IN THE MATTER OF WEGO CHEMICAL & MINERAL CORPORATION

TSCA Appeal No. 92–4

FINAL DECISION

Decided February 24, 1993

Syllabus

Wego Chemical & Mineral Corporation ("Wego") appeals from an Initial Decision assessing a total civil penalty of $42,000 for three violations of Section 8 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2607. The violations stem from Wego's failure to file a timely Preliminary Assessment Information Report ("PAIR") in connection with the importation of urea-formaldehyde polymer under 40 C.F.R. §§712.20(b) and 712.30(n) and its failure to submit Inventory Update Reports ("IUR"), under 40 C.F.R. §710.33(a), for certain quantities of oxalic acid and citric acid imported into the United States between 1984 and 1985.

For these violations, Region II sought a $51,000 penalty. Wego did not contest its failure tc submit the reports, but argued that it had several defenses that precluded a finding of liability. In addition, Wego asserted that the penalty assessment was improper. More specifically, Wego contended that: (1) the Region was barred from bringing this action because of an earlier settlement entered into between Wego and Region II, which "covered" the Section 8 violations; (2) the "PAIR" violation should have been dismissed because the Region cited the wrong regulation in the complaint; (3) the IUR requirements did not apply because oxalic acid and citric acid are "naturally-occurred substances," exempt from reporting under TSCA Section 8; and (4) the Region's penalty assessment was excessive because Wego had "voluntarily disclosed" its alleged violations.

After a two-day hearing, the Presiding Officer determined that Wego had violated Section 8, as alleged by the Region, but reduced the penalty to $42,000. The penalty was reduced on the grounds that Wego "sincerely" believed that the earlier settlement had resolved all of its liability and that it entered into the earlier settlement with the Region, in part, to keep the Region from pursuing any additional claims. On appeal, Wego argues that the Presiding Officer erred in rejecting the defenses and arguments made below. In addition, Wego asserts that the Presiding Officer erred in striking a portion of the testimony relating to the earlier settlement.

Held: We affirm the Presiding Officer's liability determination and penalty assessment because: (1) the Presiding Officer properly rejected Wego's contention that the present action was barred on res judicata and equitable estoppel grounds; (2) the Presiding Officer properly refused to strike the "PAIR" count, despite the wrong citation, because Wego failed to show any prejudice or surprise; (3) the Presiding Officer

correctly concluded that Wego had not established a basis, under the regulations, upon which to find that the citric acid and oxalic acid at issue were entitled to an exemption as "naturally-occurring substances"; (4) the Presiding Officer correctly concluded that Wego had not "voluntarily disclosed" its violations; and (5) the Presiding Officer's interlocutory order to strike portions of the testimony regarding the earlier settlement was preserved for review by the Board, but was "harmless" error given the Presiding Officer's thorough consideration of the testimony in his Initial Decision.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Wego Chemical & Mineral Corporation ("Wego") appeals from an Initial Decision assessing a total civil penalty of $42,000 for three violations of Section 8 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2607.[1] The penalty arises out of an enforcement action brought by U.S. EPA Region II for Wego's alleged failure to submit certain reports to EPA in a timely manner, as required under Section 8 and its implementing regulations, 40 C.F.R. Parts 710 and 712. Wego does not dispute that it failed to submit the reports in a timely manner, but asserts that it should not have been found liable. In addition, Wego argues, in the event it is liable, the Presiding Officer's penalty assessment was improper. For the reasons stated below, we affirm the Presiding Officer's liability determination and penalty assessment.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The facts underlying the alleged violations are not in dispute. Wego is a privately held New York-based importer of chemicals. From December 1, 1983, to November 30, 1984, Wego imported urea-formaldehyde polymer into the United States for commercial purposes. Pursuant to 40 C.F.R. §§712.20(b) and 712.30(n),[2] Wego was required to submit to EPA a Preliminary Assessment Information Report ("PAIR"),[3] on Form 7710–35, by August 5, 1985. Wego admits that

[1] The Environmental Appeals Board has the authority to consider this appeal under 40 C.F.R. §22.30.

[2] In its June 10, 1988 Complaint, EPA mistakenly identified the urea-formaldehyde polymer reporting requirement as appearing at 40 C.F.R. §712.30(d). Wego attaches great significance to this error, as discussed later in this opinion.

[3] The PAIR report is aimed at gaining production, use and exposure information about certain listed chemicals in order to set priorities for testing chemicals and for assessing risks associated with chemicals. *See* 47 Fed. Reg. 26,992 (June 22, 1982).

it did not submit the required form until March 11, 1987, one month after EPA inspected Wego's facility.

In addition, from December 1, 1984, to November 30, 1985, Wego imported 569,262 pounds of oxalic acid and 879,123 pounds of citric acid into the United States. Pursuant to 40 C.F.R. § 710.33(a), an Inventory Update Report ("IUR")[4] for these chemicals should have been submitted to EPA by December 23, 1986. Wego concedes that it did not submit an IUR on EPA Form 7740–8 for these chemicals until March 11, 1987, again, one month after an EPA inspection.

