UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STEELTECH, LIMITED,	)	**Docket No. EPCRA-037-94**
	)	
Respondent	)	
	)	
MICHAEL F. FARMER	)	
	)	
Intervenor	)	

ORDER GRANTING IN PART
COMPLAINANT'S MOTION FOR ACCELERATED DECISION

This action was initiated pursuant to Section 325(c) of Title II of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 to 11050, known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). The Complainant, The Director of the Environmental Sciences Division of The United States Environmental Protection Agency-Region V, has charged Respondent, Steeltech Limited, with six counts of violating Section 313 of EPCRA (42 U.S.C. §11023).

I. BACKGROUND

Respondent is a Michigan corporation which manufactures iron, nickel, chrome and cobalt based alloy castings at its facility situated at 1252 Phillips Avenue, S.W. in Grand Rapids, Michigan ("the facility"). On February 12, 1992, a duly authorized representative of the United States Environmental Protection Agency ("EPA") conducted an inspection of Respondent's facility to determine its compliance with EPCRA. Approximately two and a half years later, on September 2, 1994, the Complaint initiating this action was filed based upon the inspector's findings of non-compliance.

The Complaint herein alleges that Respondent processed at its facility two chemical substances, nickel and chromium, during

the years 1988, 1989 and 1990 in amounts exceeding EPCRA's regulatory threshold for annual reporting on Toxic Chemical Release Inventory Reporting forms (Form R). The Complaint alleges further that Respondent failed to file a Form R for each of the two chemical substances by the regulatory deadline of July 1 following each of those three years and thus violated EPCRA.

In its Answer to the Complaint, Respondent denied the alleged violations and requested a hearing. Upon Motion granted on March 14, 1995 to file an amended answer, Respondent added the defenses of statute of limitations, laches and/or estoppel, and unreasonable delay in bringing action.

On February 9, 1995, Complainant moved to amend the Complaint to add five more counts and to increase the amount of the total proposed penalty to $84,390. Such amendment was sought on the basis that Respondent voluntarily disclosed to EPA that it was also required to file Form Rs for nickel and chromium processed in the years 1992 and 1993, and for cobalt processed in 1993, and that Respondent did not file the Form Rs until November 15, 1994. Complainant also sought to amend the allegations in the Complaint to state that Form Rs for nickel and chromium for 1989 were submitted by Respondent on February 13, 1992, that the Form R for nickel contained errors, and that EPA had never received a corrected Form R in response to a Notice of Noncompliance it issued on June 26, 1992. The Motion to Amend the Complaint was granted on March 14, 1995 and on March 24, 1995, the Amended complaint was filed. Respondent answered the Amended Complaint on April 12, 1995, denying all of the alleged violations. Pursuant to an Order issued by the Administrative Law Judge formerly assigned to this matter, Complainant and Respondent each submitted prehearing exchange documents.[(1)]

The Intervenor in this action is Michael F. Farmer, who is a former owner of the Respondent company. Mr. Farmer entered into an indemnification agreement when he sold his stock in Respondent company to Gary Salerno and Armand Salerno on July 31, 1990. As a result, Mr. Farmer requested and was granted leave to intervene in this proceeding on April 6, 1995. On May 31, 1995, Mr. Farmer filed a Motion for Partial Accelerated Decision to dismiss Counts I and II of the Amended Complaint on the basis that those Counts are barred by the statute of limitations, 28 U.S.C. § 2462. The Respondent joined in that Motion. Complainant opposed the Motion on the basis that the Counts I and II are continuing violations which are not barred by the statute of limitations. A decision on the Motion was

stayed pending the decision by the Environmental Appeals Board in the case styled In re Lazarus, Inc., Docket No. TSCA-V-C-032-93 on the issue of whether similar filing violations under the Toxic Substances Control Act are barred by 28 U.S.C. § 2462 on the basis that they are not "continuing violations."

On July 15, 1997, Complainant submitted a Motion for Accelerated Decision on Respondent's liability for all of the violations alleged in the Amended Complaint and on the penalty proposed therein. Complainant asserted that there were no genuine issues of material fact regarding either liability or the appropriateness of a civil penalty in this matter. Respondent filed its Opposition to the Motion on July 29, 1997. The following day all of the parties filed Joint Stipulated Facts and Joint Stipulated Exhibits.[(2)]

II. DISCUSSION

A. Complainant's Motion for Accelerated Decision as to Liability

The applicable Rules of Practice, 40 C.F.R. Part 22, provide that an accelerated decision may be rendered "as to all or any part of a proceeding . . . 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." 40 C.F.R. § 22.20(a). Thus, an accelerated decision in administrative proceedings is analogous to summary judgment in Federal court proceedings.

