UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
StanChem, Incorporated	)	**DOCKET NO. CWA 2-I-95-1040**
	)	
	)	
RESPONDENT	)	

ORDER DENYING CROSS-MOTIONS FOR ACCELERATED DECISION AND GRANTING IN PART MOTION FOR DISCOVERY

The complaint in this Class II civil penalty proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g), issued on May 1, 1995, charged Respondent, StanChem, Incorporated ("StanChem") with violating CWA Section 307(d), 33 U.S.C. § 1317(d), by operating its facility in violation of pretreatment standards.

The complaint alleges that StanChem's wastewater discharges into a Publicly Owned Treatment Works ("POTW") must comply with the Categorical Pretreatment Standards for the Organic Chemicals, Plastics and Synthetic Fibers ("OCPSF") category, appearing at 40 CFR Part 414. The complaint further alleges that, since at least November 1990, StanChem's discharges violated the OCPSF pretreatment standards for existing sources ("PSES") by: 1) periodically exceeding the daily maximum and monthly average effluent limitations for five chemicals: methylene chloride, ethylbenzene, trichloroethylene, tetrachloroethylene, and lead; and 2) regularly exceeding the daily maximum and monthly average effluent limitations for two chemicals: toluene and 1,1,1-trichloroethane. For these alleged violations, Complainant proposes to assess StanChem a civil penalty of $125,000, the maximum which may be administratively assessed under the Act.

StanChem's answer, filed on May 22, 1995, admitted that it discharged wastewater into a POTW, denied that it violated the pretreatment standards alleged in the complaint, and requested a

hearing. StanChem raised six defenses: 1) the proposed penalty amount is inappropriate and unsupported; 2) 40 CFR § 414 does not apply to StanChem pursuant to Rule 414.11; 3) StanChem was unable to address issues which are the subject of the complaint pending formal approval, from the Connecticut Department of Environmental Protection ("CTDEP"), of proposed modifications to StanChem's pretreatment system; 4) compliance with any allegedly applicable requirements under 40 CFR § 414 was impossible pending renewal of StanChem's discharge permit by the CTDEP; 5) the complaint violated Respondent's rights to due process and equal protection because Complainant did not seek penalties from other, similarly situated permittees; 6) Complainant is estopped from alleging the violations in the complaint because it approved the CTDEP proposals to enforce requirements under the CWA and declined to object to the CTDEP decisions regarding enforcement of the underlying CWA requirements.[(1)]

On February 21, 1996, Complainant filed a motion for partial accelerated decision, and memorandum in support thereof ("EPA's Motion"), seeking judgment as to liability only. The motion asserts that StanChem's facility is subject to the OCPSF PSES, that StanChem's own monitoring data show numerous and significant violations of OCPSF PSES, and that none of the defenses StanChem raised establishes an affirmative defense to liability for the violations alleged in the complaint.[(2)]

Under date of March 4, 1996, StanChem submitted a motion for an accelerated decision of dismissal, a motion for discovery, an objection to Complainant's motion for partial accelerated decision, and a single memorandum in support of the three motions ("StanChem's Motion"). StanChem's motion is based upon six assertions: 1) the OCPSF rules require the delegated control authority, CTDEP in this instance, to make certain discretionary decisions regarding the discharger's mass flow limits as a prerequisite to enforceability of the OCPSF PSES; 2) EPA's formula to determine mass limits does not address the portion of StanChem's discharges that came from non-regulated wastewater; 3) genuine issues of material fact exist regarding whether StanChem manufactured the OCPSF product groups, as alleged by Complainant, and whether Standard Industrial Classification ("SIC") Codes 2821 or 2869 applied to StanChem at the time of discharge; 4) StanChem could not have been required to comply with the OCPSF PSES any earlier than September 11, 1995 because EPA revised the OCPSF rules several times since their initial publication, extending the date by which indirect discharges were required to come into compliance with any applicable OCPSF PSES as well as modifying certain PSES standards; 5) EPA is

equitably estopped from seeking a penalty due to the affirmative misconduct of EPA and CTDEP, its delegated control authority; and 6) StanChem could not have modified its pretreatment system to meet OCPSF standards until CTDEP determined the specific level at which it would set the standards and issued an approval for StanChem to install additional pretreatment. StanChem also requested discovery to establish its estoppel and selective enforcement defenses.

On March 21, 1996, Complainant filed an objection to Respondent's motions for accelerated decision and discovery, and a memorandum in support thereof ("Complainant's Reply"). StanChem submitted a reply memorandum on April 4, 1996 ("StanChem's Reply"). The parties' positions will be set forth in greater detail, below. For the reasons hereinafter appearing, the cross-motions for accelerated decisions will be denied and StanChem's motion for discovery will be granted in part. By a separate order the parties will be directed to exchange prehearing information.

DISCUSSION

StanChem manufactures specialty paints, fireproofing, and polymer products at a facility in East Berlin, Connecticut. StanChem's production, research and development, and maintenance activities produce wastewater containing organic compounds. This organic wastewater is discharged to the Mattabassett District sewer system, a POTW, in Cromwell, Connecticut. CTDEP issued a permit to StanChem, for its discharges into the POTW, on February 28, 1977. The permit in effect at the time of the alleged violations had last been renewed on December 16, 1982.

