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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
3M COMPANY (MINNESOTA MINING AND MANUFACTURING),	)	Docket No. TSCA-88-H-06
	)	
Respondent	)	

Notice of Treatment of Confidential Business Information

Portions of the attached INITIAL DECISION require use of information which Respondent submitted to the United States Environmental Protection Agency (EPA) as Confidential Business Information (CBI). Information constituting or based on CBI has been deleted as indicated by the following: (CBI deleted). The complaint, the second amended answer, certain exhibits and other documents filed in this case contain the deleted CBI material and are filed with the Headquarters Hearing Clerk. The deleted information will itself be treated as confidential unless the Respondent waives confidentiality thereto or EPA releases the information in accordance with 40 C.F.R. Part 2.

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Respondent	)	

TSCA: Section 16(a)(2)(B): Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), a civil penalty in the amount of $111,780.00 is assessed for the violations of Sections 5 and 13, 15 U.S.C. § 2604 and 2612 previously found herein.

APPEARANCES:

For Complainant:

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BEFORE: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision

On August 7, 1989, an Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency (EPA, Complainant or the Agency), found that the 3M Company (3M, Respondent or the Company) had violated Section 5(a)(1), Section 13(b) (and rules promulgated thereunder), and Section 15(1)(B) and Section 15(3)(B) of the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. (TSCA or the Act), as variously alleged in Counts I, II, III and IV of the amended complaint.

Counts I and III of the complaint alleged that 3M had violated Sections 5(a)(1)(B), 15(1)(B) and 15(3)(B) of TSCA by illegally importing the new chemical substances, identified as Chemical A and Chemical B, without having submitted Premanufacture Notices (PMNs) to EPA at least 90 days prior to commencing manufacture (importation). Counts II and IV alleged that Respondent violated Sections 5(a)(1), 13(b) and 15(3)(B), and rules promulgated thereunder, by falsely certifying to Customs officials that the new substances were imported in compliance with TSCA. The proposed total civil penalty for the violations was set by EPA at $1,394,500.00. Subsequently, in an amended complaint, all alleged violations of Section 5(a)(1) of TSCA for the pre-August 30, 1980, importation of new chemical substances as part of mixtures were

withdrawn and the total proposed civil penalty was reduced to $1,306,500.00.

II. Background - Hearing

On February 13, 14 and 15, 1990, a hearing, which had been requested by 3M, was held in Washington, D.C., for the purpose of deciding the sole remaining issue of the amount, if any, of civil penalties, which appropriately should be assessed for the violations found. Thereafter, proposed findings of fact, conclusions of law and briefs in support thereof, together with various replies and responses and other documents were filed by the parties, the last such document having been filed on July 3, 1990.

III. Obligations of the Presiding Officer in Assessing a Penalty

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), provides: "In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

40 C.F.R. § 22.27(b) provides, in pertinent part:

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any

> civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Judicial Officer has held that "the requirement to give the guidelines consideration is 'entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate. [Citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)].'"[1]

While I must consider the civil penalty guidelines in determining the amount of the recommended civil penalty pursuant to Section 16(a)(2)(B) of TSCA and must set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant, I am not bound to assess the same penalty as that proposed by the Complainant.[2] I may assess a different penalty if, upon consideration I conclude, for example, the guidelines have been improperly interpreted and applied by the Complainant; or circumstances in the case warrant recognition, or, where they may have been recognized by the Complainant, warrant a

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[1] Bell and Howell Company, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 10, n. 6, quoting the Presiding Officer's Initial Decision.

[2] In re: Electric Service Company, TSCA Docket No. V-C-024, Final Decision No. 82-2, at 20, n. 23.

weight, not accorded them by EPA;[3] or the penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

IV. The TSCA Penalty Guidelines and Enforcement Response Policies

The EPA has issued Guidelines for the Assessment of Civil Penalties Under Section 16 of the TSCA.[4] The general TSCA Civil Penalty System contained therein sets forth a general penalty assessment policy which is designed to establish standardized definitions and applications of the statutory factors that Section 16(a)(2)(B) of TSCA requires the Administrator to consider in

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[3]Thus, for example, the Judicial Officer has held that: "There is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix . . . . The guidelines were never intended to establish an inflexible policy which would force the presiding officer to elect between one amount or the other . . . . Instead, it is better to view the amounts shown in the matrix as points along a continuum, representing convenient benchmarks for purposes of proposing and, in some instances, assessing penalties. Accordingly, <u>if warranted by the circumstances</u>, other points along the continuum may be selected in assessing a penalty. Although the guidelines do not purport to give specific guidance on how this should be done, <u>it seems evident that, at a minimum, the additional evidence adduced at a hearing can be used as a basis for justifying deviations</u> (up or down) from the amounts shown in the matrix. In other words, by viewing the amounts shown in the matrix as benchmarks along a continuum, a range of penalties . . . becomes available to account for, among other things, some of the less tangible factors which the presiding officer is in a unique position to evaluate. Moreover, the existence of this range constitutes tacit acknowledgment of the fact that, no matter how desirable, mathematical precision in setting penalties is impossible." <u>Bell and Howell Co</u>., (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 18-19 (emphasis added).

[4]45 Fed. Reg. 59770 (September 10, 1980).

assessing a penalty.[5] The TSCA Civil Penalty System provides the general framework within which specific penalty guidelines under the Act are developed. Under the System, penalties are determined in two stages.

First, a "gravity-based penalty" (GBP) is calculated based upon the "nature" of the violation, the "extent" of environmental harm that could result from a given violation, and the "circumstances" of the violation. These factors are incorporated in a matrix from which the amount of the GBP is calculated.

Second, after the GBP figure has been determined, it is adjusted upward or downward in consideration of the remaining statutory factors: culpability; history of such violations; ability to pay; ability to continue in business; and such other matters as justice may require.

The specific penalty assessment guidance contained in the TSCA Section 5 Enforcement Response Policy and the TSCA Sections 8, 12 and 13 Enforcement Response Policy incorporate the approach used in the general guidelines in the TSCA Civil Penalty System.

A. TSCA Section 5 Enforcement Response Policy

The TSCA Section 5 Enforcement Response Policy (Section 5 ERP) sets forth the agency policy for the assessment of penalties for violations of Section 5 of TSCA and regulations promulgated thereunder.

To calculate the GBP the first step is to determine the nature of the violation. The Section 5 ERP establishes three categories

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[5] Id.

of violations under nature: (1) chemical control violations; (2) control-associated data-gathering violations; and (3) hazard assessment violations. Once the nature of the violation has been determined, the second step is to determine the circumstances of the violation. The Section 5 ERP establishes six circumstance levels designed to measure the probability of harm, i.e., potential exposure to an unregulated chemical substance or harm to the integrity of the Inventory. The third step in determining the GBP is to determine the extent of the violation. A matrix which uses the amount of the substance involved and the previously determined nature of the violation produces an extent classification of major, significant or minor.

The GBP which is a function of the nature, circumstances and extent of each violation is determined by using a matrix which measures the six circumstance levels against the three extent levels to produce the initial GBP amount.

Where per-day assessments are provided for in the circumstances section of the Section 5 ERP, the GBP is calculated for the first occurrence of a violative activity and assessed for each day of subsequent occurrence. Thus, each day of importation of a new chemical substance in violation of the notification requirements of TSCA Section 5 contributes a new violation under the Section 5 ERP.

The GBP is intended to reflect the seriousness of the violation's threat to health and the environment. The Act also requires the Administrator to consider certain additional factors

in assessing the violator's conduct: culpability, history of such violations, ability to pay, and ability to continue in business. In addition, the Act authorizes the Administrator to exercise a degree of discretion in considering "such other matters as justice may require." Under this last factor the Section 5 ERP provides certain specific matters to be considered: voluntary disclosure, attitude and economic benefit. After consideration of these additional factors, and any appropriate adjustment of the GBP, a final penalty is established.

