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 ON COMPLAINANT'S MOTION TO STRIKE

AND ON RESPONDENT'S MOTION FOR RECONSIDERATION

On September 2, 1997, Complainant's Motion for Accelerated Decision was granted in part, on the issue of Respondent's liability for violations of Section 313 of EPCRA, as alleged in Counts III through XI of the Complaint. The motion was stayed with respect to liability on Counts I and II, and denied with respect to the proposed penalty assessment.

Complainant and Respondent each filed motions, filed September 10 and September 9, 1997 respectively, seeking modifications to those rulings. Upon consideration of the two motions, it is concluded that the rulings in the Order Granting in Part Complainant's Motion for Accelerated Decision (Order) will not be modified, except for typographical and minor harmless error, as discussed below.

I. Complainant's Motion to Strike

On grounds of irrelevance and insufficiency as a matter of law, Complainant moved to strike defenses which Respondent raised in its Response to Complainant's Motion for Accelerated Decision (Response). Complainant refers to defenses raised in connection with the Affidavit of James Pews (Response, Exhibit A). Mr. Pews states in his affidavit essentially that EPA failed initially to

notify Respondent of the EPCRA regulatory program; that Respondent never received, from EPA's general mailing, copies of EPCRA forms, instructions, and compliance information despite repeated requests to be included on the mailing list; that Respondent's president was unaware of EPCRA reporting requirements until the time of the inspection on February 12, 1992; that Respondent received no EPA correspondence from the time of the inspection in 1992 until the complaint was filed in 1994; that Respondent experienced a turnover of employees in 1992 and 1993; that the Steeltech employee who received the Notice of Non-Compliance for the 1989 Form R for nickel did not provide copies to the individuals responsible for EPCRA compliance; and that Respondent filed timely reports for the years 1994 through 1996.

Complainant sets forth standards for striking a defense in an administrative enforcement proceeding, namely that the court must be "convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and under no set of circumstances could the defenses succeed" and that "it is clear that it can have no possible bearing upon the subject matter of the litigation." Motion to Strike at 3 (citations omitted). Complainant asserts that the defenses present no disputed issues of law or fact that could have an effect of mitigating the proposed penalty of $84,390.

First, Complainant contends that lack of knowledge about the requirements of EPCRA, and EPA's failure to provide individual notice to Respondent thereof, have no bearing on Respondent's culpability or the amount of penalty, citing *In re Chautauqua Hardware Corp.*, 3 EAD 616, 630-631, EPCRA Appeal No. 91-1 (EAB, Order on Interlocutory Appeal, June 24, 1991) and *In re Bell and Howell Company*, TSCA-V-C-034, -035, -036 (Initial Decision, February 3, 1983)(affirmed in part and modified in part on appeal by Complainant, Final Decision, December 2, 1983).[(1)]

In *Chautauqua,* ruling on a discovery request, the Environmental Appeals Board (EAB) merely stated that neither culpability nor the penalty was affected by EPA's practice or policy of sending notices to manufacturers to facilitate compliance. However, the EAB specifically suggested that respondent may "show that it did not know about the EPCRA reporting requirements" by "simply hav[ing] one of its officers testify to that effect at the hearing." *Chautauqua*, 3 EAD at 630. Thus, while the EPA's actions in notifying some facilities of reporting requirements and not others is not relevant to the determination of a

penalty, the respondent's knowledge or lack thereof may be relevant.

It is observed, however, that *Chautauqua* preceded EPA's change in policy on culpability as expressed in the Enforcement Response Policy for Section 313 of EPCRA, dated December 2, 1988 (1988 ERP), and the revised ERP for Section 313 of EPCRA, dated August 10, 1992 (1992 ERP). While the former (1988 ERP at 14) allowed upward or downward adjustments for culpability in terms of violator's knowledge, control over the violative condition, and attitude, the 1992 ERP (at 14) does not allow reductions in the penalty for culpability. Nevertheless, neither policy is binding on the Administrative Law Judge. *Chautauqua*, 3 EAD at 621, *citing, A.Y. McDonald Industries, Inc.,* RCRA (3008) Appeal No. 86-2, at 18 (July 18, 1987)("The ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it.")

