing exchanges, and both the Complainant and the Respondent, in turn, filed replies to each other's prehearing exchanges.

Under 40 C.F.R. § 22.20 (1989), the Presiding Officer,

> [U]pon 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, 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. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, 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.

Biddle Sawyer states that there are no disputed material facts that require an evidentiary hearing and that an accelerated decision, therefore, is appropriate in this proceeding.[4] Likewise, the EPA states that "there is no genuine issue of material fact that Respondent failed to comply with 40 C.F.R. § 766.35(a)(1), and thereby violated Section 15(3)(B) of TSCA,"[5] insofar as, by its own admission, Biddle Sawyer failed to submit a letter of intent to test or an exemption application.[6]

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[4]Memorandum of Law in Support of Respondent's Motion for Accelerated Decision, (dated January 31, 1990) [hereinafter Respondent's Motion] at 1-2.

[5]Memorandum of Law in Support of Complainant's Motion for Accelerated Decision, (dated April 12, 1990) [hereinafter Complainant's Motion] at 1-2.

[6]Answer at 2.

Biddle Sawyer has admitted that after January 1, 1984, and prior to July 6, 1987, it imported chloranil or Tetra into the United States for commercial purposes.[7] Biddle Sawyer also has admitted that it did not file either a letter of intent to test or an exemption application pursuant to 40 C.F.R. § 766.35(a)(1).[8] I find that no genuine issue of material fact exists in this case and therefore the issuance of an accelerated decision based upon the pleadings and as requested by the parties is appropriate.

II. Contentions of the Parties

A. Respondent's Contentions

The Respondent advances the following contentions:

- EPA seeks to impose retroactively the dioxin testing requirement on Biddle Sawyer, an importer who stopped importing chloranil months prior to the effective date of the rule and who otherwise would not be subject to the rule. Under the Supreme Court's ruling in Bowen v. Georgetown University Hospital,[9] absent express authority, EPA may not retroactively apply the dioxin testing rule to Biddle Sawyer. The language of Section 4 of TSCA is expressly prospective and no grant of retroactive authority can be found in Section 4.[10]

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[7]Respondent's Motion at 2.

[8]Supra at 3.

[9]109 S. Ct. 468 (1988).

[10]Respondent's Motion at 4-8.

- EPA's interpretation of the dioxin testing rule contradicts the plain language of the rule. A straightforward reading places a duty upon only those persons who are manufacturers and importers as of the effective date of the regulations. A reading of Sections 766.2 and 766.20 leads to the conclusions that prior to the effective date of Part 766, no requirement to test or otherwise provide information to EPA existed; that those who, on the effective date of the Part, are defined as manufacturers, importers or processors have a duty to test and report; and that this duty extends to chemicals manufactured, imported or processed between January 1, 1984, and July 6, 1987, the effective date of the Part. On the other hand, EPA, relying on Section 766.20 to the exclusion of Section 766.2, would apply the requirement to any person who imported during the stated period regardless of whether that person would otherwise have been subject to the act on its effective date.[11]

- The complaint, Congressional intent and prior agency statements all demonstrate that Section 4 and not Section 8 of TSCA controls this case. EPA is wrong in urging that the Presiding Officer look to Section 8 and not to Section 4 for three reasons:

(1) the Complaint alleged a violation of Section 4 and not Section 8;

[11]Respondent's Motion at 8-10.

(2) Congressional intent as demonstrated by the statutory language at issue, the language and design of the statute as a whole and the legislative history require that letters of intent to test and requests for exemptions be controlled by Section 4 of TSCA;

(3) EPA's interpretation of Section 4 and Section 8 of TSCA is contrary to the position previously articulated by EPA in its preamble to the Rule as published in the Federal Register and in a prior agency explanation contained in a letter signed by the Director of the Exposure Evaluation Division. In response to a 1987 inquiry from a third-party seeking clarification of certain sections of the Testing Rule, including Section 766.20, the Director had written: "Manufacturers and importers of substances listed in section 766.25 who have ceased manufacturing or importing one of these substances prior to the effective date of the rule are not required to test or report until they recommence manufacture or importation."[12] The prior agency statements in the preamble and in this letter contradict the position that EPA has now taken and EPA makes no attempt to explain the change of interpretation.[13]

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[12]Letter from Martin P. Halper, Director, Exposure Evaluation Division, to Timothy S. Hardy, (dated July 23, 1987) [hereinafter the Halper Letter] (Attachment C, Respondent's Motion).