B. TSCA Sections 8, 12 and 13 Enforcement Response Policy

The TSCA Sections 8, 12 and 13 Enforcement Response Policy (Section 13 ERP) sets forth the agency policy for the assessment of penalties for reporting and recordkeeping violations of TSCA, including, inter alia, Section 13 of TSCA and regulations promulgated thereunder.

All recordkeeping/reporting violations of TSCA are classified as "hazard assessment" in nature according to the Section 13 ERP. Hence, the first step in determining the GBP is actually to determine the circumstances of the violation. Like the Section 5 ERP, the Section 13 ERP establishes six circumstance levels which are designed to reflect the probability of harm likely to result from the particular violation. The circumstances describe the violation, e.g., "TSCA § 13 Violation (first or otherwise) where a positive/negative/no certification was submitted but the chemical does not comply with other TSCA provisions." The second step in selecting the GBP is to ascertain the extent of the violation. The

extent is intended to measure the degree of potential harm caused by the violation where harm is defined as the inability of the Agency to carry out its risk assessment responsibilities under TSCA. Like the Section 5 ERP, the Section 13 ERP establishes three levels - major, significant and minor. Unlike the Section 5 ERP however, no amounts are involved in determining the extent level. Instead, the extent is determined by the violation, e.g., "Violations of TSCA § 13" are all classified as significant.

The positions of the circumstances and the extent of the violation on their respective axes of the GBP matrix sets the penalty to be assessed for the violation.

Where per-day assessments are provided for under the circumstances section of the Section 13 ERP, the penalty is calculated for the first day of violation and per-day penalties are assessed for each subsequent day of violation based on a mathematical formula. In addition, the Section 13 ERP provides for multiple penalties if there is more than one violation of the same rule, e.g., "TSCA § 13 Per Shipment Per Port." For those violations designated as per-day in the circumstances matrix, where the penalty is calculated under the per-day formula, the cap on the number of days the penalty is to be assessed must also be taken into account.

Once the GBP is calculated, it must be adjusted in accordance with the TSCA Section 16 factors discussed in the TSCA Civil Penalty System and further amplified in the Section 13 ERP which include: culpability, history of such violations, ability to pay,

ability to continue in business and such other matters as justice may require. The Section 13 ERP provides for certain specific matters to be considered under the factor of "such other matters as justice may require." These are voluntary disclosure, economic benefit, and attitude. The final penalty is determined by making any adjustment to the GBP which may be appropriate after consideration of these additional factors.

C. Background - Penalty Calculations of EPA

The Complainant's proposed penalty assessment was calculated as follows:[6]

COUNT I - Failure to notify; Section 5 PMN
Chemical - A

Nature - Hazard Assessment
Extent - Minor since 0 to 750 lbs. produced (imported) per day
Circumstance - Level 4 (Per day)
Failure to submit a PMN for a chemical substance which would meet all requirements for a polymer exemption under 40 CFR 723.250, except that the company did not file for an exemption and the substance was further processed for commercial use, distributed to consumers, or released uncontrolled into the environment.

Penalty - $1,000 per batch manufactured (imported) per day
3 batches imported x $1,000 = ... $ 3,000

Nature - Hazard Assessment
Extent - Significant since <750 lbs to 7,500 lbs. produced (imported) per day
Circumstance - Level 4 (Per day)
Failure to submit a PMN for a chemical substance which would meet all requirements for a polymer exemption under 40 CFR 723.250, except that the company did not file for an exemption and the substance was further processed for commercial use, distributed to consumers, or released uncontrolled into the environment.

Penalty - $6,000 per batch manufactured (imported) per day
10 batches imported x $6,000 = ... $ 60,000

Nature - Hazard Assessment
Extent - Major since <7,500 lbs. produced (imported) per day
Circumstance - Level 4 (Per day)
Failure to submit a PMN for a chemical substance which would meet all requirements for a polymer exemption under 40 CFR 723.250, except that the company did not file for an exemption and the substance was further processed for commercial use, distributed to consumers, or released uncontrolled into the environment.

Penalty - $10,000 per batch manufactured (imported) per day
137 batches imported x $10,000 = ... $ 1,370,000

TOTAL PENALTY ASSESSED FOR COUNT I ..... $ 1,433,000

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[6]Complainant's Exhibit 11.

COUNT II - Falsification of Certified Statements: Section 13 Imports

Chemical A - Total days certified statements were falsified - 72 days

Penalty: $10,000 per day imported since January 1, 1984
72 days x $10,000 ..... $720,000

TOTAL PENALTY ASSESSED FOR COUNT II $720,000

COUNT III - Failure to Notify: Section 5 PMN

Chemical - B

Nature - Hazard Assessment
Extent - Significant since <7,500 lbs. produced (imported) per day
Circumstance - Level 4 (Per day)
Failure to submit a PMN for a chemical substance which would meet all requirements for a polymer exemption under 40 CFR 723.250, except that the company did not file for an exemption and the substance was further processed for commercial use, distributed to consumers, or released uncontrolled into the environment.

Penalty - $10,000 per batch manufactured (imported) per day
26 batches imported x $10,000 = ... $260,000

TOTAL PENALTY ASSESSED FOR COUNT III $260,000

COUNT IV - Falsification of Certified Statements: Section 13 Imports

Chemical B - Total days certified statements were falsified - 20 days

Penalty: $10,000 per day imported since January 1, 1984
20 days x $10,000 ..... $200,000

TOTAL PENALTY ASSESSED FOR COUNT IV $200,000

TOTALS

TOTAL PENALTY ASSESSED FOR COUNT I $1,433,000
- Failure to Notify: Section 5 PMN

TOTAL PENALTY ASSESSED FOR COUNT II ..... $ 720,000
- Falsification of Certified Statements:
  Section 13 Imports

TOTAL PENALTY ASSESSED FOR COUNT III ..... $ 260,000
- Failure to Notify: Section 5 PMN

TOTAL PENALTY ASSESSED FOR COUNT IV ..... $ 200,000
- Falsification of Certified Statements:
  Section 13 Imports

TOTAL GBP AMOUNT $2,613,000

Section 5 Penalty - $1,693,000
Section 13 Penalty - 920,000
TOTAL $2,613,000

Adjustment Factor Applied

Immediate Voluntary Disclosure - minus 50% $1,306,500

V. Respondent's Contentions

3M maintains that, in the particular facts and circumstances of this case, the penalty amounts proposed by EPA are not consistent with Section 16(a)(2)(B) of TSCA and should be substantially reduced. 3M contends that the only factors considered in EPA's calculations were the amounts of the substances imported, the number of days on which they were imported and whether or not the chemicals were polymers (and further processed). Thus, the penalty amounts were driven almost totally by the frequency and amounts of the imports. Although EPA uses certain of the statutory terms--"nature," "circumstance level," and "extent"--as labels in the penalty matrix, 3M argues that, at least in the context of these violations, the use of that matrix does not carry out the statutory intent.

As for the nature and circumstances of the Chemical A violations 3M asserts the following:

EPA's penalty calculations fail to recognize that the essential "nature" of the Chemical A violations was a one-time, inadvertent failure to report for the TSCA Inventory a chemical that had been imported and used for many years--and not a failure by 3M to notify EPA prior to manufacture or importation of a new commercial chemical. Chemical A was missed--despite a well-organized system for Inventory reporting; despite the expenditure by 3M of substantial resources to ensure complete and accurate Inventory reporting; despite having every incentive to report fully for the Inventory, and absolutely no incentive not to report; and

despite frequent admonitions from top management emphasizing the importance of reporting for the Inventory every eligible chemical.