Second, Complainant asserts that turnover in employees and failure of the receiving employee to provide the Notice of Non-Compliance to the employee responsible for EPCRA compliance are internal management matters and irrelevant to culpability or the penalty. Complainant refers to the EAB's opinion *In re Green Thumb Nursery,* FIFRA Appeal No. 95-4a (Final Order, March 6, 1997). However, the respondent's argument in that case, that the respondent was a small company without staff experienced with the environmental statutes and that it relied upon its supplier for such information, was raised and addressed only with regard to the issue of liability under the Federal Insecticide, Rodenticide and Fungicide Act.

Under EPCRA, however, the EAB has considered changes in management in connection with mitigation of a penalty for "other factors as justice may require." *In re Pacific Refining Company,* 5 EAD 607, 617-618, n. 15, EPCRA Appeal No. 94-1 (Final Decision and Order, December 6, 1994).[(2)] In that decision, the EAB also stated that "an employee's 'disobedience' may provide some basis for reduction." 5 EAD n. 15; *see also,* 1988 ERP at 14.

Third, Complainant asserts that there are no disputed questions of fact or law in regard to the defenses discussed above or in regard to the Respondent's timely filing of Form R reports for 1994 through 1996, and that they have no bearing on the penalty assessment. The 1992 ERP provides (at 18), however, that with regard to the criterion of "attitude," "the Agency may reduce the gravity-based penalty in consideration of the facility's

good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance."

Therefore, Complainant has not shown that the defenses could not succeed under any set of circumstances, and the Motion to Strike will be denied.

II. Respondent's Motion for Reconsideration

Respondent seeks reconsideration of the Order on grounds that an underlying premise for the conclusion as to the defense of "unreasonable delay/laches" was factually incorrect, and that the EPA's undue delay resulted in prejudice to Respondent.

Specifically, Respondent points to the language on pages 7 and 8 of the Order stating that the "delay in filing suit, until after additional violations for years 1992 and 1993 were discovered, does not appear to be unreasonable." Respondent points out that, consistent with the facts stated on page 2 of the Order, the violations for 1992 and 1993 were voluntarily disclosed to EPA by Respondent during a settlement conference after the complaint was filed. Respondent asserts that the concession in the Order on page 7 that "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," should be dispositive of the issue of laches or unreasonable delay.

The phrase "until after additional violations for years 1992 and 1993 were discovered" will be stricken from the Order as harmless error. That phrase has no effect on the conclusion in the Order that the defense of laches/unreasonable delay does not raise any genuine issues of material fact or preclude judgment as a matter of law on the issue of liability.

Respondent has not demonstrated any other reason to depart from the general rule stated in the Order, *i.e.*, that laches or neglect of duty on the part of officers of the government is no defense to actions brought to protect a public interest. Respondent argues that it suffered prejudice because it would have been able to assert the defense of "inability to pay" if Complainant had filed suit within a reasonable amount of time. Respondent explains that it lost the ability to assert that defense - and be "absolved from liability for violations by payment of a nominal penalty or perhaps no penalty at all" - when its business obtained economic benefits in the interim. However, the delay on the part of EPA and the Respondent's

assertion of prejudice are not of such an extraordinary nature that they merit an exemption from the general rule as to laches.

Accordingly, Respondent's motion for reconsideration will be denied. However, the typographical error pointed out by Respondent will be amended, in Paragraph 1 on page 11 of the Order, where Count III should be referenced rather than Count II.

ORDER

1. Complainant's Motion to Strike is DENIED.

2. Respondent's Motion for Reconsideration of Order Granting in Part Complainant's Motion for Accelerated Decision is DENIED.

ERRATA

1. The first full sentence on Page 8 of the Order Granting in Part Complainant's Motion for Accelerated Decision is hereby corrected to read, "Seen in this light, the delay in filing suit does not appear to be unreasonable."

2. The typographical error on Page 11 of the Order Granting in Part Motion for Accelerated Decision is hereby corrected as follows:

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

_____

Susan L. Biro

Chief Administrative Law Judge

Dated: _____

Washington D.C.

1. The Initial Decision *In re Bell and Howell,* cited by Complainant, held that although defenses of EPA's failure to provide individual notice, respondent's lack of knowledge and difficulty of finding regulations in the Federal Register "may have some superficial appeal as demonstrating Respondent's lack

of culpability," it was unpersuasive under the circumstances of that case, which involved a large corporate respondent violating the Toxic Substances Control Act, and defenses which appeared to be "more a convenient excuse than the real reason" for non-compliance. Slip op. at 17-19.

2. The ERP directs that new ownership be considered for purposes of determining whether the history of violations should result in a higher penalty. The respondent in *Pacific Refining* had no history of violations.