[13]Respondent's Response to Complainant's Motion for Accelerated Decision, (dated April 23, 1990) [hereinafter Respondent's Response] at 4-13.

- Section 8 itself imposes only a prospective reporting requirement. While Section 8(a)(2) lists data that may already be in existence, this section does not impose a duty to report upon a person who is not presently (or intends to be in the future) a manufacturer or importer or processor. Nowhere does Section 8 even remotely suggest that EPA has the authority retrospectively to require reporting requirements of such persons.[14]

- EPA's interpretation of the dioxin testing rule violates the due process clause of the Fifth Amendment to the Constitution by being impermissibly vague.[15]

B. Complainant's Arguments

The EPA alleges in its complaint that the facts presented therein constitute a violation of Section 4 of TSCA and of 40 C.F.R. § 766.35 as well as Section 15(1)(A) and (3)(B) of TSCA, in that the Respondent failed to submit to the EPA a letter of intent to test or an exemption application as required.

In Complainant's subsequent submissions, EPA apparently abandons its reliance upon Section 4 and instead relies upon Section 8 of TSCA to support the alleged violation. Thus, the Complainant states that the controversy herein pertains to Section 8 and not Section 4 of TSCA and that 40 C.F.R. § 766.35

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[14]Respondent's Response at 13-18.

[15]Respondent's Motion at 13-14.

derives from Section 8 of TSCA and not Section 4,[16] and that in failing to submit a letter of intent to test or an exemption application, the Respondent did not fulfill the requirements of Section 8 of TSCA. The Complainant, furthermore, states that while Section 4 generalizes with respect to reporting and submissions, Section 8 provides specific guidance with respect to reporting requirements and, for this reason, 40 C.F.R. § 766.35 clearly derives from Section 8.[17] As to why a reference to Section 8 of TSCA was not included in paragraph 8 of the complaint, the Complainant contends that the noninclusion of Section 8 was "harmless error."[18] Inasmuch as the Respondent was advised of the relevance of Section 8 elsewhere in the other provisions of the Complaint, Complainant argues, the Respondent received adequate notice that Section 8 was integral to the action.[19] The EPA further argues that the fact that Biddle Sawyer had ceased importation prior to the effective date of Part 766 is irrelevant to the matter being litigated.[20]

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[16]Complainant's Response to Respondent's Motion for Accelerated Decision, (dated March 21, 1990) [hereinafter Complainant's Response] at 5-6.

[17]Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision, (dated May 29, 1990) [hereinafter Complainant's Reply] at 11.

[18]Id. at 14.

[19]Id.

[20]Complainant's Prehearing Exchange, (dated February 2, 1990) [hereinafter Complainant's Prehearing Exchange] at 7.

EPA contends that Congress expressly authorized EPA to promulgate retroactive regulations under Section 8 of TSCA. Hence, the reporting regulation at 40 C.F.R. § 766.35(a)(1), which EPA argues was promulgated pursuant to Section 8 and consistent with legislative intent, does not exceed the bounds of law established by the Supreme Court in Bowen.

Complainant maintains that Respondent's citation to the letter from the Director of the Exposure Evaluation Division to a third-party is misplaced. Complainant contends that the letter offers no support for Respondent's position because the letter does not demonstrate a continuous and longstanding inconsistent interpretation of 40 C.F.R. § 766.35(a)(1); because Respondent has never claimed that it relied upon the letter to its detriment; and because such an interpretative letter from a government agency does not have the force of law.[21]

EPA asserts that the Respondent is barred from raising a constitutional defense which challenges an enforceable regulation, valid on its face, in an administrative enforcement proceeding.[22] EPA also maintains that the reporting requirement in 40 C.F.R. § 766.35(a)(1) is not impermissibly vague and thus, does not violate the Due Process Clause of the Fifth Amendment.[23]

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[21]Complainant's Response at 13-16.

