6/9/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
THE C. P. HALL COMPANY,	)	Docket No. TSCA-V-C-61-89
	)	
Respondent	)	

ORDER ON CROSS-MOTIONS
FOR ACCELERATED DECISION AND ON RESPONDENT'S
MOTION TO STRIKE OR TO PERMIT DISCOVERY

The agonizing procedural journey in this matter continues. For the reasons stated in its motion of October 26, 1990, complainant seeks an accelerated decision in this matter involving a 39-count complaint alleging violations of section 15(3) of the Toxic Substances Control Act (TSCA or the Act), 15 U.S.C § 2614(3), and the Inventory Update Regulations at 40 C.F.R. § 710.32. The complaint alleges respondent's failure to submit to the Environmental Protection Agency (EPA) by December 23, 1986, information on the Partial Updating of TSCA Inventory Data Base Production Site Report (Form U) with respect to 39 different chemicals. Thus, the 39 violations alleged are identical, except for the chemicals referenced. Each count seeks a $17,000 penalty, for a total proposed penalty of $663,000. The motion is one for a partial accelerated decision, excluding the issue of the amount of penalty to be assessed.

In an order of February 1, 1991,[1] the parties were advised that following the undersigned Administrative Law Judge's (ALJ's) rulings on any motion to compel discovery, he would turn his attention to complainant's motion for an accelerated decision. On August 9, an order was issued concerning respondent's motion to compel discovery and complainant's motion to strike.

On September 16, respondent served its response to complainant's motion for the accelerated decision and its cross motion for an accelerated decision. On September 23, complainant served its reply to respondent's September 16 submissions. On October 4, respondent served a motion to strike complainant's amended prehearing exchange or in the alternative to permit discovery. Respondent's reply to the September 23 submissions and motion to supplement its response were filed on October 7. On October 17, complainant filed an objection to the motion to strike and a note concerning respondent's supplement. Respondent served a motion to supplement authority on November 26, and finally, complainant submitted a responsive letter on December 9. The arguments as set forth in the various submissions are well known to the parties and will not be repeated here except to the extent deemed necessary to discuss the issues. All arguments set forth by the parties and not specifically addressed herein are rejected as not being of sufficient import to resolve the issues.

Despite the Niagara of paperwork filed concerning the question of accelerated decision in this matter, the critical issue is

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[1] Unless otherwise stated, all dates are for the year 1991.

merely one of multiple violations. Specifically, whether respondent may be charged with 39 separate violations, each alleging failure to submit timely information with respect to a different chemical on a Form U, or whether respondent should only be charged with one violation for failure to submit timely the Form U. If only one violation for the allegations in the complaint is found, then the maximum penalty that could be assessed would be $25,000 per day of violation. Section 15 of TSCA, 15 U.S.C. § 2615.

Respondent has admitted in its answer the essential factual allegations that it manufactured each of the 39 chemicals in an amount over 10,000 pounds, that each was listed in the EPA's Master Inventory file, that it was not excluded from reporting requirements, and that it filed a Form U after the deadline of December 23, 1986. However, several affirmative defenses were asserted, which respondent contends raise genuine issues of material fact with respect to the liability aspect of this proceeding, and therefore preclude the granting of complainant's motion for accelerated decision.

I. Cross-motions for accelerated decision - genuine issues of material fact - merits of affirmative defenses.

The threshold issue on motions for partial accelerated decision is whether there are any genuine issues of material fact which affect that part of the proceeding for which accelerated decision is requested. The fact that cross-motions were filed does

not mean that no material issues of fact exist, that a party waives consideration of whether such issues exist, or that if one motion is rejected the other is necessarily justified. The motions must be ruled upon individually. District 12, United Mine Workers v. Peabody Coal Co., 602 F. Supp. 240 (S.D. Ill. 1985); Securities and Exchange Commission v. American Commodity Exchange, Inc., 546 F.2d 1361 (10th Cir. 1976); Rains v. Cascade Industries, Inc., 402 F.2d 241 (3rd Cir. 1968). Therefore, analysis of the affirmative defenses is required with respect to complainant's motion.

Respondent listed 22 affirmative defenses in its answer. Several of them are relevant only to the penalty question, namely numbers 4, 8, 12, and 15. Number 16 asserts that complainant's statutory and regulatory interpretation and proposed penalties are arbitrary and capricious. In that it concerns the penalty question and reasonableness of EPA's construction of statutes and regulations, it does not raise any issues of fact material to the cross-motions. All issues of construction of the statute and regulations will be addressed infra at 16-28.

Affirmative defense number one, asserting that the complaint fails to state a claim upon which relief can be granted, is not supported by any arguments which raise a genuine issue of material fact. Presumably, it is supported by arguments supporting other defenses, and thus will be resolved in the discussion of those issues. The second affirmative defense states that inadequate promulgation of EPA's regulation is responsible for respondent's late filing of the Form U. However, respondent has not even

specified which regulation or articulated the basis for its affirmative defense. Furthermore, complainant has provided the history of promulgation of 40 C.F.R. Part 710 in attachment B to its motion, so this defense has been successfully rebutted.

Numbers three and five, which assert respectively that EPA's regulations do not provide clear and adequate notice of the interpretation of TSCA upon which complainant now relies, and that the purpose of TSCA will not be served through complainant's interpretation, do not give rise to any questions of fact. They merely question the validity of complainant's interpretation and are addressed in the discussion following.

