UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Rhone-Poulenc Basic Chemicals Division,	)	Docket No. 5-EPCRA-97-053
	)	
Respondent	)	

Order Granting in Part and Denying in Part Respondent's Motion to Dismiss

Emergency Planning, Community Right-to-Know Act ("EPCRA") of 1986. On November 24, 1997, Respondent filed a Motion to Dismiss Certain Counts of the 81 count Complaint pursuant to 40 C.F.R. § 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits. Respondent filed a Supplemental Motion to Dismiss on March 23, 1998, based on the affirmative defense that Complainant is barred by the statute of limitations from prosecuting those counts in the Complaint relating to § 313 of EPCRA. **Held**: Respondent's Motion to Dismiss Counts 1, 3 and 4 through 13 for 1990 violations of EPCRA § 313 is **Granted**; Respondent's Motion to Dismiss Counts 29 through 38 and 41 for 1991 violations of EPCRA § 313 is **Denied**.

Before: Stephen J. McGuire
Administrative Law Judge

Date: April 27, 1998

Appearances:

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Introduction

On June 30, 1997, EPA filed an 81 count Complaint charging Respondent, Rhone-Poulenc, a New York corporation, with violating the reporting and recordkeeping requirements of the Emergency Planning, Community Right-to- Know Act ("EPCRA"), 42 U.S.C. §11023[(1)] and the applicable regulations in 40 C.F.R. § 372.10 and 40 C.F.R. § 372.30. These counts allege that Respondent failed to submit Form Rs, for the years 1990 and 1991, required by EPCRA § 313, and further, failed to comply with EPCRA's three year recordkeeping requirements. EPA had inspected Respondent's facility, located in Hammond, Indiana, on January 19, 1994, at which time Respondent had been unable to produce these records. The Complaint assessed a total proposed penalty of $638,400.

On November 24, 1997, Respondent filed a Motion to Dismiss Certain Counts of the Complaint. This Motion requested dismissal of counts 23, 39, 40, 49, 50, 56, 59, 60, 61, 69, 75, 77, 78, 79, and 80, based upon EPA's failure to allege exceedance of the threshold quantities of each chemical subject to the Complaint. These counts were subsequently dismissed in the February 9, 1998, Order Granting Joint Motion for Extension of Time and Granting Motion to Amend Complaint, along with counts 2, 16, 18-22, 24-27, 43, 47, 48, 51-55, 57, 58, and 62 for a total of thirty-seven counts dismissed from the original Complaint. The total proposed penalty was amended from $638,400 to $272,300.

Respondent's Motion to Dismiss also requested dismissal of counts 4-13, and remaining counts 29-38 and 41 as barred by the statute of limitations 28 U.S.C. § 2462, held applicable to administrative proceedings by the Federal Court of Appeals for the D.C. Circuit in 3M v. Browner, 17 F.3d 1453 (1994).[(2)] Complainant filed its Memorandum in Opposition to Respondent's Motion to Dismiss Certain Counts of the Complaint on December 18, 1997. Respondent filed its Reply Memorandum on December 29, 1997.

On March 23, 1998, Respondent filed a Supplemental Motion to Dismiss Counts I and III, and a Memorandum in Support Thereof, wherein Respondent sought to add Counts I and III to its original Motion to Dismiss, and set forth further arguments in support of its Motion to Dismiss.

This Order addresses whether the 1990 EPCRA § 313 violations, counts 1, 3 and 4 through 13, and the 1991 EPCRA §313 violations, counts 29 through 38 and 41, are barred by the five-year statute of limitations, 28 U.S.C. § 2462, where the Complaint was filed on June 30, 1997.

II. Positions of the Parties

In its Motion to Dismiss, Respondent argues that counts 4 through 13, the 1990 Form R reporting violations, and counts 29 through 38 and 41, the 1991 Form R reporting violations, are barred by 28 U.S.C. § 2462. Respondent asserts that the "Form R reporting year under EPCRA is the calendar year and thus ends December 31." Thus, it is Respondent's position, that forms not filed during 1990 and 1991 are beyond the five-year statute of limitations period and are therefore barred by law, from enforcement.