Region II inspected the Wego facility on February 12, 1987. The inspection grew out of a review of a series of customs documents in San Juan, Puerto Rico, and Boston, Massachusetts, which indicated that Wego was importing chemicals in violation of Section 13 of TSCA, 15 U.S.C. § 2614(3)(B), and its implementing regulations.[5] One week following the inspection, on February 19, 1987, the Region served a TSCA complaint on Wego, charging Wego with ten Section 13 violations. The violations involved ten shipments of urea moulding compound sent to the United States between March 3 and July 17, 1986.

Wego and the Region entered into settlement negotiations on the Section 13 violations in March 1987. During the settlement negotiations, Regional representatives told Wego that the Region was aware of eight additional violations which the Region would not pursue if Wego settled. Eventually on April 20, 1988, Wego and the Region entered into a Consent Agreement and Final Order ("Settlement") in accordance with 40 C.F.R. § 22.18. By its terms the settlement states:

> EPA and Respondent [Wego] have agreed to settle this matter for a penalty of $30,000 for the ten (10) aforementioned violations of Section 13 * * * of TSCA.

[4] 40 C.F.R. § 710.33(a) requires importers of certain chemical substances to submit basic product information to EPA.

[5] In general, Section 13 and its implementing regulations require an importer of a chemical substance to certify to the district director of U.S. Customs ("Customs"), at the port of entry, that the chemical shipment is subject to TSCA and complies with all applicable rules and orders or is not subject to TSCA. The importer must sign the required certification statement on an appropriate entry document or commercial invoice. *See* 19 C.F.R. § 12.121(a).

While Wego and the Region were negotiating a settlement of the Section 13 violations, the Region continued to gather evidence in support of the present Section 8 action against Wego. Apparently, when the Region inspected Wego's facility on February 12, 1987, the inspectors learned that Wego was not aware of its reporting obligations under Section 8 of TSCA. Following the inspection and further correspondence with Wego, the Region concluded that Wego had failed to comply with its Section 8 obligations by failing to submit certain PAIR and IUR reports. Wego, after further consultation with the Agency and outside experts, submitted the appropriate reports on March 11, 1987.

On June 30, 1988, the Region served Wego with a complaint charging Wego with four TSCA Section 8 violations, three of which are the subject of this appeal.[6] In the complaint the Region sought a proposed penalty of $17,000 for each violation. Wego filed an answer and raised the prior Section 13 settlement as an affirmative defense, alleging that the Region had represented that "there would be no further prosecution of the [8] unspecified claims if the settlement was accepted," and that the Region was impermissibly "splitting the causes of action." *See* Answer at 1–2.

On June 19 and 20, 1990, a hearing was held before a Presiding Officer, as provided for under 40 C.F.R. Part 22. At the outset of the hearing the Region noted that Count I of the complaint contained a typographical error in that the regulation requiring a PAIR for urea-formaldehyde polymer is set forth in 40 C.F.R. § 712.30(n), not § 712.30(d) as identified in the complaint. Wego moved to strike Count I on the ground that the Region had not amended the complaint and, therefore, Count I should be dismissed. The motion to strike was denied with leave, however, for Wego to renew its motion after the hearing.

During the hearing, the Region introduced extensive evidence regarding the nature of the violations, and the basis for the Region's penalty calculation. Wego, in turn, introduced evidence and presented testimony regarding its understanding of the Section 13 settlement. In addition, Wego introduced evidence to show that citric acid and oxalic acid are naturally occurring substances which are exempt from Section 8 reporting under 40 C.F.R. § 710.26, which exempts naturally occurring substances which are unprocessed or processed "only by manual, mechanical, or gravitational means; by dissolution in water

[6] The Region withdrew the remaining fourth count of the complaint prior to the hearing in this matter.

* * * or by heating."[7] Wego did not offer any testimony or evidence to explain how the citric acid or oxalic acid at issue in this case were processed.

Following the hearing both EPA and Wego filed motions to strike portions of the case and testimony. Wego renewed its motion to strike Count I. The Region moved to strike all testimony relating to the Section 13 settlement. On June 25, 1991, the Presiding Officer denied Wego's motion to strike Count I on the grounds that Wego had not been prejudiced by the Region's mistake. Wego did not dispute that it had known for two years that the violation involved the failure to file a PAIR for the urea-formaldehyde polymer. Accordingly, the Presiding Officer concluded that the error was "harmless." With respect to the Region's motion to strike, the Presiding Officer ruled that the Section 13 settlement did not bar the Section 8 action and that the Agency was not equitably estopped from bringing the Section 8 action. Nonetheless, the Presiding Officer ruled that representations made in the course of the Section 13 settlement negotiation might be relevant to the issue of penalty and thus the Presiding Officer granted the motion to strike for purposes of determining liability, but denied the motion with respect to setting an appropriate penalty.