EPA's penalty calculations do not adequately take account of the "circumstances" of the violations which were that 3M made substantial good faith efforts to report every chemical eligible for the Inventory; that 3M did not carelessly (let alone intentionally) fail to report Chemical A; that the Chemical A violations resulted from an inadvertent human mistake in the context of an otherwise well-functioning system; that 3M currently has in place a system for ensuring that only TSCA-sanctioned chemicals are used by 3M; and that this system is thorough, well-thought-out, and detailed.

As for the nature and circumstances of the Chemical B violations, 3M asserts the following:

EPA's penalty calculations fail to recognize the essential "nature" of the Chemical B violations--violations which arose solely because the composition of a proprietary mixture which was being purchased by 3M was changed without 3M's knowledge. 3M in good faith believed that the composition of Chemical B was identical to the previously purchased chemical for which it had a TSCA certification. Chemical B was used for the same purpose in the same manner on the same products as the certified chemical had been used; and Chemical B was identified by the same vendor identification number as the certified chemical previously used by 3M for the same purpose in the same manner on the same products.

3M claims that when EPA determined the nature of the Chemical A and Chemical B violations their nature simply was categorized as "hazard assessment" because under the EPA penalty matrix, any PMN reporting violation is categorized as a "hazard assessment violation," irrespective of the nature or uses of the particular chemical involved, and without otherwise considering the nature of that specific violation. The PMN violations were further categorized as "Circumstance Level 4" violations, simply because the chemicals qualified for a PMN polymer exemption and were further processed by 3M.

As for the nature and circumstances of the Section 13 import certification violations, 3M states that EPA calculated the GBP amounts simply by multiplying the number of days that each chemical was imported times $10,000 which dollar amount is based upon the fact that each import also constituted a PMN violation. Thus, the "circumstances" of the Section 13 violations were classified as "Level 3" because there were underlying PMN violations. 3M insists that EPA considered no other "circumstances" at all including whether 3M had in place a system to try to prevent such violations.

Turning to the criterion of "extent" of the violations, 3M contends that the extent, when taken to mean the range or scope of the violations, was very limited. 3M maintains that the Chemical A violation does not reflect a defect or breakdown in 3M's existing PMN compliance system. 3M states that EPA did not identify any fault either in 3M's system for reporting for the Inventory, or in the Company's ongoing PMN compliance system. 3M views EPA's

position as one that a system must be "mistake-proof" and "work a hundred percent," i.e., be fail-safe. However, 3M emphasizes that TSCA itself recognizes that penalties should not be premised on an expectation of perfection, because the Act provides that the penalty amounts must be a function of the "extent" (and circumstances, nature and gravity) of a violation, not merely the fact of a violation.

As for the "extent" of the Section 13 import violations, 3M insists that there was no breakdown in its import certification compliance program. A system for ensuring compliance with the Section 13 import certification requirements was in place. Brokers had been hired and instructed in the requirements of TSCA. Believing that Chemical A and Chemical B were listed on the Inventory, the brokers were instructed to file positive certifications when these chemicals were imported. 3M claims, that it was inevitable that the very same errors that resulted in 3M not reporting Chemical A for the Inventory and mistakenly importing Chemical B, also caused 3M to be in violation of the import certification requirements every time those chemicals were imported. Thus, 3M concludes that the import certification violations were solely the result of the same one-time inadvertent mistakes that led to the PMN violations, and that these violations did not result from a failure nor a refusal to file import certifications.

Finally, as to the gravity of the violations 3M maintains that the penalties proposed by EPA do not reflect a consideration of

their actual gravity if the term gravity is taken to mean seriousness. 3M claims that on any scale of "seriousness," the Chemical A violations would rank at the lowest end of the scale. Chemical A was eligible for the TSCA Inventory, and if Chemical A had been reported during Inventory reporting, 3M automatically would have been permitted to continue to import and use Chemical A. When the absence of Chemical A and Chemical B from Inventory was discovered and a polymer exemption PMN was filed for each chemical, EPA approved their continued importation and use without delay.

3M further emphasizes that inherent in EPA's clearance of Chemical A and Chemical B for continuing importation and use, was the Agency's conclusion that the continued importation, processing, distribution and use of the chemicals did not present any unreasonable risks of injury to health or the environment and that EPA took no regulatory actions with respect to either Chemical A or Chemical B. 3M also contends that even at the time of the hearing in this matter EPA's expert on chemistry and toxicology had no concerns about the safety of the chemicals based upon additional information which may have been developed since submission of the polymer exemptions for the chemicals in 1986.

As for factors pertaining to the violator, 3M states that EPA gave no consideration to 3M's history of prior such violations or of 3M's degree of culpability. Although EPA applied a 50 percent reduction factor for immediate voluntary disclosure, it did not apply the 15 percent reduction for 3M having taken all steps reasonably expected nor did it apply the additional 15 percent for

"good attitude." Thus, full consideration was not given to such other matters as justice may require.

3M emphasizes that upon discovering the Chemical A and Chemical B violations, 3M voluntarily reported these violations to EPA; 3M made such reports promptly; 3M did not dispute its liability for the violations; immediately upon discovering the violations, 3M shut down operations and ceased all importing and use of the chemicals; 3M did not resume either use of existing stocks of the chemicals, or imports of the chemicals, until authorized by EPA to do so; and 3M cooperated with EPA and provided all information requested by the Agency.

3M claims that the evidence unequivocally demonstrates that 3M has an exemplary attitude toward environmental responsibility in general, and toward compliance with the TSCA in particular. 3M also insists that it did not obtain any economic or other benefits from the Chemical A or Chemical B violations. Quite to the contrary, it maintains that it had every incentive to report for the TSCA Inventory, and to comply with the PMN and import certification programs. The failure to do so in these instances cost 3M a great deal by virtue of the production shut-downs which followed 3M's discovery that Chemical A and Chemical B were not on the TSCA Inventory, and the expenses incurred by 3M in self-reporting to EPA and challenging the amount of the penalties proposed by EPA.

Finally, 3M asserts that the violations did not in any way affect EPA's administration of the Section 5 PMN program, the

government's review of the Section 13 import certification or implementation of any other TSCA program such as EPA's use of the Inventory.

3M therefore urges that the appropriate total penalty should be $21,000, calculated as follows. The penalty for the Chemical A PMN violations should be a single $10,000 amount because those violations resulted from a one-time, isolated mistake. The penalty for the Chemical B PMN violations should be $11,000. The $11,000 penalty would be derived by assessing $5,000 for the initial, first-day import of Chemical B; $500 per day for each of the next 10 imports and $100 per day for the subsequent 10 imports. No further penalties would be assessed, because 3M had instituted an effective Section 13 compliance program and because 3M committed no Section 13 import certification violations distinct from those which flowed through from the underlying PMN violations. 3M urges that no penalties should be assessed for the Section 13 violations.

VI. Complainant's Contentions

EPA contends that the penalty which it has proposed is appropriate in light of the facts of the case and was determined pursuant to, and conforms with, Section 16 of TSCA and the TSCA Guidelines and ERP's. EPA argues that each of 3M's numerous TSCA Section 5 and Section 13 violations are separate violations for which a penalty shall be assessed under Section 16(a)(2)(A). Moreover, EPA rejects 3M's argument that by separately penalizing 3M's Section 13 violations after penalizing the Section 5 violations "imposes a type of double jeopardy on 3M." EPA points

out that its TSCA Guidelines and ERP's distinguish between imported and domestic chemicals because the Act itself does so and argues that the failure to assess suitable Section-specific penalties for 3M's TSCA Section 13 violations would have the effect of editing this provision out of the Act.

