10/30/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF	:	
	:	
CASCHEM, INC.	:	Dkt. No. II TSCA-PMN-89-0106
	:	
Respondent	:	Judge Greene
	:	
	:	

ORDER UPON CROSS-MOTIONS FOR PARTIAL ACCELERATED DECISION

This matter arises under § 16(a) of the Toxic Substances Control Act ("TSCA" or "the Act"), 15 U.S.C. § 2615(a). The complaint, consisting of two counts, charges respondent with (1) failure to have submitted in a timely manner a Notice of Commencement prior to manufacture of a chemical substance,[1] and (2) failure to report to the Environmental Protection Agency (EPA) thirty-one chemical substances for the Partial Updating of the TSCA Inventory Data Base in a timely manner, as required by §710.33(a) of 40 C.F.R. Part 710, Subpart B ("Inventory Update Rule"), issued pursuant to authority contained in § 8(a) of TSCA [15 U.S.C. §2607(a)].

The Inventory Update Rule requires every person who manufactured, during the prior corporate fiscal year, at a single site for commercial purposes, 10,000 pounds or more of any chemical

[1] Respondent has claimed that the chemical referred to in Count I of the complaint is Confidential Business Information.

substance listed in the EPA's "Master Inventory File," [2] to report certain information on each such chemical substance.[3] That information is to be entered into a chemical substance inventory database maintained by the EPA pursuant to §8(b) of TSCA [15 U.S.C. § 2607(b)]. The form upon which such information is to be reported, the Partial Updating of the Inventory Data Base Production and Site Report ("Form U"), was required to be completed and submitted for the initial reporting period (August 25, 1986 to December 23, 1986) by December 23, 1986.[4]

The parties in this matter filed cross motions for "accelerated decision" as to the second count of the complaint. Respondent's motion challenges the assessment of multiple penalties for the violation alleged. The proposed penalty for count two is assessed per chemical, i.e. $17,000 for each chemical substance respondent allegedly failed to report on time.

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[2] See 40 C.F.R. §§ 710.23(a), 710.25, 710.28. The Master Inventory File is EPA's comprehensive list of chemical substances which constitute the Chemical Substance Inventory compiled under section 8(b) of the Act [15 U.S.C. § 2607(b)].

[3] See 40 C.F.R. § 710.32.

[4] 40 C.F.R. § 710.33 provides that:

> All information reported to EPA in response to the requirements of this subpart must be submitted during the applicable reporting period. The following reporting periods are prescribed for this subpart.
>
> (a) Initial reporting period. The first reporting period is from August 25, 1986 to December 23, 1986. Any person described in § 710.28(a) must report during this period for each chemical substance described in § 710.25 that the person manufactured during the corporate fiscal year described in § 710.28(a).

Respondent argues that it has been charged with only one violation of the Inventory Update Rule -- the failure to submit a report -- and, accordingly, may be assessed only one penalty in an amount no greater than the statutory limit ($25,000) under section 16(a) of TSCA [15 U.S.C. § 2615(a)].

Complainant seeks judgment as a matter of law as to both the liability and the penalty for count two, urging that respondent is liable for failure to report 29 chemical substances[5] by the deadline set forth in the Inventory Update Rule, and that respondent must pay a penalty of $493,000. In the alternative, complainant seeks judgment in its favor as to liability alone on count two.

Respondent concedes that it was required to submit information required by the Inventory Update Rule for the corporate fiscal year 1985 by a certain date and that it failed to do so.[6] Respondent submitted the information on a number of chemical substances in

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[5] The allegations in count two of the the complaint are based upon information reported in the Form U which respondent submitted after the reporting deadline. Complainant reduced the number of chemicals that it alleges respondent failed to report from 31 to 30 because respondent reported one chemical substance twice. Complainant's Brief in Support of its Cross-Motion for Partial Accelerated Decision (Cross-motion) at 7, n. 3. Subsequently, in its Brief in Opposition to Respondent's Motion for Partial Accelerated Decision and In Further Support of Complainant's Cross-Motion for Accelerated Decision (Complainant's Opposition), the number was reduced to 29 chemical substances, after EPA discovered that one chemical substance listed by respondent was exempt from the reporting requirements (Complainant's Opposition at 8 n. 2. The proposed penalty was thereupon modified from the initial proposed penalty for count two of $527,000 for 31 violations, to $493,000 for 29 separate violations.