Complainant argues that the continuing violations doctrine extends the date of accrual until the end of the three year recordkeeping requirement under 40 C.F.R. § 372.10. Thus, the Form Rs for the 1990 calendar year reporting period were due on July 1, 1991; and the Form Rs for the 1991 calendar year reporting period were due on July 1, 1992, plus the three year record-keeping retention requirement, which

EPA claims should toll the statute of limitations until July 1, 1994, and July 1, 1995 respectively. Thus, according to Complainant, the June 30, 1997 Complaint was timely filed.

In its Reply and Supplemental Motion, Respondent argues that the EPCRA § 313 reporting and maintaining records requirement is triggered annually. Thus, it argues that any claim by EPA that Respondent violated EPCRA's regulatory requirement to maintain records accrues at the conclusion of the reporting period and is not continuing in nature.

Respondent asserts that its position is analogous to the Environmental Appeals Board (EAB) decision In the Matter of Lazarus, Docket No. TSCA-V-C-32-93, TSCA Appeal No. 95-2, 1997 EPA LEXIS 27 (Final Decision and Order, September 30, 1997), in which the EAB held that the failure to file annual reports and maintain records under the TSCA PCB records requirement was not a continuing violation and actions not brought within five years of the reporting period were barred by the statute of limitations. Respondent argues that the provisions at issue in Lazarus under TSCA are similar to the issues here, involving EPCRA § 313. Further, Respondent distinguishes this case from In the Matter of Harmon Electronics, Docket No. VII-91-H-0037, Appeal No. 94-4, 1997 RCRA LEXIS 2 (Final Order, March 24, 1997), in which the EAB held that the obligation to have a RCRA permit for the operation of a facility, the obligation to conduct groundwater monitoring, and the obligation under the Act's financial responsibility provision are continuing violations.

III. Discussion

As noted, the D.C. Circuit Court of Appeals has held that the general five-year statute of limitations under 28 U.S.C. § 2462 should be applied to administrative cases. 3M v. Browner, 17 F.3d 1453 (1994). In the aftermath of this decision, the issue as to whether environmental violations are continuous violations, effectively tolling the five-year statute of limitations, has been a source of ongoing contention between EPA and the regulated community. Accordingly, the issue here, is whether an EPCRA § 313 reporting violation is, by law, a continuous violation. For the reasons set forth below, the undersigned concludes that it is not.

The doctrine of continuing violations provides a special rule for determining when a violation first accrues. Toussie v. United States, 397 U.S. 112, 115 (1970). The phrase "first accrued" as used in 28 U.S.C. § 2462, refers to the point in time at which a violation is complete for purposes of maintaining an action by the plaintiff against a defendant. Generally, a cause of action accrues when a defendant commits an act that injures the plaintiff. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971). The continuing violations doctrine is an exception to this general rule of accrual. The effect of a continuing violation is to restart the statute of limitations. Airweld, Inc. v. Airco., Inc., 742 F.2d 1184, 1189 (9th Cir. 1984).

Various circuit court decisions have attempted to describe a continuing violation. "A continuing violation accrues when the course of illegal conduct is complete, not when an action to enforce the violation can first be maintained. "A 'continuing offense' is, in general, one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course...the limitations period for a continuing offense does not begin until the offense is complete..." United States v. Rivera-Ventura, 72 F.3d 277, 281 (2d Cir. 1995). "'Continuing wrongs,' however, are repeated instances or continuing acts of the same nature...", Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 597 (9th Cir. 1990) cert. denied, 498 U.S. 824 (1990).

The 7th Circuit has held that "The continuing violation doctrine does not apply 'where the harm is definite and discoverable, and nothing prevented the plaintiff from coming forward and seeking redress' at any earlier time." Further, "The exception as to continuing, ongoing acts does not apply where the alleged tortious acts...caused direct damages that occurred at a certain point in time--resulting in immediate and direct injury...with consequential effects." S. Speiser, C. Krause & A. Gans, The American Law of Torts, @ 5:27 at 890 (1983) cited in Wilson v. Giesen, 956 F.2d 738, 743 (7th Cir. 1992); 1992 U.S. App. LEXIS 1958.