Complainant has requested an accelerated decision on Respondent's liability for all eleven counts of the Amended Complaint as well as on the penalty. The Intervenor, joined by Respondent, has moved for accelerated decision only as to Counts I and II of the Amended Complaint. The initial question to address is whether any genuine issues of material fact exist with respect to Respondent's liability for any of the alleged violations.

Complainant alleged that Respondent violated the basic requirement of Section 313 of EPCRA, which provides as follows, in pertinent part:

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form . . . for each toxic chemical listed under subsection (c) of this section that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the

preceding calendar year at such facility. Such form shall be submitted to the Administrator and to . . . the State . . . on or before July 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

Subsection (b) provides that the above quoted filing requirements apply only to owners and operators of those facilities which meet the following three criteria: (1) the facility has ten or more full-time employees; (2) the facility is in Standard Industrial Classification (SIC) Codes 20 through 39; and (3) the facility manufactured, processed or otherwise used a chemical, listed under EPCRA § 313(c), in excess of the threshold quantity, during the calendar year for which a release form is required.

In this case, the parties have stipulated to all of the facts evidencing that the Respondent's facility is covered by the filing requirements of EPCRA Section 313.

Specifically, the parties have stipulated that Respondent's facility did employ the equivalent of at least ten employees with at least 20,000 hours total paid hours per year during the period of time relevant to the Amended Complaint (1988-1990, 1992 and 1993). *See,* Joint Stipulated Facts ("Stipulations") ¶¶ 5, 14, 21, 30, 38, and 47. This constitutes ten "full-time employees" as that term is defined in section 372.3 of the Federal Regulations implementing EPCRA, at 40 C.F.R. Part 372.

In addition, the parties stipulated to the fact that Respondent's facility is designated as having the SIC Code 3369, which falls within SIC Codes 20 through 39. *See,* Stipulations ¶¶ 7 and 8.

There is also no dispute among the parties that nickel, chromium and cobalt, are chemicals listed under EPCRA §313(c) in 40 C.F.R. § 372.65. *See,* Stipulations ¶¶ 9, 10 and 11.

The parties have stipulated that Respondent, in fact, processed nickel in the amount of 307,134 pounds in 1988, 351,625 pounds in 1989, 285,890 pounds in 1990, 283,901 pounds in 1992, and 347,933 pounds in 1993. *See,* Stipulations ¶¶ 15, 22, 31, 39 and 48. The parties have also stipulated that Respondent processed chromium in the amount of 223,816 pounds in 1988, 256,238 pounds in 1989, 208,335 pounds in 1990, 189,268 pounds in 1992, and 231,955 pounds in 1993. *See,* Stipulations ¶¶ 17, 26, 33, 42 and

51. Moreover, it is stipulated that Respondent processed cobalt in the amount of 162,369 pounds in 1993. *See,* Stipulations ¶ 54.

There also is no dispute that the threshold amounts for triggering reporting on a Form R for those listed chemicals are processing more than 50,000 pounds per year in calendar year 1988 and 25,000 pounds per year for calendar year 1989 and each year thereafter. EPCRA § 313(f)(1)(B), 40 C.F.R. § 372.25(a).

Therefore, based upon the Stipulations, it is undisputed that Respondent's covered facility processed each of the three chemicals in amounts exceeding the reporting threshold for each of the years alleged in the Amended Complaint and thus, was required to file the Form Rs as alleged in the Amended Complaint.

Finally, there is also dispute to the fact that Respondent did not file the requisite Form Rs on or before July 1 following the years in which the nickel, chromium and cobalt were processed in excess of the thresholds. Specifically, the parties stipulated that Respondent did not file the Form R for nickel and chromium processed in 1988, 1989 and 1990 until February 13, 1992. *See,* Stipulations ¶¶ 16, 18, 23, 27, 32 and 34. The parties stipulated further that Respondent did not file the Form R for nickel and chromium processed in 1992 and 1993, and for cobalt processed in 1993, until November 15, 1994. *See,* Stipulations

¶¶ 41, 44, 50, 53 and 56.