On April 22, 1992, the Presiding Officer issued an initial decision assessing a total penalty of $42,000 for the three Section 8 violations. The Presiding Officer concluded that the Region had met its burden with regard to each of the three counts and that Wego had failed to meet its burden with regard to its defenses. In particular, the

[7] Specifically, 40 C.F.R. §710.26 provides that certain categories of chemical substances are excluded from the IUR reporting requirements. Among the listed exclusions are naturally occurring chemical substances. "Naturally occurring" is defined in 40 C.F.R. §710.4(b) as:

> Any chemical substance which is naturally occurring and:
>
> (1) Which is (i) unprocessed or (ii) processed only by manual, mechanical, or gravitational means; by dissolution in water; by flotation or by heating solely to remove water or (2) Which is extracted from air by any means, shall automatically be included in the inventory under the category "Naturally Occurring Chemical Substances." Examples of such substances are: raw agricultural commodities, water, air, natural gas, and crude oil; and rocks, ores and minerals.

Section 710.26(d) further provides, in relevant part:

> The applicability of this exclusion for naturally occurring substances is determined in each case by the specific activities of the person who manufactures the substance in question.

EPA has listed oxalic acid and citric acid as substances which, absent proof of an exemption, must be reported. *See* 40 C.F.R. §710.25. A copy of the list appears in Exhibit C–18.

Presiding Officer reaffirmed his earlier denial of Wego's motion to strike Count I, holding that Wego had failed to prove any prejudice, and, therefore, the typographical error was harmless. In addition, the Presiding Officer rejected Wego's argument that the "naturally occurring" exemption applied to Wego's importation of oxalic acid and citric acid on the grounds that Wego had never argued in its pretrial pleadings that it was entitled to the exemption and, in any event, failed to introduce any evidence to show that the substances were processed in a way that meets the exemption. Finally, the Presiding Officer reaffirmed his earlier rejection of Wego's affirmative defense of estoppel based on the Section 13 settlement.

After determining liability, the Presiding Officer turned to assessing the penalty. Following due consideration of the pertinent statutory provisions and EPA guidelines, the Presiding Officer assessed a total penalty of $42,000.[8] The Presiding Officer affirmed the Region's determination that the PAIR and IUR violations were subject to a $17,000 assessment under the terms of the relevant penalty policies and rejected Wego's contention that it was entitled to a penalty reduction for "voluntarily disclosing" the Section 8 violations. EPA policies allow for a reduction of up to 50 percent when a violator voluntarily discloses a violation. In this case, the Presiding Officer concluded that Wego did not voluntarily disclose any violation but "stood silent until the violations were uncovered by complainant [EPA]." Initial Decision at 22.

Nonetheless, the Presiding Officer reduced the Region's assessed penalty by $9,000. The Presiding Officer explained that under TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), (n.8 *supra*), he may take into consideration "such other matters as justice may require." In this case, the Presiding Officer reasoned that in light of the Section 13 settlement, "the respondent [Wego] had the reasonable belief that it had been taken advantage of by the government." Initial Decision

[8] TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(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.

EPA regulations further provide that the Presiding Officer must also consider any civil penalty guidelines issued by the Agency. 40 C.F.R. § 22.27(b). With regard to TSCA, EPA has issued EPA Guidelines for the Assessment of Civil Penalties ("Penalty Guidelines"), 45 Fed. Reg. 59,770, (Sept. 10, 1980), and a Final Enforcement Response Policy for TSCA §§ 8, 12 and 13 (May 15, 1987), for assessing penalties under TSCA (Exhibit C–12).

at 24. Consequently, he reduced the total penalty from $51,000 to $42,000.

Wego appeals from the Presiding Officer's decision. In its notice of appeal, Wego makes the following five arguments:

1. The Section 13 settlement resolved all differences between EPA and Wego and is thus a bar to the present action;

2. The Presiding Officer erred in concluding that the typographical error in Count I was "harmless" and in not striking Count I;

3. The Presiding Officer should have reduced the penalty for the oxalic and citric acid IUR violations because the regulations concerning naturally occurring substances are subject to differing interpretations;

4. The Presiding Officer misapplied the Agency's penalty policy by failing to characterize Wego's violations as "voluntarily disclosed;" and

5. The Presiding Officer erred in granting the Region's motion to strike all testimony regarding the Section 13 settlement for purposes of determining liability.

II. *DISCUSSION*

A. *Res Judicata and Equitable Estoppel*

Wego continues to press its claim-splitting and estoppel arguments on appeal. First, Wego argues that the Section 13 settlement bars this action. Second, Wego argues that even if the settlement does not, EPA should be equitably estopped from pursuing this action, given the representations made in connection with the earlier settlement. We will discuss each argument in turn.

