4/15/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
WEGO CHEMICAL & MINERAL CORP.,	)	**Docket No. TSCA-8(a)-88-0228**
	)	
Respondent	)	

Respondent found in violation of sections 8(a) and 15(3)(B) of the Toxic Substances Control Act, 15 U.S.C. §§ 2607(a), 2614(3)(B), and the pertinent regulations promulgated thereunder, 40 C.F.R. §§ 710.28, 712.30(n).

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: April 15, 1992

Appearances:

For Complainant:
Carl R. Howard, Esquire
Coles Phinizy, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

For Respondent:
Alfred F. Koller, Esquire
230 Central Park West
New York, New York 10024

INTRODUCTION

This matter is brought pursuant to section 16 of the Toxic Substances Control Act (Act), 15 U.S.C. § 2615, to assess civil penalties for violation of section 15(3)(B) of the Act, 15 U.S.C. § 2614(3)(B), and regulations promulgated thereunder. In its complaint, the U.S. Environmental Protection Agency (sometimes complainant or EPA) alleged four violations against Wego Chemical and Mineral Corporation (respondent). The penalty proposed was $17,000 for each violation, for a total of $68,000. At the inception of the hearing, the charge in Count IV was withdrawn by complainant. The modified complaint seeks a proposed penalty of $51,000. The complaint alleges violations of section 8 of the Act, 15 U.S.C. § 2607, which addresses reporting and retention of information, and pertinent regulations, namely, 40 C.F.R. Parts 710 and 712.[1] Specifically, the complaint alleges that respondent

---

[1] 40 C.F.R. § 710.28: Persons who must report.
Except as provided in §§ 710.29 and 710.30, the following persons are subject to the requirements of this subpart. Persons must determine whether they must report under this § 710.28 for each chemical substance that they manufacture at an individual site.

(a) Persons subject to initial reporting. Any person who manufactured for commercial purposes 10,000 pounds (4,540 kilograms) or more of a chemical substance described in § 710.25 at any single site owned or controlled by that person at any time during the person's latest complete corporate fiscal year before August 26, 1986.

(b) Persons subject to recurring reporting. Any person who manufactured for commercial purposes 10,000 pounds (4,540 kilograms) or more of a chemical substance described in § 710.25 at any single site owned or controlled by that person at any time during the person's latest complete corporate fiscal year before

(continued...)

failed to submit reports to EPA in a timely manner. The reporting requirement concerned respondent's importation of chemical substances into the United States. Those questions not discussed are either rejected or viewed as not being of sufficient import for the resolution of the principal issues involved in this matter.

FINDINGS OF FACT

Based upon a review of the evidence, these are the findings of fact.[2]

Respondent is a corporation having its principal place of business at 417 Northern Boulevard, Great Neck, New York 11021. It is an importer of, among others, chemicals. From December 1, 1983 to November 30, 1984, respondent imported urea-formaldehyde

---

[1](...continued)
August 25, 1990, or before August 25 at four-year intervals thereafter.

(c) Special provisions for importers. For purposes of paragraphs (a) and (b) of this section, the site for a person who imports a chemical substance described in § 710.25 is the site of the operating unit within the person's organization which is directly responsible for importing the substance and which controls the import transaction. The import site may in some cases be the organization's headquarters in the U.S. (See also § 710.35(b).)

40 C.F.R. § 712.30 Chemical lists and reporting periods. . . . (n) A Preliminary Assessment Information Manufacturer's Report must be submitted by August 1, 1985, for each chemical substance listed in this paragraph. CAS No. 9011-05-6 Urea, polymer with formaldehyde. CAS No. 68611-64-3 Urea, reaction product with formaldehyde.

[2] The findings, of necessity, embrace an evaluation of the credibility of witnesses testifying upon particular issues. This involves more than merely observing the demeanor of a witness. It also encompasses an evaluation of his or her testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. Wright & Miller, Federal Practice and Procedures: Civil, § 2586 (1971).

polymer into the United States for commercial purposes. (JX 2). Pursuant to 40 C.F.R. §§ 712.20(b), 712.30(n), respondent was required to submit a Preliminary Assessment Information Report (PAIR), on EPA Form 7710-35, by August 1, 1985. Respondent does not deny importing into the United States 3,267,889 pounds of urea-formaldehyde during the period from December 1, 1983 to November 30, 1984. (Resp. Op. Br. at 4).