Respondent asserts in number six that its conduct was consistent with the regulations, but inasmuch as they are susceptible to complainant's interpretation, they are neither substantive nor binding upon respondent. Such a claim of compliance simply cannot be maintained in the face of respondent's admission that it filed the Form U after the date required by regulation. A challenge to the validity of the regulations, which are substantive and binding, is rarely entertained in the administrative enforcement forum. The decision to meet such a challenge is discretionary. In re American Ecological Recycle Research Corp. and Donald K. Gums, RCRA Appeal No. 83-3 (Final Decision, July 18, 1985, at 5-6); In re Transportation, Inc., et al., Docket No. CAA (211)-27 et al., (Decision on Interlocutory Appeal, February 15, 1982, at 8, n.8). Especially because the question here concerns only the assessment of multiple penalties,

and not the conduct required by regulation, there is no compelling reason to address the validity of the regulations. Complainant's interpretation of the regulations, on the other hand, may not necessarily be binding on respondent, and this issue is met below.

It is maintained in number seven that there exists an inconsistency in the complaint with EPA General Enforcement Policies numbers GM-21 and GM-22, dated February 16, 1984. That argument does not raise any issues of material fact, because it merely concerns construction of penalty policies. It is noted that those penalty policies do not mention the issue of multiple penalties.

The ninth, tenth and eleventh affirmative defenses state that the complaint and penalties proposed are contrary to Constitutional rights of due process and equal protection, and to the excessive fines clause of the Eighth Amendment. Respondent alleges that EPA's inconsistencies regarding the interpretation of TSCA or regulations thereunder are material facts relevant to whether EPA afforded the regulated community with due process. (Response at 11-12) Respondent urges that the regulation does not give adequate notice of the interpretation which complainant relies upon, noting that the application of a regulation may be challenged on the ground that it "fails to give fair warning of the conduct it prohibits or requires." Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986); Rollins Environmental Services (NJ), Inc. v. U.S. EPA, Civ. No. 00-1508 (D. D.C. July 5, 1991) (Response, Exhibit E). Due process also "requires legislatures to set

reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" Smith v. Goguen, 415 U.S. 566, 572-73 (1974), quoting, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Respondent argues that according to EPA's position, the conduct required is to engage in multiple acts by submitting multiple reports for each facility. (Response at 8) However, respondent does not claim that it was not on notice of the exact conduct required; namely, to file information concerning all of the chemicals required to be reported on the Form U. Respondent also does not maintain that it was not on notice that such requirement applied to it. Respondent really is only claiming it was not warned of the extent of the penalty which could be assessed. Therefore, any such alleged inconsistencies in EPA's interpretation are not relevant to due process. It is emphasized that respondent will be afforded full opportunity to contest the amount of penalty proposed. Respondent does not cite authority or present arguments with respect to the other Constitutional issues. Considering the record as it stands, no material facts are in dispute which are relevant to those issues, especially taking into account the broad enforcement discretion vested in EPA. Moreover, the issue of excessive fines is premature at this point in the proceeding; it will be ripe when the amount of penalty is addressed.

The thirteenth affirmative defense states that complainant "is estopped to assert the proposed penalties because of its conduct with respect to Respondent and Respondent's reliance upon an

inconsistent penalty policy created after the alleged violations occurred." The latter phrase is inscrutable. Respondent's reliance upon a document for purposes of asserting estoppel would have to have been contemporaneous with, not after, the alleged violations. Furthermore, respondent argues that complainant relied upon the penalty policy dated after the alleged violations occurred, and misled or misrepresented whether multiple violations may be assessed. If that is what respondent meant to assert as an affirmative defense, then it must demonstrate that, to its detriment, it acted in reliance thereon. In re Urschel Laboratories, RCRA Docket No. V-W-89-R-35 (Interlocutory Order For Partial Accelerated Decision as to Liability and Denying Respondent's Motion for Accelerated Decision, April 25, 1991, at 12-14). It is ludicrous and antithetical to respondent's case to imagine that respondent would decide not to file a Form U in reliance on a belief that it could only be assessed a maximum penalty of $25,000, and therefore this argument is discarded. Regarding the first phrase of this defense, respondent does not specify any "conduct" concerning respondent except for the filing of this complaint. Such failure to provide concrete particulars is insufficient to resist a motion for summary judgment, which is analogous to a motion for accelerated decision. Sherrell Perfumers, Inc. v. Revlon, Inc., 483 F. Supp. 188, 193-94 (S.D.N.Y. 1980), citing SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978).

The fourteenth affirmative defense asserts laches, estoppel and unclean hands because of complainant's delay in prosecuting this case. There are no disputed facts relevant to these affirmative defenses. Complainant admits the date of alleged violation (December 23, 1986), EPA's inspection of respondent's facility (February 18, 1988), and the date of the complaint (September 14, 1989). Complainant's Memorandum in Support of Motion for Accelerated Decision, dated October 26, 1990 (Complainant's Memorandum at 10). Respondent does not support this defense with authority or argument, and it should be pointed out that the defense of laches cannot be asserted against the government when it acts in its sovereign and governmental capacity to protect public health and safety. Chesapeake and Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. Weintraub, 613 F.2d 612, 618-19 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980). See also, Connecticut Fund for the Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1413 (D. Conn. 1987). (No court has ruled that the doctrine of laches bars an enforcement action.)

Estoppel is rarely successful against the government. In re Tremco, Inc., Incon Division, Docket No TSCA-88-H-05 (Order by the undersigned, April 7, 1989, at 12-14); In re Wego Chemical & Mineral Corporation, Docket No. II TSCA-8(a)-88-0228 (Order by the undersigned, May 8, 1989, at 8-10). Estoppel requires a showing, inter alia, of misleading conduct or misrepresentation or concealment of a material fact on the part of EPA, and action by

respondent in reliance thereon, resulting in damages if estoppel is denied. In re Urschel Laboratories, supra; citing Nelson v. Chicago Mill & Lumber Corp., 76 F.2d 17, 21, 100 A.L.R. 87 (8th Cir. 1935); Minnesota Mining & Manufacturing Co. v. Blume, 533 F. Supp. 493, 517, 525 (S.D. Ohio 1978); 28 Am. Jur. 2d Estoppel § 28, at 631. There is no apparent or imaginable reliance by respondent on EPA's failure to bring an enforcement action immediately after the alleged violation. Respondent's filing of the Form U would have been untimely whether EPA inspected or filed the complaint on December 24, 1986, or any time thereafter. However, the extent of tardiness on the part of respondent may be considered, in the context of determining the amount of penalty, in light of the length of time it took EPA to come out to inspect the facility after the filing deadline had passed.

