12/23/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

BETHLEHEM STEEL CORPORATION

Respondent

Docket TSCA-III-322

Judge Greene

ORDER GRANTING MOTION TO DISMISS

This matter arises under § 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a). ("TSCA," or "the Act").

Section 8 of the Act, 15 U.S.C. §2607, authorizes the Administrator of the U. S. Environmental Protection Agency (EPA) to promulgate regulations regarding reporting of the manufacture and processing of chemical substances. 40 C.F.R. Part 712 established procedures for the reporting of production, use, and other information respecting certain chemical substances. Persons who manufactured or imported such substances for commercial purposes were required to submit a report, the "Manufacturer's Report -- Preliminary Assessment Information" ("PAI"), 40 C.F.R. § 712.20, for each plant site at which they manufactured or imported for commercial purposes the chemical substances listed at 40 C.F.R. § 712.30(d). The PAI report was to be submitted no later than November 19, 1982. The list of chemical substances includes dimethylbenzene 1/, CAS registry number 1330-20-7 (Benzene, dimethy-).

Respondent Bethlehem Steel Corporation operates an integrated steel mine at Sparrows Point, Maryland. On August 26, 1982, respondent submitted a PAI which stated that dimethylbenzene had been manufactured for commercial purposes at the Spar-

---

1/ The chemical substances are listed at 40 C.F.R. § 712.30(d) in order of Chemical Abstracts Service (CAS) registry number. The prescribed PAI form appears at 40 C.F.R. § 712.28. See generally 40 C.F.R. Part 712, Chemical Information Rules.

rows Point facility during the year 1981. In fact, however, dimethylbenzene had not been manufactured at the facility during 1981. This was discovered on April 10, 1985, when EPA inspected records at the Sparrows Point facility. On April 19, 1985, respondent corrected the August 26, 1982, report. The corrected PAI did not show production of dimethylbenzene at the facility during 1981.

Section 15(3) of the Act, 15 U.S.C. § 2614(3), provides, inter alia, that it shall be unlawful for any person "to fail or refuse to . . . establish or maintain records, . . . submit reports, notices, or other information . . . as required by this chapter or a rule thereunder." The complaint charges respondent with a violation of this provision for having filed a false report. Section 16 of the Act, 15 U.S.C. § 2615, provides that persons who violate Section 15 shall be liable for civil penalties of up to $25,000 for each such violation.

Respondent's Answer to the complaint admitted that it had, " . . . . through an error in compiling the records for the plant for the period in question, mistakenly listed as manufactured in 1981 material that a subsequent review of the records indicates was not in fact manufactured during this period." 2/ Respondent denied that a violation of Section 15 of the Act had occurred, because respondent had not "fail(ed) or refus(ed)" to "maintain

2/ Answer to the complaint at 3.

records" or "submit reports." Respondent asserts that an erroneous report of manufacture, such as occurred here, as opposed to the failure to report the manufacture of a chemical, does not violate the language of Section 15 or 40 C.F.R. Part 712. This is true also, according to respondent, because the Act and regulations contemplated only that, for the PAI due by November 19, 1982, -- a one-time report, preliminary in nature, -- the reporting person's best efforts were to be used to identify the chemicals produced or imported for commercial purposes. An inadvertant omission was never intended to be actionable, in connection with the November 19, 1982, report. 3/ Respondent further argues that the complaint is barred by the general statute of limitations at 28 U.S.C. § 2462, because it was filed more than five years after the date upon which the erroneous report was submitted. A motion to dismiss on the ground that the complaint is barred by 28 U.S.C. § 2462 was filed.

In opposition to the motion to dismiss, complainant argues that the five year limitation at 28 U.S.C. § 2462 does not apply to administrative enforcement proceedings; according to complainant, it applies only to federal district and appellate court actions. Complainant argues further that, assuming that the statute of limitations did apply, the five year period was equitably

---

3/ Respondent's Response to Complainant's Motion in Opposition to Complainant's Motion to Dismiss, at 1-3.

tolled by what complainant regards as respondent's fraudulent concealment of the violation. Last, complainant argues that the filing of a false PAI constituted a "continuing violation." Consequently, it is urged, this cause of action did not accrue until respondent filed its corrected PAI on April 19, 1985.

The question of whether the general statute of limitations at 28 U.S.C. § 2462 applies to administrative complaints filed pursuant to TSCA has been addressed by several federal administrative law judges but not specifically by any federal district or appellate court. The arguments are persuasive that, as a matter of law as well as common sense and fairness, 28 U.S.C. § 2462 should and does apply to TSCA administrative complaints. It is so held. 4/

Turning to complainant's argument that, if the statute of limitations does apply, it should nonetheless be tolled until April 10, 1985, because of fraudulent concealment of the violation by respondent, a brief examination of the doctrine of fraudulent concealment is in order.