[6] Respondent's Motion for Partial Accelerated Decision, dated February 27, 1990 (Motion) at 3, 5.

May, 1988,[7] after EPA's inspection of respondent's facility.[8] However, while liability is admitted for one violation of Inventory Update reporting, respondent does not admit to the scope of liability charged in the complaint.[9] Respondent denies that all of the thirty-one chemical substances which it was charged with failure to report were required to be reported. On that basis, if its Motion is not granted, respondent opposes the Cross-motion on the ground that genuine issues of material fact remain to be resolved.

DISCUSSION

A motion for partial accelerated decision may be granted only if there are no genuine issues of material fact as to that part of the proceeding for which judgment is requested.[10] Respondent's

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[7] Cross-motion, Exhibit B.

[8] Complaint and Answer ¶ 17. EPA also inspected respondent's facility on May 11, 1988, but it is not clear from the record whether that inspection occurred before or after respondent submitted its Forms U. Complaint and Answer ¶ 19; see Follow-up Inspection Report dated May 31, 1988, Respondent's Exhibit A attached to Motion.

In any event, the fact that respondent did not report until after the EPA inspected respondent's facility renders the alleged violation a failure to report, according to EPA policy. Cross-motion, Exhibit D at 14.

[9] Motion at 5-6 and 4-5 n. 1: "Caschem admits, however, that at least two chemicals should have been timely reported but were not. . . .By admitting herein to a violation of [40 C.F.R.] Section 710,33(a), Caschem does not intend to waive its rights under TSCA to challenge the appropriateness of the penalty."

[10] The Rules of Practice applicable to this proceeding provide at 40 C.F.R. § 22.20(a):

> The Presiding Officer upon motion of either

[footnote continued on page 5]

motion raises a question of law not dependent upon any contested facts. To grant complainant's cross-motion as to liability[11] would require a finding that each of the chemical substances at issue was required to be reported, and a conclusion that respondent's affirmative defenses do not preclude judgment as to liability. If the Cross-motion were to be granted as to liability, an accelerated decision on the penalty question may be issued only if there are no genuine issues of material fact with respect to the proposed base penalty assessment (the so-called "gravity-based penalty") and to any mitigating or aggravating circumstances ("adjustment factors").

In denying that all of the 31 chemical substances referred to in the complaint[12] were required to be reported, respondent asserts that disputed issues of material fact exist. In support, respondent states:

> party ... may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

[11] Complainant seeks judgment on the scope of liability, i.e. a ruling that respondent is liable for 29 separate violations of TSCA, and not merely that respondent is liable for failing to report on time. See Complainant's Reply at 2, 6.

[12] The 31 chemical substances are referred to in the complaint, ¶¶ 32, 33, by their Chemical Abstract Service (CAS) registry number.

> The facts to be presented at the hearing will show that many of the 31 chemicals had nothing to do with the Inventory Update rule and, for various reasons, were not required to be reported. Until the precise number of chemicals required to be reported is determined through testimony and evidence at hearing, the scope of CasChem's liability cannot be settled. . . . Caschem would present testimonial and documentary evidence that additional chemicals identified by EPA as subject to the Inventory Update rule were not in fact required to be reported. . . . To take one example, ethoxylated castor oil . . . is one of many chemicals unnecessarily included on the Form U sent to EPA. Although it is identified on EPA's Master Inventory List, that chemical is exempt from TSCA's Inventory Update rule. [Respondent's Opposition at 5-6]

Respondent states further that "numerous errors" which were made in the reports by the responsible company employee, the reasons the errors were made, instructions from the EPA inspector concerning completion of the Form U, "and other facts" are all relevant factual issues which respondent has a right to present. [Respondent's Opposition at 6 n. 4]

Complainant concedes that ethoxylated castor oil is exempt from the reporting requirements. [Complainant's Reply at 5; Complainant's Opposition at 8-9, Exhibit F] It also admits that one of the 31 chemicals was reported twice on respondent's Form U reports. [Cross-motion at 7 n. 3; Complainant's Reply at 4 n. 1] Consequently, complainant reduced the number of violations for each of those "errors" from 31 to 29. With respect to the remaining 29 chemicals referred to in the complaint, complainant argues that each of the elements necessary to find liability has been established through respondent's documentary admissions in its

answer and the Forms U [Motion, Exhibit B] it submitted. Complainant further argues that respondent should be precluded from raising facts and issues not raised in its answer. In support thereof, complainant cites the instruction in the complaint to provide in the answer facts to be placed in issue and in defense, and further cites case law regarding the failure to plead affirmative defenses in the answer. [Complainant's Opposition at 10-11]