In determining the gravity of the violations, EPA asserts that the critical inquiry is not the ultimate risks actually presented by the chemicals, but rather, what TSCA requires prior to importation, in the absence of actual knowledge of such risks. EPA maintains that the pre-market review of all new chemicals and the exclusion of all violative imports, is essential if TSCA's goal of preventing unreasonable risks of injury to humans and the environment is to be achieved. Even polymers eligible for "polymer exemptions" must, without exception, receive case-specific reviews. Therefore, EPA insists that 3M's argument that the gravity of the violations is minimal because, several years after 3M introduced Chemical A and Chemical B into commerce, EPA reviewed the chemicals and granted them "polymer exemptions," is without merit and should be rejected. EPA emphasizes that the gravity of 3M's violations is a function of their potential for serious harm at the time when the violations were committed.

The true gravity of the violations in this case, EPA insists, is exacerbated in that, when 3M failed to provide EPA with any notice that Chemical A and Chemical B had been placed into commerce, 3M not only prevented EPA from reviewing the chemicals themselves, as "new chemicals," prior to their introduction into

commerce, but also rendered it impossible for EPA to review and/or regulate the chemicals, in any TSCA context, under any "new" or "existing chemicals" authority, at any point in time during the pendency of the violations. Furthermore, the failure to provide any notice to EPA rendered the TSCA Inventory inaccurate thereby jeopardizing the decisionmaking of all EPA and non-EPA personnel who consult the Inventory. EPA also maintains that the failure of 3M to submit the required notices prevented EPA from analyzing and assessing the detailed information required to have been included in the notices and from entering that data into its TSCA database. "As a consequence" EPA alleges, "the review of future new chemicals submissions, the determination of the best appropriate chemical analogues for SAR analysis, and the efficient and complete review of new and existing chemicals, generally, were all placed at risk . . . ."

As for the "extent" of the violations, EPA pleads that it is appropriate to relate "extent" to the actual import volume of Chemical A and Chemical B, per separate day of importation because "exposure" and ultimately, "risk," are directly proportional to a chemical's production volume.

EPA claims that the deterrent effect of the penalty to be imposed must be considered and insists that the penalty assessed against 3M must be sufficient to deter 3M and other persons from similar present and future TSCA violations.

As for possible adjustments to the GBP, EPA contends that no additional downward adjustments are warranted because of the

seriousness of the violation and the projected impact of the proposed penalty on 3M. EPA maintains "3M does not deserve these adjustments in this case" because no downward adjustment for a "good attitude" is warranted for developing a system for compliance where the system fails to identify long ongoing violations or for limited subsequent remedial measures after discovering the violations.

EPA contends that 3M's penalty should be increased to recover the economic benefits from noncompliance which 3M received in this case if the GBP component of the proposed penalty is reduced in any respect. Complainant also argues that the adequacy of 3M's non-TSCA environmental programs bear no relationship to the issue of the appropriate penalty in this case and should not be considered in assessing the penalty.

VII. Findings of Fact

A. General

In addition to the findings of fact previously made in my Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision of August 7, 1989, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined

upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. 3M is a large, diverse corporation with approximately 80,000 employees, 50,000 products and uses over 100 technologies to make these products. 3M's 1989 sales were about $12 billion. Transcript (Tr.) 570.

2. In 1988, 3M had net sales of $10.58 billion, income before taxes of $1.88 billion, and a net income (profit) of $1.154 billion. Tr. 376-77; Complainant's Exhibit (Comp. Exh.) 25.

B. 3M's Efforts to Comply with TSCA

3. Shortly after TSCA became law, 3M established a special committee of six or seven high-level technical and management personnel to monitor EPA's proposed regulations implementing TSCA and to establish procedures to carry out the requirements of TSCA and the implementing regulations, including Inventory reporting. Tr. 633-34, 643-45; Respondent's Exhibits (Resp. Exhs.) 41, 44.

4. The initial development of 3M's procedures to implement the PMN requirements of TSCA is reflected in 3M's 1977 Guidelines for Planned Product Responsibility which sets forth 3M's five-step process for introducing new products. Although TSCA had just been passed, and was not yet implemented, 3M's Guidelines already incorporated certain general TSCA requirements into 3M's new product introduction procedures. For example, as part of its "Product Safety" checklist, the Guidelines included a requirement

for verification that "chemicals used in the product are in conformance with the requirements of Section 5 and/or Section 8 of the Toxic Substances Control Act, 1976." Regarding "Product's Environmental Impact," the 1977 Guidelines specified: "Does the product contain "new" chemical substances? . . . If "Yes," are we prepared to file 90-day pre-manufacturing notice with EPA in conformance with the 1976 Toxic Substances Control Act?" Tr. 575-78, 793; Resp. Exhs. 64, 65.

5. As EPA revised and modified the proposed regulations to implement TSCA, 3M's special committee adjusted its proposed procedures to take account of EPA's changes. Tr. 633-34, 642, 644-45, 647-51; Resp. Exh. 41.

6. 3M's special committee set up a corporate-wide network of TSCA representatives from all of 3M's divisions. The TSCA representatives were experienced people in the 3M organization who knew the Company's product lines and processes well. The approximately 53 TSCA representatives from the Company's 45 divisions were charged with making sure that all of the information necessary for TSCA Inventory reporting was collected by 3M. Tr. 634-35, 644, 780-81, 800.

7. To prepare for and coordinate Inventory reporting 3M hired Mrs. Nancy Kippenhan, who had had experience with several companies working in the areas of organic chemical synthesis and information management. 3M assembled a team of people from various 3M departments, including Corporate Technical Planning and Coordination, Office of Product Performance, Purchasing,

Information Systems and Data Processing to assist in the task. Tr. 631-34, 643; Resp. Exhs. 41, 43, 51.

8. Periodic meetings of 3M TSCA representatives were held. 3M's staff experts who were monitoring the TSCA regulations attended and participated in the discussions. At these meetings, Mrs. Kippenhan gave detailed presentations on many aspects of Inventory reporting. Tr. 652-53, 661-63; Resp. Exh. 52.

9. Periodic meetings of high level 3M management also were held to discuss TSCA and Inventory reporting. For example, 3M's Technical Council, which includes the research directors from all of the 3M laboratories, met several times to discuss the subject. Tr. 781.

10. 3M emphasized to personnel at all levels in the Company how important it was to report every single chemical that was eligible to be reported for the Inventory. Numerous memoranda emphasized to 3M employees that every eligible chemical should be reported, because only chemicals listed on the final TSCA Inventory could continue to be used by 3M without going through the TSCA PMN procedures. 3M repeatedly emphasized to employees that it was critical to its business to avoid any unnecessary interruption caused by failure to report an eligible chemical for the Inventory. Tr. 579-80, 635, 651-58, 663-65, 668-69; Resp. Exhs. 46, 49, 50, 51, 53.

11. 3M tried to report only <u>eligible</u> chemicals. For example, 3M carefully screened chemicals to be sure (1) that they had been used during the eligibility period set by EPA, and (2) that they

had not been used solely for research and development (R&D) purposes. Tr. 635-36, 650, 656-67.

12. Detailed instructions were provided to 3M employees who were assisting in Inventory reporting. Special forms were developed by 3M and distributed to 3M employees, to collect the information necessary for Inventory reporting. Resp. Exhs. 43, 49.

13. 3M reported during both phases of Inventory reporting. Compiling a complete list of chemicals manufactured by 3M, and applying the EPA eligibility criteria to determine which of the chemicals could be reported for Manufacturer reporting, 3M reported approximately 950 chemicals. Tr. 637.

14. To report for the Processor phase of the Inventory, 3M reviewed 30,000-34,000 raw materials. The information available to 3M for many of the raw materials that it purchased for processing was not sufficient for the requirements of TSCA Inventory reporting. The purchasing department had a computer file of the raw materials that were purchased by 3M. 3M needed information on the precise chemical compositions of these raw materials and 3M collected the in-house information which was available on the chemical identity of the components of the raw materials. 3M personnel also researched the Chemical Abstract Service (CAS) registry number for each chemical component identified. Many of the raw materials purchased by 3M were mixtures, whose formulations were considered to be proprietary by 3M's vendors. In order to obtain the necessary information from its suppliers, 3M followed the procedures recommended by EPA in its

manual, Reporting for the Chemical Substance Inventory: Instructions for Reporting for the Revised Inventory. In the case of proprietary mixtures whose compositions were not known to the processor, the EPA manual recommended that the processor "contact [its] supplier and ask him for written certification that all component substances have been reported for the Inventory." Tr. 637-40, 679-80; Resp. Exh. 70.