The Supreme Court in Toussie, 397 U.S. at 115, recognized that the continuing violations doctrine should be applied only in limited circumstances because "...for all practical purposes, [the continuing violation doctrine] extends the statute beyond its stated term." As an exception to the general rule, it should be used only in circumstances which are best suited to the violation through analysis of the statute and Congressional intent. "The language of the statute of limitations must be interpreted in the light of the general purposes of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." U.S. v. Core Labs, 759 F.2d 480, 481 (5th Cir. 1985), citing Reading Co. v. Koons, 271 U.S. 58 (1926).

From an environmental perspective, the EAB in Harmon, addressed the issue of whether violations of various RCRA provisions were deemed to be continuing in nature. The EAB's analysis involved examinations of 1) the language of the overall statute; 2) the language of the provision(s) at issue; 3) the regulations and preamble; 4) the legislative history; and 5) an examination of words and phrases connoting continuity as an indication of congressional intent. The EAB similarly employed this methodology in Lazarus to determine whether Congress intended various provisions of TSCA to be continuing violations.

This analytical approach is particularly useful for purposes of addressing the instant case and to determine whether the alleged EPCRA § 313 violations are continuing in nature. A discussion of the language of EPCRA follows.

Analysis of EPCRA

EPCRA is Title III of the "Superfund Amendments and Reauthorization Act of 1986" (SARA). Title III of SARA is a free standing statute titled "The Emergency Planning and Community Right-To-Know Act of 1986". The purpose of EPCRA is to provide communities with information on potential chemical hazards within their boundaries and to foster state and local emergency planning efforts to control any accidental releases.

To achieve this end, EPCRA imposed a system of notification requirements on industrial and commercial facilities and mandated that state emergency response commissions and local emergency planning committees be created. The local emergency planning committees were charged with developing emergency response plans based on the information provided by facilities. Huls America Inc., v. Browner 317 U.S. App D.C. 333, 446 (1996).

Generally, EPCRA has three subchapters and contains inter alia, major requirements involving emergency planning and notification (§§ 301-303); emergency release notification (§ 304); community right-to-know reporting (§§ 311-312); and toxic chemical release inventory reporting (§ 313).

Section 313 requires owners and operators of certain facilities that manufacture, process, or otherwise use certain toxic chemicals in quantities exceeding the toxic threshold established during the preceding calendar year, to report annually their releases of listed chemicals. The reporting form is referred to as a Toxic Chemical Release Inventory Reporting Form, or "Form R". These reports are required to be submitted annually, each July 1 and must contain data reflecting releases during the preceding calendar year.

In addition, the regulations at 40 C.F.R. § 372.10(a) require the owner or operator of a facility covered by the § 313 reporting requirements to retain Form R records for three years from the date each report was submitted. These records must be readily available for inspection by EPA officials.

The statutory language of EPCRA does not explicitly indicate that violations under the Act are continuing in nature. Because the continuing violations doctrine effectively extends the term of the violation, courts have refused to apply the continuing violations doctrine where the language of a statute and its implementing

regulations are vague or ambiguous. In U.S. v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995), the Ninth Circuit held that failure to notify EPA of asbestos removal as required under the Clean Air Act asbestos removal regulations, is not a continuing violation. While the penalty provision authorized the EPA to recover civil penalties "of not more than $25,000 per day for each violation", the court found that EPA did not "state clearly in its regulations either that there is a continuous duty to notify or that a failure to notify gives rise to a penalty based on the length of time that the breach exists."

Trident further held that when "violations of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." Citing Phelps Dodge Corp. v. Federal Mine Safety & Health Commission, 681 F.2d 1189, 1193 (9th Cir. 1982). The Ninth Circuit noted that this lack of clear intent in the statute and regulations outweighed countervailing policy considerations upon which the district court's finding of a continuing violation was based.

This finding of ambiguous and vague statutory language as evidence of a lack of Congressional intent is further exemplified in two criminal cases[(3)], Toussie, supra, and United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987), cited in the 3M decision. [(4)]

In Toussie, despite the fact that the regulations stated that the registration obligation "shall continue at all times", and other indications of Congressional intent, the Supreme Court found the statute "at best highly equivocal". Toussie, 397 U.S. at 122.