Complainant has, therefore, established all of the elements for a finding of Respondent's liability for all of the violations alleged in the Amended Complaint, by the Stipulations of Fact and by the Joint Stipulated Exhibits. *See,* Report of Inspection on February 12, 1992, and Respondent's Form Rs for 1988, 1989, 1990, 1992 and 1993, Joint Stipulated Exhibits 1, 15, 16, 17, 19, 20. Indeed, Respondent has conceded that "U.S. EPA's assertion that Steeltech has not presented any evidence to the contrary with regard to jurisdictional allegations and the fact that, in a strict liability sense, violations of [EPCRA] occurred is not challenged." *See,* Respondent's Response to Complainant's Motion for Accelerated Decision, at 1.

However, Complainant's Motion for Accelerated Decision still cannot be granted if Respondent's affirmative defenses raise any genuine issues of material fact or if Complainant is not entitled to judgment as a matter of law.

B. Intervenor's Motion for Accelerated Decision and Respondent's Defenses

Respondent asserted in response to Complainant's Motion for Accelerated Decision that it is entitled to adjudication of its defenses of estoppel, laches, failure to bring the action without unreasonable delay and statute of limitations. However, in support of that assertion, it merely stated that Intervenor's Motion for Accelerated Decision is "presently pending with regard to these defenses."

However, the Intervenor's Motion for Accelerated Decision is grounded solely on the basis that the statute of limitations bars the claims in Counts I and II. The Intervenor's Motion does not refer to a defense of estoppel, laches, or unreasonable delay. Respondent did not describe a factual basis in support of those defenses either in its Answer to the Amended Complaint or its response to the Complainant's Motion for Accelerated Decision. Moreover, to the extent that the factual basis for these defenses was addressed in Respondent's Pre-Hearing Brief, filed on August 19, 1997, they were apparently presented for the express purpose of "illustrat[ing] the gross inequity of the proposed penalty amount." *See,* Respondent's Pre-Hearing Brief, p.1. Nevertheless, the defenses to the extent they would prevent entry of judgment as to liability will be considered at this time.

Estoppel

Estoppel is "an equitable doctrine invoked to avoid injustice in particular cases." The elements of the defense are (a) a definitive misstatement or omission of fact made by one party to another with reason to believe that the other will rely upon it; and (b) the other party does in fact reasonably rely upon the misrepresentation to his detriment. For the reliance to be reasonable, the party claiming the estoppel defense must show that at the time it acted to its detriment it did not have knowledge of the truth nor could such knowledge have been obtained with reasonable diligence. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 58 (1984).

The defense of estoppel is rarely valid against the Federal Government acting in its sovereign capacity. OPM v. Richmond, 496 U.S. 414 (1990); Heckler, 467 U.S. at 60-63 (1984). In Heckler, the Supreme Court explained that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as

a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* at 60 (citations omitted). Therefore, not only must the proponent of the defense prove the traditional elements but to prevail against the Government it must prove affirmative misconduct by the government. United States v. Marine Shale Processors, 81 F.3d 1329, 1349 (5th Cir. 1996); In re B.J. Carney Industries, Inc., CWA Appeal No. 96-2 (EAB, Remand Order, June 9, 1997), slip op. at 35. Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material act. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct. Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1499 (10th Cir. 1994); Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987). *See,* United States v. Bloom, 112 F.3d 200 (5th Cir. 1997) (mere assertions of inaction on the part of the Government to do not give rise to an estoppel defense).

In its Pre-Hearing Brief, Respondent has proffered in support of its defenses the assertion that the Complaint initiating this action was filed more than five years after the first asserted violation, and that during the two and a half years after EPA knew of Respondent's failure to file Form Rs for 1988 through 1991, EPA did not correspond or communicate with Respondent with regard to non-compliance or possible penalties. Further, Respondent indicated that it has never received as part of a general Agency mailing EPCRA forms, instructions and compliance and that when contacted beginning in 1994, the Agency promised to provide Agency mailings on EPCRA to Respondent but failed to do so.

