UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Troy Chemical Corp.	)	Docket No. II-TSCA-8(a)-98-0101
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND GRANTING COMPLAINANT'S MOTION TO AMEND THE PREHEARING EXCHANGE

Toxic Substances Control Act --By motion dated July 28, 1999, Complainant, United States Environmental Protection Agency (EPA) moved, pursuant to 40 C.F.R. § 22.20(a), for accelerated decision in the above-captioned case for alleged violations of the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. Complainant seeks civil penalties in the amount of $272,000 under Section 16 of TSCA, 15 U.S.C. § 2615, and asserts that it is entitled to judgment as a matter of law. **Held:** Complainant's Motion For Accelerated Decision is **Denied** with respect to the issue of liability and Complainant's Motion to Amend the Prehearing Exchange is **Granted**.

I. Introduction

On April 8, 1998, Complainant issued a Complaint and Notice of Opportunity for Hearing to Troy Chemical Corporation under the authority of Section 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. The Complaint consists of two separate counts and assesses a total civil penalty of $272,000. In Count 1, Complainant alleges that Respondent manufactured for commercial purposes more than 10,000 pounds of each of the five chemicals listed in

paragraph 18 and failed to submit Partial Updating of the Inventory Data Base Production and Site Reports (Form U) for the prior corporate fiscal year 1994 by the December 23, 1994 deadline for those chemical substances.

In Count 2, Complainant alleges that Respondent failed to submit a Form U inventory update containing accurate information for the 11 chemicals listed in paragraph 32 by the December 23, 1994 deadline.

On August 10, 1998, Complainant filed its initial prehearing exchange and on or about September 28, 1998, Respondent filed its initial prehearing exchange. Complainant filed a motion to amend the initial prehearing exchange on July 27, 1999. Respondent, Troy Chemical Corporation, on May 4, 1998, submitted an answer to the Complaint denying the allegations therein. Respondent further filed a brief in response to Complainant's Motion for Accelerated Decision and To Amend Its Pre-Hearing Exchange on August 12, 1999, asserting that there remain genuine issues of material fact concerning its liability for alleged violations of TSCA, and opposing an Order allowing Complainant to amend its Prehearing Exchange, arguing that such an amendment is untimely and will unfairly prejudice Respondent. Thereafter, with the retention of new counsel, Respondent, on September 21, 1999, filed a Supplemental Brief in Opposition to Complainant's Motion. On September 29, 1999, Complainant filed a Reply to Respondent's Supplemental Brief.

Upon review of the merits of this case and the complexity of the issues raised by the parties, there remain, with respect to the issue of liability, genuine issues of material fact that require a formal evidentiary hearing.

II. Standard for Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), authorizes the Administrative Law Judge (ALJ) to "render an accelerated decision in favor of the Complainant or 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 any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). See, e.g., In re CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS, 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress., 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F. 3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90 (November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp. 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Celotex v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20 (a); F.R.C.P. § 56 (c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1979).

III. Discussion

A. Motion for Accelerated Decision - Liability

In its Motion for Accelerated Decision, Complainant argues that it is entitled to judgment as a matter of law on the issue of Respondent's liability for alleged violations of TSCA and its implementing regulations. Complainant asserts that Respondent has admitted that it failed to submit to EPA "accurate, complete, and timely" Forms U for each of the 16 chemical substances listed in Paragraphs 18 and 32 of its Complaint, which Respondent manufactured for commercial purposes at its Newark, New Jersey facility. In response, Respondent asserts that Complainant's Motion for Accelerated Decision should be denied as there exist factual discrepancies with respect to Respondent's alleged liability. With regard to Count 1 of the Complaint, Respondent maintains that it did indeed submit completed Forms U for the five chemicals described in Paragraph 18 of the Complaint, on or about December 20, 1994, in reliance upon Complainant's July 12, 1994 instructions to use the reporting period of August 25, 1994 to December 23, 1994. After being advised by Complainant during a 1997 EPA inspection of the facility, to use its 1994 corporate fiscal year in reporting, Respondent asserts that it submitted revised Forms U to Complainant. Respondent contends that it relied upon Complainant's initial instructions with respect to the proper reporting period and as a result, Respondent did not incur liability under TSCA or its implementing regulations.

With respect to Count 2 of the Complaint, Respondent likewise denies liability. In reliance upon Complainant's initial instructions to use the reporting period of August 25, 1994 to December 23, 1994 in completing the Forms U, Respondent concluded that it did not manufacture for commercial purposes more than 10,000 pounds for any of the eleven chemicals listed in Paragraph 32 of the Complaint. After being informed during the 1997 inspection to use its prior fiscal year in calculating the quantities of chemical substances manufactured for commercial purposes, Respondent recalculated. In recalculating, Respondent determined that it manufactured more than 10,000 pounds per chemical substance listed in Paragraph 32 of the Complaint and subsequently submitted revised Forms U for these chemical substances. As such, Respondent denies incurring any liability under the statute or regulations for failing to make its submission timely or accurately.