On November 3, 1980, CTDEP approved the installation by StanChem of equipment for collecting and pretreating wastewater (CTDEP letter to StanChem, dated November 3, 1980, entitled "Approval", Exh C to StanChem's motion). The letter specifically authorized the installation of "one 11,820 gallon fiberglass batch treatment tank, one 6,000 gallon stainless steel batch treatment tank, two mixers together with appurtenant pumps, piping, and pH control system for the treatment of an average flow of 7,000 gallons per day of polymer production, P.P. Process, and tank truck interior washdown wastewaters prior to being discharged....."[(3)] StanChem collected, pretreated, and monitored its wastewater in one central system prior to each discharge into the POTW.

In the 1982 permit, CTDEP required StanChem to monitor its combined wastewater discharges for organic compounds through a monthly hydrocarbon scan, but did not impose any limits on the levels of organics discharged to the POTW. StanChem submitted a permit renewal application in July, 1987.[4] The application identified StanChem as a producer of polymers, paints, and fireproofing (SIC 2851) and the processes which generate the wastewater as Polymer and Melamine Pyrophosphate production (Form 1 at 6). Specific products produced were identified as Melamine Pyrophosphate and Polymer and Copolymer products (Form 1 at 7). The application answered in the negative the question of whether any effluent limitations [categorical limits] adopted in Section 22a-430-4(1) of the regulations of Connecticut State Agencies by reference to the Clean Water Act apply to the discharge (Id. 3).

EPA issued a final rule establishing categorical pretreatment standards and effluent limitations guidelines for the OCPSF category on November 5, 1987.[5] The OCPSF limitations are technology-based and apply to categories of dischargers based on industrial characteristics.[6] The OCPSF limits provide maximum daily limits and maximum monthly average limits for the discharge of designated pollutants. CTDEP was the Control Authority responsible for administering the General Pretreatment Regulations, 40 CFR Part 403, including baseline reporting and other requirements related to categorical pretreatment standards.

I. Issues of Fact Preclude Granting Complainant's Motion For an Accelerated Decision as to Liability and StanChem's Motion for an Accelerated Decision of Dismissal

Complainant asserts that StanChem's facility is subject to the OCPSF PSES because StanChem manufactures products that are covered by subparts D, E and H of the OCPSF regulations, and SIC Codes 2821 and 2869. In its motion for accelerated decision, Complainant alleges that StanChem's products include "acrylic resins" and "polyvinyl acetate resins," specifically listed in Subpart D, 40 CFR § 414.40; "melamine resins," specifically listed in Subpart E, 40 CFR § 414.50; and "melamine pyrophosphate," a SIC 2869 organic chemical that is covered by Subpart H, which applies to "all SIC 2865 and SIC 2869 organic chemicals and organic chemical groups not defined as commodity or bulk organic chemicals in §§ 414.60 and 414.70...[subparts F and G]," 40 CFR § 414.80 (Motion at 7-9).

In support of these assertions, Complainant cites the Lombardo affidavit (supra note 2), which states, inter alia, that StanChem's 308 response indicates that it manufactures acrylic and vinyl acetate latex polymers, products falling within SIC 2821, that acrylic polymers are included in the acrylic resins product group and that vinyl acetate latex polymers are included in the polyvinyl acetate resins product group. Because acrylic resins and polyvinyl acetate resins are specifically listed under Subpart D, Ms. Lombardo concludes that Subpart D is applicable to wastewater discharges resulting from StanChem's acrylic polymer and vinyl acetate latex polymer production (Affidavit at 3).

Ms. Lombardo states that Thermosetting Resins, 40 CFR Part 414, Subpart E, are also included within SIC 2821 and that included within the products and product groups covered by Subpart E (§ 414.50) are the melamine resins product group. StanChem's 308 response indicates that it manufactured urea formaldehyde melamine condensate. According to Ms. Lombardo, urea formaldehyde melamine condensate is included in the melamine resins product group. She concludes, therefore, that Subpart E is applicable to wastewater discharges resulting from StanChem's urea formaldehyde melamine condensate production.[(7)]

Regarding Speciality Organic Chemicals, 40 CFR Part 414, Subpart H, which applies to "process wastewater discharges resulting from the manufacture of all SIC 2865 and 2869 organic chemicals and organic chemical groups that are not defined as commodity or bulk organic chemicals in §§ 414.60 and 414.70, respectively," Ms. Lombardo states that melamine pyrophosphate is an SIC 2869 chemical that is not defined as a commodity or bulk organic chemical. She concludes, therefore, that StanChem's melamine pyrophosphate manufacturing process is within Subpart H and that Subpart H is applicable to wastewater discharges resulting from StanChem's melamine pyrophosphate production (Affidavit at 4). StanChem points out (Motion at 17) that the provisions of the OCPSF rule are applicable to only those process wastewater discharges that are from establishments or portions of establishments that manufacture the OCPSF products or product groups covered by the rule and that are included within {Standard Industrial Classification) (SIC) major groups specified in the rule (40 C.F.R. § 414.11(a)). Accordingly, StanChem asserts that an essential component to applicability of the OCPSF rule is the existence of an establishment or a portion of an establishment that is included within one of the designated SIC codes.