15. 3M wrote to thousands of suppliers to obtain the necessary information as to the chemical composition of the raw materials which 3M purchased or, in lieu of the chemical composition, certification that the supplier had put the chemical(s) on the Inventory. Tr. 639-40.

16. To implement the Inventory reporting requirement, 3M set up a computerized data system. Initially 3M planned to create an on-line data base for raw materials utilizing a punch card system. Sometime in the summer or fall of 1977 3M developed a pilot system for an interactive data base utilizing more sophisticated computer technology and by February of 1978 had transferred the punch card system into the full data base. Tr. 646-47; Resp. Exh. 42.

17. 3M created, on a corporate basis, utilizing computer records from its inventory and accounting system, a list of the raw materials believed to be used for commercial purposes during the eligible reporting period. The operating units within the Company were asked to compare that list with any other chemical materials they were using which met the reporting criteria. The operating units were asked to provide both the internal 3M eleven-digit raw

material number and a description for each chemical material being used. Tr. 655-59; Resp. Exhs. 48, 49.

18. 3M realized that if 3M failed to report an eligible chemical for the Inventory, 3M would be required to submit a PMN thereby resulting in an interruption in its use or manufacture of the chemical and, hence, affecting on 3M's business operations. Tr. 635.

19. 3M distributed to its TSCA representative EPA-authored manuals, position papers, commentaries, and forms on Inventory reporting, to keep them fully informed. In addition, 3M developed and provided to its TSCA representatives various detailed step-by-step instructions and timetables on TSCA Inventory reporting. 3M also prepared and distributed a 3M General Guidance Manual, which included an explanation of what was reportable, the criteria for a reportable chemical substance, how reporting was to be handled within 3M, the responsibilities of the various organizational elements within 3M and what was to be done by each in order to complete Inventory reporting on a timely basis. Tr. 651-52, 655-56, 664-66; Resp. Exhs. 44, 46, 47, 48, 49.

20. Following its efforts to comply with the TSCA Inventory reporting requirements, 3M established a system designed to insure compliance with TSCA's requirements whenever a new chemical is manufactured or processed by the Company. 3M's phased introduction process for new products includes a series of steps, each of which requires consideration of regulatory requirements. Even before a product is made, when it may still just be an idea in the

inventor's mind, an evaluation of environmental and regulatory requirements is required. 3M's phased introduction process for new products recommends that a PMN be filed in phase 3, when the product is still in development. In describing phase 4, "scale up," 3M's procedure emphasizes:

> The chemical components of a new product must be reviewed for applicable Toxic Substances Control Act regulations. All components must be on the TSCA inventory; if not, a Premanufacture Notice (PMN) to EPA is required 90 days prior to commercial manufacture. Other reporting requirements may also apply.

The document describing these procedures is distributed widely throughout 3M, particularly to marketing and manufacturing people, to make it clear that there is control on new products which must be observed. Tr. 605-09; Resp. Exh. 67.

21. 3M has retained the corporate-wide network of TSCA representatives, originally put in place to accomplish Inventory reporting, and has expanded their responsibilities to include ensuring continued compliance with all regulatory requirements, including the requirements of TSCA. Tr. 734-35.

22. As part of its effort to ensure continued compliance with TSCA, 3M continues to use a unique eleven-digit code to identify each item used by 3M for a commercial purpose, including all of its raw materials. 3M has built procedures into this eleven-digit code system for ensuring continued TSCA compliance. In the case of raw materials, for example, before any 3M division can purchase a raw material for a commercial purpose, an eleven-digit code must be obtained by submitting a particular form to the 3M purchasing

department. Before the eleven-digit code can be assigned, the 3M TSCA representative within the division must approve the request. And before approving the request, the TSCA representative is required to confirm that the raw material appears on the TSCA Inventory. 3M's purchasing department will not purchase the chemical until they have a certification from the TSCA representative that the chemical complies with TSCA. Tr. 659-61, 667-68.

23. 3M's environmental program is administered by 3M's Department of Environmental Protection Engineering and Pollution Control. The predecessor to that Department was established in the late 1950's or early 1960's well before EPA was established. Today, the Department has approximately 85 persons on staff. It operates independent of other 3M departments and is responsible for the environmental activities of 3M throughout the world. The Department includes a regulatory affairs group, which monitors compliance with all regulations; an environmental services group, which services the needs of all 3M facilities; an environmental analytical laboratory; and an environmental assessment group. Dr. Bringer, who heads the Department, reports through an executive vice president directly to the CEO of 3M. Tr. 572, 580-81, 781-82; Resp. Exh. 66.

C. Chemical A

24. On July 28, 1986, 3M voluntarily reported to EPA by telephone that 3M was in violation of TSCA because 3M had been

importing Chemical A which was not on the TSCA Inventory. Tr. 64; Comp. Exh. 2.

25. Upon discovering that Chemical A was not on the Inventory, 3M's senior management was advised of the problem. 3M immediately ceased using Chemical A. This required that three plants and major product lines be shut down. Telexes and memos were sent, and telephone calls were made, to everyone at 3M involved with the manufacture of products using Chemical A, alerting them to cease all use of the chemical until further notice. And 3M promptly telephoned EPA in order to report the apparent violations. Tr. 106-07, 594-95, 683, 717-19, 727-29, 797-98. Resp. Exhs. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

26. On July 29, 1986, representatives of 3M met with representatives of EPA in Washington, D.C., to discuss the violations. As a result of the meeting, EPA requested additional information concerning Chemical A, all of which 3M provided. This information included the history of the importation of the chemical, its processing by 3M, the history of customer distribution and use and labels and advertising literature. Tr. 64-65; Comp. Exh. 2, 4.

27. 3M immediately submitted to EPA a limited PMN claiming a polymer exemption from the full PMN requirements. EPA's Office of Toxic Substances (OTS) assigned the identifying number of Y86-209 to this polymer exemption notice (PEN) for Chemical A. Tr. 66-67; Resp. Exhs. 17, 18.

28. 3M also requested EPA's permission to continue to process and use Chemical A during the pendency of the 21-day review period for the PEN. 3M stated that if it were unable to continue to process and use the existing stocks of Chemical A during the review period, it would incur severe economic hardships. (Tr. 67-68; Comp. Exh. 5.

29. Upon receipt of 3M's request to continue to process and use existing stocks of Chemical A, EPA initiated an expedited safety review of Chemical A. EPA completed the review in one day and determined that Chemical A would, in fact, qualify for a polymer exemption under Section 5(h)(4) of TSCA and "will not present an unreasonable risk of injury to health or the environment under the conditions of the exemption." Upon completing the expedited review, EPA informed 3M, by a telephone call on August 1, 1986, that 3M could resume the processing and use of Chemical A immediately which was confirmed by letter dated August 6, 1986. Tr. 68-71; Comp. Exhs. 6, 7.

30. Chemical A's primary use is as a resin for coating paper (both in-process liners, as well as reflective sheeting). 3M estimates that Chemical A was used at three different 3M sites, on [CBI deleted] days, [CBI deleted] days, and [CBI deleted] days, respectively. Comp. Exhs. 2, 4.

31. Chemical A was imported into the United States (U.S.) in drums, and in large barrels on pallets, on a semi-truck. When used for coating paper, the Chemical A drums were shipped to a 3M facility, where they were emptied into mixing kettles and mixed

with other materials. The mixture was then coated onto paper by pumping it through a coating trough. Rolls were dipped into the solution in the trough. The paper was dried in convection ovens, the solvent evaporated, and the Chemical cured. Tr. 587-88, 611-12; Comp. Exh. 2.