[22]Complainant's Reply at 5-9.

[23]Complainant's Response at 19-22.

III. Discussion and Conclusions

A. Introduction

Part 766 of the EPA's rules is described as identifying "requirements for testing under section 4 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2603, to ascertain whether certain specified chemical substances may be contaminated with halogenated dibenzodioxins (HDDs)/dibenzofurans (HDFs) as defined in § 766.3, and requirements for reporting under section 8 of TSCA, 15 U.S.C. 2607."[24]

Under Section 4 of TSCA, the EPA is authorized to require, by rule, that chemical manufacturers or processors conduct tests in order to compile data relevant to a determination that the manufacture, distribution in commerce, processing, use or disposal of a chemical substance does not present an unreasonable risk of injury to human health or the environment.

In order to promulgate a Section 4(a)(1)(A) rule, the EPA must make three findings: (a) that a chemical substance may present an unreasonable risk of injury to health or the environment; (2) that there is insufficient data and experience from which the effects of manufacture, distribution in commerce, processing, use or disposal of such chemical substance can be reasonably determined or predicted; and (3) that the testing of such chemical substance is necessary to develop such data.[25]

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[24] 40 C.F.R. § 766.1(a).

[25] 15 U.S.C. § 2603(a)(1)(A).

Under Section 8 of TSCA, the EPA is empowered to require, by rule, that chemical manufacturers or processors maintain such records and make such reports as the EPA may reasonably require. Section 8(a)(2) provides an extensive list of examples of the kind of information that the EPA may require. Such data include the common or trade names, the chemical identity and molecular structure of each chemical substance; the categories or proposed categories of use; the total amount of each chemical substance manufactured or processed and reasonable estimates of the total amount of each chemical substance projected to be manufactured or processed as well as the total amounts and projected total amounts for each category of use; a list of reasonably ascertainable chemical by-products; all existing data concerning the adverse environmental and health effects of such chemical substance; and the number of persons exposed to such chemical substance, the number of persons projected to be exposed and the duration of such exposure.[26]

In addition, under Section 8(b) of TSCA, the EPA is required to compile, maintain and publish an "inventory" of existing chemical substances manufactured or processed in the United States.[27]

40 C.F.R. § 766.35(a)(1)(i) requires any persons who have manufactured or imported, between January 1, 1984 and July 6,

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[26]15 U.S.C. § 2607(a)(2).

[27]15 U.S.C. § 2607(b).

1987, the effective date of Part 766, a chemical substance identified in 40 C.F.R. § 766.25 to submit a letter of intent to test or an exemption application no later than September 3, 1987.[28] Biddle Sawyer imported Tetra into the United States for commercial purposes after January 1, 1984, and prior to July 6, 1987. Tetra is a chemical substance identified in 40 C.F.R. § 766.25. Biddle Sawyer admitted, in its answer, that it did not submit a letter of intent to test or an exemption application but asserted that it had ceased importing Tetra prior to the effective date of the Part. The first question of law to be resolved, therefore, is whether the Respondent may be held liable for a violation of Section 766.35(a)(1)(i) in view of the fact that, as of the effective date of the Part, it no longer engaged in the importation of the chemical substance. A related question is whether the application of the Section 766.35(a)(1)(i) requirement to Biddle Sawyer would be a retroactive application of a

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[28]40 C.F.R. § 766.35(a)(1)(i) reads as follows:

> § 766.35 Reporting requirements.
> (a) Letters of intent, exemption applications, and protocols-(1) Letters of Intent. (i) Persons who have manufactured or imported chemical substances listed under § 766.25 between January 1, 1984, and the effective date of this part are required to submit under § 790.45 of this chapter a letter of intent to test or an exemption application. These letters must be submitted no later than September 3, 1987.

regulation and, if so, whether such retroactive application of the requirement is permitted.