Paragraph "4" of Count 1 of the complaint alleges that respondent's failure to submit the required EPA Form 7710-35 constituted a failure or refusal to comply with "40 C.F.R. § 712.30(d)." (The aforementioned regulation was also stated in paragraph "2" of Count 1.) This was an inaccurate citation. However, in its answer, respondent made no mention that the complaint cited erroneously section 712.30(d) instead of the proper section 712.30(n). Respondent's answer did not, in any way, raise the faulty citation as an issue. At the hearing, respondent moved to strike Count 1. Complainant conceded that the complaint contained a typographical error in stating "40 C.F.R. § 712.30(d)" and that it should read "40 C.F.R. § 712.30(n)." Respondent's motion was denied, but it was accorded an opportunity to renew same. In a post-hearing pleading, respondent renewed its motion to strike Count 1. In a post-hearing order of June 25, 1991, respondent's motion was again denied. Among the reasons for denial was that the typographical error was harmless to respondent. For example, EPA and respondent discussed the section 712.30(n) violation for over two years, during which time respondent was

aware of, and discussed at length, all of the relevant factual allegations, including the violation of 40 C.F.R. § 712.30(n). (TR 19-20). At no time did respondent appear misled by the typographical error.

From December 1, 1984 to November 30, 1985, respondent imported 569,262 pounds of oxalic acid into the United States for commercial purposes. (JX 2 at 1; Resp. Op. Br. at 5). Pursuant to 40 C.F.R. § 710.33(a), the Inventory Update Report (IUR) was due on December 23, 1986. Respondent submitted its IUR on EPA Form 7740-8 on or about March 11, 1987. (JX 2 at 2; CX 10). Respondent concedes that 40 C.F.R. § 710.28 requires manufacturers and importers of certain chemical substances to have submitted data by December 23, 1986. However, it denies the applicability of the regulation to importers of oxalic acid. Respondent admits that as of the February 12, 1987 inspection of its offices, it had not submitted the EPA Form 7740-8. (Resp. Op. Br. at 5, 6).

From December 1, 1984 to November 30, 1985, respondent imported 879,123 pounds of citric acid. Again, and pursuant to 40 C.F.R. § 710.28, respondent was required to submit an IUR on EPA Form 7740-8 by December 23, 1986. Respondent did this on or about March 11, 1987. (JX 2 and CX 10 for the actual IUR submitted by respondent.)

Respondent does not deny that during the period from December 1, 1984 to November 30, 1985, it imported 879,123 pounds of citric acid. It admits that 40 C.F.R. § 710.28 requires manufacturers and importers of certain chemical substances to have

submitted data by December 23, 1986. It further concedes there was an inspection on February 12, 1987 and admits that as of that date, it had not submitted EPA Form 7740-8 for citric acid. However, respondent denies the applicability of 40 C.F.R. § 710.28 to importers of citric acid. (JX 2; Resp. Op. Br. at 6, 7).

Respondent was notified of complainant's intent to conduct the February 12, 1987 inspection. At that time, complainant knew of respondent's section 13 violations, and based upon a routine inspection procedure, complainant expanded the scope of the inspection to include section 8. (CX 1; TR 31, 33-34, 148-50). Therefore, respondent was notified of the inspection before it revealed its section 8 violations; that the inspection was begun before respondent revealed such violations; and that respondent could not have voluntarily disclosed the section 8 violations until after complainant informed the former of such.