32. Chemical A is imported in solution in xylene, a solvent. The 3M label for the product (mixture) contained a warning statement, and protective equipment requirements, for xylene. Tr. 617-18; Resp. Exh. 2.

33. Chemical A's secondary use is as a component of transparent screen printing inks. 3M processed Chemical A into such inks on at least [CBI deleted] separate days. 3M then distributed the inks, which contained Chemical A in an uncured state, in commerce. 3M distributed the inks to at least [CBI deleted] customers, in [CBI deleted] gallons of ink, from 1981 through 1985. Comp. Exhs. 2, 4.

34. 3M discovered the violations involving Chemical A when preparing a list of chemicals exported by 3M to Australia. 3M prepared the list for purposes of reporting the chemicals to the government of Australia so that they could be placed on the Australian "inventory." 3M contacted the manufacturer of Chemical A to determine whether the manufacturer intended to report it for the Australian inventory. The manufacturer did not intend to so report Chemical A but provided 3M with the chemical identity so that 3M could report it. Tr. 682-83; Comp. Exh. 2.

35. 3M undertook an investigation to determine how Chemical A came to be left off the TSCA Inventory. 3M reported to EPA that 3M's investigation of the violations indicated that the Chemical A error resulted from 3M's misidentification of the supplier of Chemical A. At the time of Inventory reporting, 3M believed that it purchased Chemical A from GE USA and, hence, believed Chemical A to have been reported for the Inventory by GE. 3M later discovered that it was purchased from GE Canada. It was this error that apparently resulted in 3M's mistake in not reporting Chemical A for the initial TSCA Inventory or to report it thereafter as a "new chemical substance." Tr. 684, 723, 769-70; Comp. Exh. 2.

36. 3M believes that sometime prior to the close of the Inventory reporting period, probably in August, September or October, 3M requested from GE a written certification of Chemical A's Inventory status. Tr. 694.

37. It was standard procedure for the 3M purchasing department to maintain copies of letters sent to suppliers requesting certification of the status of chemicals compiled for possible Inventory reporting. 3M has been unable to locate such a letter, from 3M to GE, with respect to Chemical A. Tr. 698.

38. The 3M procedures also required the purchasing agents to telephone suppliers, such as GE, where no response to the 3M request for written certification of the status of a chemical had been received and to request a follow-up letter from the suppliers as to the information provided during the telephone conversation.

However, 3M has been unable to locate a copy of such a letter, from GE to 3M with respect to Chemical A. Tr. 698.

39. During the period August 1, 1980 through July 23, 1986, 3M imported Chemical A in [CBI deleted] discrete shipments totalling [CBI deleted] pounds. Chemical A was supplied to 3M by "Canadian GE" (now "Canada Square Resins") during the six-year period of importation as well as during the prior reporting period for the TSCA Inventory. Comp. Exh. 2.

40. 3M's TSCA Section 13 import certification procedures are handled by a "central transportation import operation." This operation handles the Customs entry, and ensures that the duties are paid and the Customs paperwork is completed, including the Section 13 certification. At the various ports of entry, 3M uses "brokers" to handle the paperwork. Tr. 737.

41. In "determining" the inventory status of imported chemicals, 3M's brokers contact corporate TSCA representatives who, in turn, consult the raw materials database compiled by 3M to comply with TSCA Section 5 to determine whether a chemical is listed on the TSCA Inventory. Tr. 737-38.

42. The importation of Chemical A by 3M was accompanied by a U.S. Customs "Consumption Entry Form" listing the point of origin of Chemical A as Canada on the Form. 3M's import brokers would have handled the paperwork. Tr. 737, 769.

43. Following its discovery of the Chemical A violations, 3M contacted the thousands of manufacturers/suppliers of the thousands

of raw materials which 3M purchased and reverified their TSCA status. Tr. 684-85; 723. Resp. Exhs. 34, 35, 36, 37 and 38.

D. Chemical B

44. Upon discovering the Chemical A violations, the 3M division responsible for that raw material reexamined all of its imported raw materials. As a result of that investigation, 3M discovered that since the time Inventory reporting had occurred, the composition of another chemical which the Company imported from Germany and used as a coating on reflective traffic control signs had been changed, from a substance that was included on the TSCA Inventory, to one that was not, i.e., Chemical B. 3M determined the chemical identity of Chemical B by analyzing the chemical itself. Just as in the case of Chemical A, upon discovering the Chemical B violations 3M immediately shut down all operations using the chemical, ceased using Chemical B, and informed everyone at 3M involved with the manufacture of products using Chemical B that it was not to be used until further notice. Tr. 725-26, 730-31, 768, 798; Resp. Exhs. 21, 22, 23, 24, 25, 26, 27, 28, 29.

45. On September 16, 1986, 3M informed EPA by telephone that 3M was in violation of TSCA because 3M had been importing Chemical B which was not on the TSCA Inventory. EPA requested additional information concerning Chemical B, all of which 3M provided. Tr. 72-73, 78; Comp. Exhs. 3, 4.

46. 3M also immediately submitted to EPA a limited PMN claiming a polymer exemption from the full PMN requirements. EPA

assigned the identifying number of Y86-250 to this PEN for Chemical B. Tr. 74; Resp. Exh. 32.

47. 3M requested EPA's permission to continue to process and use Chemical B during the pendency of the 21-day review period for the PEN. 3M stated that if it were unable to continue to process and use the existing stocks of Chemical B during the review period, it would incur severe economic hardships. Tr. 74-75; Comp. Exh. 8.

48. In response to 3M's request to continue to process and use existing stocks of Chemical B, EPA's Office of Compliance Monitoring initiated an expedited safety review of Chemical B on September 19, 1986. Tr. 76; Comp. Exh. 9.

49. Upon completing the expedited review the OTS at EPA informed the Office of Compliance Monitoring that Chemical B (Y86-250) was eligible for a polymer exemption and "will not present an unreasonable risk of injury to health or the environment under the conditions of the exemption." EPA informed 3M, by a telephone call on September 24, 1986, that 3M immediately could resume the processing and use of existing stocks of Chemical B. Tr. 77-78; Comp. Exh. 9.

50. The Chemistry Review and Search Strategy (CRSS) meeting is the first stage in the review process at which chemicals are actually reviewed by a group of scientists. Specific categories of polymers are dropped from further review at this stage based upon their chemical structure. Polymer exemption Y86-250 for Chemical B did not meet the CRSS drop criteria on September 25, 1986. Since that time the CRSS drop criteria have been modified

and at this time it would meet the CRSS drop criteria. Tr. 285-86, 293-95.

51. In reviewing the PEN for Chemical B, OTS initially identified a potential health concern for Chemical B. The health concern for Chemical B was triggered by two factors, the presence in the polymer of (1) more than 5 weight percent of oligomers of 500 or lower molecular weight, and (2) an unreacted monomer and potential metabolite, para-tertiary butylbenzoic acid (p-TBBA). Tr. 77; 294-95.

52. Although EPA had regulated another polymer under Section 5(e) of TSCA based on concerns over p-TBBA present as an unreacted monomer and as a potential metabolite, EPA decided that no such action needed to be taken with respect to Y86-250. Tr. 295-98.

53. Chemical B's primary use is as a raw material in coatings for reflective sheeting (both as a [CBI deleted], and as a [CBI deleted]). Comp. Exh. 3.

54. 3M had initially obtained a coating chemical material which was used for the same purposes as Chemical B from a supplier in the U.S. and during the TSCA Inventory reporting period 3M sought and received a certification from that U.S. supplier that the chemical was listed on the TSCA Inventory. That coating chemical was assigned the eleven-digit code of 11-0000-4208-2 by 3M in 3M's TSCA Inventory data base. Tr. 731-33; Resp. Exh. 39.