1. *Res Judicata*

Although Wego does not clearly articulate its claim, Wego's claim-splitting argument is based upon the principles of res judicata. When an administrative agency is acting in a judicial capacity, common law doctrines of collateral estoppel and res judicata apply to final administrative determinations. *See In re International Paper Company,* RCRA (3008) Appeal No. 90–3 at 8–9 (CJO, Mar. 28, 1991)

(citing U.S. v. *Utah Construction & Mining Co.,* 384 U.S. 394, 421–422 (1966); *see also In re Martin Electronics,* RCRA (3008), Appeal No. 86–1 at 8 n.8 (CJO, Jun. 22, 1987)). Under the doctrine of res judicata, a party may not relitigate issues and claims that have been previously litigated and decided. In order to prove that a claim is foreclosed by res judicata, the moving party bears the burden of showing that (1) there has been a final judgment on the merits in a prior action (2) involving the same parties and (3) the subsequent proceeding is based on the same cause of action. *United States* v. *Athlone Industries,* Inc., 746 F.2d 977, 983 (3rd Cir. 1984); *I.A.M. National Pension Fund* v. *Industrial Gear Manufacturing Co.,* 723 F.2d 944, 946–947 (D.C. Cir. 1983) *(citing Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, n.5 (1979)).

In applying these elements to this case, we conclude that Wego has satisfied the first two elements. First, we find that absent an express reservation of rights, a final Agency settlement, much like a judicial consent decree, should generally be treated as a final judgment on the merits and given res judicata effect. *See United States* v. *Athlone,* 746 F.2d at 983 n.5; *I.A.M. National Pension Fund,* 723 F.2d at 947. Thus, we consider the Section 13 Consent Agreement and Final Order in this case to be equivalent to a final judgment. Second, there is no question that the Section 8 action is a subsequent action involving the same parties. Accordingly, the only question before us is whether the Section 8 complaint alleges the same cause of action as that set forth in the Section 13 action. The Presiding Officer concluded that regardless of whether the claims arose out of the same investigation, Section 8 and Section 13 present distinct and separate causes of action, and, therefore, the Section 13 settlement is not a bar to the Section 8 action. For the reasons set forth below, we agree.

Determining whether claims present the same cause of action does not lend itself to a simple test. A single cause of action may comprise claims under a number of different statutory grounds. Thus, the fact that the Region relied on different statutory provisions does not, in and of itself, end our inquiry. *See e.g., Davis* v. *United States Steel Supply,* 688 F.2d 166, 171–72 (3rd Cir. 1982), *cert. den.* 460 U.S. 1014 (1983). Rather, whether the causes of action are separate hinges, among other things on: (1) whether the acts complained of are the same; (2) whether the material facts are the same; and (3) whether the proof required is the same. *United States* v. *Athlone,* 746 F.2d at 984.

Here, we conclude that the acts complained of in the Section 8 and Section 13 complaints are not the same, and thus res judicata does not apply. TSCA Section 8 requires that specific information concerning certain chemicals be reported to EPA. As explained in EPA's *Final Enforcement Response Policy for TSCA §§8, 12 and 13,* at 16 (May 15, 1987) ("TSCA ERP"), Section 8 information is used by the Agency to evaluate potential risks associated with the manufacture and use of the chemical. Section 13, in contrast, describes procedures for certifying that imported chemical substances subject to TSCA are in compliance with TSCA. Section 13 information allows EPA to check on the status of chemicals entering the United States. The Presiding Officer, therefore, properly concluded that TSCA Section 8 and TSCA Section 13 serve different purposes and establish "totally different requirements." Initial Decision at 19.

Second, the material facts and proof necessary to establish the violations are not the same. The Section 13 violations stemmed from Wego's failure to submit certain information to the United States Customs Office. The facts concerning these Section 13 violations came from a review of forms submitted to the Customs Office by Wego or its agents at various locations, including Boston, Massachusetts and San Juan, Puerto Rico. The Section 8 violations, in contrast, were established by demonstrating, based on a review of EPA and Wego's files, that Wego had imported certain listed chemical substances without submitting the requisite information to EPA Headquarters within the time specified by the applicable rules. Clearly, the facts and proof necessary to establish Section 8 and Section 13 violations are different.

Accordingly, since the administrative actions involved different statutory provisions, different acts, and different evidence to support different material facts, the Presiding Officer properly rejected Wego's argument that the Section 8 action was barred on res judicata grounds.