In reply, respondent asserts that it was not required to plead an affirmative defense regarding the number of chemicals it was not required to report. The denial that it was required to report each of the 31 chemical substances is sufficient. [Answer ¶¶ 33,34] Respondent argues that an answer need not set forth all facts to be presented in defense, and that it has a right to present such facts at the hearing as a matter of due process. The scope of liability is not established merely by the belated Form U submissions, as evidenced by complainant's modification from 31 to 29 violations. Respondent asserts that if its motion is denied, a hearing would be required to examine evidence, such as what it "said or did with regard to those [F]orms [U]," to determine the proper scope of liability. Respondent's Reply at 3-5.

While respondent denied in its answer that it was legally obligated to submit the reports for the Inventory Update reporting requirement, to date respondent has presented no evidence or specific argument in support of that denial with respect to the remaining 29 chemical substances at issue. Nor has respondent

sought discovery with respect to this issue.[13]

Complainant, on the other hand, has presented evidence that none of the 29 chemical substances was exempt from the reporting requirements, in a certified statement from the Director of Information Management in the EPA's Office of Toxic Substances. [Complainant's Oppposition at 8, Exhibit F]

Generally in federal court proceedings, neither conclusory allegations unsupported by evidence nor mere promises to produce evidence at trial are sufficient to defeat a motion for summary judgment. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990); Securities and Exchange Commission v. Bonastia, 614 F.2d 908, 914 (3d Cir. 1980). A specific showing of a factual issue, or "concrete particulars" showing that a trial is needed, must be made. R.G. Group v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984), citing SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978); In re ICC Industries, Inc., TSCA Appeal No. 91-4

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[13] It is sometimes said that discovery is strongly favored before summary judgment is granted. Bryant v. O'Connor, 671 F. Supp. 1279, 1282 (D. Kan. 1986). In this proceeding, discovery in the form of the pretrial exchange of documents has not yet been initiated. Under the Federal Rules of Civil Procedure (FRCP), a ruling on a motion for summary judgment may be deferred to allow discovery if the party opposing the motion cannot at the time present by affidavit facts essential to justify its opposition. FRCP 56(f). However, the burden to justify the discovery is on the party opposing the motion for summary judgment to state by affidavit reasons for the inability to present such essential facts. Id. The party must show what facts are sought and how they are to be obtained, how those facts are reasonably expected to create a genuine issue of material fact, what effort has been made to obtain them, and why those efforts were unsuccessful. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 422 (2d Cir. 1989). Respondent has neither requested discovery here nor set forth particular material facts which could be obtained through discovery.

(Order on Interlocutory Review, December 2, 1991) at 13 (affirming administrative law judge's order denying further discovery and granting accelerated decision on liability for failing to report under § 8(a) of TSCA, where respondent claimed a factual issue existed by virtue of the statement in its answer that it was uncertain that the report was not filed, and requested further discovery). A party is not necessarily entitled to an oral hearing to resolve issues of fact, where there are no material factual disputes. In re ENSCO, Inc., Docket No. TSCA-VI-532C (Orders dated May 7, 1992) at 18-19.

Complainant has established prima facie[14] that respondent was

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[14] Data on the Form U are not binding judicial admissions, but are merely pre-litigation admissions which are not conclusive if there is opposing evidence. As such, they may establish a prima facie case of liability, but may be controverted by evidence of mistake or inaccuracy. In re Pitt-Des Moines, Inc., Docket No. EPCRA-VIII-89-06 (Initial Decision, July 24, 1991) at 19 (Data reported to EPA on Form R under the Emergency Planning and Community Right-To-Know Act are admissions which may be controverted or explained by presenting evidence of errors in calculating amount of chemical processed); accord, In re U.S. Aluminum, Docket No. EPCRA-89-0124 (Ruling on Motion for Partial Accelerated Decision, November 26, 1991) at 4-5; Public Interest Research Group v. Yates Industries, 757 F.Supp. 438, 447 (D. N.J. 1991) (Discharge Monitoring Reports required under the Federal Water Pollution Control Act may be deemed admissions when establishing liability in a summary judgment motion, but such a motion may be defeated by direct evidence of reporting inaccuracies, and not merely by unsupported "speculation" of measurement error); see also, Connecticut Fund for the Environment v. Job Plating Company, Inc., 623 F.Supp. 207, 218 n. 12 (D. Conn. 1985).