During cross examination of EPA's final witness, respondent argued for the first time that the language of EPA's Chemical Substances Inventory (CSI), CX 8, excludes both oxalic acid and citric acid from reporting requirements as naturally-occurring substances. (TR 219-30). In support of its assertion that oxalic acid and citric acid are naturally-occurring substances, respondent referred to excerpts from Sach's Chemical Dictionary. (RX 5, 6). The entry for citric acid reads in pertinent part: "Occurrence: In living cells, both animal and plant." Consequently, respondent argues citric acid is a "naturally-occurring" substance under EPA's CSI, and as such, is exempt from reporting. In RX 6, concerning

oxalic acid, it states, in significant part, "Derivation: Occurs naturally in many plants (wood sorrel, rhubarb, spinach) and can be made by alkali extraction of sawdust." Thus, respondent also argues, oxalic acid and citric acid are both naturally-occurring substances and by the terms of the CSI are exempt from reporting. (TR 229).

The preponderance of the evidence[3] supports the finding that the exemption does not apply to the chemicals imported by respondent. In order to show that the exemption applies, respondent would have to prove that the form of respondent's import, the condition of the oxalic acid and the citric acid imported was entitled to exemption. (Comp. R. Br. at 10). Respondent failed to introduce any evidence showing the particular form or condition of the chemicals which it imported was exempt from the reporting requirements. The more credible argument, advanced by EPA, is that while oxalic acid and citric acid may occur naturally in plants, living cells and animals, oxalic acid or citric acid cannot be recovered from these sources unless one extracts these acids by some process. Substances that must be processed prior to import, such as oxalic acid and citric acid, are therefore subject to the reporting requirements. (TR 231-32).

EPA's major witness was Daniel Kraft (Kraft). He has been employed at EPA since August 1971, and is currently the Chief of

---

[3] The Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides, in pertinent part, that: "Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

the Toxic Substances Section of the Pesticides and Toxic Substances Branch, EPA Region II. (TR 24). His testimony established that EPA inspectors visited respondent's facility after EPA had received evidence that respondent had committed numerous violations of section 13 of TSCA. (TR 31). Secondarily to the section 13 inspection conducted at respondent's facility on February 12, 1987, the inspectors conducted a section 8 inspection. (TR 31, 33). In that respondent did not have all the information requested by EPA's inspectors with regard to the section 8 inspection, follow-up conversations and written correspondence ensued. (CX 6; TR 40, 208-10, 236). Kraft reviewed an inspection report dated April 28, 1987, which reveals respondent's admission that it was unaware of its obligations to comply with PAIR regarding the import of urea-formaldehyde molding compound. (CX 7, ¶ 4; TR 42-46, 147). Bert Eshaghpour is an employee and principal in respondent's organization. (TR 185). He admitted that "we were not aware of the reporting requirements." (TR 195-96). The inspection report establishes respondent was subject to PAIR requirement. (CX 7; TR 46).[4] Kimberly O'Connell is an EPA inspector. Her testimony established the accuracy and veracity of the Section 8 PAIR. (TR 161-62). It is also observed that EPA inspectors informed respondent during the inspection that it should have filed the PAIR. (TR 196).

---

[4] In preparation for the hearing, the inspection reports and correspondence between EPA and respondent were reviewed again, which further confirmed that respondent was subject to the reporting requirement cited in the complaint. (TR 118).

Respondent admits that authorized representatives of EPA inspected its premises on February 12, 1987 and that as of that time respondent had not submitted Form 7710-35. However, as noted above, respondent argues that the filing of EPA Form 7710-35 was not required due to complainant's typographical error in citing 40 C.F.R. § 712.30(d), and consequently the omission thereof could not be a violation. (Resp. Op. Br. at 4,5).

Respondent was also subject to the IUR requirement. (TR 44-46). A review of the second inspection report of April 28, 1987 reveals that respondent failed to comply with this. (CX 8). Based upon the inspection report and subsequent follow-up correspondence, respondent was required to submit an IUR. (TR 46, 109, 235-36).

The PAIR was dated March 6, 1987 and was submitted by respondent with its letter of March 11, 1987. (CX 9; TR 48-49). The IUR was dated March 10, 1987 and submitted by respondent with its letter of March 11, 1987. (CX 10; TR 50).