StanChem emphasizes that Complainant's motion is based not only on the factual assumption that StanChem manufactured the products listed in these SIC codes, but also on the factual assumption that the portion of StanChem's establishment involved with these operations was included within SIC code 2821 or SIC code 2869 and was therefore potentially subject to the OCPSF rule.[8]

StanChem further points out that the 1987 SIC Manual (portions of which are attached as Exh I) defines an establishment according to its "primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered."[9] StanChem says that in most instances an establishment's SIC code applies to all departments included within an establishment (even those not engaged in the establishment's primary activity). According to the Manual, "[D]istinct and separate economic activities [that] are performed at a single physical location" are only assigned separate SIC codes "where (1) no one industry description in the classification includes such combined activities; (2) the employment in each such activity is significant; and (3) separate reports can be prepared on the number of employees, their wages and salaries, sales or receipts, and other types of establishment data." Id. 11-13. Because none of its departments assertedly meet the listed criteria for a separate establishment at a single location, StanChem contends that each are included within the SIC code defining StanChem's primary activity, i.e., SIC Code 2851, the code applicable to facilities "primarily engaged in manufacturing paints..... and allied paint products." (Motion at 19).

StanChem notes that Complainant does not contest [the fact] that StanChem produces speciality coatings (e.g., paints) and fireproofing, as well as polymer products. StanChem further notes that Complainant fails to recognize that StanChem listed SIC code 2851, the code applicable to facilities" primarily engaged in manufacturing paint.....and allied paint products", in its 1987 permit application. Section 414.11(c) provides that Part 414 is not applicable to wastewaters from the production of OCPSF products in listed SIC subgroups, if the products are included within identified SIC subgroups and have in the past been reported by the establishment under those SIC groups rather than under the groups listed under § 414.11(a). SIC code 2851 is not listed as an excluded code in § 414.11(c).

Pursuant to 40 CFR § 414.11(d), the provisions of Part 414, with exceptions not here relevant, are not applicable to any

discharges for which a different set of previously promulgated effluent limitation guidelines and standards in this subchapter apply.[10] While StanChem has not identified any previously promulgated effluent limitations guidelines and standards applicable to SIC 2851, and it does not appear that any such standards have been issued, it should be noted that in the preamble to the initial regulation (52 Fed. Reg. 42524) the Agency identified SIC 2851 as among codes for which a conscious decision was made not to establish national regulations [categorical standards] for priority pollutants.[11] Although the preamble language is ambiguous, it's thrust is that discharge limitations for OCPSF activities at plants manufacturing products within the SIC groups for which a decision was made not to establish categorical standards are subject to the "best professional judgment" of the permit writer (supra note 10). Moreover, it is clear that the Agency's information gathering activities to support the rule do not include plants having OCPSF activities, but which are otherwise within SIC 2851 and other codes listed at 52 Fed. Reg. 42524.

In view of the foregoing, it is concluded that, although whether StanChem's OCPSF activities are primary or secondary in the sense of the percentage of the plant's manufacturing capacity devoted to such activities or the output by weight of OCPSF manufacture are not controlling, there is merit in StanChem's assertion that genuine issues of material fact exist as to whether it was subject to SIC 2821 or SIC 2869 at the time of discharge. Otherwise stated, the issue is whether StanChem was within SIC code 2851 and thus its OCPSF activities were within an apparent exclusion to the OCPSF rule.

As indicated infra at 20, 21, the Agency in its 1990 proposal to eliminate alleged unintended restrictions as to the coverage of the rule stated that the applicability of §§ 414.30, 414.40, and 414.50 should be governed solely by SIC code definitions.

StanChem's assertion that it listed SIC code 2821 in its December 1993 revision to its permit application pursuant to the instructions of CTDEP, who had reassessed the OCPSF rule and concluded that StanChem was subject to the rule because it made products listed in SIC 2821, appears be true because StanChem was informed in February 1993 that compliance with OCPSF pretreatment standards would be required (supra note 4). Complainant's reliance on StanChem's amended permit application as an admission that the OCPSF rule applied to its manufacturing activities is, therefore, misplaced. Subsequent statements or reports regarding the applicability of the OCPSF rule by

StanChem may not be relied upon as admissions for the same reason.

If, in fact, StanChem is within an exclusion to the OCPSF rule, its motion to dismiss should, of course, be granted. There are, however, factual issues as to whether StanChem was within SIC code 2851 and the extent of the apparent exclusion for plants having OCPSF activities but otherwise within SIC code 2851 or other codes applicable to paint and ink formulation and printing (supra note 10). Additionally, StanChem appears to be disputing Complainant's position that urea formaldehyde melamine condensate, which it manufactures, is a melamine resin (supra note 7). The fact that "melamine resins" are a product group (40 CFR § 414.50) indicates that more than one chemical formulation is involved. Although Complainant has explained in some detail why urea formaldehyde melamine condensate is considered to be a melamine resin in the "2nd Lombardo Affidavit", attached to its "Object" to StanChem's motion for an accelerated decision of dismissal, and StanChem has not countered with an affidavit from a scientist or technical person, it is concluded that resolution of this issue on a motion for summary judgment is inappropriate.