Although the language of EPCRA does not provide clear evidence of Congressional intent to apply the continuing violations doctrine, the penalty provision for reporting violations, § 325(c)(3), indicates the propriety of applying a continuous penalty, in line with the remedial purposes of the statute. Section 325(c)(3) states "Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation."[(5)]

Administrative Law Judge (ALJ) decisions have addressed similar language in environmental statutes and whether such language operates to extend the statute of limitations. In In the Matter of Umetco Minerals Corporation, Docket No. CAA-(133)VIII-92-03, 1996 CAA LEXIS 2 (Order Denying Respondent's Motion for Accelerated Decision, March 29, 1996), the ALJ noted that whether an obligation is complete for purposes of the statute of limitations is not determinative of the question of whether daily penalties may be assessed for the violation of that obligation.

In the Matter of Bethlehem Steel Corporation, TSCA-III-322, 1991 TSCA LEXIS 63 (Order Granting Motion to Dismiss, Dec. 23, 1991), later remanded on other grounds in light of the 3M decision, the ALJ noted, "While Section 16(a)(1) does suggest that a violation continues, such reading is limited by the phrase, 'for purposes of this subsection.' It is clear that for purposes of proposing the assessment of civil penalties, complainant may consider the length of time during which the violation went on. That does not mean, however, that Section 16(a)(1) should be construed to create a continuing violation for purposes of tolling a statute of limitations." 1991 TSCA LEXIS at *7-8.

The EAB in Harmon confronted similar language under RCRA's § 3008 penalty provision. While it was not completely clear whether RCRA violations were continuing violations, upon examining this penalty language, the EAB concluded that it clearly "contemplates the possibility of continuing violations". Harmon, 1997 RCRA LEXIS at *51. Nevertheless, the above-stated penalty provision at most, refers only to the "possibility" of a continuing violation, with no finding by the EAB that such language clearly indicated Congressional intent to find a continuing violation. See also Lazarus, slip. op. at 67, 1997 EPA App. LEXIS at *112.

Language of Section 313

Turning to the specific language of § 313, the provision fails to make any direct

reference to the application of continuing violations. Instead, it requires owners and operators to comply within a specific annual deadline:

§ 11023 Toxic Chemical release forms [EPCRTKA § 313]

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was *manufactured, processed, or otherwise used* in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the *preceding calendar year* at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the *preceding calendar year*. (emphasis added).

(b) Covered owners and operators of facilities

(1) In general

(A) The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 and that *manufactured, processed, or otherwise used a toxic chemical* listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section *during the calendar year for which a release form is required under this section*. (emphasis added).

The language of § 313 sets a clear July 1 annual deadline for submissions of Form Rs. The reporting period for each Form R is the preceding calendar year, from January 1 through December 31. Applying the 7th Circuit's rationale in Wilson, 956 F.2d at 743, this deadline requirement reveals an "immediate" and direct "point-in-time" violation, which for purposes of the running of the statute of limitations, can be seen as having a distinct beginning and end. As such, a violation is complete and separate penalties first accrue on the annual July 1 reporting date of each Form R. The undersigned thus rejects Respondent's argument that any claim against it accrues on December 31st, upon the termination of the reporting year. The statutory obligation subjects Respondent to violation on the July 1 deadline, and not on December 31st, which is merely the close of the reporting period. See Lazarus, slip. op. at 82, 1997 EPA App. LEXIS at *136.

An examination of the words and phrases utilized in § 313, such as "was manufactured, processed, or otherwise used...during the preceding calendar year" refer to past-tense activities. Such words connote a sense of separateness from present and future activity, with each annual act of compliance constituting a discrete requirement, distinct from other years.

In contrast, EAB's analysis of the words and phrases of RCRA § 3005(a)[(6)] in Harmon, indicate that the present-tense word "have," in "to have a permit" "contemplates a continuing course of conduct, rather than a discrete act." The EAB held that the word "have," in addition to the phrase indicating that disposal of hazardous waste is prohibited "except in accordance with such a permit," indicates "that Congress intended the obligation to have a permit to be a continuing one." Harmon, 1997 RCRA LEXIS at *54-55. The EAB similarly reasoned that the ordinary meaning of the present-tense word "monitoring"[(7)] connotes an ongoing activity.