The CSI is the official document EPA used to determine reporting requirements. Both citric acid and oxalic acid are listed in the document and are subject to reporting requirements unless an exemption applies. (CX 18; TR 216-19, 224). In Volume I of the CSI, printed page 8 lists citric acid by its Chemical Abstract Number (CAS) 77-92-9, in the left-hand column. Printed page 46 lists oxalic acid by its CAS number 144-62-7, in the left-hand column. In Volume II of the CSI, printed page number 481 lists citric acid in the right-hand column. Volume III, at printed page 1227, also lists oxalic acid in the left-hand column. The CSI

alone does not indicate whether or not citric acid is subject to IUR. Some responsibility is placed upon the importer. For example, an importer subject to such reporting requirements must determine for itself the nature of the substance imported, whether any fermenting, extracting, purifying or other processing of the substances has occurred, and whether the substances were imported for commercial purposes. (TR 222-23, 231). Also, the importer must consider additional factors such as the volume of chemicals imported, and whether any small business exemptions apply before an importer can make an informed decision as to whether or not reporting is required. (CX 7, ¶ 4; TR 150).

Complainant's evidence is completely credible, while respondent is silent concerning precisely how it derived its chemical imports. It is found that complainant has satisfied its burden of proof with regard to the reporting requirements demanded of the respondent regarding its imports.

As an affirmative defense, respondent maintains that EPA "waived prosecution" of the alleged offenses listed in section 8 of the Act, which are the subject of the complaint. Respondent's position is that alleged oral representations were made by a former EPA attorney and other EPA officials in negotiating a settlement of a prior case brought pursuant to section 13 of the Act, 15 U.S.C. § 2612. It is argued that in negotiating the settlement of the section 13 offenses, it was represented that EPA had numerous other claims which it would add to the section 13 complaint in the event respondent did not settle on the proposed terms. Respondent

contends (but offered no evidence in support thereof) that it demanded a listing of these other claims; that EPA refused to deliver such a list; and that EPA represented that there would be no further prosecution of these unspecified claims if the settlement were accepted. Respondent urges that the charges set forth in the section 8 complaint originated in the same investigation that resulted in the section 13 proceeding and that EPA, by making the section 8 claims, was splitting its causes of action. (Answer at 1). Though not stated specifically as such in its answer, respondent's assertions have the ring of estoppel. EPA denies absolutely that any such representation was made; and argues further that respondent's assertions concerning oral representations made by EPA during settlement of a prior case brought pursuant to section 13 of the Act are inaccurate and irrelevant to the present TSCA section 8 case. EPA's position is there is no relation between the two cases, and that settlement of one case concerning section 13 has absolutely no effect on EPA's prosecution for violations of section 8 for the following reasons: Section 13 of the Act and its implementing regulations established a different set of requirements than those pertaining to section 8 of the Act. Also, section 13 requires that importers of chemical substances into the United States certify that their imports comply with the Act or that such imports are not subject to same. Further, section 8 of the Act demands that manufacturers and processors of chemical substances comply with recordkeeping and reporting requirements. In sum, these two sections address two

separate entities (importers in section 13, manufacturers and processors in section 8), and set out entirely unrelated requirements.

EPA has also moved in this forum to strike respondent's affirmative defenses because, absent a showing of affirmative misconduct, the United States government cannot be estopped from exercising its sovereign power for the benefit of the public. (Complainant's Prehearing Memorandum, served February 15, 1989, at 6-7, hereinafter "Complainant's Memorandum").

The ALJ concurs in complainant's view that respondent's statement, that both actions arise "out of the same investigations," overlooks the fact that the initial section 13 violations were detected in San Juan, Puerto Rico and Boston, Massachusetts, and referred to EPA's Region II office (TR 31), whereas the section 8 violations were detected during an inspection of respondent's offices in Great Neck, New York. (Complainant's Memorandum at 10; TR 31-34). From the prehearing pleadings and the unfolding of the evidence at the hearing, the ALJ is persuaded to the finding that respondents were not feigning, but believed sincerely that EPA was engaging in coercive practices. However, EPA's argument that application of the claim-splitting doctrine in the manner sought by respondent will retard an already slow enforcement process and will "chill" government enforcement actions because enforcers will always be in jeopardy of sacrificing other causes of action is well taken. (Complainant's Memorandum at 11.) Further, at three places in the consent agreement, it was agreed by

the parties that the settlement concluded the section 13 violations alleged in the previous complaint. Respondent should be prevented here from resuscitating the previous proceeding.