Moreover, although Complainant may well be correct that the "tiered flow rates" (2,000, 4,000, and 6,000 mgd) used by Ms. Lombardo to calculate daily average and monthly maximum discharge limits for the chemicals at issue are conservative and favorable to StanChem, StanChem properly notes that the Agency's complaint omitted any reference to specific mass limits allegedly applicable to its discharges and points out that by assigning these tiered flow rates the Agency is for the first time making factual decisions concerning StanChem's discharges (Motion at 11, 14, 15). Although for the reasons discussed below, this approach may be justified (assuming the applicability of the OCPSF rule) in the absence of the submission of a baseline monitoring report by StanChem, it raises issues which should not be resolved on summary judgment. This is especially true here, because Complainant acknowledges that StanChem's flow rates varied significantly on occasion.

The foregoing conclusions require that Complainant's motion for an accelerated decision as to liability and StanChem's motion for an accelerated decision of dismissal be denied. Remaining for discussion, however, are StanChem's assertions that the rule was not enforceable until the designated control authority, CTDEP in this instance, made certain discretionary determinations regarding the mass flow limits applicable to

StanChem and issued an approval for StanChem to install additional pretreatment [equipment] (Motion at 11, 13-15).

Pursuant to § 307(d) of the Act (33 U.S.C. § 1317(d)), it is unlawful for the owner or operator of any source, after the effective date of any effluent standard, prohibition, or pretreatment standard promulgated under that section, to operate such source in violation of any effluent standard, prohibition, or pretreatment standard. This language is straight forward and indicates that after the effective date of effluent or pretreatment standards, violations of such standards are not dependent upon further action by the Agency or the control authority. In this regard, the regulation (40 CFR § 403.12(b)) provides that within 180 days after the effective date of a pretreatment standard existing industrial users subject to such standards and currently discharging or scheduled to discharge to a POTW shall be required to submit to the control authority a report containing the information specified in paragraphs (b)(1)-(7) of that section (baseline monitoring report). StanChem appears to have submitted such a report for the first time in July 1994 in response to a request from CTDEP (308 Response ¶¶ 14-17). Although nothing in the regulation (Part 403) appears to expressly so state, as a matter of logic, it is the submission of this report that triggers any necessary determinations by the control authority.[(12)] In the absence of a baseline monitoring report, enforcement of the Act may require reconstruction of prior wastewater flows and calculation of the discharge limits applicable thereto.

StanChem describes categorical standards (Electroplating Point Source Category, 40 CFR Part 413, and the Metal Finishing Point Source Category, Part 433) in cases cited by Complainant, e.g., Public Interest Research Group of New Jersey v. Ferro Merchandising Equipment Corp., 29 ERC 1197, 1202 (D.N.J. 1988); reconsideration denied, 29 ERC 1202 (D.N.J. 1989), as "self-implementing" in contrast to the OCPSF rule at issue here (Reply at 2-5). The limitations in Part 413 do not require any flow determinations or estimates (discharges above 38,000 liters per day are, however, subject to more stringent limits) and the only calculations apparently necessary are those required to determine whether daily and monthly average per liter concentrations of particular pollutants in the discharges are within specified limits. Similarly, the limits in Part 433 do not require calculation of mass limits based on flows. Accordingly, the Part 413 and Part 433 limits are purely concentration based and provide support for StanChem's argument that the standards in the cases cited by Complainant involving

these parts, and other standards are self-implementing or at least distinguishable from the OCPSF rule which requires calculation of mass limits based on flows.[13] Although the preamble to the final rule states that the OCPSF rule is concentration based, it expressly requires the permitting or control authority to multiply a reasonable estimate of a plant's regulated wastewater discharge by the concentration limitations to develop mass limitations for each NPDES or industrial user permit.[14] These determinations cannot be made in a vacuum and, of necessity, must be based on information obtained from the permit applicant by means of a base-line monitoring report or otherwise.

The Clean Water Act is a strict liability statute and enforcement of the Act may not be precluded by StanChem's failure to submit a base-line monitoring report as required by the regulation, § 403.12(b). StanChem's argument that the Agency may not impose what are in effect "retroactive limits" on its discharges (Reply at 6, 7), is, therefore, rejected. Whether the tiered flow rates used by Complainant are reasonable involves factual issues to be addressed at a hearing.

StanChem also focuses in particular on 40 CFR § 414.111, paragraph (b) of which provides in part that in the case of lead, zinc, and total cyanide the discharge quantity (mass) shall be determined by multiplying the concentrations listed in the following table for these pollutants times the flow from metal-bearing wastestreams for metals and times the flow from cyanide-bearing wastestreams for total cyanide. The metal-bearing waste- streams are defined as those wastestreams listed in Appendix A of this part, plus any additional OCPSF process wastewater streams identified by the control authority on a case-by-case basis. Although Complainant argues that StanChem misinterprets the regulation, it relies on a 1993 "clarification" which allegedly made it clear that the allowance for metals in OCPSF wastestreams applied only to metal-bearing wastestreams specifically listed as such in the regulation and that other wastestreams not so designated have a zero discharge allowance for these pollutants.[15]

StanChem also points out that the OCPSF rule was the subject of complex and protracted litigation under which portions of the original rule were remanded, resulting in revocations and amendments to the rule and that there were revisions and extensions of the compliance dates for portions of the rule.[16] Although Complainant says that this litigation did not alter StanChem's obligation to comply with the OCPSF rule and is

irrelevant here, StanChem correctly points out that the coverage of the OCPSF PSES prior to a 1992 amendment was limited to wastewaters from the products and product groups specifically listed in §§ 414.30, 414.40 and 414.50 (Reply at 9, note 4). The Agency stated that the applicability of these three subcategories should be based solely on SIC code definitions and acknowledged that the mentioned limitation was incorrect, stating that the listings were intended to be illustrative rather than exclusive. See 55 Fed. Reg. 42336 (October 18, 1990) and 57 Fed. Reg. 41841 (September 11, 1992). As indicated supra note 7, StanChem disputes Complainant's position that the urea formaldehyde melamine concentrate, produced by StanChem, is a melamine resin within the scope of the initial OCPSF rule. Resolution of such issues on a motion for summary judgment is simply inappropriate.