Regulations

The implementing regulations[(8)] also use the words "manufactured, processed or otherwise used...for a calendar year" throughout § 372.30. Further, in § 372.85,

Subpart E "Forms and Instructions" for submitting Form R information, the language emphasizes the requirement for the submission of such information relevant to a distinct time, using words such as "reporting year" and "annual reportable amount". Thus, the regulations, similar to the statutory language used in § 313, do not contain any words or phrases that provide for continuing violations. Rather, the words utilized indicate that compliance with these provisions begins and ends on a scheduled time, and are not continuing in nature.

Legislative History

The legislative history of EPCRA in general, and § 313 in particular, emphasizes the annual aspect of the reporting provision. Words such as "annual quantities", "annual report", and "annual availability"[(9)] relate the yearly information requirement of § 313. The legislative history does not indicate any further extended responsibility under this provision. Each annual report is separate and distinct and has no correlation to the preceding or the subsequent reports.

One-Time Filing Obligation Versus Filing Within A Certain Time Frame

In Harmon, the EAB contrasted RCRA's ongoing, continuous obligations of requiring a permit and conducting groundwater monitoring with obligations or requirements which must be performed within a specific time frame. Harmon, 1997 RCRA LEXIS at *79-80. In Lazarus, the EAB further enunciated on this distinction:

> "The RCRA requirements in Harmon that were found to be continuing in nature were distinguished from obligations in other cases that were complete upon certain dates. Harmon, slip op. at 42, 46, 48. See Toussie, 397 U.S. at 119 (obligation to register for the military draft arises at a specific time and is not continuing); Del Percio, 870 F.2d at 1097 (regulations that required submission of plans and schedules by a date certain were not found to be inherently continuing in nature.)" Lazarus, slip. op., fn. 86 at 66, 1997 EPA App. LEXIS at *110.

In Harmon, the EAB examined the Supreme Court's two prong-test in Toussie, (1) whether there is language in the Act that clearly contemplates a prolonged course of conduct; and (2) whether the "nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." The Supreme Court, applying this test to the statute before it, concluded that although the regulation implementing the Act clearly imposed a continuing obligation to register, nothing in the statute suggested that the obligation to register continued beyond the deadline for registering. Toussie 397 U.S. at 119-122.

Applying the first-prong of the Toussie test to EPCRA § 313, it is noted that a failure to submit an annual report for one reporting year does not contemplate a prolonged course of conduct because the required conduct is complete, whether filed or not, by a specified date. Further, a Form R violation does not impose an ongoing obligation which affects the continuing operation of Respondent's facility, as did the RCRA violations in Harmon. Because of § 313's annual requirement, each submission is particular to the operations of that year only. Once the year has passed, a new obligation begins that is particular to the operations of the next year. Therefore, it is clear under this facet of the Toussie analysis that § 313 does not contemplate a prolonged course of conduct. By its nature, the conduct cannot continue.

Section 313 similarly fails the second prong of the Toussie test. As previously noted, an analysis of the language of the statute, the regulations, and legislative history, demonstrate lack of Congressional intent to impose a continuing violation. A violation for failure to file a Form R for 1991 cannot continue beyond July 1, 1992, as a new obligation begins in 1992, particular to the circumstances of the facility during the course of that year. Thus, although the basic requirement to file a Form R may be the same each year, a violation for failing to file in any given year is incapable of continuing into the next year, as each new year holds

the possibility of a change in chemical operations. Compare this requirement to an obligation which remains the same such as registering a pesticide under FIFRA § 3, filing an Material Safety Data Sheet (MSDS) form under § 311 EPCRA, or obtaining a permit for hazardous waste operations under RCRA § 3005. The obligations under these provisions do not change from year to year, rather, they remain the same.