The preponderance of the evidence reveals that all of EPA's evidence did not come from the single inspection of Wego's premises. EPA gathered evidence of respondent's alleged violations of section 13 of the Act from, among other sources, customs offices in Region I, Boston, Massachusetts, and Region II, including New York and Puerto Rico. Assuming, without finding, that even if all of EPA's evidence did come from a single source, or from a single inspection, the question would then become whether or not two separate and distinct causes of action were present. If two causes of action were found, then EPA would be within its rights to issue two separate complaints.

For the reasons noted above, it is found that respondent's claims of estoppel must fail, in that respondent has not shown any evidence of affirmative misconduct by EPA. Respondent's belief, however sincere, in its allegation that a former EPA attorney made certain promises to respondent is not supported by the record. It produces no convincing evidence confirming its understanding of EPA's alleged representations. Further, EPA has denied these claims, and the ALJ, after reviewing the evidence and the demeanor of EPA's witness O'Connell, finds such denials to be credible.[5]

---

[5] The ALJ remains puzzled as to why respondent did not call, as a witness, the former EPA attorney alleged to have made such representations to it. Upon questioning respondent's counsel on this point, he answered that the former attorney, in deposition,

(continued...)

CONCLUSIONS OF LAW

Respondent is subject to rules and regulations under the Act concerning its import activities. Specifically, it is subject to two reporting requirements. Under one reporting requirement, PAIR, respondent should have reported to EPA Headquarters the names of chemicals imported and the quantities it placed into the stream of commerce. 40 C.F.R. § 712.30(n). The PAIR was due on August 1, 1985. After being prodded, and then assisted by EPA, respondent submitted a late PAIR on March 11, 1987. (TR 48-49). Respondent submitted the Report to EPA's Regional Office in Edison, New Jersey. (CX 9; TR 48-49). It is concluded that respondent failed to submit a timely PAIR to the proper office, as required by the above-noted regulation, and that violated 40 C.F.R. § 712.30(n).

Under the second reporting requirement, respondent was required to submit to EPA Headquarters an IUR. This was due on December 23, 1986, pursuant to 40 C.F.R. § 710.28. With the urging and assistance of EPA, respondent submitted a late IUR on March 11, 1987. (TR 50; CX 10). Respondent submitted the IUR to EPA's Regional Office in Edison, New Jersey. (CX 10; TR 50). For failing to submit a timely IUR to the proper office, as required by the aforementioned regulation, it is concluded that respondent violated 40 C.F.R. § 710.28.

---

[5](...continued)
did not recall matters in a light favorable to it. Such an explanation fails to address why respondent chose not to allow the ALJ to view the demeanor, and assess the credibility, of the former attorney.

Respondent's arguments in support of its motion to strike Count 1 (the PAIR), due to a typographical error, are utterly unconvincing.[6] To accept them would exalt form over substance. The factual allegation of the complaint was accurate, and the parties negotiated and discussed the alleged violations for over two years. During this time, respondent was well aware of the facts alleged by complainant. It was too late in the day for respondent to make its motion to strike at the inception of the hearing. Its action, or lack of same, precludes the motion. A fortiori it is estopped at the conclusion of the hearing, in that the record shows that respondent was not prevented from defending itself concerning Count 1. It is to be observed here that respondent did not move for a continuance in the hearing in order to better defend itself in light of the "change" in the complaint. In sum, citing "40 C.F.R. § 712.30(d)" instead of "40 C.F.R. § 712.30(n)" amounted to harmless error. Respondent failed to present evidence to show that it was prejudiced by complainant's typographical error. Dismissal is generally not justified absent a showing of prejudice. United Food and Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984). Also, pleading is not a game of skill in which one misstep by counsel may be decisive to the outcome of the litigation. The purpose of pleading is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41, 48 (1957).

---

[6] The rest of this paragraph is incorporated by reference from the ALJ's Order of June 25, 1991 in this proceeding.