Respondent stresses in affirmative defense numbers 17 and 18 that the black and white of section 15(B)(3) of the Act shows that Congress intended a single violation for a failure to submit one report, and that the use of penalty policies to create multiple violations contradicts that plain language. Number 19 avers that 40 C.F.R. § 710.32, as well as EPA's prior position, supports respondent's interpretation. Again, these are issues of construction of the statute, regulations, and penalty policies and are addressed below. To the extent that EPA could have had a prior position inconsistent with complainant's present position on multiple penalty assessment, would not constitute a material fact, because, as discussed below, EPA's position is and has been clear

at all times relevant to this case with respect to per chemical penalty assessments for inventory update violations.

Number 20 states that EPA's prior enforcement practices and precedent under TSCA reporting requirements support respondent's position. The question of whether and how to charge a respondent in a complaint, and the penalty to be assessed for alleged violations, are matters of enforcement discretion. Administrative agencies have broad discretion to fashion appropriate sanctions. Chalfy v. Turoff, 804 F.2d 20, 22 (2d Cir. 1986). It has been held that EPA's decision to charge a respondent with multiple violations under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, in order to deter the respondent from future violations, was within EPA's prosecutorial discretion, where it was consistent with the applicable statute, regulations and penalty policy. In re Helena Chemical Company, FIFRA Appeal No. 87-3 (Order dated November 16, 1991, at 10). Any limitation upon EPA's enforcement discretion must be defined by applicable statutory or regulatory authority. In re Wyoming Refining Company, RCRA (3008) Appeal No. 84-2 (Final Decision, May 30, 1986, at 6). EPA's action in proposing the penalties in this case is consistent with the relevant statutory and regulatory provisions, and with the applicable penalty policy, as discussed below.

Furthermore, similar cases cannot be used to show that the penalty in the present case is inappropriate as being more severe than those imposed in the other cases. In re Chautauqua Hardware

Corporation, EPCRA Appeal No. 91-1 (Order on Interlocutory Review, June 24, 1991, at 17, n.16), referring to In re Briggs & Stratton Corp., TSCA Appeal No. 81-1 (Final Decision, February 4, 1981) and Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187, rehearing denied, 412 U.S. 933 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.")

Generally, the ALJ may evaluate whether there has been an abuse of discretion on the part of EPA, that is, whether there has been "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to matter submitted." Black's Law Dictionary (Abridged 5th Ed.) at 4. In another decision where the respondent had challenged multiple penalty assessment, Helena, supra, (Order on Motion for Reconsideration, January 24, 1990), the Chief Judicial Officer denied reconsideration of the respondent's argument that EPA acted arbitrarily and capriciously by imposing a separate penalty under FIFRA for each pesticide sale, where it was claimed that EPA consistently charged others similarly situated with only one violation. It was noted in that decision that each case rests on its own set of facts, and that it is incorrect to compare a penalty in one case with penalties assessed in other cases. Id. at 6, citing, U.S. v. Chotin Transportation, Inc., 649 F. Supp. 356, 358-59 (S.D. Ohio 1986). Therefore, even if EPA issued some complaints assessing one penalty for several chemicals which had not been

reported by a company, that would not raise an issue of material fact to the effect that EPA acted unreasonably, unconscionably or arbitrarily in the present case, considering the broad enforcement discretion EPA has in assessing penalties. It is observed that, considering the prior enforcement practices and precedent respondent has pointed out, EPA does not appear to have acted significantly different in this case from other matters in terms of enforcing TSCA, including assessing penalties. See infra at 25-26, 35-36.

Number 21 asserts that reporting requirements under the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001 et seq., demonstrate that when Congress intends to create separate reporting violations for specific chemicals, it does so expressly by requiring separate reports for each chemical. This is a question of statutory construction and no facts are disputed on this issue, so it will be discussed below.

The last affirmative defense argues that if complainant's interpretation is correct, EPA has engaged in substantive rulemaking in violation of section 553 of the Administrative Procedure Act. This is a question of law, it does not present any factual issues, and it is discussed infra at 32-33.

Respondent argues stoutly that not only are there genuine issues of material fact affecting the liability question according to the record as it stands, but that respondent has been denied the opportunity to develop factual information to support its affirmative defenses. Respondent refers to an order dated

August 9, issued in this proceeding by the undersigned, which notes in denying a motion to depose complainant's witnesses that they will appear at the hearing, and therefore there is no reason to believe that relevant and probative evidence may otherwise not be preserved. Contending that order postpones its opportunity to inquire into certain facts until the hearing, respondent asserts that it must be permitted to develop factual information concerning the affirmative defenses at the hearing, and that it is improper to entertain complainant's motion for accelerated decision at this time. (Response at 6-7)

Respondent is attempting to create issues of material fact by guessing that testimony could be elicited and that EPA documents exist (undiscovered by respondent) which support its position. Respondent also assumes incorrectly that it has a right to discover them. The issue of discovery, particularly the limitations of it in EPA administrative enforcement proceedings, has been addressed in the order dated August 9, referred to above. Respondent's speculation concerning finding documents to support its position is grounded on the assumption that the relevant statutory and regulatory language, and EPA's action in other enforcement proceedings and policies, is inconsistent with complainant's position here. This assumption is incorrect, as discussed below. Any such documents or testimony, if they could be elicited or produced, would not raise any genuine issues of material fact for the reason that multiple penalty assessments are a matter of policy

and enforcement discretion when consistent with the relevant statute and regulations.