II. The Compliance Deadline For the OCPSF Rules

EPA issued the OCPSF final rule on November 5, 1987. In accordance with § 307(a)(6) of the Act, compliance was required not later than three years after promulgation. "Promulgation" was deemed to be synonymous with publication in the Federal Register, 40 CFR § 414.12. Existing sources, therefore, were required to comply with limits specified in the November 5, 1987 Federal Register (40 CFR Part 414) no later than November 5, 1990.

StanChem points out that the Agency issued revisions to the OCPSF PSES rule in 1992, 57 Fed. Reg. 41836 (September 11, 1992) (Motion at 8, 20, 21). This revision unequivocally stated that: "The compliance date for PSES is September 11, 1995." (Id.). Although this language could and should have been more precise, § 307(a)(6) of the Act requires that the effective date of effluent standards or prohibitions under that section be not later than three years after promulgation. It is therefore concluded that the amendment was not intended to and did not change the compliance date for previously promulgated standards. This conclusion is supported by the statement, 57 Fed. Reg. 41842: "The compliance dates for today's amendment will follow the same statutory requirements as any new rule."

As noted previously, the 1992 amendment, inter alia, eliminated assertedly unintended restrictions as to the scope of the products and product groups covered by §§ 414.30, 414.40, and 414.50. StanChem asserts that at least urea formaldehyde melamine condensate, which it produced, was not covered by the initial rule. There can be no question that the compliance date

of the rule for products first included within the OCPSF rule by the 1992 amendment is September 11, 1995. Whether any of StanChem's products were so included by the 1992 amendment are questions of fact to be addressed at a hearing.

As noted above, lead is one of the pollutants which StanChem is alleged to have discharged in excess of the limits set forth in the table at 40 CFR § 111(b). StanChem points out that revisions for metals including lead were added to the OCPSF rule in the 1992 amendment which authorized the control authority to allow credit, i.e., establish alternative effluent limitations, for metals incidentally present in non-metal-bearing wastestreams (§ 414.11(h)) and argues that this revision in effect extends the compliance date for the OCPSF rule to September 11, 1995 (Motion at 20, 21; Reply at 8, 9). The mentioned amendment was to allow for metals not reasonably avoidable in the wastestreams because of sources such as intake water, corrosion of construction materials and contamination of raw materials. This amendment and others resulted from the OCPSF litigation (see 55 Fed. Reg. 42232), making questionable indeed Complainant's contention that in the absence of the amendment the allowance for wastestreams not designated as metal-bearing could reasonably be zero. Be that as it may, the amendment logically extends the compliance date only for wastestreams thereby affected. This is dependent on a showing by StanChem that it is entitled to an alternate effluent limitation for metals which might obviate some or all of the alleged violations for lead. These are issues to be addressed at a hearing.

III. StanChem's Estoppel Defense

In its answer, StanChem pointed out that Complainant had approved CTDEP proposals to enforce [administer] requirements of the Clean Water Act and argued that EPA should be equitably estopped from seeking a penalty for the alleged violations because it declined to object to CTDEP''s decisions concerning enforcement of the requirements alleged in the complaint (Id. 6, 7). Citing memoranda of understanding between EPA and CTDEP (MOUs), e.g. Exh K, StanChem says CTDEP had primary responsibility for applying and enforcing national pretreatment standards in Connecticut (Memorandum at 22). StanChem alleges that EPA permitted its delegated agent, CTDEP, to continue a prolonged and misleading permitting process under which StanChem reasonably concluded that its discharges were fully authorized to continue under the terms of its existing permit (Id. 23).

StanChem contends that Complainant cannot avoid responsibility for its misconduct and the misconduct of its authorized control authority, CTDEP, by allowing such conduct to take place and then initiating an enforcement action to take advantage of such misconduct (Reply at 11). StanChem cites Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984) at 61 (citizens are entitled to a "minimum standard of decency, honor, and reliability in dealings with their Government"). Although StanChem maintains that CTDEP's alleged misconduct may be imputed to Complainant irrespective of an agency relationship with EPA, it argues that the MOUs between EPA and CTDEP prove that such a relationship exists.

Factually, StanChem points out that CTDEP has been authorized to administer the CWA including the pretreatment program since 1981, that StanChem submitted its application for a renewal of its permit in July 1987, that the Region was well aware that CTDEP was not processing permit applications in a timely manner, and that StanChem was repeatedly assured by CTDEP that it was authorized to discharge in accordance with its existing permit (Memorandum at 22-26). Supporting these assertions, StanChem relies, inter alia, on an Executive Summary of a management review of CTDEP, for the period ending April 30, 1994 (Exh J), which refers to a backlog of expired NPDES and municipal permits and CTDEP's efforts to improve the rate of permit application review and issuance, and to a letter from CTDEP, dated July 22, 1988 (Exh D), which, among other things, acknowledged receipt of a complete application for a renewal permit from StanChem and enclosed a copy of the draft permit.