Concerning Counts 2 and 3, EPA has proved that the chemical substances imported by respondent are listed in the CSI. Kraft's testimony clearly demonstrates that, in the absence of an applicable exemption, oxalic acid and citric acid are subject to the IUR requirements. (CX 18; TR 218-19, 224). Nowhere in any of respondent's pretrial submissions does respondent argue, as an affirmative defense or otherwise, that the chemicals it imported are entitled to any regulatory exemption. In addition, at the hearing, respondent introduced absolutely no convincing evidence that these chemicals, in the form imported by respondent, are entitled to any exemption. In particular, respondent offered no information concerning whether its chemical imports were or were not subject to fermenting, extracting, purifying, or any other processing. Nor did respondent introduce any evidence concerning whether or not it was entitled to any small business exemption. Complainant proved respondent's chemical imports were for commercial purposes, and that the volume of such made them subject to the reporting requirements.

The alleged oral representations made to respondent by an EPA attorney are refuted by EPA. It is a well-settled rule of law that the United States is not subject to estoppel when exercising its sovereign power for the benefit of the public, absent some affirmative misconduct. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59-61 (1984); Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); Lovell Manufacturing v. Export-Import Bank, 777 F.2d 894, 899 (3rd Cir. 1985); United

States v. Inercon Leasing Inc., 617 F. Supp 323, 330 (S.D. Fla. 1985); United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984). Likewise, the courts have held that equitable doctrine of unclean hands may not be asserted against the United States when acting in its sovereign capacity to protect the public welfare. Securities and Exchange Commission v. Gulf & Western Industries, Inc., 502 F. Supp. 343, 348, (D.D.C. 1980); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 52 (N.D. Ga. 1977). The courts have not permitted the imposition of an equitable defense to prevent the government from exercising its sovereign powers for the benefit of the public. Cox v. Kurt's Marine Diesel of Tampa, Inc., 785 F.2d 935, 936 (11th Cir. 1986) and Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008, 1011, (C.C.P.A. 1979).

Similarly, in United States v. Medico Industries, Inc., 784 F.2d 840, 845-46 (7th Cir. 1986), Circuit Judge Easterbrook reasoned:

> [a]s with other claims of estoppel against the government, the question is: 'Who is in charge here, Congress and the President or subordinate officials?' Congress and the President are in charge, and their decisions must be followed. 'Estoppel' is just a way to describe a decision of a subordinate official that prevails over a decision of the political branches expressed in a law or regulation. Because subordinate officials are not running the show, the United States may not be estopped by the inaction or erroneous action of its employees unless statutes or regulations confer on the subordinates in question the power to bind the United States.

At the very most, as stated in United States v. Florida, 482 F.2d 205, 209 (5th Cir. 1973);

> Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietory capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government . . . . (emphasis added).

Under the Act, EPA is responsible for the regulation of the manufacture and distribution in commerce of chemical substances and mixtures. To accomplish this task, Congress has provided the EPA with enforcement power. It is settled law that the use of this power is a sovereign exercise of powers of government and is not subject to equitable affirmative defenses such as estoppel and unclean hands. United States v. Stringfellow, 661 F. Supp 1053, 1062 (C.D. Cal. 1987). Respondent's claim that EPA was splitting causes of action represents an indirect effort by respondent to estop EPA's prosecution. The claim is erroneous as a matter of law.

Respondent suggests that Region II was in a position to file a complaint for the section 8 violations at the time it issued a complaint for violations of section 13. This is erroneous. Even if Region II had wanted to cite respondent for violations of section 8 concurrently with the section 13 complaint, it could not have done so, in that Region II was not authorized to pursue

section 8 violations unilaterally. EPA Headquarters must be involved and concur in such proceedings. (CX 5; TR 31-32).

As explained above, section 8 and section 13 are totally different sections establishing totally different requirements. A suit brought pursuant to one of these sections in no way affects or precludes a subsequent suit brought pursuant to the other section. The elements comprising a prima facie case under section 8 are different elements from those required to establish a prima facie case under section 13.