Complainant argues that the Form U data are admissions made under oath which respondent should not be able to deny, refute or ignore. It emphasizes that to allow respondent to do so would render nugatory an official submission to the government.

However, the evidentiary status of Form U data is not upgraded into irrevocable binding admissions by virtue of the certification statement on the Form U, which the applicant by signing certifies

[footnote continued on page 10]

required to report the 29 chemical substances. Respondent has provided no facts or arguments to contest this. Mere promises to present facts at trial are insufficient. Neither has respondent stated which of the 29 chemicals were reported in error, the factual bases for any error, or any evidence which might be obtained through discovery. Consequently, no showing has been made that a genuine issue of material fact exists with respect to respondent's responsibility to report the 29 chemical substances.

Respondent has asserted three affirmative defenses: failure to state a claim upon which relief may be granted, laches, and failure to provide respondent with actual advance notice of the duty to file Form U reports. In addition, respondent's third affirmative defense urges that imposition of a penalty under these circumstances would be confiscatory, a denial of due process and a taking of property in violation of the Fifth Amendment. Respondent merely asserts that it has not had the opportunity to present evidence to establish these defenses and that it is entitled to litigate them. [Respondent's Opposition at 8, Respondent's Reply at 4]

In order to defeat a cross-motion, affirmative defenses must

"to the best of [his] knowledge and belief that . . . all information entered on this form is complete and accurate . . . ." Complainant's Opposition, Exhibit B. The "best" of one's knowledge and belief is not infallible.

Such certified documents submitted to the government are only rendered "nugatory" to the extent of any significant reporting errors. This is not to say, however, that such errors are inconsequential, in view of the respondent's burden to prove such error in an enforcement proceeding. See 40 C.F.R. § 22.24.

either raise a genuine dispute of material fact or entitle respondent to judgment as a matter of law. Neither has been demonstrated by respondent, as it has presented no supportive arguments. Moreover, respondent would have the burden of proof at trial on the affirmative defenses, so providing support for them in opposing the Cross-motion is particularly necessary, even where discovery on them is desired. See, Security Pacific Mortgage and Real Estate Services, Inc., v. Canadian Land Company of America, 690 F. Supp. 1214, 1225-1226 (S.D.N.Y. 1988), affirmed, Security Pacific Mortgage and Real Estate Services v. Herald Center, 891 F.2d 447 (2d Cir. 1989).

However, without simply disposing of the affirmative defenses on that basis, they are addressed as follows. As to the first affirmative defense, failure to state a claim, complainant has established a prima facie case, as discussed above. The second defense, laches, cannot be asserted against the government when it acts in its sovereign and governmental capacity to protect public health and safety. See, United States v. Amoco Oil Company, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984); Chesapeake and Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. California, 332 U.S. 19, 40 (1947). Regarding the third affirmative defense, no citation of authority for any legal obligation of EPA to provide actual advance notice to each person who may be required to report under the Inventory Update rule has been presented or found in TSCA or the applicable regulations.

The affirmative defenses therefore do not bar judgment as to

liability. To the extent that they may bear upon the amount of penalty, respondent will be given the opportunity to present evidence on the affirmative defenses as appropriate.

On the issue of the penalty, however, accelerated decisions are seldom granted where respondent contends the penalty recommended is inappropriate. At this point in the proceeding, before a pretrial exchange has taken place, an accelerated decision on the penalty would be particularly unwarranted. The parties will be provided with an opportunity to present evidence on the penalty issue.

Complainant's motion will be denied with respect to judgment on the penalty. However, the substantive issue presented in the Motion and Cross-motion regarding the scope of liability is a question of law appropriate for accelerated decision, as no genuine disputes of material fact have been demonstrated on that issue.

The substantive issue

The question of law presented is whether complainant may assess multiple penalties, consisting of a separate penalty for the failure to report on time each chemical substance required to be reported under the Inventory Update Rule for the initial reporting period, or whether complainant is limited to a single penalty assessment no greater than the statutory maximum of $25,000 for all failures to report during that period.