Decisions pertaining to environmental reporting violations have generally been consistent with this one-time filing requirement versus the certain time frame filing obligation approach. Violation of a one-time obligation is the result of a "prolonged course of conduct" which usually involves serious public health and environmental consequences. Violation of a certain time frame reporting requirement has typically been held to be complete on a certain date provided in the statute.(10)

The most recent case which distinguishes the one-time filing requirement versus filing within a certain time frame approach is In the Matter of Mafix, Inc., Docket No. EPCRA-III-113, 1998 EPA App. LEXIS 6 [sic], (Order Granting in Part, and Denying in Part, Respondent's Motion for Judgment on the Pleadings, February 12, 1998). Respondent was charged with failure to file an MSDS in violation of EPCRA § 311 and failure to file certain hazardous chemical filings with the Local and State planning commissions in violation of EPCRA § 312. With regard to the § 311 violation, the ALJ concluded that given the continuing nature of the violations in Counts I, II, and III, EPA's Complaint was not barred by the statute of limitations. The ALJ examined the remedial purpose of EPCRA Section 311 and concluded:

> "Thus, the fact that the MSDS filing required by Section 311 is essentially a one-time event, and the fact that this filing serves as an important public safety and health purpose, supports the holding that the Section 311 violations...are continuing violations. In other words, the legal requirement to file the MSDS with the LEPC, SERC, and the fire department remains until the statutory filing requirements are satisfied....Therefore, only the actual filing of the MSDS will satisfy the requirements of EPCRA Section 311 and begin the running of the five-year statute of limitations " 1998 EPA App. LEXIS [sic] at *11,12.

In contrast, the ALJ distinquished Counts IV, V, and VI cited under EPCRA Section 312 which requires the filing of emergency and hazardous chemical inventory forms. Unlike Section 311, however, the ALJ held that the chemical inventory form submission is not a one-time event. Rather, Section 312, requires that this filing be performed annually...on or before March 1, 1988, and "annually thereafter on March 1."

Relying on Lazarus, supra, slip op. at 66 ("a continuing nature may be negated by requirements that must be fulfilled within a particular time frame"), the ALJ concluded that a "plain reading of Section 312, particularly in light of that section's annual filing requirement, supports a holding that the violations cited in Counts IV, V, and VI are not continuing violations". The ALJ further held:

> "If the owner or operator of a covered facility fails to make a chemical inventory form submission by the March 1 filing date, then a violation of Section 312 accrues....failure to satisfy this March 1 filing obligation does not relieve the responsible party from compliance. It simply marks the end of the period for which the preceding year's...form was required to be submitted.... ....Continued failure to submit....forms for future years will expose the owner or operator to additional Section 312 liability. For each separate failure, however, the five-year statute of limitations of a 2462 must be measured from the date that each separate violation accrued. Given the annual filing requirement of Section 312, the the statute of limitations contained in a 2462 begins to run from the time that the owner or operator should have filed the ....inventory form, but didn't." 1998 EPA App. LEXIS at 13, 14.

Similar to a § 312 violation, a § 313 violation is not continuing in nature. Rather, the public information aspect of the Form R requirement, although very

important in the statutory scheme, does not create increasing levels of risk to the environment and the public each day the Form R is not filed, and for this reason, does not warrant invoking the exception to the general rule of accrual as does §§ 311 and 304.[(11)]

If the continuing violations doctrine were to apply to such EPCRA reporting requirements, it would essentially expand the scope of the violation. While the deterrent effect of the continuing violations doctrine upon EPCRA reporting requirements would no doubt ensure greater compliance, it would be inherently unfair to the regulated public. From an enforcement perspective, the severity of the punishment would not fit the violation, and there is no evidence that Congress intended such a result.

Recordkeeping violations

Complainant asserts that Respondent's inability to maintain and produce records at the time of inspection, pursuant to the record-keeping requirements of 40 C.F.R. § 372.10[(12)] effectively extends the date at which EPA can maintain an action until the end of the three-year record-keeping requirement.

Complainant's argument is without merit. The record-keeping requirement, by definition, would require initial compliance with the statutory obligation to file Form Rs before it could take effect. Thus, the requirement to maintain records infers the generation and existence of such records in the first instance. Nothing in EPCRA's language, or legislative history indicates that failure to file a Form R constitutes a continuing violation. As such, the recordkeeping requirement cannot by itself, operate to toll the five-year statute of limitations where failure to generate a timely filed Form R would not have done so.

The EAB addressed this issue in Lazarus.