2. *Equitable Estoppel*

The Presiding Officer also properly rejected Wego's contention that the present action is barred on equitable estoppel grounds. As the Presiding Officer noted, the principle of equitable estoppel is not applied to the United States on the same terms as it is to private citizens. *OPM* v. *Richmond,* 496 U.S. 414, 420–424 (1990) (*citing Heckler* v. *Community Health Servs.,* 467 U.S. 51, 60 (1984)). The reason for a different standard stems from the concern that estoppel interferes with the public interest in full enforcement of

the law. *Community Health Servs.,* 467 U.S. at 60. Thus, a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment. *Id.* at 61. Here, Wego has failed to satisfy its burden.

In support of its estoppel claim, Wego introduced the handwritten notes of EPA inspector Kimberly O'Connell from the March 31, 1987 settlement conference on the Section 13 complaint. Ms. O'Connell's notes state: "we offer them [a] 50% reduction of $60,000–$30,000 including 10 counts on complaint and *8* other violations." Exhibit R–1. However, Ms. O'Connell explained that the additional "8" violations referred to "8" Section 13 violations. Transcript at 174. In addition, Wego presented the testimony of Bert Eshaghpous, a principal in Wego, who testified that Regional Counsel represented that if Wego accepted the settlement "EPA has no intention of going back to the other violations." Transcript at 194. Edward Khalily, President of Wego, also testified that he understood that "the [Section 13] settlement was a comprehensive settlement" and had he known of the Section 8 violations he would not have settled. Transcript at 205.

In these circumstances, Wego has failed to show that the government made any affirmative misrepresentation about the Section 8 violations upon which Wego could reasonably have relied upon to its detriment. *Community Health Services,* at 59–60 n.10. While the Region's representations during the settlement negotiations may have been less than clear, the Region did not affirmatively misrepresent that the Section 13 settlement would relieve Wego of its TSCA Section 8 liability. There is simply no evidence to suggest that Regional personnel ever mentioned Section 8 much less promised to excuse Wego of its noncompliance if Wego settled the Section 13 case.[9] Ab-

[9]The Presiding Officer's credibility determinations are entitled to deference. *In re Port of Oakland and Great Lakes Dredge and Dock Company,* MPRSA Appeal No. 91–1 (EAB, Aug. 5, 1992) ("Port of Oakland"), at 28 n.59. As the Presiding Officer stated, in pertinent part:

> 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 credible.

Initial Decision at 13.

sent such proof, Wego has failed to show any affirmative misconduct on the part of the Region.

Moreover, Wego's reliance on the Region's general statements regarding "8" other violations was not reasonable. The evidence conclusively showed that Wego knew at the time of the Section 13 settlement of its potential Section 8 liability. Mr. Khalily admitted on cross-examination that he had received a letter from Region II in March 1987, more than one year before the settlement was finalized, which advised Wego that it may have failed to submit certain PAIR and IUR reports. Exhibit C–6. Moreover, Wego, after consulting with an expert, knew that it had not timely complied with Section 8 when it submitted the required information on March 11, 1987, several months beyond the regulatory deadline. Transcript at 203. Nonetheless, Wego failed to ask whether its Section 8 violations would be covered by the settlement or to demand that the Region include the Section 8 violations in the settlement. The fact that the Region would not identify the other "8" claims did not relieve Wego of its obligation to inquire as whether Wego's Section 8 violations were covered by the settlement, particularly before Wego signed a settlement which, by its terms, covered only the 10 violations identified in the Section 13 settlement. *Heckler* v. *Community Health Services* makes plain that persons claiming estoppel against the United States must show that they endeavored to clarify their obligations before they can establish that their reliance on the Government's misrepresentation was reasonable. *Id.* at 59–60 n.10.

For these reasons, the Presiding Officer properly concluded that Wego's claim of equitable estoppel must fail.

B. *Failure to Strike Count I*

Wego argues that the Presiding Officer also erred in refusing to strike Count I. According to Wego, "where the citation of the very law which is allegedly violated is incorrect, the error cannot be dismissed as harmless or inconsequential." Wego Brief at 8. Rather, Wego contends that because the Presiding Officer failed to expressly grant the Region's motion to amend its complaint, Count I must be dismissed. We hold that the Presiding Officer properly denied Wego's motion to strike Count I.

Under the rules governing this proceeding once a party has answered the complaint, the Agency may only amend its complaint upon a motion granted by the Presiding Officer. 40 C.F.R. § 22.14(d). This provision is modeled after Rule 15 of the Federal Rules of

Civil Procedure, which governs amended pleadings. Section 22.14(c) differs from its federal counterpart, however, in that it does not specifically provide for amendments to conform to the evidence, which is expressly provided for in Rule 15(b). Nevertheless, the Consolidated Rules of Practice have been interpreted as allowing amendments that conform to the evidence. *See In re Yaffee Iron and Metal Company, Inc.,* TSCA Appeal No. 81–2 at 5 (JO, Aug. 9, 1982). For guidance, we look to Rule 15(b).[10]

Rule 15(b) provides in pertinent part:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The last two sentences of Rule 15(b) require that a party objecting to evidence on the ground that the material offered is not within the issues framed by the pleadings must meet a heavy burden. The nature of that burden has been described as follows:

> To justify the exclusion of evidence, the rule contemplates that the objecting party must be put at some serious disadvantage; it is not enough that the party advances an imagined grievance or seeks to protect some tactical advantage. Thus, a claim of surprise that is not borne out by the facts or an objection to a mere technical addition to the theory or claim for relief * * * will not, entail sufficient prejudice to warrant the denial of a motion to amend.