To address more specifically respondent's emphatic arguments, some examples of the questions that it believes raise genuine issues of material fact on the affirmative defenses are the following: Has EPA provided fair warning and notice of the interpretation of TSCA proposed here and given respondent due process? Is that interpretation EPA's official interpretation or policy? Has EPA formally changed its interpretation, as evidenced by singular penalty assessments in subsequently filed complaints? Who authorized those assessments, and were they based on internal or external EPA policies or guidelines? Did the penalty assessor for this case have authority to find multiple violations? Are other EPA regional offices authorized to assert different interpretations of the relevant statutory and regulatory provisions? Has EPA taken different positions in other enforcement proceedings? Was EPA's different treatment of respondent deliberate and did respondent's small size and limited resources influence the interpretation applied here? (Response at 14, Respondent's Motion to Supplement Response, October 7, 1991, at 4-5; Motion to Supplement Authority, November 26, 1991, at 4-5)

Not every factual issue is a bar to a motion for accelerated decision, as is the situation of a motion for summary judgment. Material facts are those which have legal probative force as to the controlling issue. For respondent's questions to raise facts which are material depends on a finding that EPA's position on multiple

violations in this case is inconsistent with the applicable statutory and regulatory provisions, or that EPA does not have enforcement discretion in assessing multiple penalties under such provisions, or that EPA is bound by its pronouncements on the issue. There are no such findings in this case. Complainant's point is well taken, and one is led ineluctably to conclude that the affirmative defenses, as well as the substantive question posed by the cross-motions, do not raise any genuine issues of material fact.

II. Whether respondent may be assessed multiple penalties.

The substantive question presented by the cross-motions for accelerated decision is, what constitutes a unit of violation of the inventory update reporting regulations? More specifically, may EPA charge separate violations for each chemical not reported on a Form U and assess each violation a separate penalty? The parties agree that the final Enforcement Response Policy (ERP) for TSCA §§ 8, 12, and 13, issued May 15, 1987 (Exhibit 3 of Complainant's Prehearing Exchange) clearly states that TSCA § 8(a) inventory update violations are assessed per chemical, per site, as complainant has assessed them here. (ERP at 13, 25) The policy is applicable to this proceeding, as it states it "should be used to calculate penalties for all administrative actions concerning TSCA §§ 8, 12 and 13 instituted after the date of this policy, regardless of the date of violation." (ERP at 7) However, because that policy is not a binding substantive rule, and the question

presented in the cross-motions has not as yet been adjudicated in any other proceeding, the ALJ is at liberty to decide it here as a case of first impression.

To answer the question, the language of the relevant statutory provisions should first be examined to reveal any legislative intent. The section of TSCA listing prohibited acts provides, in relevant part, as follows:

> It shall be unlawful for any person to --
> . . .
> (3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this chapter or a rule thereunder;
> . . . .

TSCA § 15, 15 U.S.C. §2614.

In applying this provision, respondent focuses on the failure to submit a report. It equates a completed Form U with a report, and construes section 15(3)(B) as establishing that such failure constitutes one violation of the Act. Respondent asserts further that the language of section 15 delimits separate violations of TSCA, rather than section 16 of TSCA (15 U.S.C. § 2615) concerning penalties, or the applicable penalty policies. The reasoning presented is that the violations must first be clearly asserted, which must include the number of violations, and proven before the penalty may be assessed. Further, respondent sees a conclusive distinction between the wording of subsections (1) and (2) of section 15, which refer to other sections of TSCA that set forth requirements on a chemical specific basis, and subsection (3).

Complainant, in its analysis, examines the language "fail . . . to . . . submit . . . other information" in section 15(3)(B) to support its multiple counts against respondent; that is, each chemical may be considered one unit of information.

Contrary to respondent's argument, section 15 of TSCA does not appear to specify units of violation under TSCA, for purposes of distinguishing singular from multiple penalty assessment.[2] For example, to "fail or refuse to . . . establish or maintain records" may be interpreted as one violation per record, but just as plausibly may be interpreted as a single violation for a group of several records. Similarly, to "fail or refuse to . . . submit . . . other information" may be construed as a single violation, either of failure to submit one item or type of information or of failure to submit several items or types of information by a certain time. To "fail or refuse to . . . submit reports" could mean one violation for each report, or for a group of several reports.

The legislative history of section 15 of TSCA does not indicate any intent on the part of Congress to clarify single as opposed to multiple reporting violations. Earlier versions of the "prohibited acts" provision concerning recordkeeping and reporting requirements are even less indicative of delimiting separate

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[2] Most statutes under which government agencies may assess penalties leave the precise unit of violation undefined, although many such statutes specify that each day of an offense is a separate violation. Diver, Colin S., The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Col. L. Rev. 1435, 1440-41 (1979).

violations than the current version. For example, "The following acts and the causing thereof are prohibited -- . . . the failure or refusal to provide information as required by sections . . . 109 [precursor to current section 8] of this title . . ." S. 1478, 92nd Cong., 2d Sess., 118 Cong. Rec. 19,172 (1972); similar language in S. 426, 93rd Cong., 1st Sess. 119 Cong. Rec. 1,379, 24,499 (1973). See also, House consideration and passage of S. 426, amended, in lieu of H.R. 5356, 119 Cong. Rec. 25,475 (July 23, 1973) ("It shall be unlawful for any person to -- . . . fail or refuse to comply with section 8 or any rule or order thereunder . . . . "); similar language in S. 776, 94th Cong., 1st Sess., § 16, 121 Cong. Rec. 3,784 (1975).