> "...the obligation to maintain documents cannot logically be separated from the obligation to prepare the documents in the first instance. Preparation and maintenance of annual documents are examples of 'completely dependent' acts of compliance similar to those described in EPA's PCB penalty policy...Maintenance of the documents is impossible unless they have first been prepared. Given the dependent nature of the two prongs of the annual document regulation...the extended maintenance period does not transform the requirement into a continuing obligation." Lazarus, slip. op. at 82, 1997 EPA App. LEXIS at *135.

In Lazarus the EAB further speaks to the effect of the statute of limitations on annual reporting requirements. In addressing the TSCA PCB records requirements, the EAB concluded: "A separate limitations period begins to run each year that an annual document has not been prepared by July 1. An action for penalties may be initiated any time within the five-year period following each July 1." Lazarus, slip. op. at 82, 1997 EPA App. LEXIS at *136.

The EAB's conclusion reinforces the ruling herein, that the continuing violation doctrine does not apply to the annual reporting requirements of EPCRA § 313 and that the five-year statute of limitations begins to run when the claim first accrues, which in this case is the annual July 1 submission date. Therefore, EPA can only bring an action within five years of the July 1 statutory reporting deadline.

IV. Conclusion

Accordingly, Respondent's Motion to Dismiss violations of EPCRA § 313 reporting and recordkeeping requirements under 40 C.F.R. § 372.30 and § 372.10, for violations for failure to file Form Rs in 1990 is granted. These Form R reports accrued on July 1, 1991 and EPA had five years from that date, or until July 1, 1996, to maintain an action against Respondent. The Complaint, filed on June 30, 1997 was thus barred by the five-year statute of limitations for counts 1, 3, and 4 through

13.

Respondent's 1991 violations however, are not dismissed. These Form R's were due on July 1, 1992, and EPA had five years, or until July 1, 1997 to bring an action. Complainant filed its action for counts 29-38 and 41 within the five-year statute of limitations requirement. These counts remain viable for the remainder of the administrative proceedings.

A total of 32 counts remain to be resolved in this proceeding. These are counts are: 14, 15, 17, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 44, 45, 46, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 76, and 81.

Order

For the foregoing reasons, and pursuant to 40 C.F.R. § 22.20 of the Consolidated Rules of Practice:

1. Respondent's Motion to Dismiss counts 1, 3 and 4 through 13 for violations of 1990 Form R violations is GRANTED. These violations are dismissed as barred by 28 U.S.C. § 2462, the five-year statute of limitations.

2. Respondent's Motion to Dismiss counts 29 through 38 and 41 for 1991 Form R violations is DENIED. EPA's enforcement action is timely for these counts.

Prehearing exchange shall occur within 60 days of receipt of this decision as set forth in the December 12, 1997, Scheduling Order.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

1. EPCRA shall be cited by the section number in the original statutes and the reference to the U.S. Code section will be omitted.

2. 28 U.S.C. § 2462 states "...except as otherwise provided by Act of Congress, and action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim *first accrued*"(emphasis supplied).

3. As indicated by the EAB in Lazarus, there is a difference in the treatment of civil and criminal statutes of limitations. In criminal cases, the rule of lenity is applied; and in civil cases, consideration is given to the underlying remedial purposes of statutes. Lazarus slip. op. at 64, 1997 EPA App. LEXIS at *105-106. Despite this distinction, the Toussie and McGoff analyses of the continuing violations doctrine is useful as indicated by the discussions and analysis of these cases by the EAB in Harmon and Lazarus.

4. First, in Toussie, the Supreme Court held that failure to register for the draft under the Universal Military Training and Service Act, which required that each male citizen register for the draft within five days of his eighteenth birthday, is not a continuing violation. In the second criminal case, the D.C. Circuit in United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987), did not find a violation of the Foreign Agents Registration Act which required persons representing foreigners in the U.S. to file a registration statement within 10 days of commencing such activities to be continuing. The D.C. Circuit held the violation not to be continuing despite congressional language to the contrary: "Failure to file any such registration statement...as is required by the [section of the act] shall be

considered a continuing offense for as long as such failure exists, notwithstanding any statute of limitations or other statute to the contrary." Such language still, was considered by the D.C. Circuit Court to be "ambiguous."