[10] Although the Federal Rules of Civil Procedure do not apply to these proceedings, in some circumstances they have been relied upon for guidance. *See In re BKK Corp.,* RCRA (3008) Appeal No. 84–5 (CJO, May 10, 1985), *vacated on other grounds* (Oct. 23, 1985); *see also In re Detroit Plastic Molding,* TSCA Appeal No. 87–7 at 7 (CJO, Mar. 1, 1990). Also, under 40 C.F.R. §§ 22.01(c) and .04, the Board may resolve procedural questions arising during the proceedings that are not addressed by the rules.

Wright, Miller & Kane, *Federal Practice and Civil Procedure,* § 1495 at 57–58 (1990). Here, Wego failed to meet its burden. Wego never presented any evidence before the Presiding Officer to show that it was "surprised" or "disadvantaged" by the Region's request to correct the typographical error in Count I. Indeed, Wego does not contend on appeal that it was prejudiced, in any way, by the introduction of evidence regarding Wego's reporting requirements under 40 C.F.R. § 712.30(n). The Presiding Officer properly noted that, "the purpose of pleading is to facilitate a proper decision *on* the merits." Initial Decision, at 15. Moreover, before allowing the Region to proceed with Count I, the Presiding Officer determined that Wego was on notice as to the relevant facts for two years and had not demonstrated any prejudice or surprise by the introduction of evidence concerning the violation of 40 C.F.R. § 710.30(n).

Without question, the Presiding Officer properly applied the standards established by Rule 15(b), in considering whether the Region could proceed to make the typographical change in the complaint.[11] Having concluded that Wego would not be prejudiced in any way by correcting the complaint, the Presiding Officer effectively granted the Region's request to amend the typographical error in the citation to 40 C.F.R. § 712.30.[12] In these circumstances, allowing the Region to present evidence to support Count I was not improper and the Presiding Officer properly refused to strike Count I.[13]

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[11] The Presiding Officer's decision is also in keeping with earlier decisions of the Board, including, *In re Port of Oakland* at 41, where we noted, citing *In re Yaffe Iron & Metal Co., Inc.,* TSCA Appeal No. 81–2 (JO Aug. 9, 1982), that administrative pleadings should be liberally construed and easily amended to serve the merits of the action.

[12] While no motion to amend the complaint was formally granted, throughout the proceeding the Presiding Officer treated the complaint, as though it had been amended. For example, when Regional Counsel sought to introduce the complaint into evidence, and asked that the Presiding Officer take notice of the typographical change, the following exchange occurred:

> Mr. Howard: "* * * paragraphs 2 and 4 should be amended to read "n" instead of the "d" in those paragraphs.
>
> Judge Vanderheyden: "Okay, I already ruled on that." (Transcript at 59).

[13] In construing Rule 15(b) courts have recognized that the failure to formally amend the complaint to conform to the evidence will not defeat a valid judgment where the trial court erred in holding that a formal amendment was not required. *Green* v. *United States,* 629 F.2d 581, 584 (9th Cir. 1980); *see also Dunn* v. *Transworld Airlines, Inc.,* 589 F.2d 408, 412–413 (9th Cir. 1978). As the Ninth Circuit held in *Green* v. *United States,* 629 F.2d at 584, quoting from 2A *Moore's Federal Practice* § 8.05 at 8–34 (2d ed. 1979): "[A]t the trial stage the case is to be heard on the

Continued

C. *Naturally Occurring Substances*

Wego does not expressly argue in its appeal that it did not violate TSCA Section 8 when it failed to timely submit IUR reports for oxalic acid and citric acid. Rather, Wego asserts that because there is some "*confusion*" as to when an importer must submit reports for naturally-occurring substances, Wego should have been dealt with "*less harshly.*" (Wego Brief at 11.) Because Wego hinges its assertion, in part, on its construction of the TSCA regulations, we will construe Wego's argument to be both a challenge to its liability as well as a challenge to the penalty assessment, and we will address both contentions.

Under 40 C.F.R. § 710.26(d), *see* n.7 *supra,* certain naturally occurring chemical substances, as described in 40 C.F.R. § 710.4(b), are exempt from the IUR reporting requirements of TSCA Section 8. Section 710.26(d), however, expressly provides:

> The applicability of this exclusion is determined in each case by the specific activities of the person who manufactures the substance in question. * * * If a person * * * manufactures a chemical substance by means other than those described in § 710.4(b), the person must report * * *.