Biddle Sawyer asserts that it was not required to abide by 40 C.F.R. § 766.35(a)(1)(i) because it had ceased importing Tetra prior to the effective date of Part 766.[29] It emphasizes that the EPA distorts the plain meaning of the Part 766 and that a straightforward reading of the Part obligates only those persons who are manufacturers, processors or importers as of July 6, 1987, the effective date of the Part.[30] Respondent maintains that the EPA relies on 40 C.F.R. § 766.35 to the exclusion of 40 C.F.R. § 766.2, which is the general applicability section of the Part.[31] Respondent insists that Section 4, and not Section 8, of TSCA controls the issue before me and emphasizes, inter alia, that Congress intended that letters of intent to test and requests for exemptions be controlled by Section 4 of TSCA.[32]

EPA contends that the testing requirement, promulgated pursuant to Section 4 of TSCA, is not the issue in controversy. Instead, EPA alleges that Respondent failed to submit the

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[29]Respondent's Motion at 8.

[30]Respondent's Response at 16.

[31]Id., at 16-17.
40 C.F.R. § 766.2 provides, in relevant part: "(2) The duration of this part for any testing requirement for any chemical substance is the period commencing with the effective date of this part to the end of the reimbursement period. . . . All reporting requirements for any chemical substance listed under § 766.25 shall be in effect for the same period as the testing requirement."

[32]Respondent's Response at 4-12.

information, as required at 40 C.F.R. § 766.35(a)(1), which regulation was promulgated pursuant to Section 8 of TSCA.

B. Holding and Analysis of Regulations and Statute

I hold that Respondent may not be held liable for a violation of Section 766.35(a)(1)(i) in view of the fact that, as of the effective date of Part 766, it was no longer engaged in the importation of the chemical substance involved here, chloranil or Tetra.

On its face, Section 766.35(a)(1)(i) would appear to require everyone who manufactured or imported certain chemical substances, including Tetra, between January 1, 1984, and the effective date of Part 766, July 6, 1987, to submit a letter of intent to test or an exemption application regardless of whether they intended to manufacture or import the substance again. This is EPA's contention and EPA would not have me look beyond Section 766.35(a)(1)(i) (and Section 8 of TSCA) to so conclude. Nevertheless, such a result defies logic and common sense and were it only for that reason and for no other, I would look beyond Section 766.35(a)(1)(i). However, Courts have held that the words of a rule or statute must be read in their context and with a view to the overall statutory scheme.[33] Reading Section 766.35(a)(1)(i)

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[33] Davis v. Michigan Dep't of Treasury, 489 U.S. ___, 103 L. Ed. 2d 891, 901 (1989). See also Moorehead v. United States, 774 F.2d 936, 941 (9th Cir. 1985) ("A statute is passed in whole and not piecemeal. Thus, in interpreting a statute, examination of the whole, not isolated words, will disclose legislative intent.")

Most courts hold that regulations should be construed in the same way as statutes. 1A C. Sands, Sutherland Statutory Construction § 31.06 (rev. 4th ed. 1985). See also General Elec. Co. v. United States, 610 F.2d 730, 734 (Cl. Ct. 1979) ("In

out of context, and consequently imposing liability upon Biddle Sawyer, is precluded by the canons of statutory construction.[34]

Biddle Sawyer cannot be held liable because it was not subject to Part 766 as of the effective date of that Part. Section 766.2(a) states:

> §766.2 Applicability and duration of this part.
>
> (a) Chemical substances subject to testing. (1) This part is applicable to each person who, at any time during the duration of this part, manufactures (and/or imports), or processes, a chemical substance identified under § 766.25.
>
> (2) The duration of this part for any testing requirement for any chemical substance is the period commencing with the effective date of this part to the end of the reimbursement period, as defined in § 766.3, for each chemical substance. All reporting requirements for any chemical substance listed under § 766.25 shall be in effect for the same period as the testing requirement. [Emphasis added.]