StanChem also relies on the fact that on March 14, 1989, CTDEP faxed it a copy of Part 414, Subpart G "Bulk Organic Chemicals" under a cover sheet entitled "Re: Organic chem. Regulations-List of product groups to determine applicability." (Exh E). The circumstances under which this subpart and not other subparts came to be sent to StanChem have not been explained. StanChem alleges that its engineer reviewed this list and made a good faith determination that the OCPSF regulations were not applicable. This is confirmed by a letter to CTDEP, dated May 18, 1989, signed by StanChem's environmental engineer (Exh F), which states that the Organic Chemical Regulations, Subpart G, § 414.70 have been reviewed [for the purpose of determining] the applicability of the regulation to its [pending] wastewater discharge application and that "we" do not manufacture any of the bulk organic chemicals or any of the materials which would fall under the bulk organic chemical groups listed in the referenced regulations. The letter further states that this

information should help you in completing and issuing our new discharge permit.

It should be noted that CTDEP's advice, and StanChem's belief, that it was authorized to continue discharges in accordance with its existing permit pending action on its permit application were in accordance with the Administrative Procedure Act.[17] Presumably, Connecticut has a similar provision in its statutes or regulations. Although it is concluded that the cited APA provision does not relieve StanChem of the necessity of complying with the OCPSF rule, which became effective subsequent to the submission of StanChem's application for a renewal of its permit, if, in fact, the rule applies to StanChem, the APA provision highlights the significance of CTDEP's apparent confusion or indecision as to the applicability of the OCPSF rule. CTDEP was not alone in this regard.[18]

It is, of course, well settled that estoppel against the U.S. government will be permitted only in the most extraordinary circumstances. (U.S. v. Buccanfuso, 882 F.2d 666, 670 (2d Cir. 1989)). "A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some 'affirmative misconduct' on the part of the government" upon which the party "reasonably relied to its detriment." (In re B.J. Carney Industries, Inc., CWA Appeal No. 96-2, 35 (EAB June 9, 1997) quoting U.S. v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995) and In re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4, 4 EAD 513, 522 (EAB February 24, 1993)). Estoppel is not available when the party claiming estoppel "should...have known that the conduct upon which it bases the estoppel is misleading." (Heckler v. Community Health Services of Crawford County, Inc., supra.

StanChem "bears a heavy burden" to demonstrate affirmative misconduct by CTDEP and Complainant and its reasonable reliance thereon so that estoppel may be warranted. It has, however, prima facie presented a compelling case that a penalty of the magnitude sought by Complainant is not justified. These and other issues are matters appropriate for decision only after a hearing.

V. StanChem's Motion for an Order of Discovery

Concomitant with its other pleadings, StanChem filed a motion for discovery pursuant to Rule 22.19(f) (40 CFR Part 22), on March 6, 1997. The motion seeks information allegedly in the possession of, or known to, members of EPA and/or CTDEP which is

material to questions of fact with respect to StanChem's defenses. Specifically, StanChem asks for the production of Executive Summaries of the Agency's Mid Year Reviews of CTDEP for the periods ending April 30, 1988; April 30, 1989; April 30, 1990; and April 30, 1995; a copy of the MOU for Pretreatment and NPDES Permit Issuance and Compliance (1994), and copies of reports of CTDEP inspections of StanChem conducted in 1990, 1991, and 1992.

Additionally, StanChem asks that Complainant and CTDEP be ordered to disclose the names, addresses, and phone numbers of all individuals under their control with knowledge, information, or access to information related to StanChem's equitable estoppel and selective enforcement special defenses, including but not limited to review of StanChem's 1987 permit renewal application; referral of this enforcement action to Complainant; CTDEP's assessment in 1989 that the OCPSF rule did not apply to StanChem and its subsequent change of position in that regard. StanChem proposes to depose the individuals so disclosed and asks for the production of relevant documents available to the deponents which have not previously been provided StanChem.

Complainant opposes StanChem's motion upon the ground that discovery is unnecessary, because Complainant is entitled to an accelerated decision as to liability (Objection, dated March 20, 1996). This argument has been rejected for reasons discussed above.

In the prehearing exchange which is being directed by a contemporaneous order, Complainant will be directed to provide the specific documents requested by StanChem and to identify individuals employed by CTDEP and EPA having knowledge of the matters listed by StanChem involving the review of StanChem's permit application. Rule 22.19(f) is, however, not hospitable to discovery by means of depositions, requiring in addition to a showing of good cause, a finding that the information cannot be obtained by alternate methods (Rule 22.19(f)(2)(i)). StanChem's motion for discovery insofar as it seeks to depose employees of CTDEP or EPA will be denied. StanChem may, of course, renew the motion, if considered necessary, after the receipt of Complainant's prehearing exchange.

Order

1. Complainant's motion for a partial accelerated decision as to liability is denied.

2. Respondent's motion for an accelerated decision of dismissal is denied.

3. Respondent's motion for discovery is granted in part as specified in the contemporaneous order directing the parties to submit prehearing exchanges.

Dated this 26th day of September 1997.