Complainant's position is that such multiple penalty

assessments are authorized under § 16 of TSCA [15 U.S.C. § 2615][15] and are consistent with the language, purposes and objectives of § 8 [15 U.S.C. § 2607].[16] This interpretation of TSCA appears in a policy document, the "Recordkeeping and Reporting Rules, TSCA Sections 8, 12, and 13 Enforcement Response Policy," ("ERP"), dated May 15, 1987 [Complainant's Opposition, Exhibit D], where it states in reference to determining the number of violations that TSCA § 8(a) Inventory Update violations are to be assessed on a "per chemical per site" basis. [ERP at 13, 25] Complainant asserts that this interpretation must be accorded deference based upon the principle that reviewing courts must be deferential to an Agency's interpretation and implementation of a statute it enforces, citing,

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[15] Section 16(a)(1) of TSCA provides: "Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title." [Emphasis added].

The provision of section 15 [15 U.S.C. § 2614] applicable to section 8(a) reporting violations is section 15(3)(B), which states: "It shall be unlawful for any person to -- . . . fail or refuse to . . . submit reports, notices, or other information . . . as required by this chapter or a rule thereunder . . . ."

Complainant argues that the word "each" in section 16 is significant and that respondent's interpretation disregards it. It can be argued that this begs the question because the essential issue here is what constitutes a unit of violation -- "each such violation."

[16] TSCA § 8(a) provides, in pertinent part: "The Administrator shall promulgate rules under which -- each person . . . who manufactures . . . a chemical substance . . . shall submit to the Administrator such reports, as the Administrator may reasonably require . . . ."

The chemical substance inventory must be updated by EPA under § 8(b), which requires EPA to "compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States."

inter alia, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Respondent, pointing out that the ERP is not binding upon the administrative law judge, argues that EPA's interpretation violates the TSCA penalty provision, § 16, and that penal statutes are to be strictly construed. Respondent urges that complainant's position runs counter to established precedent on the propriety of charging multiple violations, including penalty assessments under the Federal Water Pollution Control Act [33 U.S.C. §§ 1251 et seq.] Both parties include policy arguments in support of their positions.

The issue at hand was dealt with recently in In re C.P. Hall, Docket No. TSCA-V-C-61-89 (Order dated June 9, 1992). That opinion concluded that assessment of separate penalties for each chemical not reported under the inventory update regulations is consistent with applicable statutory and regulatory language, is within EPA's enforcement discretion, and is not inconsistent with EPA's practice in other enforcement actions.

It should be noted that the C.P. Hall complaint contained a separate count for each chemical substance alleged not to have not been reported timely, whereas the complaint here cites one count of "failure to have timely submitted a report . . . [which] constitutes a failure or refusal to comply with 40 C.F.R. § 710.33(a), which is a violation of Section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B)." [complaint ¶ 35] The section of the complaint concerning the proposed civil penalty recommends a penalty

assessment "per chemical" of $17,000, which is multiplied by 31 to arrive at the total penalty amount. Respondent points ou the inconsistency between the multiple penalty recommendations and the language "a failure or refusal to comply . . . a violation."

C.P. Hall observed that Congress apparently did not specify units of violation under TSCA for purposes of multiple penalty assessment. C.P. Hall, slip opinion at 18.[17] Generally, each count in the complaint purports to state a separate claim for which relief may be granted, or "cause of action." Each count, however, does not necessarily contain only one such claim. It is not mandatory to allege in separate counts "numerous causes of action based on the same or similar facts or identical instruments which can be easily described in one count . . . in courts where rigid forms of pleading are not required." 71 C.J.S. § 88 at 210-12, quoted in C.P. Hall, slip opinion at 25; see 40 C.F.R. § 22.14(a), which sets forth the applicable format requirements for the complaint. "When there are several claims, each founded upon a separate transaction or occurrence, then each such separate claim is to be stated in a separate count in the complaint only when 'a separation facilitates the clear presentation of the matters set forth.'" United States v. Iroquois Apartments, 21 F.R.D. 151, 153 (E.D.N.Y. 1957), quoting FRCP 10(b); Northwest Airlines, Inc. v. Glenn L. Martin Co., 9 F.R.D. 551 (N.D. Ohio 1949) (Even if separate claims were involved in an action involving five different

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[17] See, C.P. Hall, slip opinion n. 2, which cites an observation that the precise unit of violation is often undefined in statutes under which government agencies may assess penalties.

airplanes, separation of claims would not be required because the complaint was sufficiently clear). Therefore the fact that the numerous claims or violations were expressed in one count does not render them a single violation for which only a single penalty may be imposed.