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determining the meaning of such regulations, rules of interpretation applicable to statutes are appropriate tools of analysis."); Rucker v. Wabash R.R., 418 F.2d 146, 149 (7th Cir. 1969) ("Administrative regulations, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases."). See generally, Weaver, Judicial Interpretation of Administrative Regulations: An Overview, 53 U. Cin. L. Rev. 681 (1984).

[34]Davis v. Michigan Dep't of Treasury, 489 U.S. at ___, 103 L. Ed. 2d at 901.

Thus, the applicability of Part 766 is defined in terms of its duration and the duration of Part 766 begins on its effective date, July 6, 1987, and ends at the "reimbursement period." The "reimbursement period" is defined as "the period that begins when the data from the last test to be completed under this part for a specific chemical substance listed in Section 766.25 is submitted to EPA, and ends after an amount of time equal to that which had been required to develop that data or 5 years, whichever is later."[35] Biddle Sawyer was not importing, manufacturing or processing Tetra on July 6, 1987. Indeed, Biddle Sawyer had ceased such activities at least seven months prior to July 6, 1987, namely on November 20, 1986.[36] Moreover, Biddle Sawyer has not engaged in such activities since the effective date of Part 766. Section 766.2(a) describes all persons to whom the entire Part applies. The Part includes Section 766.35(a)(1)(i). Hence, the requirements of Section 766.35(a)(1)(i) do not apply to any person to whom the Part does not apply. The Part does not apply to Biddle Sawyer and therefore Section 766.35(a)(1)(i) does not apply to Biddle Sawyer.

Section 766.20(a) defines who must test. It provides:

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[35]40 C.F.R. § 766.3.

[36]Respondent's Prehearing Exchange, (dated March 9, 1990) at 2.

> Any person who manufactures, imports, or processes a chemical substance listed in § 766.25 must test that chemical substance and must submit appropriate information to EPA according to the schedules described in § 766.35. Chemical substances manufactured, imported or processed between January 1, 1984 and the date of promulgation of this part are subject to testing upon the effective date of this part.

A reading of these three provisions together, Section 766.2, Section 766.20(a) and Section 766.35(a)(1)(i), leads one to the following conclusions: Prior to the effective date of Part 766 on July 7, 1987, there was no requirement to test or to submit a letter of intent to test or an exemption application. However, persons who on the effective date are defined as manufacturers and/or importers[37] do have a duty to submit a letter of intent to test (and to test) or to submit an exemption application. This duty extends to chemical substances which they manufacture or import on the effective date and which they had previously imported or manufactured between January 1, 1984 and July 6, 1987.

This reading of the regulations is supported by and fully consistent with the preamble to the final rule.[38] Moreover,

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[37]See 40 C.F.R. § 704.3.

[38]While I do not rely upon the Halper letter (FN 12 Supra) for support of my conclusion herein, I should note that the position which EPA took in that letter is consistent with the conclusion reached herein. In that letter the Director of the Exposure Evaluation Division said, in pertinent part: "Manufacturers and importers of substances listed in section 766.25 who have ceased manufacturing or importing one of these substances prior to the effective date of the rule are not required to test or report until they recommence manufacture or importation . . . . Sections 776.20(a) [sic] and 776.35(a)(i) [sic] specify when those persons

that preamble emphasizes the logical and inescapable connection between the submission of a letter of intent to test or an exemption application and the testing requirement itself.

In that section of the preamble entitled "Testing Requirements Under Section 4," the EPA states in explanation that "[m]anufacturers of any listed chemical may request an exclusion or waiver from testing . . . . Requests for exclusions/waivers must be submitted within 60 days of the effective date of this rule. Persons who plan to resume manufacture, import or processing of a chemical listed for testing must apply for an exclusion 60 days prior to actual such [sic] resumption . . . . Persons required to test under this rule must, within 60 days of the effective date, or 60 days after they become subject to the rule, submit to EPA either a letter of intent to test or an application for exemption/waiver." [Emphasis added.][39]

This passage is important for several reasons. First, it demonstrates that only persons required to test must submit a letter of intent to test or an application for exemption/waiver. That is imminently reasonable and sensible. Why require such a submission in the absence of a requirement to test? However, EPA now insists that Biddle Sawyer make such a submission even in the

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required in section 776.2 [sic] to test or report become subject to the rule. Thus, persons not within the scope of section 766.2 have no testing or reporting obligations until they resume manufacturing or importing a substance subject to the rule."