Spencer T. Nissen

Administrative Law Judge

1. This Order only addresses the principal defenses raised in StanChem's motion for an accelerated decision.

2. The alleged violations occurred during the period November 8,1990 through April 1995, and are set forth in a "Table of Violations" attached to an affidavit, dated February 5, 1996, by Virginia A. Lombardo, an EPA environmental engineer, which was submitted in support of EPA's motion. The table does not include ethylbenzene as a chemical discharged in excess of daily or monthly average limitations, and although it does include trichloroethane, it does not include 1,1,1-Trichloroethane. Limitations applicable to indirect discharges of these and other chemicals are set forth in a table at 40 CFR § 414.111(b).

3. Exh B to StanChem's motion."P.P. Process" in the approval letter refers to "Melamine Pyrophosphate process" (Memorandum in Support of Respondent's Motion for an Accelerated Decision of Dismissal, Motion for an Order of Discovery, and Objection to Complainant's Motion for a Partial Accelerated Decision (StanChem's Motion at 4).

4. Exh. 5 to Complainant's motion; Exh C to StanChem's motion. On February 26, 1993, after some of the violations at issue in this action allegedly occurred, CTDEP informed StanChem that it did not intend to renew StanChem's discharge permit until StanChem upgraded its pretreatment system to achieve levels consistent with the OCPSF pretreatment standards and submitted a corresponding amendment to its 1987 permit renewal application. StanChem submitted a renewal application under date of December 2, 1993, which unlike the 1987 permit application, specifically acknowledged that effluent limitations adopted in regulations of Connecticut State Agencies by reference to the Clean Water Act applied to its discharges (Exh 6). On November 14, 1995, CTDEP renewed StanChem's permit, under which StanChem agreed to reduce

the levels of organics in its discharge to levels consistent with the OCPSF PSES.

5. 52 Fed. Reg. 42522 (November 5, 1987). The Clean Water Act requires EPA to establish pretreatment standards for the introduction of pollutants into POTWs that would interfere with the operation of a POTW or which are not susceptible to treatment by the POTW. 33 U.S.C. § 1317(b)(1). The Act also instructs the Agency to designate categories of sources to which pretreatment standards shall apply. 33 U.S.C. § 1317(b)(3).

6. The Best Practicable Technology (BPT) limitations in the final OCPSF regulations are divided into seven, product-based subcategories of the OCPSF industry (40 CFR Part 414). The categories at issue in this proceeding are: (3) thermoplastic resins, SIC 28213 (Subpart D); (4) thermosetting resins, SIC 28214 (Subpart E); and (7) specialty organic chemicals which fall within SIC 2865 and SIC 2869 which are not listed as commodity or bulk organic chemicals in subparts F and G (Subpart H).

7. Affidavit at 3, 4. Alluding to Ms. Lombardo's assertion that the production of urea formaldehyde melamine condensate constitutes production of a "melamine resin" specifically included within Subpart E "Thermosetting Resins" (§ 414.50) and SIC 2821, StanChem asserts that the type of urea formaldehyde melamine condensate, which it produced, was not specifically listed in the original OCPSF rule, 40 CFR §§ 414.30, 414.40, and 414.50, citing 52 Fed. Reg. 42574 (November 5, 1987) (StanChem's Reply at 9, note 4). Melamine resins are among product groups listed in the initial OCPSF rule, § 414.50 (52 Fed. Reg. 42574), and, although it is not clear, StanChem appears to be disputing Complainant's contention that urea formaldehyde melamine condensate is a melamine resin.

8. Motion at 17,18. StanChem asserts that genuine issues of material fact exist as to whether it manufactures the OCPSF product groups as alleged by Complainant. For example, Complainant alleges that "melamine pyrophosphate is an SIC 2869 organic chemical" included within the OCPSF rule [because of Subpart H, which is applicable to the process wastewater discharges resulting from the manufacture of all SIC 2865 and 2869 chemicals and chemical groups which are not defined as commodity or bulk organic chemicals in §§ 414.60 [Subpart F] and 414.70 [Subpart G].StanChem alleges, however, that the manufacturing and product descriptions under these SIC codes in the SIC Manual do not describe any operations, products, nor any

intermediates made by StanChem (Motion at 18, note 6). Moreover, StanChem asserts that, even if the ALJ should find that certain materials which it makes as an intermediate for use in certain fireproofing products (melamine pyrophosphate and urea formaldehyde melamine condensate) are equivalent in chemical makeup to the products described in SIC code 2821, the only other allegedly applicable SIC code, genuine issues of material fact exist as to whether the materials made by StanChem are products, and whether StanChem's corresponding processes are equivalent to the manufacture of OCPSF products covered by the rule.

9. SIC Manual at 15. As used in the preamble to the regulations the terms primary and secondary manufacture refer to the percentage of a plant's capacity devoted to OCPSF activities rather than whether a product is an intermediate stage or step to the production of another product. See 52 Fed. Reg. 42525 (November 5, 1987). See also 55 Fed. Reg. 42336 (October 18, 1990) (OCPSF production is primary if OCPSF products comprise one-half or more by weight of a plant's total production). In the SIC Manual, primary for manufacturing establishments is determined by the value of production (Id. 15, 16).