Respondent's arguments raise factual questions that might bear on the issue of liability and whether it reasonably relied on EPA documents to support the defense of equitable estoppel, citing In the Matter of V-1 Oil Company, Docket No. 10-94-0215-RCRA (Order Denying Cross Motions for Accelerated Decision or Dismissal, July 22, 1997). Respondent argues that it responded to EPA's letter regarding the 1994 Inventory Update based on its understanding of the phrase "1994 reporting period is from August 25, 1994 to December 23, 1994" which Respondent asserts was included in both the letter from EPA and on the Highlights Page of the Instruction Book that accompanied the letter. Respondent further cites to EPA's own alleged inconsistent interpretation of the phrase "reporting period" in EPCRA Hazardous Chemical

Reporting : Community Right To Know Subpart D Inventory Forms Tier I and II, 40 C.F.R. Section 370.40(b) and 370.41(b) to support its position.

Complainant makes a valid point on page 5 of its Reply Brief that a "naked assertion" of genuine issues of material fact is insufficient to defeat an otherwise valid motion for accelerated decision. Respondent's burden in opposing summary judgment is to point to specific material facts in dispute, such as a genuine factual dispute regarding one or more of the elements of equitable estoppel. Respondent's legal conclusion as to one of those elements, that Respondent reasonably relied on EPA's correspondence, and its assertion that there are genuine issues of material fact regarding such reliance, standing alone, are insufficient. "Denials in the form of legal conclusions, unsupported by documentation of specific facts, are insufficient to create issues of material fact that would preclude summary judgment." SEC v. Bonastia, 614 F. 2d 908, 914 (3rd Cir. 1980).

However, Respondent presented as exhibits to its Prehearing Exchange the documents which contain the alleged misrepresentations (Exhibits 1 and 2). To support its argument that its reliance was reasonable, Respondent (on page 5 of its Supplemental Brief), cites to EPA documents to illustrate that EPA sometimes used the phrase "reporting period," upon which Respondent contends it relied, the same way Respondent interpreted it. Although Complainant asserts that a misrepresentation did not occur, and that any reliance was not reasonable (Reply at 6), Respondent has nevertheless pointed to specific facts regarding reasonable reliance which the parties dispute.

Even should Respondent raise a factual dispute as to an element of estoppel, it must be a "material fact" in order for Respondent to successfully oppose the motion for accelerated decision. Complainant argues that the defense of estoppel must fail as a matter of law (and therefore cannot be "material" to the issue of liability), because TSCA is a strict liability statute.

As Complainant has noted, several courts have applied estoppel arguments to penalty issues. See, United States v. Pretty Products, Inc., 780 F. Supp. 1488, at 1504 (S.D. Ohio 1991); Connecticut Fund for the Environment Inc. v. UPJOHN Co., 660 F. Supp. 1397, 1412 (D. Conn. 1987); United States v. Production Plated Products, 742 F. Supp. 956, 961, aff'd, 22 ELR 20899 (6th Cir. 1992); Urschel Laboratories, Inc., EPA Docket No. V-W-89-R-35, slip op. at 12 (ALJ Interlocutory Order Granting Partial Accelerated Decision, 1991); See also, (not cited by Complainant), United States v. Roll Coaster, Inc., 1991 U.S. Dist. LEXIS 8790 at *5, 21 ELR 21073 (S.D. Ind. 1991)("...in this case, equitable principles are more applicable to the issue of damages than the issue of liability. The Clean Water Act is a strict liability statute, and liability ensues if there is a violation. USEPA's failure to contact Roll Coater does not provide sufficient justification to ignore the statute. In contrast, USEPA's failure to enunciate the involvement of the various levels of government is important is determining the appropriate penalty.")

Generally speaking, a "strict liability statute" means that a showing of intent is not required in order to impose sanctions. See, Black's Law Dictionary at 741 (abridged 5th Ed.). In the environmental context, under the Clean Water Act, "compliance is a matter of strict liability and a defendant's intention to comply or good faith attempt to do so does not excuse a violation." Connecticut Fund for the Environment, supra at 1409. EPA has deemed TSCA to be a strict liability statute. Leonard Strandley, 3 E.A.D. 718, 722, 1991 EPA App. LEXIS 12 (Chief Judicial Officer, November 25, 1991)("TSCA is a strict liability statute; therefore, lack of intent to violate its requirements is not a defense to the allegations"); PCB Penalty Policy, dated April 9, 1990 at 2 ("TSCA is a strict liability statute; and there is no requirement that a violator's conduct be willful or knowing for it to be found in violation of TSCA or its implementing regulations").