The delay in filing and lack of forms and communication do not constitute affirmative misconduct. The Respondent's only allegation of affirmative misconduct by the Government is that it allegedly falsely promised to place Respondent on its mailing list for general Agency EPCRA mailings and did not do so. However, this alleged misconduct occurred after the violations at issue in this case occurred and thus the Respondent could not be deemed to have reasonably relied upon the misrepresentation so as to induce the violations. Moreover, there is no evidence that acting in due diligence the Respondent could not have obtained the forms after 1992, since Respondent has admitted that it became aware of its reporting requirements at that time. Thus, Respondent has failed to make out a valid estoppel defense so as to avoid entry of judgment as to liability on any of the Counts of the Complaint.

Unreasonable Delay/Laches

Respondent's defense of unreasonable delay appears to be subsumed by the defense of laches, which requires a showing of unreasonable delay and of harm or prejudice to the defendant. Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1091 (7th Cir. 1992). The Supreme Court has stated and reiterated that, "[a]s a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or to protect a public interest." Nevada v. United States, et al., 463 U.S. 110, 141 (1983), *quoting*, Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917); *see also,* United States v. Summerlin, 310 U.S. 414, 416 (1940); Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 34 (7th Cir. 1977).

The Respondent arguably supports its laches defense with an assertion of the same facts as proffered for the estoppel defense regarding the two and a half year delay in filing suit after the inspection. Admittedly, a two and a half year delay does appear on its face to be an unduly long time period to wait to file suit after an inspection has uncovered long standing violations. However, it must be noted that the Respondent has admitted that the day after the inspection, it filed the missing Form Rs, and thus, essentially remedied the violations to the most extent it could. Seen in this light, the delay in filing suit, until after additional violations for years 1992 and 1993 were discovered, does not appear to be unreasonable.

Moreover, there is no evidence that the Respondent suffered any harm or prejudice as a result of the delay. The only negative effect of the delay as seen from Respondent's perspective is that had suit been instituted promptly it alleges that it would have had the defense of inability to pay, which it has subsequently lost do to its good business fortunes. On the other hand, the delay in the filing of the Complaint deferred

Respondent having to incur the costs of defending the action or paying a penalty for many years. Thus, the Respondent would otherwise be able to put such sums to good business purposes. Therefore, on balance I do not find that the Respondent has alleged any facts which would show unreasonable delay as well as harm and/or prejudice so as to overcome this general rule so as to bar entry of judgment on liability.

Therefore, Respondent's affirmative defenses of estoppel, laches/unreasonable delay do not raise any genuine issues of

material fact or evidence that Complainant is not entitled to judgment as a matter of law as to liability.

Statute of Limitations

As to the statute of limitations defense, Intervenor, as joined by Respondent, argue that Counts I and II should be dismissed because they are barred by the general five-year statute of limitations, 28 U.S.C. § 2462. Intervenor argues that the statute of limitations began to run on those counts on the day after the date on which the report was required to have been filed, and elapsed before the Complaint was filed in 1994.

In response, Complainant asserts that the violations alleged in Counts I and II continued until Respondent filed the Form Rs on February 13, 1992, and thus the statute of limitations did not begin to run until that date, which is well within five years of the date of the original Complaint.

A ruling on this question was stayed by prior Order of the undersigned until issuance of the appellate decision In re Lazarus, Inc.. That case poses the issue of whether certain violations of TSCA, namely failure to register PCB transformers with fire response personnel and failure to mark the access door to the transformers, are continuing violations and thus not barred by the statute of limitations. The applicable statutory provision, Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), includes a provision virtually identical to that of EPCRA § 325(c)(3) quoted above. While the violations at issue in the present case and in Lazarus are not identical, the EAB's decision in Lazarus may provide significant guidance in interpreting the EPCRA provision. Unfortunately, as of the date of this Order, In re Lazarus, Inc. is still pending before the Environmental Appeals Board.

Therefore, the subject of the Intervenor's Motion will not be addressed in this Order. Regardless of whether the Environmental Appeals Board has ruled on the issue in Lazarus by the time of the hearing, the parties may and should raise the statute of limitations defense again at that time and, regardless of whether or not the Appeals Board has ruled on Lazarus, a decision on the statute of limitations defense will be issued by the undersigned in connection with the disposition of this case rendered in a timely manner after hearing.

Consequently, Complainant's Motion for Accelerated Decision will be granted as to the issue of liability only on Counts III through XI.