The singular form of language -- "a violation" -- is initially confusing, but does not render the complaint so confusing as to constitute a failure to provide respondent clear notice of the nature and basis of the claims asserted. As long as a complaint contains fair notice of the claim and the legal theory upon which it rests, and unless they prejudice or are unfair to respondent, defects in the complaint should be disregarded. In re Bethenergy (Bethlehem Steel Corp.), Docket No. CAA-120-70204, CAA (120) Appeal No. 90-1 (Final Decision, June 21, 1990) at 17-18; citing Conley v. Gibson, 355 U.S. 41, 47 (1957)(applying FRCP 8(a)(2)); see generally, 2A Moore's Federal Practice ¶ 12.07[2.-5]. The complaint clearly provided respondent with adequate notice that the proposed penalty consisted of separate penalties for each chemical substance referred to in count two. Moreover, assuming arguendo that the singular language conclusively indicates one claim, the consequence of the complainant withdrawing and re-issuing, or amending, the complaint to specify multiple claims would cause unnecessary delay and would render futile the respondent's efforts in opposing the multiple claims. Therefore the complaint will be deemed as having charged respondent in count two for multiple violations -- specifically, 29 separate violations, taking into

account the concessions on the part of complainant noted above.

Respondent supports its position with the principle that imposing multiple penalties for actions arising from the same act, omission, course of conduct or transaction is improper. Cases brought under several different statutes are cited, including criminal cases. In particular, respondent cites the Supreme Court's language in United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), a criminal case in which it was held that Congress intended certain provisions of the Fair Labor Standards Act to punish a course of conduct: "[s]uch a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action . . . ." Id. at 224. Respondent also cites federal district court decisions which held, pursuant to the Federal Water Pollution Control Act, that prohibited discharges of multiple substances on one day constitute a single violation. Emphasizing the basic test of whether the acts arise out of the same course of conduct or transaction, respondent asserts here that its conduct, consisting of one act -- failure to report certain information required by EPA, at one point in time, implicating one rule -- should be deemed one violation under that test.

The issue of whether certain conduct may constitute multiple offenses for which multiple penalties may be assessed is at least initially a matter of statutory construction. That begins with a search for congressional intent, i.e. from the plain language of

the statute and legislative history directly on point. Where Congress has clearly stated its intent as to that issue, the inquiry is ended.[18] Where Congress has not expressed such an intent, the next step is to look to any interpretations of the federal administrative agency responsible for implementing the statute.[19] If the agency has issued an interpretation in a format which constitutes congressionally delegated lawmaking, the court generally defers to the agency interpretation.[20]

Applying that analysis, Congress has not spoken directly to the issue of multiple penalties for inventory reporting requirements under TSCA. While the statute lists prohibited acts [§ 15] and directs the Agency in its assessment of penalty amounts [§ 16], the statute and its legislative history leaves the precise units of violation undefined. See, C.P. Hall, slip opinion at 17-

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[18] Issues of statutory construction are analyzed under the first prong of the Supreme Court's test in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) as "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

[19] Chevron, 467 U.S. at 843.

[20] The issue of according deference to administrative agency interpretations of statutory provisions, with respect to different formats of such interpretations, was discussed recently in In re Mobil Oil Corp., Docket Nos. EPCRA-91-0120, -0122, -0123 (Interlocutory Order Granting Complainant's Cross-Motion for Accelerated Decision, dated September 30, 1992) at 25, 29-33. Since Chevron, courts generally accord deference only to interpretations which are contained in formally promulgated regulations or other congressionally delegated lawmaking authority of the agency responsible for implementing the statute. Id. See also, Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron, 6 Admin. L. J. of Am. U. 187, 212-215 (1992).

20. Pursuant to congressionally delegated rulemaking authority under § 8 of TSCA, EPA issued regulations, including the Inventory Update Rule. That Rule does not specifically address multiple violations or penalties.

Instead, EPA has set forth in a policy document, the ERP, its interpretation of TSCA and its implementing regulations under § 8 with respect to determining the number of violations.[21] Unless the interpretation regarding the number of violations is clearly erroneous, unfair, unreasonable, or is an abuse of discretion, there is no reason not to uphold its application.