In criminal cases, the defense of entrapment by estoppel "rests upon principles of fairness, not a defendant's mental state", and that the defense therefore may be raised in cases in which the crime is one of strict liability. United States v. Smith, 940 F. 2d 710 , 714(1st Cir. 1991); Poppell v. City of San Diego, 149 F. 3d 951 (9th Cir. 1998). Similarly, in civil cases brought by the Government, equitable estoppel is based upon principles of fairness. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984)(estoppel may be justified where the public interest in ensuring the Government can enforce the law free from estoppel "might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government"). Thus, although equitable estoppel arguments may in some cases merely mitigate a respondent's culpability(degree of wilfulness or negligence), in some cases equitable estoppel may justify deeming a respondent's conduct to be in compliance, or justify excusing noncompliance.

Upon a close reading, Complainant's argument that the defense of estoppel cannot negate liability in a penalty assessment action is not fully supported by the cases it cites for that proposition . In United States v. Pretty Products, Inc., supra, the court opined that the defense of equitable estoppel could not preclude injunctive relief under Section 104 of CERCLA, but could bar a request or claim for the "imposition of penalties". As Complainant quoted, the court stated, "[t]o the extent that EPA's conduct has induced non-compliance with a request for information or documents, the public interest requires that the EPA still be able to receive the information and documents, but that it lose the ability to seek the imposition of a civil penalty on the noncomplying party."(Emphasis supplied). 780 F. Supp. at 1504.

Thus, a fair reading of the court's decision is that estoppel applies not just to the amount of penalty, but to the underlying cause of action for the imposition of penalties as well. In Connecticut Fund for the Environment, supra, at 1411, the court specifically stated that it need not resolve the question of whether an estoppel defense should ever be applied against the Government generally or in FWPCA (Clean Water Act) litigation, a strict liability statute, because the defendant had failed to satisfy the elements of the defense. The court in that case merely cautioned that, "[a]rguably, even greater reluctance should be exercised in allowing an estoppel defense in the FWPCA area as such contradicts the general notion of strict liability."Id.

Finally, the undersigned notes that another federal district court has found that an equitable estoppel defense may apply to the issue of liability for alleged violations of a strict liability statute. In United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 287 (W.D. Mich. 1988), *appeal dismissed*, 867 F. 2d 611 (6th Cir. 1989), the court recognized that the violations at issue under RCRA, including failure to file timely financial assurance documentation, were "strict liability offenses." Nevertheless, the court denied a motion for summary judgment , holding that genuine issues of material fact existed as to the defense of equitable estoppel, specifically as to whether financial assurance documentation was deemed or ought to be deemed timely filed based upon alleged conduct of the EPA .

In light of the above, the undersigned declines to rule that the defense of equitable estoppel is unavailable to Respondent as a matter of law. Respondent has set forth genuine issues of material fact pertinent to the issue of its alleged liability for violations of TSCA. The argument of the parties thus can properly be measured only against the backdrop of an evidentiary hearing, which is necessary to develop fully the questions presented in this matter. Such issues preclude granting Complainant's Motion under the appropriate standard for accelerated decision. To this extent, Complainant's Motion is **Denied**.

B. Motion to Amend the Prehearing Exchange

In its Motion, Complainant seeks to supplement the initial prehearing exchange with testimony from two additional witnesses and an exhibit. Complainant proposes to call Dr. John D. Walker, Director, Interagency Testing Committee (ITC), U.S. EPA and David R. Williams, Associate Branch Chief, Chemical Information and Testing Branch, Chemical Control Division, office of Pollution Prevention and Toxics, Office of prevention pesticides and Toxic Substances, U.S. EPA, to testify to issues pertinent to the TSCA Chemical Substances Inventory and the Inventory Update Rule. Complainant plans also to submit the certified statement of Allan Abramson, Director of the Information Management Division in EPA's Office of Prevention, Pesticides, and Toxic Substances, to establish that the chemicals at issue in the instant matter are subject to the inventory reporting requirements.

So long as evidence is not "irrelevant, immaterial, or unduly repetitious, unreliable, or of little probative value," it may be admitted at the discretion of the Presiding Administrative Law Judge, regardless of whether the evidence was included in the initial prehearing information exchange. See 40 C.F.R. § 22.22(a). The addition of witnesses to the original prehearing exchange will not prejudice Respondent as Respondent will have an opportunity to cross-examine such witnesses at the hearing pursuant to 40 C.F.R. 22.22(b). Furthermore, Respondent has received ample notice of Complainant's intent. Accordingly, Complainant's Motion to Amend the Prehearing Exchange is **Granted**.

The case shall proceed to evidentiary hearing on the issues of liability and penalty.

IV. Order

Accordingly, for the foregoing reasons and pursuant to 40 C.F.R. § 22.20 of the Consolidated Rules of Practice, Complainant's Motion for Accelerated Decision is **DENIED** and Complainant's Motion to Amend Prehearing Exchange is **GRANTED**.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.
October 14, 1999