[39]52 Fed. Reg. 21414 (June 5, 1987).

absence of any obligation to test. That is unreasonable and makes little sense.

Second, those manufacturers/importers required to test, include two categories: (1) those currently manufacturing a listed chemical substance who must make their submission within 60 days of the effective date of the rule and (2) those manufacturers/importers who resume such activity must make their submissions 60 days prior to such actual resumption. There is no time period mentioned for submissions from manufacturers who have ceased such activity and who do not plan to resume such activity. Biddle Sawyer falls into this last, unmentioned category. There is clearly a good reason that no mention is made of this last category. No test requirement applies to persons in that category; hence, no submission is required.

Third, this passage reveals that the requirement to submit a letter of intent to test or an exemption application was, in EPA's view, an inherent part of the "Testing Requirements Under Section 4." There can be little doubt that EPA considered letters of intent to test and exemption applications to be requirements under Section 4 of TSCA when these final rules were published. Any reading to the contrary would be illogical.

An objective of TSCA is the compilation of information on toxic chemical substances. Under the statutory scheme, testing, as provided for in Section 4, would be performed to amass scientific data and information. The reporting and retention of such scientific data as provided in Section 8, would follow. A

letter of intent to test (or an exemption application) is clearly a preliminary procedural matter which deals exclusively with testing requirements, in contrast to information collected as a result of testing and which must be submitted under the reporting requirements.

Nevertheless, EPA insists upon the contrary position in its arguments before me.[40] Thus, EPA seeks post hoc to change its position as to the statutory basis of this requirement and to take a position in conflict with the statements in the preamble to the final rule. Such post hoc pronouncements are not acceptable.[41]

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[40]The Complainant asserts that the authority under Section 8(a) of TSCA, to require the regulated community to submit information, includes a letter of intent to test or an exemption application. The Complainant acquires the notion that such information may include a letter of intent to test from 40 C.F.R. § 766.7, which provides, in relevant part: "All information (including letters of intent, protocols, data, forms, studies, and allegations) submitted to EPA under this part must bear the applicable Code of Federal Regulations (CFR)" section number . . . and must be addressed to: Document Control Office . . . ." The Complainant then concludes that if Section 8 of TSCA is entitled "Reporting and Retention of Information," then letters of intent must fall under Section 8. While syllogistically creative, this notion is not necessarily true. Section 766.7 simply explains how and where certain information should be submitted to the EPA; it merely provides a mailbox address. The word "information" is not a term of art; rather, it is a broadly-defined, generic word meaning "knowledge obtained from investigation, study or instruction." The Merriam-Webster Dictionary 366 (1974). The simple fact that Section 766.7 states that letters of intent are a type of "information" does not support the conclusion that letters of intent are necessarily included in the types of information referred to in Section 8 of TSCA and hence, Section 8 rather than Section 4 governs.

[41]Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

Therefore, I conclude that Respondent may not be held liable for a violation of Section 766.35(a)(1)(i) in view of the fact that, as of the effective date of Part 766, Respondent was not subject thereto because Respondent was no longer engaged in the importation of the chemical substance chloranil or Tetra.

Alternatively, even if I did not look beyond the words of Section 766.35(a)(1)(i) itself, Respondent could not be held liable for a violation of that provision. 40 C.F.R. § 766.35(a)(1) requires any persons who have manufactured or imported chemical substances identified in 40 C.F.R. § 766.25 between January 1, 1984 and July 6, 1987, the effective date of the Part, to submit a letter of intent to test or an exemption application no later than September 3, 1987. Biddle Sawyer states in its answer that it did, in fact, import Tetra into the United States for commercial purposes after January 1, 1984 but also emphasizes that it ceased importing Tetra prior to July 6, 1987.[42] If one did not look beyond that provision of the regulations, the question would be whether the requirements of Part 766 can be applied to Biddle Sawyer retroactively in view of the fact that Biddle Sawyer was no longer engaged in the importation of a listed chemical substance on the effective date of the Part.