C. Complainant's Motion for Accelerated Decision as to the Penalty

Complainant has also moved for Accelerated Decision as to Penalty. The Complainant is seeking a total penalty in this case of $84,390. Respondent opposes the request for accelerated decision as to penalty. A motion for accelerated decision, like a motion for summary judgment in Federal court, may be defeated if the person opposing the motion raises any genuine issue of material fact. The burden of showing the absence of a genuine issue of material fact rests on the party moving for summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). In considering a motion for summary judgment, the tribunal's consideration of the facts must be in a light most favorable to the party opposing summary judgment, and all reasonable inferences from the facts must be drawn in his favor. Id.

In response to the Motion for Accelerated Decision, Respondent provided the Affidavit of James Pews, Vice-President of Finance for Respondent since 1994, who is responsible for preparing Form Rs for the facility. Respondent's Response, Exhibit A. Mr. Pews states in his Affidavit that he participated in telephone calls with Bob Allen, an EPA Environmental Engineer involved in this proceeding, as to Respondent's failure to receive from EPA any EPCRA compliance information despite Respondent's requests and its failure to receive the Notice of Non-Compliance for the 1989 Form R. Mr. Pews also referred in his Affidavit to a turnover of shareholders in 1990 and of employees in 1992 and 1993, and to information in the stipulated financial statements of Respondent as to net losses and deficits. Joint Stipulated Exhibits 21 through 25.

There are no criteria listed in EPCRA for the assessment of penalties for violations of Section 313. For calculation of the proposed penalty, Complainant relies upon the Enforcement Response Policy for Section 313 of EPCRA (ERP), dated August 10, 1992. The ERP does not have the force of law, and is not binding authority for calculating a civil penalty. Joint Stipulated Exhibits 2, 3. Moreover, a finding that the penalty policy was followed in calculating the proposed penalty would not necessarily lead to a conclusion that the penalty is appropriate in the particular circumstances of the case.

Even if the ERP is considered, Respondent challenges EPA's calculation of the penalty under the ERP. Specifically, Respondent challenges EPA's failure to mitigate the penalty on the basis of Respondent's voluntary disclosure of violations for 1992 and 1993, and on the basis of Respondents' attitude.

The parties disagree as to whether Respondent has demonstrated that it has put procedures in place to ensure violations will not recur. Respondent asserts that testimony should be heard from its representatives as to what measures have been taken. Mr. Pews stated with some supporting details in his Affidavit that Respondent has taken steps to improve EPCRA compliance. As to the criterion in the ERP, "other factors as justice may require," Respondent asserts that the change in employees and ownership of Respondent, its financial status around the time of EPA's discovery of the violations, and the circumstances leading to the violations, as referenced in Mr. Pews' Affidavit, should be considered in assessing the penalty. Construing the facts in light most favorable to Respondent and drawing reasonable inferences in its favor, genuine issues of material fact have been raised with respect to the amount of penalty to assess.

In view of the lack of statutory criteria upon which to determine a penalty, and because material issues of fact were raised by Respondent with respect to the penalty, an accelerated decision on the penalty is not warranted.

ORDER

1. Complainant's Motion for Accelerated Decision is GRANTED as to the issue of Respondent's liability for the violations alleged in Counts II, IV, V, VI, VII, VIII, IX, X and XI of the complaint.

2. Complainant's Motion for Accelerated Decision is DENIED with respect to the issue of the penalty assessment.

3. Intervenor's Motion for Partial Accelerated Decision on Counts I and II is STAYED until the date of the hearing.

_____

Susan L. Biro

Chief Administrative Law Judge

Dated: _____

Washington D.C.

1. Administrative Law Judge Daniel M. Head was the Presiding Judge in this matter until his retirement in January 1997. The undersigned was redesignated as the Administrative Law Judge to preside over this matter on January 21, 1997.

2. Complainant moved on July 15, 1997 to supplement its prehearing exchange with five documents: excerpts from the EPA Delegations Manual, a Dun and Bradstreet report for Steeltech, Limited, and selected pages from the 1992 and 1993 volumes of the Michigan Manufacturer's Directory. However, the parties listed those documents as Joint Stipulated Exhibits, without any reservations in regard thereto, so the Motion is hereby deemed moot.