Thus, unless the chemical substance was processed in a manner prescribed by § 710.4(b), reporting is required. The exclusion or exemption, therefore turns on how the substances were processed. Here, Wego did not present any evidence on how the oxalic acid and citric acid were processed. The Presiding Officer concluded that Wego had the burden of establishing that it was entitled to the exemption. We agree.

While we recognize that the Region had the ultimate burden of proving the IUR violations, Wego had the burden of "going forward" on the exemption. Under 40 C.F.R. § 22.24, "the complainant has the burden of going forward * * * and proving that the violation occurred * * *." Here, the Region presented evidence to show that oxalic acid and citric acid are listed under 40 C.F.R. § 710.25 and that an IUR report is required under 40 C.F.R. § 710.33, unless an exemption applies. Once the Region established its prima facie case, Wego had the affirmative obligation of "going forward" and presenting

merits and is not to be hamstrung by faulty pleadings, unless actual not conjectural prejudice results from the faulty pleading."

at least some evidence to show that the chemicals were processed in a manner contemplated by the exemption. 40 C.F.R. § 22.24 provides, in pertinent part:

> Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint.

Here, Wego failed to meet its burden of "going forward" by failing to introduce any evidence to show how the oxalic acid and citric acid were processed.

Wego's suggestion that the Region's alleged confusion over Wego's Section 8 obligations should have led to a lesser penalty is also without merit. Wego argues that the Region's failure to identify Wego's reporting obligation for citric acid in its March 1987 letter to Wego (Exhibit C–6), and the Region's original belief that an IUR report was needed for the urea-formaldehyde polymer,[14] demonstrates that the regulations are ambiguous. Wego apparently believes that this alleged ambiguity should have been taken into account in assessing a penalty for the IUR violations. In particular Wego states:

> Under the circumstances of such confusion it seem[s] only common sense to deal less harshly with a respondent than where there is an intentional violation of unambiguous regulations. (Wego Brief at 11.)

Wego's argument comes too late. In *In re Genicom Corporation,* EPCRA Appeal No. 92–2, at 16 (EAB, Dec. 15, 1992), we held that "the appeal of an initial decision shall be limited to those issues raised by the parties during the course of the proceeding." Wego never challenged the penalty assessment for the IUR violations on these grounds in its answer, in any pre-trial pleadings or at the hearing. At the hearing, Wego defended its liability for the IUR violations solely on the grounds that citric acid and oxalic acid are not covered by Section 8 under the "naturally-occurring" exemption. During the hearing Wego focused its penalty argument on its contention that its violations had been voluntarily disclosed. Wego challenged the IUR penalty on "confusion" grounds for the first time in its post-hearing brief. In these circumstances, we will not entertain this new attack on the assessed penalty.

[14] This is the violation that was identified in Count IV of the complaint, but was dropped before the hearing. (*See* n.5, *supra.*)

D. *The Penalty Assessment*

As noted above, Wego also challenges the entire penalty assessment on the grounds that the Presiding Officer failed to give Wego credit for "voluntarily disclosing" its violations. Wego argues that under EPA's penalty policies, it was entitled to a significant penalty reduction. EPA's TSCA ERP provides in pertinent part:

> The ERP establishes fixed percentage reductions in penalties for voluntary disclosure of violations for the following sections only: TSCA Sec. 8(a) Inventory Rule, TSCA Sec. 12, and TSCA Sec. 13. For all other sections, the voluntary disclosure of a violation is to be treated as a late report, and therefore, the violator receives a substantial reduction since the circumstances level moves from Level 1 to Level 4.
>
> For TSCA Secs. 8(a) Inventory Rule, 12 and 13, the adjustment factors for voluntary disclosure is as follows:
>
> | | |
> |---|---|
> | Disclosure | 25% |
> | Immediate disclosure within 30 days of discovery. | 25% |
> | TOTAL | 50% |
>
> The 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 failure to report/file. *However, if, for example, an inspector is conducting a TSCA Sec. 8 inspection at an establishment, and the company voluntarily discloses a TSCA Sec. 13 violation and the inspector would not have any expectation of discovering such a violation, the TSCA Sec. 13 violation would be considered to be voluntarily disclosed.*

See Exhibit C–12, emphasis added. Wego contends that because the Region learned of Wego's Section 8 violations during an inspection focused primarily on Section 13 violations, Wego's Section 8 violations should be treated as "voluntarily disclosed." Wego's contention is meritless. There is nothing in the record to support a finding that Wego voluntarily disclosed its Section 8 violations. To the contrary, the evidence showed that Wego was not aware of its Section 8 obliga-

tions until the EPA inspector brought the Section 8 requirements to the attention of Wego during the inspection.[15] *See* Initial Decision at 22. Thus, the Presiding Officer properly concluded that Wego was not entitled to a penalty reduction based upon a theory of "voluntary disclosure."