In its motion for accelerated decision, the Respondent concedes that the regulation imposes an "affirmative duty" upon manufacturers and importers of regulated chemical substances to

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[42]Answer at 3.

submit a letter of intent to test or an exemption application.[43] The Respondent asserts, however, that such an affirmative duty is not imposed upon it because it stopped importing Tetra months prior to the Part's effective date. Citing Bowen v. Georgetown University Hospital, 488 U.S. ___, 102 L. Ed. 2d 493 (1988), the Respondent states that an agency cannot promulgate retroactive regulations unless Congress expressly delegates the authority.[44] Biddle Sawyer insists that neither Section 4 nor Section 8 of TSCA grant the EPA the authority to promulgate retroactive regulations. Furthermore, the Respondent contends that the Administrative Procedure Act likewise proscribes the promulgation of retroactive regulations insofar as it designates that rules have prospective application.[45]

The Complainant asserts that Section 766.35(a)(1) derives from Section 8 of TSCA and not Section 4,[46] and that under Section 8 of TSCA the EPA possesses the authority to promulgate retroactive regulations.[47] In light of the information-gathering intent behind TSCA, the Complainant notes, it is logical that the

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[43]Respondent's Motion at 2.

[44]Respondent's Motion at 5.

[45]Id. at 7.
The Administrative Procedure Act § 2, 5 U.S.C. § 551(4) (1988) states, in relevant part: "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."

[46]Complainant's Response at 5.

[47]Id. at 9-10.

EPA would require information pertaining to past as well as present and future activities of chemical manufacturers and processors.[48] To require that TSCA's "statutory provisions have express language authorizing every single specific retroactive effect, and not leave to the discretion of the Agency the ability to determine what type of information is needed for a particular set of circumstances, would defeat the purpose of the law." Such a requirement would have a "chilling" effect on the EPA's information-gathering abilities.[49]

In response to the Respondent's assertion that, according to Bowen, express authority is needed from Congress in order to promulgate retroactive regulations, the Complainant states that such authority is found in Section 8 of TSCA.[50] The Complainant concludes that the regulation is, therefore, permissibly retroactive.

In its unanimous opinion in Bowen, the Supreme Court ruled:

> "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. . . .
>
> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory

[48] Id. at 10.

[49] Id. at 11.

[50] Id. at 12.

> grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.[51]

In its motion for accelerated decision, the Respondent contends that the construction of TSCA lends support to its conclusion that it is a prospective statute. Quoting Section 4(b)(3)(B) of TSCA,[52] the Respondent states that "[t]he terms 'manufactures or intends to manufacture' and 'processes or intends to process' are forward-looking terms. The language is expressly prospective . . . ."[53] In response, the Complainant asserts that TSCA has both prospective and retrospective provisions. Quoting the Section 8(a)(2) reporting criteria,[54] the Complainant states

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[51] Bowen v. Georgetown Univ. Hosp., 488 U.S. at ___, 102 L. Ed. 2d at 499-500.

[52] 15 U.S.C. § 2603(b)(3)(B) states, in relevant part: "The following persons shall be required to conduct tests and submit data . . . :
(i) Each person who manufactures or intends to manufacture such substance or mixture . . . .
(ii) Each person who processes or intends to process such substance or mixture . . . .
(iii) Each person who manufactures or processes or intends to manufacture or process such substance or mixture . . . ."

[53] Respondent's Motion at 7.

[54] 15 U.S.C. § 2607(a)(2) states, in relevant part: "The Administrator may require under paragraph (1) maintenance of records and reporting with respect to the following . . . :

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that "Section 8(a)(2)(C) uses language which expresses past activities, i.e., 'manufactured' . . . . In addition . . . when a person reports the amount of a specific chemical substance it has manufactured that person is identifying itself as a party who has engaged in past activities."[55]

The Respondent's argument that TSCA is prospective because of its use of the present and future tenses is feeble. The Complainant's arguments are similarly ineffective. Verb tenses simply cannot be dispositive of an issue of such importance as the permissibility of retroactive rulemaking. Indeed, in light of the judicial presumption against retroactivity, it would be inappropriate to lend such significance to verb tenses.[56]

The Supreme Court in Bowen held that retroactive rulemaking is not permissible unless expressly mandated by Congress. The statutory provisions which Complainant cites do not expressly mandate retroactive rulemaking.