The doctrine for the purpose of tolling a statute of limitations is set forth in Hobson v. Wilson, 737 F. 2d 1, 33-36

4/ See In re District of Columbia, Docket No. TSCA-III-439, Memorandum Decision Upon Order Granting Motion to Dismiss, August 30, 1991; and CWM Chemical Services Inc., Chemical Waste Management, Inc., and Waste Management, Inc., Docket No. II-TSCA-PCG-91-0213, November 6, 1991.

D. C. Cir. 1984) cert. denied sub nom. Brennan v. Hobson, 470 U. S. 1084 (1985), as follows:

> First, . . . equitable tolling generally has two elements, (successful) concealment by defendant and diligence by plaintiff, and, second . . . a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong, may be found to have concealed the wrong. Id. at 33.

The Court of Appeals distinguishes two types of concealment: one in which the concealment is an additional affirmative action which conceals the underlying fraud (active concealment), and one in which the concealment is inherent in the fraud (self-concealment). 5/

In connection with active concealment, "additional acts of concealment are required to trigger the tolling doctrine." 6/ In the instant case, assuming arguendo that the filing of the erroneous PAI report constituted a fraud, complainant has not alleged that respondent took any additional steps to conceal the fraud. The April 10, 1985, inspection revealed an error in reporting, and, on April 19, 1985, respondent revised the PAI to correct the error. Since complainant has not alleged an additional act which successfully contributed to concealing

---

5/ Id. at 33, note 102.

6/ Id. at 33.

the alleged fraud, it has not shown fraudulent concealment.

In connection with self-concealment, " . . . . defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of action." 7/ Here, complainant has not alleged anything other than that respondent submitted a PAI report which contained information which was untrue. Therefore, fraudulent concealment of the "self-concealment" type has not been show. Accordingly, the statute of limitations at 28 U.S.C. §2462 is not tolled based upon the equitable doctrine of fraudulent concealment.

Complainant argues that this cause of action did not accrue until April 10, 1985, when respondent submitted its revised PAI report, since the violation is of a "continuing" nature. Section 16(a)(1) of the Act, 15 U.S.C. §2615(a)(1), provides that "[E]ach day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title." While Section 16(a)(1) does suggest that a violation continues, such reading is limited by the phrase, "for purposes of this subsection." It is clear that for purposes of proposing the assessment of civil penalties, complainant may consider the length of time during which the violation went on.

7/ Id. at 34. Emphasis in original.

That does not mean, however, that Section 16(a)(1) should be construed to create a continuing violation for purposes of tolling a statute of limitations. In effect, such a construction would result in no effective statute of limitations upon administrative complaints under TSCA, a result which was rejected in considering whether 28 U.S.C. § 2462 applies to administrative proceedings under TSCA. 8/

In support of its "continuing" violation argument, complainant cites U. S. v. Advance Machinery Co., 547 F. Supp. 1085 (D. MN. 1982). In that case, the court interpreted Section 4 of the Consumer Product Safety Act, 15 U.S.C. §2614(b), to impose upon a manufacturer a "continuing duty" to inform the Consumer Product Safety Commission of products which fail to comply with regulations or which contain defects. This, however, is quite a different matter from the proposition contended for.

Here, Section 8 of the Act, 15 U.S.C. § 2607, authorizes the EPA Administrator to promulgate regulations regarding the porting of the manufacturing or processing of certain chemicals. Pursuant to Section 8, EPA promulgated 40 C.F.R. Part 712. 40 C.F.R. § 712.30(d) required a PAI report to be submitted by a particular date for the chemicals listed in that section. Nei-

---

8/ See footnote 4, supra, at 5.

ther the Act nor the regulations imposes upon the manufacturer a continuing duty to submit revised PAI reports. Indeed, the one-time "preliminary assessment" scheme set out at § 712.30(d) belies a continuing duty of the sort found in Advance Machinery.

Accordingly, it is found that, while the length of time during which a violation of the Act has continued is properly taken into account in determining the amount of civil penalty which will be sought against a proposed respondent, Section 16(a)(1) does not provide, and may not reasonably be read to provide, for a "continuing" violation that tolls a statute of limitations.

Respondent's motion to dismiss is hereby granted. This matter is dismissed with prejudice as barred by the statute of limitations at 23 U.S.C. § 2462.

J. F. Greene
Administrative Law Judge

December 23, 1991
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on January 17, 1992.

Shirley Smith
Secretary to Judge J. F. Greene

Ms. Lydia Guy
Regional Hearing Clerk
Region III - EPA
841 Chestnut Building
Philadelphia, PA 19107

Robert J. Smolski, Esq.
Office of Regional Counsel
Region III - EPA
841 Chestnut Building
Philadelphia, PA 19107

Kevin A. Gaynor, Esq.
Venable, Baetjer, Howard & Civiletti
Suite 1000
1201 New York Avenue, N.W.
Washington, D.C. 20005-3917