The other relevant statutory provision, section 8 of the Act, 15 U.S.C. § 2607, entitled "Reporting and retention of information," in subsection (a) requires the Administrator of EPA to promulgate rules under which:

> each person . . . who manufactures or processes . . . a chemical substance . . . shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require . . . .
>
> For purposes of the compilation of the list of chemical substances [inventory] required under subsection (b) of this section, the Administrator shall promulgate rules pursuant to this subsection not later than 180 days after January 1, 1977.

This section of the Act, as well as the legislative history of that section, also does not provide sufficient clues with regard to multiple penalty assessments. See, S. 426, § 10(a), 119 Cong. Rec. 1,377 (January 18, 1973); H.R. 5356 § 8(a), 119 Cong. Rec. 25,473

(July 23, 1973); S. 776, § 8(a), (c), 121 Cong. Rec. 3,783 (February 20, 1975). The text of section 8(a) appears to support respondent's theory that the violations of issue are those of "fail[ure] . . . to . . . submit . . . reports," under TSCA section 15(3). However, some legislative history of that section suggests otherwise. See, H.R. Rep. No. 1341, 94th Cong., 2d Sess. 41-45 (1976) ("the Administrator may by rule require a small manufacturer or processor of a chemical substance to submit information respecting the substance to the Administrator for purposes of compiling the inventory of existing chemical substances required under section 8(b)" (emphasis added). Furthermore, to "sumbit . . . reports" could be construed in this context as submitting a report for each chemical, albeit on the same form.

The next step is to examine the section of the regulations promulgated under section 8(a) which respondent allegedly violated, to discover any regulatory intent to limn separate violations. The relevant section, 40 C.F.R. § 710.32, provides, in pertinent part, as follows:

> Any person who must report under this subpart must submit the information prescribed in this section for each chemical substance described in § 710.25 that the person manufactured for commercial purposes in an amount of 10,000 pounds (4,540 kilograms) or more at a single site during a corporate fiscal year described in § 710.28. . . . . A respondent to this subpart must report information in writing or by computer tape as prescribed in this section, to the extent that such information is known to or reasonably ascertainable by that person. A respondent to this subpart must report information that applies to the specific corporate fiscal year for which the person is required to report. Information on

> chemical substances for which the chemical identities are claimed confidential under § 710.38 must be submitted in writing.
> (a) Reporting in writing. Any person who chooses to report information to EPA in writing must do so by completing the reporting form contained in § 710.39 [Form U], and must submit a separate form for each site for which the person is required to report. Information on substances for which the chemical identity is claimed confidential under § 710.38 must be submitted in writing on a separate reporting form; a respondent to this subpart must not report confidential chemical substance identities on the same reporting form.

That provision does not distinguish a unit of violation with crystal clarity, but the requirement to "submit the information . . . for each chemical substance" strongly suggests that is the unit of violation. Respondent's argument that the language of subsection (a) discloses an intent to regard as one violation a failure to file one Form U is simply not supported by the language of the entire subsection. It says nothing about submitting a "report," but rather requires a person to report information on a form, which is not necessarily synonymous with filing a report. Moreover, if there were such an intent as respondent suggests, it would seem unfair to charge two separate violations (one for each Form U) against an entity which manufactures chemicals which are confidential as well as chemicals which are not confidential, but only one violation against an entity that manufactures the same number of chemical substances, but which are all confidential.

Also supporting complainant's position is the language of the regulation which specifies the scope of and compliance with 40 C.F.R. Part 710 (the inventory reporting regulations), as expressed

in the following excerpt of that regulation, 40 C.F.R. § 710.1:

> (a) This part establishes regulations governing reporting by certain persons who manufacture, import or process chemical substances for commercial purposes under section 8(a) of the Toxic Substances Control Act (15 U.S.C. 2607(a)). Section 8(a) authorizes the Administrator to require reporting of information necessary for administration of the Act and requires EPA to issue regulations for the purpose of compiling an inventory . . . as required by section 8(b) of the Act.
>
> . . . .
>
> (b) Section 15(3) of TSCA makes it unlawful for any person to fail or refuse to submit information required under these reporting regulations. In addition, section 15(3) makes it unlawful for any person to fail to keep, and permit access to, records required by these regulations. Section 16 provides that a person who violates a provision of section 15 is liable to the United States for a civil penalty and may be criminally prosecuted. Pursuant to section 17, the Government may seek judicial relief to compel submission of section 8(a) information and to otherwise restrain any violation of section 15 (emphasis added).

A note following the text of section 710.1 states, "As a matter of traditional Agency policy, EPA does not intend to concentrate its enforcement efforts on insignificant clerical errors in reporting." Application of the maxim expressio unius est exclusio alterius to 40 C.F.R. § 710.1 (i.e., that section does not reflect the TSCA 15(3) provision of failure to submit reports), and considering the logical implication of the note following it (suggesting that significant errors or omissions in reporting are enforceable), reveals an intent not to restrict enforceable inventory reporting violations to the failure to submit a reporting form, but to consider under TSCA section 15(3) the failure to

submit inventory information to be an enforceable violation, consistent with complainant's position.[3]

The issue is distilled to whether failure to provide information regarding each chemical may properly be considered as a separate violation, per chemical. While section 15 of TSCA does not specify units of violation for failure to submit information, it does set forth the causes of action, or claims for enforcement under TSCA. Each count in a complaint is generally a distinct statement of a separate cause of action.[4] Hence, complainant represents in the complaint that there are 39 separate causes of action or claims against respondent for failure to submit information to EPA.