10. Section 414.11(d) provides:

(d) Notwithstanding paragraph (a) of this section, the provisions of this part are not applicable to any discharges for which a different set of previously promulgated effluent limitations guidelines and standards in this subchapter apply, unless the facility reports OCPSF products under SIC codes 2865, 2869, or 2821, and the facility's OCPSF wastewaters are treated in a separate treatment system or discharged separately to a publicly owned treatment works.

11. Under the heading "Scope of This Rulemaking",the Agency stated (52 Fed. Reg. at 42524) in part: Some of the non-OCPSF subgroups were the subject of prior EPA decisions not to establish national regulations for priority pollutants under the terms of Paragraph 8 of the Settlement Agreement [National Resources Defense Council v. Train, 8 ERC 2120 (D.D.C. 1976)]. Such action was taken for adhesive and sealant manufacturing (SIC 2891), as well as plastic molding and forming (SIC 3079), paint and ink formulation and printing (which industries were within SIC 2851, 2893, 2711, 2721, 2731 and ten other SIC 27 groups) and soap and detergent manufacturing (SIC 2841). However, it should be noted that in specific instances where a plant in these categories has OCPSF production activities, toxic

pollutants may be present in the discharges in amounts that warrant best professional judgment (BPJ) regulatory control. The adhesives and sealants, plastic molding and forming, and paint and ink formulation and printing exclusions do not include process wastewater from the secondary manufacture of synthetic resins. Similarly, the soaps and detergents Paragraph 8 exclusions do not include process wastewater from the manufacture of surface active agents (SIC 2843). In these cases, and even in cases where priority pollutants from OCPSF production covered by other categorical standards (e.g., petroleum refining and pharmaceuticals) have been excluded from these regulations under he terms of Paragraph 8 of the Settlement Agreement, BPJ priority pollutant regulation for individual plants having OCPSF production may be appropriate.

12. See, however, § 403.6(a) specifying procedures under which an industrial user or a POTW may request a determination as to the applicability of any particular subcategory. Additionally, it is clear that alternative discharge limits under the combined wastestream formula may only be calculated by the control authority or by the industrial user with the concurrence of the control authority (§ 403.6(e)).

13. The Agency has, however, described the the OCPSF rule as "concentration based" in contrast to the "mass-based" approach adopted in other unnamed guidelines. 58 Fed. Reg. 36874 (July 9, 1993). See also Id. 36890, apparently regarding as concentration based all standards which do not regulate flow. Be that as it may, it is clear that the limits in § 414.111 require determination of the mass, calculated by multiplying flows subject to the 0CPSF rule by concentrations listed in the accompanying table. No such mass determination appears to be necessary for the Electroplating Point Source Category, 40 CFR Part 413 or the Metal Finishing Point Source Category, Part 433.

14. The Agency stated in part at 58 Fed. Reg. 36890: Regarding the first issue-the appropriate flow basis for establishing permit limits-the promulgated OCPSF effluent limitations guidelines and standards listed in 40 CFR [Part] 414 are concentration-based and thus do not regulate flow. As required by the regulation, the permitting authority must multiply a reasonable estimate of a plant's regulated process wastewater discharge by the concentration limitations to develop mass limitations for each NPDES or industrial user permit. The appropriate process wastewater flow to be used must be determined by the permitting or control authority on a case-by-case basis using current information provided by the applicant

and other available data. The Agency went on to state that the permitting or control authority is advised to establish a flow rate that is expected to be representative during the entire term of the permit or other control mechanism. Id. 36891. Additionally, the preamble alluded to guidance for determining appropriate process wastewater flow as being available from the Office of Wastewater Enforcement and acknowledged that confusion in this respect has arisen because of OCPSF guidance memoranda which are in conflict with the OCPSF preamble and the mentioned guidance documents.

15. Complainant's "Object" at 4,5, citing 58 Fed. Reg. 36872, 36877 (July 9, 1993).

16. Motion at 5, note 2. Numerous petitions for review of the regulations were consolidated in the Fifth Circuit, Chemical Manufacturers Assn. v. U.S. EPA, 870 F.2d 177 (5th Cir. 1989); on rehearing, 885 F.2d 253 (1989), remanding portions of the rule; cert. denied, sub. nom. PPG Industries v. U.S. EPA, 495 U.S. 910 (1990). Subsequent EPA action on the rule is reflected in 55 Fed. Reg. 26691 (June 29, 1990); 55 Fed. Reg. 42332 (October 18, 1990); 56 Fed. Reg. 63897 (December 6, 1991); 57 Fed. Reg. 2238 (January 21, 1992); 57 Fed. Reg. 41836 (September 11, 1992); 57 Fed. Reg. 56883 (December 1, 1992) and 58 Fed. Reg. 36872 (July 9, 1993).

17. See 5 USCS § 558(c) providing in part: When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

18. Confusion and doubt as to the scope of the OCPSF rule is illustrated by the rescissions, revisions, amendments, explanations, and clarifications of the rule engendered by the OCPSF litigation and comments of affected parties (supra note 16). Moreover, in rejecting an argument that the Agency was not proceeding with amendments as expeditiously as possible as it had agreed to do in settling aspects of the OCPSF litigation, the Agency noted the "complex issues raised by today's amendment". 57 Fed. Reg. 41842 (September 11, 1992). See also supra note 14, wherein the Agency acknowledged conflicting guidance as to the manner of determining process wastewater flow.