55. At a later date, 3M began obtaining the coating chemical material from a foreign subsidiary of 3M which in turn acquired the material from a different foreign company independent of 3M.

3M believed that the imported chemical, Chemical B, was identical to the material it had been purchasing from the U.S. supplier because Chemical B was used in the same manner, for the same purposes and on the same products as the chemical from the U.S. supplier and because both chemicals had been identified by their vendors with the same polymer code, "6201-R-68," with the only difference in their respective descriptions being in their tradenames. Tr. 731-33, 736, 767-68; Resp. Exhs. 29, 39; Comp. Exh. 3.

56. 3M imported Chemical B on numerous separate occasions, from September 15, 1983 through August 4, 1986. During this period, 3M imported Chemical B in 26 discrete shipments, totalling [CBI deleted] pounds. Of these 26 shipments, 20 occurred subsequent to the promulgation of the TSCA Section 13 rule on August 1, 1984. Comp. Exh. 3.

57. 3M imported Chemical B in solution in xylene, a solvent. The label for the product contained a flammability warning for xylene. Tr. 617, 621; Resp. Exh. 20.

58. 3M's import brokers and corporate representatives relied on the raw material database, compiled by 3M for TSCA Section 5 compliance, to determine the compliance status of Chemical B. Tr. 738.

59. 3M imported Chemical B into the U.S. in drums, on pallets. The drums were shipped to the 3M facility, and emptied, drum by drum, into a mixing tank. The formulated batches were then fed to a coater. The coater placed the formulation on a piece of

paper, onto which were sprinkled reflective beads. The solution-coated web containing Chemical B was then "heat cured." Tr. 612; Comp. Exh. 3.

60. 3M estimates that Chemical B was processed, and used, at one 3M site for [CBI deleted] days, and [CBI deleted] days, respectively. Comp. Exh. 4.

61. 3M distributed Chemical B in commerce to [CBI deleted]. 3M estimates that [CBI deleted] used [CBI deleted] Chemical B for [CBI deleted] days [CBI deleted]. Comp. Exh. 4.

E. Chemical A and Chemical B

62. Both Chemical A and Chemical B are used, among other things, to produce reflective traffic control signs. Chemical A is used to bind the glass beads that produce the retro-reflective effect on the sign to the backing and Chemical B is used as a coating on the signs. Tr. 582-85, 591, 732.

63. As a result of the Chemical A and Chemical B violations, 3M tightened up its procedures by requiring a letter certification be on file from each vendor of each product purchased, whereas previously 3M required such a certification for each raw material, but where there were multiple vendors, not necessarily from each vendor. Tr. 766, 774.

64. EPA has never taken any specific regulatory action under Section 5(e) of TSCA or under its informal non-Section 5(e) follow-up letter approach for the Chemicals assigned the PEN numbers of Y86-209 and Y86-250, which numbers were assigned to Chemical A and to Chemical B, respectively. Tr. 243, 309-11, 318, 348.

65. EPA has never requested additional information pertaining to Chemical A or Chemical B with respect to exposure-based factors such as production volume or use changes to ensure that any future risk that could result from changes in exposure are identified. Tr. 243, 316-17.

66. EPA has never regulated Chemical A or Chemical B under the significant new use rule (SNUR) or under Section 8 of TSCA. Tr. 318-19, 348-49.

67. 3M had never had a prior violation of Section 5 of TSCA. Tr. 120.

VIII. Calculation of Civil Penalty

A. Calculation of the GBP Amount for Count I

As noted above,[7] in calculating the civil penalty for a violation of Section 5(a)(1) of TSCA, I must consider, first with respect to the violation itself, its nature, circumstances, extent and gravity; and second, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability and such other matters as justice may require. In assessing the nature, circumstances, extent and gravity of Count I, and thereby determining the GBP amount, the Complainant considered the facts that 3M imported and made commercial use of Chemical A without having filed a PMN and, hence, committed a "hazard assessment violation;" that the chemical substance so imported would have met

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[7] See supra p. 9.

all requirements for a polymer exemption except 3M did not file for such an exemption and further processed the substance for commercial use; and that 150 batches of Chemical A, 3 weighing less than 750 pounds, 10 weighing between 750 and 7,500 pounds and 137 weighing more than 7,500 pounds, were imported.

While these facts clearly must be considered under the agency's TSCA Section 5 ERP, I believe that there are additional relevant and material facts in this case which warrant consideration in assessing, pursuant to the statute, the nature, circumstances, extent and gravity of the Count I violation.

3M's failure to file a PMN or a PEN for Chemical A came about because of a good faith belief on the part of 3M that the chemical had been reported for the initial TSCA Inventory. Because of an inadvertent mistake concerning the supplier, this chemical, which had been imported and used for a number of years prior to the establishment of the TSCA Inventory, was not reported by 3M for that Inventory. Shortly after TSCA became law, 3M launched a major corporate effort to ensure that it complied with all provisions of the statute, including both the initial inventory reporting requirements and the PMN requirements (Finding of Facts 3 through 23). 3M had absolutely no incentive, as EPA has acknowledged, to fail to report a chemical for the Initial TSCA Inventory. In fact, 3M had every incentive to ensure that chemical substances which were being used, such as Chemical A, were properly reported for the Inventory. The memoranda and other corporate publications issued within 3M emphasized the importance of reporting for the Inventory.

3M had everything to gain by reporting and much to lose by not reporting. These are matters which, I believe, warrant my consideration in ascertaining the nature, circumstances, extent and gravity of the violation.

The EPA case preparations officer who calculated the agency's proposed penalty in this case testified that the circumstances which gave rise to the Chemical A violation (i.e., the inadvertent failure to report the chemical for the initial TSCA Inventory based upon the misplaced assumption that it had been so reported) were not relevant to his determination of the proposed penalty.[8] The EPA witness who chaired the work group and supervised the development of the ERP for Section 5 testified that the EPA does not make a distinction, for penalty assessment purposes, between new chemical substances which may have been eligible for initial inventory reporting (but were not so reported) and other new chemical substances where, in both instances, there has been a failure to file a PMN. The reason for the absence of such a distinction, in EPA's view, is that TSCA makes no such distinction.[9]

I concede that TSCA makes no such distinction in determining the liability of the violator in these circumstances. But there is a difference between determining liability under a strict liability statute such as TSCA and assessing a penalty for such a violation. Having a well-developed compliance program in place and

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[8]Tr. 59-61, 113, 171-72.

[9]Tr. 433, 454-57, 463.

attempting to ensure that the program would function so as to achieve compliance with the law did not prevent the inadvertent violation from occurring herein. Clearly, these facts could not excuse Respondent's liability. However, that is not to say that these facts should not be considered in determining the nature, circumstances, extent and gravity of the violation when assessing a penalty.

EPA has not prescribed the specific type of compliance program which a company should develop and put into place to ensure compliance with TSCA other than to emphasize that any such compliance program should ensure full compliance with the law.[10] Nevertheless, regardless of the features a company incorporates into its compliance program, EPA now insists that the resulting program must be a "mistake-proof program."[11] Where a compliance program or system, such as 3M's program, proves not to be fail-safe, EPA's position in assessing the proposed penalty is unforgiving unless the mistakes "were very minor errors that resulted in absolutely no significant impact to the Agency whatsoever . . ."[12] In assessing the proposed penalty, EPA would make no allowance and give no consideration to having a system in place which "did not work a hundred percent" because the statute requires that all chemical substances must be reported.[13] Here

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[10]Tr. 452.

[11]Id.

[12]Tr. 495.