Complainant has established by the preponderance of the evidence that respondent was in violation of the Act and the pertinent regulations as set forth in Counts 1, 2, and 3 of the complaint.

Appropriateness of Proposed Penalty

The modified complaint seeks a proposed penalty of $51,000. The pertinent provision of the Act, Section 16(B), 15 U.S.C. § 2615(B), provides that:

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

The elements mentioned in the Act are restated, explained and amplified upon in EPA's Guidelines for the Assessment of Civil

Penalties (Penalty Guidelines), 45 Fed. Reg. 59770, September 10, 1980. The general purpose of the Penalty Guidelines is to assure that the Act's civil penalties are assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that the economic incentives for violating the Act are eliminated; and that persons will be deterred from committing TSCA violations. (CX 11 at 59771). The Penalty Guidelines also provide that it will be supplemented by regulation-specific penalty assessment guidances. EPA also developed an Enforcement Response Policy (ERP) for recordkeeping and reporting requirements under sections 8, 12 and 13 of the Act. (CX 12; TR 52-53). If the ALJ determines that a violation has occurred, he shall determine the dollar amount of the civil penalty to be assessed in accordance with any criteria set forth in the Act. Further, he must consider any civil penalty guidelines issued under the Act, and if a penalty is assessed that is different from that proposed in the complaint, the ALJ shall set forth the specific reasons for any increase or decrease. 40 C.F.R. § 22.27(b).

Section 16 of the Act mandates that eight enumerated factors shall be taken into account without prescribing any particular weight to a given element. The first four factors, nature, circumstances, extent and gravity relate to the violation itself. These four factors are charted on a matrix which yields a Gravity Based Penalty (GBP). The matrix is constant and the format is as follows: The extent of potential damage, on the horizontal plane, takes into consideration the degree, range or scope of the

violation. There are three levels for measuring extent. Level A is classified as major, and is a potential for serious harm to human health or major damage to the environment. Level B, designated as significant, is the potential for significant amount of damage to the human health or the environment. Level C, known as minor, is the potential for lesser amount of damage to human health or the environment. "Circumstances," on the vertical plane of the matrix, reflects the probability of the harm which will result from a particular violation. A variety of facts surrounding the violations as they occurred are examined to determine whether the circumstances of the violation are such that there is a high, medium or low probability that damage will occur. Within the matrix, "circumstances" are in three major categories. If the violation is likely to cause damage, it falls within levels 1 and 2 of the high range. Should there be a significant chance that damage will result from the violation, it falls within 3 and 4 of the medium range. Where there is a small likelihood that the violation will result in damage, then 5 and 6 of the low range apply. (CX 11 at 59771, 72; TR 54).

In complainant's view, nonreporting in the instant case comes with Level 1 of circumstances, and the PAIR violation and IUR violation is also Level 1, with the matrix calling for a penalty of $17,000. (TR 56-60). At the time EPA issues a complaint, it determines whether or not there was a prior history of the violation. This is basically the only adjustment factor considered upon the issuing of the complaint. Information concerning the

other factors, such as the ability to pay, culpability, ability to continue in business, and such other matters as justice may require were not fully developed at the time of the issuance of the complaint, and are normally considered in the settlement process. (TR 56, 61).

Returning to the ERP, it provides for a reduction for penalties assessed only under sections 8(a), 12, and 13 of the Act, for voluntary disclosures of violations by a respondent. A reduction of 25 percent is provided for disclosure, and another 25 percent for immediate disclosure within 30 days of discovery, for a total of 50 percent. It is significant to observe, however, that "[t]he Agency will not consider disclosure voluntary if the company has been notified of a scheduled inspection or the inspection has begun. Information received after these events will be considered as a failure to report/file. However, if, for example an inspector is conducting a TSCA section 8 inspection at an establishment, and the company voluntarily discloses a TSCA section 13 violation and the inspector would not have any expectation of discovering such violation, the TSCA section 13 violation would be considered to be voluntarily disclosed." (CX 12 at 14). The respondent here is not entitled to a penalty reduction based upon voluntary disclosure as it has been found that such disclosure did not occur on the part of the respondent. Rather, respondent stood mute until the violations were uncovered by complainant. Any reporting by respondent subsequent to contact by EPA is considered a failure to report or nonreporting. (TR 115-17). The ERP states clearly that