5. The regulations also provide the same language with respect to penalty at 40 C.F.R. § 372.18, entitled Compliance and enforcement which states "Violators of the requirements of this part shall be liable for a civil penalty in an amount not to exceed $25,000 each day for each violation as provided in § 325(c) of Title III."

6. The EAB in Harmon examined the words and phrases in RCRA § 3005, the provision at issue, to determine whether failure to have a permit is a continuing violation. It found that the word "have", like the word "possess," indicates an ongoing requirement. Section 3005 states, "Not later than eighteen months after [the date of the enactment of this section], the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter *to have a permit* issued pursuant to this section." (emphasis added).

7. The EAB states that "monitor" is defined as, "an instrument used to measure continuously or at intervals a condition that must be kept within prescribed limits." Harmon, 1997 RCRA LEXIS at *76, citing McGraw-Hill, Dictionary of Scientific and Technical Terms (1967).

8. The applicable regulations for purposes of Respondent's violations of the 1990 and 1991 Form R EPCRA § 313 requirements are the 1990 regulations at 40 C.F.R. § 372.30, and for the 1991 reports, the 1991 regulations at § 372.30. The language of the regulations during those years is the subject of this analysis. The words and phrases discussed in the 1990 and 1991 regulations have not been changed in the 1997, 40 C.F.R. § 372.30 regulations.

9. H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 2835, 3392, 3393.

10. Decisions on one-time obligations are as follows: In the Matter of Union Carbide Corp., TSCA-85-H-02, 1985 TSCA LEXIS 58 (October 3, 1985), failure to submit a TSCA § 8(e) notice was held to be a continuing violation. Section 8(e) requires notification anytime involving new information obtained on substantial risk of injury to health or the environment; In the Matter of Mobay Corporation, Docket No. TSCA-III-605, 1995 TSCA LEXIS 4 (Order Denying Motion for an Accelerated Decision, March 1, 1995), failure to submit notice of intent to import a new chemical substance, wherein the ALJ supported a finding of continuous violation because "the importation is the initial step in the introduction of the chemical into the market place and the risk to health and environment remains until the information enabling an evaluation of its potential toxicity becomes known"; In the Matter of Lazarus, Docket No. TSCA-V-C-32-93, TSCA Appeal No. 95-2, 1997 EPA App. LEXIS 27 (Final Order and Decision, September 30, 1997) failure to register PCB transformers with fire response personnel was found to be a continuing violation (one-time obligation), failure to mark the door to the transformer room was held to be a continuing violation (one-time obligation)(whereas failure to maintain annual documents was not found to be a continuing violation); All Regions Chemical Labs, Inc. v. EPA, 932 F.2d 73 (1st Cir. 1991), failure to "immediately" notify EPA under the emergency notification provision of accidental releases in violation of EPCRA § 304 was held to be a continuing violation; In the Matter of Mobil Oil Corp., EPCRA-91-0120, Appeal No. 94-2, 5 E.A.D. 490, 1994 EPCRA LEXIS 53 (Final Decision, September 29, 1994), failure to comply with EPCRA § 304 emergency notification provision was deemed a continuing violation; and Dehart v. Indiana, 471 N.E.2d 312 (Ind. Ct. App. 1984), unpermitted storage of hazardous waste constituted a continuing crime under a state law similar to RCRA.

For obligations to submit notifications or reports within a certain time frame, see U.S. v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995), wherein failure to notify EPA regarding asbestos removal within 10 days before the removal work began was found not to be a continuing violation; and In the Matter of Umetco Minerals

Corporation, Docket No. CAA-133-VIII-92-03, 1996 CAA LEXIS 2 (Order Deny Respondent's Motion for Accelerated Decision, March 29, 1996) failure to submit a radon emissions report was held not to be a continuing violation as filings were required for each calendar year.

11. While the releases reported in the Form R document are releases exceeding the threshold quantity of chemicals during the calendar year, this provision does not indicate that exceeding the threshold quantity would constitute any type of emergency situation as would be the case under § 304.

12. The regulatory requirement for record keeping under 40 C.F.R. § 372.10 states:

(a) Each person subject to the reporting requirements of this part must retain the following records for a period of 3 years from the date of the submission of a report under § 372.30.

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