The essential issue may be rephrased as whether EPA states a separate cause of action for each chemical that was not reported, or in other words, whether the counts in this case are multiplicitous. The test most often cited is whether each offense charged requires proof of an additional fact which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932). United States v. Nixon, 634 F.2d 306, 313 (5th Cir. 1981) (Separate

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[3] It is acknowledged that "submitting information" may logically include submitting reports. However, examining the inventory regulations as a whole reveals emphasis of the word "information." Although the nouns "form," verb forms of "to report," and the adjective "reporting" appear repeatedly, the noun "report" is mentioned infrequently in the inventory regulations (40 C.F.R. §§ 710.6, 710.35(b), 710.37). Furthermore, the noun "report" does not necessarily equate with a completed form, but may refer to a statement or accounting with regard to a particular item, such as a chemical.

[4] However, a single count does not necessarily only include one cause of action or claim. See infra at 25-26.

counts in perjury indictment not multiplicitous where each question upon which count was based sought information relating to different aspect of alleged counterfeiting operation, and proof of each falsehood required establishment of different facts.); United States v. Kennedy, 726 F.2d 546, 547-48 (9th Cir. 1984), cert. denied, 469 U.S. 965 (Indictment charging three counts of making false statements to federally insured bank was not multiplicitous even though all documents submitted to the bank repeated the same false statement and were executed for single purpose.) Expressed yet another way, the standard is whether each count contained different elements and whether each could have stood alone. U.S. v. Reed, 639 F.2d 896, 905 (2nd Cir. 1981) (Mail fraud counts and securities fraud count against defendant in criminal prosecution were held not multiplicitous.)

The failure to report one chemical as required by 40 C.F.R. § 710.32 is sufficient for EPA to state an enforceable claim. The additional facts which must be proven in the present case for each count are that there was manufactured for commercial purposes during the relevant corporate fiscal year the particular chemical respondent is charged with not reporting, that the chemical is subject to the inventory reporting regulations, and that it was manufactured during that year in excess of the threshold quantity.

While there is no precedent revealed by the parties or by research in point, EPA has filed other complaints alleging violations of the inventory update requirements, which respondent believes support its position. Respondent submits as evidence In

re Caschem, Inc., Docket No. II TSCA-PMN-89-0106, complaint filed September 27, 1989; In re Dowell Schlumberger, Inc., Docket No. TSCA-91-H-09, Consent Agreement filed August 16, 1991, Respondent's Reply, Exhibit B; In re Sieflor Corporation, Docket No. TSCA-09-91-0029, complaint dated September 24, 1991.

In Caschem, similar facts and violations are alleged (failure to submit inventory update information for 31 different chemicals), and only one count is charged. However, the number of counts charged, and even the singular language "a violation" (¶ 35 in the Caschem complaint) does not conclusively establish that only one cause of action, or violation, exists. 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; and it has been said that plaintiffs should be required to state their claims separately only when it will facilitate the clear presentation of matters set forth." 71 C.J.S. § 88, at 210-12; United States v. Iroquois Apartments, 21 F.R.D 151, 153 (E.D.N.Y 1957); Westmoreland Asbestos Co. v. Johns-Manville Corporation, et al., 30 F. Supp. 389, 392 (S.D. N.Y. 1939), decision adhered to, 32 F. Supp. 731, affirmed 113 F.2d 114 (1940). The Caschem complaint itself makes clear that 31 separate penalties are proposed to be assessed for the count of failure to report the 31 chemicals; the proposed penalty assessed per chemical is $17,000 times 31, or $527,000. Therefore, 31 separate claims are contained in that count.

With respect to Sieflor and Schlumberger, the facts are distinguishable from those in the present case. For filing an incomplete or an inaccurate Form U, the respondents were each charged, in EPA's discretion, with one violation of section 15(3)(B), and assessed a proposed penalty of $20,000. While the relevant count in the Sieflor complaint involved two different chemicals, the respondent had timely submitted a Form U reporting manufacture or importation of the two chemicals, but over a year later filed a revised Form U claiming that neither chemical was imported or produced during the same reporting period. The violation alleged was the failure to report in a manner that met the regulatory standard, rather than a failure to report. In Schlumberger, the same violation was alleged. Specifically, that respondent allegedly timely reported information for the wrong time period, and then submitted a revised report covering the correct time period after the deadline (December 23, 1986). The magnitude of those violations is much less than the violations at issue here, yet respondent's position is to assess about the same penalty against it as against those respondents.

Respondent also cites FAA v. Landy, 705 F.2d 624, 636 (2nd Cir. 1983), cert. denied, 464 U.S. 895, in which the Second Circuit states: "The test of whether charges are multiplicitous is, in important part, one of legislative intent. Congress should indicate clearly that it contemplated separate violations because a determination that separate violations are involved makes it possible to fine cumulatively." Concluding that alleged violations

of F.A.A. safety regulations were distinct, the court found that the regulatory scheme clearly stated discrete harms, noting the anomaly of a person who totally ignored the safety manual requirements being subject to only a single fine, the same as a person who merely failed to furnish a copy of the manual to the F.A.A. but otherwise complied, if multiple penalties were not assessed.

However, as noted above, Congress did not indicate with clarity that it contemplated the issue of multiple or single violations, because Congress did not specify units of reporting violations under TSCA. The anomaly cited in Landy applies similarly here, supporting multiple penalty assessment in that matter as well as the present case: the manufacturer who failed to list one chemical on a timely filed Form U should not be assessed about the same amount of penalty as a manufacturer of several chemicals who failed to file a Form U for all of them.

The fact that all chemicals required to be reported were to be listed on the same form, respondent believes, discloses an intent to treat any failures to report as one violation. Respondent contrasts the Form U with the Toxic Chemical Release Inventory Reporting Form ("Form R") under EPCRA, 42 U.S.C. §§ 11001 et seq., which includes a separate form for each chemical, and thus apparently contemplates separate violations for each chemical not reported. See, 40 C.F.R. § 372.85 (1990).