In light of the Supreme Court's holding in Bowen that retroactive rulemaking is not permissible unless the language of the statute specifically allows it, Justice Scalia attempts, in his

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(C) The total amount of each such substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use . . . ."

[55]Complainant's Response at 9-10.

[56]See United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985) ("[C]ongressional intent . . . cannot be divined from the verb tenses.").

concurring opinion in Bowen, to identify the difference between "primary" retroactivity and "secondary" retroactivity.

A statute applied retroactively in the "primary" sense alters the legal consequences of past events as of the time of those past events. However, a statute applied retroactively in the "secondary" sense operates prospectively, but affects, as of its effective date, the future legal consequences of past actions.[57] Primary retroactivity of regulations is, unless expressly authorized by statute, impermissible to the extent that it makes unlawful an act that began and ended in the past.[58] As regards the present case, retroactive application of the Part to Respondent would constitute primary retroactivity by affecting the past legal consequences of past actions; that is, retroactive application would impose liability for the Respondent's failure to file a letter of intent with respect to the importation of Tetra which ceased prior to the effective date of the part. Such retroactive application is not mandated by TSCA and hence is impermissible.

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[57] Bowen, 488 U.S. at ___, 102 L. Ed. 2d at 507 (Scalia, J., concurring).

The theory of primary and secondary retroactivity was addressed in McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Calif. L. Rev. 12, 58-59 (1967).

An example of primary retroactivity is if a rule issued on January 1, 1990 makes unlawful an act that occurred in 1988. An example of secondary retroactivity is if a rule issued on January 1, 1990 affects the future legal consequences of an activity begun in 1984 but not completed until 1992. Brief for the Respondents, Bowen v. Georgetown University Hospital, 821 F.2d 750 (D.C. Cir. 1987), cert. granted, 485 U.S. 903 (1988).

[58] In re Hercules, Inc., Docket No. TSCA-III-416 (Accelerated Decision, April 26, 1990), at 25.

In his concurrence, Justice Scalia noted that with respect to "secondary" retroactivity that "'[w]here a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.'"[59] With respect to Respondent it is theoretically possible in different factual circumstances that the Respondent may have been found liable under a theory of secondary retroactivity for its failure to file a letter of intent to test or an exemption application. Such a finding of liability would apply only if Respondent had continued to import Tetra through and after the Part's effective date. Culpability would be premised upon the importation of Tetra which began in the past but was still ongoing. Of course, in such hypothetical circumstances the requirements of reasonableness still would have to be met.

In light of these conclusions, it is clear that the Respondent cannot be held liable because the Respondent ceased to import Tetra prior to the effective date of July 6, 1987. To hold the Respondent liable under the circumstances in this case would be not only unreasonable and unjust but also an impermissible retroactive application of the regulation.

Accordingly, the question of the applicability of 40 C.F.R. § 766.35(a)(1)(i) having been resolved in Respondent's favor,

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[59] Bowen, 488 U.S. at ___, 102 L. Ed. 2d at 507 (quoting General Tel. Co. of Southwest v. United States, 449 F.2d 846, 863 (5th Cir. 1971)).

Respondent is entitled to a judgment as a matter of law pursuant to 40 C.F.R. § 22.20.[60]

ORDER

It is hereby ordered that the complaint be, and it is hereby, DISMISSED.[61]

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: September 27, 1990
Washington, DC

[60]In view of this conclusion, I find it unnecessary to reach the questions raised by Respondent's remaining defenses to the complaint.

[61]Pursuant to 40 C.F.R. § 22.27(c), this accelerated decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the accelerated decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this accelerated decision.