It is clear that assessment of penalties is particularly delegated to the administrative agency and is the exercise of a discretionary grant of power from Congress. Panhandle Co-op. Ass'n, Bridgeport, Neb. v. EPA, 771 F.2d 1149, 1152 (8th Cir. 1985); Cox v. U.S. Dep't of Agriculture, 925 F.2d 1102, 1107 (8th Cir. 1983)(upholding administrative law judge's calculation of penalties for 41 violations of the Animal Welfare Act). It is a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" American Power Co. v. SEC, 329 U.S. 90, 112 (1946)[citation omitted], quoted in Robinson v. U.S., 718 F.2d 336, 339 (10th Cir. 1983). "An administrative agency is entitled to substantial deference in

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[21] A policy document not intended by the agency to constitute binding legal authority is probably not of the format contemplated by the Chevron rule of deference. See n. 20, supra.

assessing the civil penalty appropriate for a violation of its regulations." NL Industries, Inc. v. Dep't of Transportation, 901 F.2d 141, 144 (D.C. Cir. 1990)(affirming administrative law judge's penalty assessment for 370 violations of FAA regulations without deciding the issue of number of violations, upon challenge that only ten different basic violations were alleged.).

The agency acts outside its authority only when it transgresses the provisions of the statute. Within its statutory authority, it is a matter of an agency's prosecutorial discretion to charge a respondent with multiple violations in order to deter future violations. In re Helena Chemical Company, FIFRA Appeal No. 87-3 (Final Decision, November 16, 1989) at 10. [Complainant's Exhibit H] (Each of 20 sales of pesticide to same vendor assessed separate penalty under the standard for separate penalties in the penalty policy under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) [39 Fed. Reg. 27711 (July 31, 1974)]: "whether each provision requires an element of proof not required by the other.")

Pursuant to that authority, the EPA has developed guidelines in the form of penalty policies or ERPs (enforcement response policies) for use in making proposed penalty assessments. Penalty policies must be considered by the judge in determining the penalty amount, but are not binding.[22] 40 C.F.R. § 22.27(b).

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[22] Complainant argues that respondent's challenge to EPA's construction of TSCA centers on the wisdom of an agency's policy and as such must fail in view of the deference due under Chevron, supra, and does not properly belong in an adjudicative proceeding.

[footnote continued on page 21]

Administrative law judges have not uncommonly departed from provisions in penalty policies and ERPs where the need to do so appeared clear. See, In re General Electric Company, Docket No. TSCA-IV-89-0016 (Initial Decision, February 7, 1992) at 58 (risk of actual or potential exposure to PCBs for improper use and disposal of PCBs were remote in the circumstances of the case, justifying a rejection of the "circumstance level" prescribed by the PCB penalty policy under TSCA); In re Riverside Furniture Corp., Docket no. EPCRA-88-H-VI-406S (Initial Decision, September 28, 1989) at 10, 12 (Guideline in Enforcement Response Policy for EPCRA § 313, dated December 2, 1988, of treating a report submitted after EPA contacts the facility for pending inspection as failure to report rather then a late report found to be "arbitrary and opposed to the expressed interest in arriving at penalties in a fair, uniform and consistent manner," and "impractical in application and produce[s] a resultant civil penalty incommensurate with the facts presented by the record."); accord, In re Colonial Processing, Inc., Docket No. II EPCRA-89-0114 (Initial Decision, June 24, 1991), In re Pease & Curran, Docket No. EPCRA-I-90-1008 (Initial Decision, March 13, 1991), In re CBI Services, Inc., Docket no. EPCRA-05-1990 (Order Granting Motion for "Accelerated Decision," April 30, 1991).

However, drafting penalty policies is an exercise of EPA's discretion requiring certain expertise on various policy issues, including deterrence and relative gravities of different

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Not only is this argument weak for the reason stated in note 20, supra, but it is moot inasmuch as the court is not bound by the policy at issue.

violations. Therefore, aside from the issue of exceeding statutory limitations, the basic guidelines set forth in the ERP should not be dismissed lightly. In order to reject application of a penalty policy guideline, there must be a demonstration of arbitrariness, caprice, failure to take certain evidence or arguments into account, or unreasonableness in penalty assessment resulting from application of the guideline.