The statutory provision of EPCRA concerning civil and administrative penalties for the reporting requirements states,

"Any person . . . who violates any requirement of section 11022 or 11023 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." EPCRA § 325(c), 42 U.S.C. § 11045. The statutory "[b]asic requirement" concerning the Form R is to "complete a toxic chemical release form . . . for each toxic chemical listed . . . that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity . . . during the preceding calendar year at [the] facility." Section 313(a) of EPCRA, 42 U.S.C. § 11023.

Congress did not express any guidance on the format of the form for reporting inventory update information; EPA was responsible for creating the Form U. The singularity or multiplicity of forms is not conclusive on the issue of multiplicity of violations. Rather, the forms are constructed with regard to practical purposes. It would be absurd and a princely waste of paper and postage to require a separate piece of paper for a mere listing of a name of a chemical substance, the production volume, identifying numbers, and type of activity. (Respondent's Memorandum, dated September 16, 1991, Exhibit 6) Much more information is required in the Form R per chemical, which occupies a whole page. 40 C.F.R. § 372.85 (1990).

On another reporting form, respondent points out, EPA Form 7710-36 (Respondent's Memorandum, Exhibit 8), persons who were miners, primary processors or importers of asbestos are required under TSCA to report under 40 C.F.R § 763.65(a) all the types of

asbestos used commercially or industrially on a particular site. Failure to report has been charged under section 15(3)(B) of TSCA as one violation of failure to submit a report, not as multiple violations for each type of asbestos at the site, as respondent points out. In re Empire Ace Insulation Manufacturing Corp., Docket No. TSCA-ASB-8a-85-0216 (Initial Decision, August 11, 1986). However, on that form, essentially only one chemical is required to be reported: asbestos, in whatever asbestiform variety. Consequently, it is consistent with the per chemical approach of penalty assessments for EPCRA and TSCA section 8 inventory update reporting violations.

That type of approach in penalty assessment is consistent with the impact those violations have on EPA's purpose to gather information, monitor, and make assessments, decisions and rules concerning chemicals. EPA is hobbled in its efforts incrementally for each chemical not reported. As stated in a Response to Comments, attached to the ERP, if a large manufacturer fails to report on a large number of substances, a substantial harm may have occurred in the EPA's efforts to characterize exposure, justifying high penalties for multiple violations. Small manufacturers are exempt, and penalties may be adjusted, inter alia, to account for the size of the business. (Complainant's Prehearing Exchange, Exhibit 3) The detrimental impact on EPA (and consequently the public), for reporting violations here is measured not in the volume or the toxicity of the chemicals manufactured by each company, but in the number of chemicals companies fail to report.

Respondent's comparison of inventory update violations to violations of the regulations governing polychlorinated biphenyls (PCBs), 40 C.F.R. Part 761, is simply inapposite. PCB violations are treated differently from other infractions of TSCA, as evidenced by the penalty policy in the Federal Register which treats PCB violations separately from the general TSCA penalty assessments. (Complainant's Prehearing Exchange, Exhibit 2) The PCB regulations are for chemical control, including a ban on the manufacture, processing and distribution in commerce of PCBs, to reduce the chance that additional PCBs will enter the environment. Penalties are assessed according to the amount and concentration of PCBs. It is interesting to note, however, that there are certain limits on multiple penalty assessments, such as a limit of four separate counts for each missed quarterly inspection or record of inspection.

Respondent raises the argument that the number of violations being dependent on the number of chemicals is unfair to a small company manufacturing small amounts of many nonhazardous chemicals. (Respondent's Memorandum at 22-23) However, 10,000 pounds per year, the threshold amount of chemical substance required for reporting, is no small amount, and "small manufacturers," as defined in 40 C.F.R. § 704.3, are excluded from the inventory reporting requirement. 40 C.F.R. §§ 710.29, 710.32. Also, the penalty may be adjusted to account for any such unfairness. What would be patently unfair is the situation of a company that timely submitted a Form U but failed to report one chemical being assessed

a penalty approximately the same as a company that completely failed to report any of hundreds of chemicals it manufactures.

With respect to the penalty policies, there is simply no merit to respondent's interpretation of the guidelines for assessment of civil penalties under section 16 of TSCA, dated September 10, 1980, 45 Fed. Reg. 59770, Complainant's Prehearing Exchange, Exhibit 2, as suggesting that EPA's position prior to the 1987 ERP was contrary to that in the ERP on the issue of multiple penalties for inventory reporting requirements. Respondent points out in the reference to late inventory reporting the singular language "the violation," 45 Fed. Reg. 52776, and believes it indicates that there may only be one violation for late inventory reporting. This argument is too thin to support a finding that EPA considers all inventory reporting violations to be singular in nature. Presumably, the singular language merely reflects the general procedure of calculating penalties for each violation individually, whether or not the procedure is then repeated, or multiplied, for multiple violations. See id., note at end of page 52776. The general enforcement policies referred to in respondent's seventh affirmative defense (GM-21 and GM-22) do not address the issue of multiple penalties and therefore do not establish any inconsistency in EPA's position on the issue at hand.

Respondent alleges that EPA, in the 1987 ERP, has violated section 553 of the Administrative Procedure Act (APA) by engaging in substantive rulemaking, allowing multiple penalty assessments for inventory update reporting violations without complying with

the notice and comment requirements. However, as concluded above, the policy of assessment of separate penalties for each chemical not reported under the inventory update regulations is consistent with the applicable statutory and regulatory language. That policy as contained in the 1987 ERP does not create or change the rights or obligations of respondent and is not a "binding norm,"[5] but merely provides guidance to EPA officials in assessing penalties. Formal rulemaking is not necessary for establishing penalty policies. The 1987 ERP is a general statement of policy,[6] and as such is exempt from the notice and comment requirements of the APA. 5 U.S.C. § 553 (b).