E. *Striking the Testimony on the Section 13 Settlement*

Wego's final argument on appeal is that the Presiding Officer erred in granting the Region's motion to strike certain testimony regarding the negotiations surrounding the Section 13 settlement. As noted above, the Presiding Officer granted the Region's motion to strike the testimony with regard to liability in his June 25, 1991 order. In its response, the Region argues that Wego waived any objection to the order by failing to pursue an interlocutory appeal under 40 C.F.R. § 22.29(a). The Region further argues that the Presiding Officer's motion was, in any event, correct because the Section 13 settlement was not relevant on the issue of liability. We find that the Region's arguments are without merit. Nonetheless, for the reasons that follow, we conclude that the error was harmless and need not be reversed.

Wego did not waive any rights by failing to pursue an interlocutory appeal. Under 40 C.F.R. § 22.29(a), interlocutory appeals are discretionary. An interlocutory appeal must ordinarily be certified to the Board by the Presiding Officer, under § 22.29(b). Even assuming the issue is certified, the Board reserves the right to decline review and to wait for the initial decision. 40 C.F.R. § 22.29(c). Given the discretionary nature of interlocutory appeals under 40 C.F.R. § 22.29, a party does not ordinarily waive an objection by failing to seek interlocutory review. Rather, the issue will be preserved for review in the appeal from the initial decision, under 40 C.F.R.

[15] As Kimberly O'Connell, one of the EPA inspectors, explained in response to questions from Wego's counsel regarding the inspection:

> A. We discussed Section 8 with the company. The company didn't appear to be aware of all the Section 8 reporting requirements
> * * *

Transcript at 147.

Mr. Khalily, Wego's President, further testified that following the inspection:

> A. I tried to find somebody that is very much up to par within the regulatory paragraphs and so on. Maybe they could help us to implement those.
>
> Q. You hired him as a direct result of that inspection.
>
> A. Exactly.

Transcript at 202–203.

§ 22.30(a).[16] Accordingly, Wego's objections to the Presiding Officer's July 15, 1991 order are properly before us at this time.

The Region's substantive argument in support of the Presiding Officer's June 25, 1991 order is also without merit. We recognize that the admissibility of evidence relating to settlement negotiations is subject to special rules. Section 22.22 of the Rules governing these proceedings provides in pertinent part that the Presiding Officer "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible * * *." Turning to Rule 408, it states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible *to prove liability for or invalidity of the claim or its amount.* Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does *not* require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *This rule also does not require exclusion when the evidence is offered for another purpose,* such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(Emphasis added.) The last sentence of Fed. R. Evid. 408 makes it plain that its exclusionary principle does not make settlement evidence inadmissible when offered for a purpose *other than* to prove underlying liability, nonliability, or the amount of the claim. Here, testimony regarding the Section 13 settlement was offered by Wego

[16] This result is consistent with the decisions concerning this same issue under the Federal Rules of Appellate Procedure. More specifically, courts have recognized that: "[A]s a general proposition when a trial court disposes finally of a case any interlocutory rulings merge with the final judgment. Thus, both the order finally disposing of the case and the interlocutory orders are reviewable on appeal." *Hendler* v. *U.S.*, 952 F.2d 1364, 1368 (Fed. Cir. 1991). In addition, it is well-recognized that, failure to take an authorized appeal from an interlocutory order does not preclude raising the question on appeal from the final judgment. *Drayer* v. *Krasner,* 572 F.2d 348, 353 (2d Cir. 1978), *cert. denied,* 436 U.S. 948 (1978).

in an effort to show that the present action should be dismissed on equitable estoppel grounds. The testimony was proper. See generally, Wright and Graham, *Federal Practice and Procedure Evidence,* § 5314 (1990). Moreover, despite his June 25, 1991 ruling, the Presiding Officer considered the testimony in evaluating Wego's affirmative defense to liability. As noted above, the Presiding Officer stated:

> 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.

Initial Decision at 13. In view of the foregoing, the Presiding Officer's error was at worst harmless and in no way affected the determination of liability.[17]

III. *CONCLUSION*

For the reasons discussed in this decision, respondent, Wego Chemical & Mineral Corporation, is assessed a civil penalty of $42,000. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of service of this decision.

> Regional Hearing Clerk,
> U.S. EPA, Region II,
> P.O. Box 360188M,
> Pittsburgh, PA 15251

So ordered.

[17] The Region has not appealed the Presiding Officer's decision to reduce the penalty based on his conclusion that Wego sincerely believed that the Section 13 settlement resolved all of its TSCA liability:

> [T]he ALJ is persuaded to the finding that respondents were not feigning, but believed sincerely that EPA was engaging in coercive practices.

Initial Decision at 12. Absent an appeal by the Region, we see no reason to disturb the Presiding Officer's penalty reduction.