nonreporting for Inventory Update is a Level 1 violation, and section 8(a) and section 13 violations are considered significant in extent. It is for the above reasons that complainant seeks a $17,000 penalty for each of the three violations. It is stressed that the reporting of chemical information is not just another piece of paper, or form, foisted upon the regulated community. The Level 1, high range, is assigned to nonreporting as failure to report or keep records for the reason that EPA views such violations as "extremely serious." The basis for this is that EPA is deprived of critical information in that EPA may become unaware of the nature or amount of chemicals that are introduced into commerce. Without the vital information provided by required reports, EPA is hobbled in the mission assigned to it by Congress. (CX 12 at 17). Another consideration is that penalties send a message to the regulated community and deter potential violators from committing similar acts.

Notwithstanding the above, however, the ALJ is of the opinion that Congress inserted the phrase "and such other matters as justice may require" into the consideration of penalty to deal with particular or extenuating circumstances which require an adjustment in the penalty proposed by EPA. The Penalty Guidelines acknowledged this when it states that "other issues might arise, as a case-by-case basis, which should be considered in assessing penalties." The Penalty Guidelines go on to illustrate examples of such "other factors [matters] as justice may require." (CX 11 at 58775, 76). The ALJ's view is that he is not confined solely to

the specific examples mentioned in the Penalty Guidelines; that he is at liberty to use sound judicial discretion to determine what other matters in the interest of justice would require an adjustment of the penalty. In so doing, of course, the EPA's task of receiving accurate reports and the deterrence factor should not be compromised unreasonably.

Though not valid legally as a defense to liability, the respondent's affirmative defense should not be ignored in penalty assessment. Respondent alleged that in negotiating the settlement of the previous case involving section 13 offenses it was represented that EPA had numerous other claims which it would add to the section 13 complaint in the event it did not settle on the proposed terms. Respondent also under the impression that the section 13 and section 8 violations arose out of the same investigation. The evidence shows that respondent was wrong in its conclusions. To be given some weight, however, is that respondent had the reasonable belief that it had been taken advantage of by the government. Like Caesar's wife, EPA must be above suspicion. Further, justice must be dispensed justly and it is necessary that some downward adjustment in the penalty be made because of the unusual facts of this matter, coupled with the previous section 8 proceedings. The penalty of each of the three Counts of the complaint should be reduced from $17,000 to $14,000, for a total penalty of $42,000.

ORDER[7]

Pursuant to section 16(a)(2)(B) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2)(B), the following order is entered against Wego Chemical & Mineral Corporation:

a. A civil penalty of $42,000 is assessed against the respondent for violations of the Toxic Substances Control Act.

b. Payment of the civil penalty shall be made by submitting a cashier's or certified check payable to the Treasurer, United States of America, and mailed to:

EPA - Region II
Regional Hearing Clerk
P.O. Box 36018M
Pittsburgh, PA 15251

c. A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

d. Payment shall be made within sixty (60) days after receipt of the final order. Failure upon part of respondent to pay the

[7] Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. §§ 102.13(b)(c)(e).

Frank W. Vanderheyden
Administrative Law Judge

Dated: April 15, 1992

CERTIFICATE OF SERVICE

I hereby certify that the Initial Decision by Administrative Law Judge **Frank W. Vanderheyden** *in the matter of* **Wego Chemical & Mineral Corp., Docket No. II TSCA-8(a)-88-0228,** *was filed on* **April 22, 1992.** *I served copies of the Initial Decision to the parties as indicated below:*

Certified Mail
Return Receipt Requested

Bessie Hammiel
Hearing Clerk (A-110)
US Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460
(w/Administrative Record)

Alfred F. Koller, Esq.
230 Central Park West
New York, New York 10024

Hand-Delivered -

Carl Howard, Esq.
Office of Regional Counsel
US Environmental Protection Agency
26 Federal Plaza, Rm 437
New York, New York 10278

Karen Maples

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: **April 22, 1992**