It is concluded that EPA has not violated the APA, and it is further decided that EPA has acted within the meaning and spirit of the statutory and regulatory language, and has not abused its enforcement discretion, in charging respondent with multiple violations, that is, one per chemical, and assessing separate penalties for each such violation. Accordingly, complainant is entitled to judgment in its favor on the question of law presented by the cross-motions for accelerated decision. However, the issue of the amount of penalty to be assessed remains controverted.

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[5] Pacific Gas & Electric v. Federal Power Comm'n, 506 F.2d 33, 37-39 (D.C. Cir. 1974) (distinguishing general statements of policy from substantive rules).

[6] General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947); Pacific Gas & Electric Co., supra, n.17.

Therefore, the proceeding shall continue in furtherance of resolving that issue.

III. Respondent's motion to strike or to permit discovery

Respondent moved to strike two expired inventory update enforcement policies, dated July 30, 1984, and May 28, 1986, on grounds that complainant failed to include them in the prehearing exchange and thus waived its opportunity to rely on them. Respondent's position is that EPA cannot rely on those documents without disclosing all of its internal documents concerning inventory update reporting, and that the two documents are unreliable and without proper foundation for admissibility, as they are merely computer-generated drafts. In the interim, complainant, on October 17, 1991, supplied copies of the two original policy documents, rendering moot the latter ground.

Under the Rules of Practice (Rules) governing this proceeding, 40 C.F.R. Part 22, all evidence shall be admitted "which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value." 40 C.F.R. § 22.22(a). It is not necessary to determine whether the copies of the two penalty policies meet that test for purposes of this decision, because they are not binding and were not relied upon here. While they appear to provide additional support for complainant's position, evidencing the consistency of EPA's policy that inventory update violations may be assessed penalties on a per chemical basis, it is not necessary here to find such historical consistency in EPA's

policies. It should be pointed out that EPA has not waived an opportunity to present them as evidence, especially in light of the fact that complainant expressly reserved the right to supplement the list of documents in its prehearing exchange. (Complainant's Prehearing Exchange, March 13, 1991, at 11) The motion to strike is not viewed favorably.

On the question of discovery of all of EPA's internal policies and guidelines regarding inventory update reporting, such documents are not binding, do not confer substantive or procedural rights on the public, and are for sole use of EPA personnel. It is within the EPA'S discretion to administer the guidance in such documents as it deems necessary. Wyoming Refining Company, supra, at 7. Other relevant policies, guidelines and case precedents that are available to the public, such as TSCA penalty policies and administrative enforcement decisions are "otherwise obtainable" and thus discovery of them will not be permitted under the Rules, 40 C.F.R. § 22.19(f)(1).[7] Discovery of EPA's internal policies, guidelines, and pre-decisional enforcement practices would only be useful as comparisons of how EPA has exercised its discretion. To be of significant probative value in this case, that is, to demonstrate that EPA has abused its discretion or violated due process rights, respondent must present facts which, if not actual

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[7] Discovery beyond that in the prehearing exchange, denominated "[o]ther discovery," "shall be permitted only upon determination by the Presiding Officer: (i) That such discovery will not in any way unreasonably delay the proceeding; (ii) That such information to be obtained is not otherwise obtainable; and (iii) That such information has significant probative value."

proof of bad faith, arbitrariness or unreasonableness on the part of EPA, must at least demonstrate a possible abuse of discretion in its treatment of respondent. In re Bass Plating Co., Docket No. 82-1024, (Order appended to Initial Decision, April 13, 1983, at 19-20). This respondent has not done.

Even if EPA had in the past interpreted TSCA inconsistently with EPA's present penalty policy regarding multiple penalties, "[a]dministrative agencies are not bound by their own prior construction of a statute. They are free to reject prior constructions which have not been endorsed by the courts." Crounse Corp. v. ICC, 781 F.2d 1176, 1186 (6th Cir. 1986). Respondent's submission of Rollins Environmental Services (NJ), Inc. v. U.S. EPA, supra, Response, Exhibit E, to support its position that prior agency interpretations are probative is not applicable to this case. In Rollins, the issue was ambiguity of a regulation in terms of the conduct required. Rollins, Civ. No. 90-1508 at 4-5. There is no such question here.

The 1987 ERP is applicable to this case and is clear in its policy on per chemical penalty assessments for inventory update reporting violations, and that policy is consistent with relevant statutory and regulatory authority. Any prior internal agency statements, practices, guidelines or policies are not significantly probative and thus not discoverable. 40 C.F.R. § 22.19(f)(1). Respondent's motion in the alternative for discovery is not well-taken.

IT IS ORDERED that:

1. Respondent's motion to strike or in the alternative to permit discovery be **DENIED**.

2. Complainant's motion for accelerated decision on the issue of liability be **GRANTED**.

3. Respondent's cross-motion for accelerated decision be **DENIED**.

4. The parties continue good faith efforts toward settlement.

5. The complainant submit a status report thirty days from the date of service of this order, and each month thereafter, until otherwise directed by the ALJ.

Frank W. Vanderheyden
Administrative Law Judge

Dated: June 9, 1992

IN THE MATTER OF C. P. HALL COMPANY, Respondent,
Docket No. TSCA V-C-61-89

Certificate of Service

I hereby certify that the foregoing Order, dated 6/9/92, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Beverely Shorty
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Copy by Regular Mail to:

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Marion I. Walzel
Secretary

Dated: June 11, 1992