Respondent contends that the per chemical approach is unreasonable as being unreflective of the impact upon EPA's program for inventory update data collection, analysis, and consequent overall decisionmaking. It is argued that the data is analyzed en masse, not on an individual chemical basis. However, complainant's policy arguments to the contrary are more persuasive. Complainant argues in essence that the damage to EPA's ability to make reasonable and informed decisions because of a party's failure to report reflects the extent of information that EPA is missing, which is measured on a per chemical basis. Here, too, EPA's responsibility under the Act must be kept in mind. As complainant points out, the Agency is charged with enforcing a goal of TSCA "to look [comprehensively] at the hazards [associated with chemical substances] . . . in total." Senate Report No. 94-698 at 2, reprinted in 1976 U.S. Code Congressional and Administrative News (USCCAN), p. 4492. As to the goal of the chemical substance inventory of TSCA § 8(b), EPA was authorized "to collect information which will prove extremely valuable in gathering information necessary to assess and take action on chemicals

causing unreasonable risks." Id. at 80, reprinted in USCCAN, p. 4498. Based upon such information, EPA must make determinations for promulgating regulations for testing, marketing or other controlling or regulatory purposes, for each particular chemical substance, in light of the particular risks and dangers presented by that particular chemical. Complainant's Opposition at 15. Failure to acquire information such as respondent was required to furnish makes it that much more difficult for EPA to carry out its charge.

Moreover, while the per chemical approach functions as a multiplier for a single penalty assessment, it does not "lock in" a particular penalty amount or range. Certainly it increases the scope of potential total exposure, but, because it does not per se mandate any particular penalty amount, it does not necessarily result in an unreasonable total penalty assessment.

In view thereof, a "per chemical per site" approach for inventory update reporting violations will be upheld,[23] since it is properly within EPA's discretion to charge separate violations for each chemical that respondent failed to report in accordance with the Inventory Update reporting requirement, 40 C.F.R. § 710.33(a). Consequently, a separate penalty may be assessed for each such violation.

The amount of penalty to be assessed for the violations in

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[23] It is noted that the Enforcement Response Policy for EPCRA § 313, dated August 10, 1992 (at 13) similarly provides for penalty assessments for reporting violations on a per chemical per facility basis.

count two and all issues with respect to count one remain in controversy. If strict application of the penalty policy provisions should suggest an an unfair or unreasonble result, the per chemical penalty will be reduced as appropriate.[24] The parties are encouraged to negotiate settlement, as contemplated by the Rules of Practice, 40 C.F.R. Part 22.

In conclusion, it is found that:

Respondent is a "person" within the meaning of 40 C.F.R. § 710.2(s) and within the meaning of 40 C.F.R. § 720.3.

Respondent is subject to the requirements pertaining to the Inventory reporting of chemical substances for commercial purposes as set forth in section 8(a) of TSCA, 15 U.S.C. §2607(a), and the regulations promulgated pursuant thereto and set forth at 40 C.F.R. Part 710.

Respondent was required pursuant to 40 C.F.R. § 710.33(a) to report by December 23, 1986 for the Partial Updating of the TSCA Inventory Data Base each of the 29 substances which were referred to in the complaint, excluding chemical substances identified in the complaint with CAS numbers 103-34-8 and 61791-12-6.

Respondent failed to report by December 23, 1986 each of those 29 chemical substances for the Partial Updating of the TSCA Inventory Data Base.

Accordingly, CasChem, Inc., respondent, is liable for failure

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[24] This flexibility in determining the amount of penalty is even reflected in the statute; TSCA § 16: "The Administrator [by delegation the administrative law judge] shall take into account . . . other matters as justice may require."

to report each of the 29 chemical substances for the Partial Updating of the TSCA Inventory Data Base, which constitutes 29 separate violations of 40 C.F.R. § 710.33(a), and 29 acts prohibited under section 15(3)(B) of TSCA.

ORDER

1. Respondent's Motion for Partial Accelerated Decision is DENIED.

2. Complainant's Cross-Motion for Partial Accelerated Decision on the issue of liability is GRANTED.

3. Complainant's Cross-Motion for Partial Accelerated Decision on the issue of the penalty is DENIED.

And it is FURTHER ORDERED that:

1. The parties shall continue their efforts to reach a settlement as to all other issues, including an appropriate penlty, and shall report upon the progress of such effort during the week ending December 11, 1992.

2. If an agreed disposition is not reached within sixty (60) days from the date of this Order, a pretrial schedule which will direct the pretrial exchange of information between the parties will issue.

J.F. Greene
Administrative Law Judge

Washington D.C.
October 30, 1992

CERTIFICATE OF SERVICE

I hereby certify that the original of this **Order** was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on **November 2, 1992.**

Shirley Smith
Secretary to Judge J. F. Greene

NAME OF RESPONDENT: CasChem, Inc.
DOCKET NUMBER; TSCA-II-PMN-89-0106

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