[13]Tr. 497.

again I believe EPA has failed to recognize or acknowledge the distinction between liability and penalty. TSCA requires all chemical substances to be reported, and is unforgiving in assessing liability where a failure to report occurs. However, TSCA does not prohibit consideration of all the circumstances surrounding a failure to file a PMN (or a PEN). Indeed, I am compelled by the statute to consider the full nature, circumstances, extent and gravity of the violation when assessing the penalty. Therefore, in determining the GBP amount for Count I, I have given full consideration to the facts which EPA considered as well as the additional facts outlined above.

Giving full consideration to the totality of the circumstances surrounding the violations found under Count I, I conclude that the appropriate level of the circumstances warrants selecting from the penalty "continuum" (see FN 3, supra) a GBP amount as follows:

3 batches imported	x $ 200	= $	600
11 batches imported	x $1,300	= $	14,300
154 batches imported	x $2,000	=	$308,000
Total GBP amount for Count I			$322,900

B. Calculation of the GBP Amount for Count III

In calculating the proposed GBP amount for Count III, the Complainant considered the facts that 3M imported and made commercial use of Chemical B without having filed a PMN and, hence, committed a "hazard assessment violation"; that the chemical substance so imported would have met all requirements for a polymer exemption except 3M did not file for such an exemption and further

processed the substance for commercial use; and that 3M imported 26 batches of Chemical B, each batch in excess of 7,500 pounds.

Just as I concluded in calculating the GBP amount for Count I, I believe that there are additional pertinent facts in this case which warrant my consideration in assessing, pursuant to the statute, the nature, circumstances, extent and gravity of the Count III violation. While I give full weight to the facts which the Complainant has considered, I believe that the following additional facts also must be considered in calculating the GBP amount for the Count III violations.

Following the discovery of the violations with respect to Chemical A, 3M directed a reexamination of all imported raw materials. As a result of that investigation, 3M discovered that a change had been made in the composition of a chemical substance for which it had received an earlier certification that the chemical substance was on the initial TSCA Inventory. At the time the initial Inventory was established 3M obtained the chemical substance from a U.S. supplier. This supplier provided 3M with a certification that the chemical was on the TSCA Inventory. Subsequently, 3M began obtaining what it believed to be the same chemical substance from a foreign subsidiary of 3M which in turn acquired the substance from another foreign corporation which was independent of 3M. This chemical substance was Chemical B. It was a proprietary mixture which was used in the same manner, for the same purpose and on the same products as the previous chemical from the U.S. supplier. Both the chemical substance provided earlier

by a U.S. source and Chemical B provided by the foreign source had been identified by their vendors with the same polymer code, "6201-R-68," with the only difference in their respective descriptions being in their trade names. As a result of these several similarities, 3M in good faith made the erroneous assumption that the two chemicals were one and the same.

Giving full consideration to the totality of the circumstances surrounding the violations under Count III, I conclude that the appropriate level of the circumstances warrants selecting from the penalty "continuum" a GBP amount as follows:

26 batches imported x $2,000 = $52,000

C. Calculation of the GBP Amount for Counts II and IV

3M contends that no penalties should be assessed for the Section 13 violations in Counts II and IV because 3M had instituted an effective Section 13 compliance program and because 3M committed no Section 13 import certification violations distinct from those which flowed from the underlying PMN violations. The Agency rejects this contention and maintains that because Respondent has been found to have committed separate violations of two different sections of the statute (Section 5 and Section 13) separate penalties are appropriate for the violations in Counts II and IV. Furthermore, the Complainant insists that a separate penalty is appropriate for each separate day that a Section 13 violation occurred. In support, the Complainant points out that the Bureau of Customs regulations require separate certifications for each shipment; that each failure to file an accurate and proper

certification has a distinctly separate impact on the ability of Customs to carry out its statutory mandate to prevent that shipment from being imported; and that each shipment constituted a separate opportunity for a potential risk of harm to human health or the environment.[14]

I agree with Complainant that the statute requires separate penalties for the separate violations of Section 5 and Section 13 and that separate per-day penalties are appropriate. However, I must agree with 3M that in determining the GBP amount for the Section 13 violations I should consider the full circumstances of the violations, including the facts that the violations of Section 13 occurred only because of the inadvertent mistakes and erroneous, but good faith assumptions which led to the Section 5 violations and that 3M had instituted Section 13 compliance program to ensure that proper certifications were filed. A pertinent feature of 3M's Section 13 compliance program was a training program for the brokers who processed 3M's importations of Chemical A and Chemical B. In addition, the evidence supports the conclusion that the brokers properly utilized the TSCA compliance system which 3M had in place, determined that, according to the 3M data base, Chemical A and Chemical B were on the TSCA Inventory and submitted the required certifications.

Therefore, in assessing the nature, circumstances, extent and gravity of Counts II and IV, and thereby determining the GBP amounts appropriate for the violations found under each Count, I

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[14]Tr. 414-15.

will consider more than the simple facts that there were positive certifications and the chemicals were in violation of other TSCA provisions and that Chemical A and Chemical B were imported on 72 days and 20 days, respectively.

Giving full consideration to the totality of the circumstances surrounding the violations found under Counts II and IV, I conclude that the following GBP amounts from the penalty "continuum" are warranted:

Count II: $2,000 x 72 = $144,000

Count IV: $2,000 x 20 = $ 40,000

D. Summary of GBP Amounts:

Count I: $322,900

Count II: $144,000

Count III: $ 52,000

Count IV: $ 40,000

Total $558,900

In reaching my conclusions as to the appropriate GBP amount for each of the Counts, I did not take into consideration the "after the fact determination that harm did not take place"[15] as a result of these particular violations. Further, I did not specifically consider and apply a factor of "deterrence" in calculating the penalty herein.

Chemical A and Chemical B were submitted to EPA for review under the "polymer exemption rule." EPA is authorized to permit

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[15]TSCA Section 5 Enforcement Response Policy (August 4, 1988) at 8.

exemptions under Section 5(h)(4) of TSCA. The polymer exemption is designed to allow for an expedited review of certain polymers. It permits a party to submit, as 3M did here, a modified PMN (i.e., PEN) for an expedited review of polymers which EPA believes are typically lower in risk than other chemical substances.[16] When EPA completed the expedited reviews of Chemical A and of Chemical B, it found that these chemical substances would not present an unreasonable risk to health or the environment under the "conditions of the exemption."[17]

The determination of the GBP amount must take into consideration the potential for harm to the environment or the Agency's decisionmaking or ability to ensure compliance with the statute or to regulate, i.e., potential exposure to an unregulated chemical substance or harm to the integrity of the Inventory at the time of the violation. Thus, I made no allowance because Chemical A and Chemical B were judged by EPA to be harmless to human health and the environment after the PEN's were submitted by 3M.

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[16]TR. 243-48.

[17]The phrase "conditions of the exemption" refers to the requirement that Chemical A and Chemical B each retain its chemical identity and composition, i.e., that the chemical substance being imported, used or processed be the same chemical substance as that reported. (Tr. 261-62, 311.) Thus, when a chemical substance is approved under the polymer exemption rule the ratio of monomers cannot be changed without notification to EPA because to change that ratio is viewed as a change of the chemical substance for which the exemption was granted. (Tr. 348-50.) No such changes have been made to Chemical A or Chemical B since the polymer exemptions were approved for these chemicals.

Probably the most important purpose of TSCA was to ensure that EPA would receive advance notice before a new chemical substance was introduced into the environment in the U.S. Through the PMN requirement Congress intended to maximize the likelihood that any unreasonable risk of injury to health or the environment which might result from the introduction of a new chemical substance would be brought to the attention of EPA in a timely manner prior to its introduction. This gives EPA an opportunity to assess any risks that might be presented and to act to protect human beings and the environment in those circumstances where such action was deemed to be warranted.

As the Conference Report said:

> "Section 5 sets out the notification requirements with which manufacturers of new chemical substances and manufacturers and processors of existing substances for significant new uses must comply. The requirements are intended to provide the Administrator with an opportunity to review and evaluate information with respect to the substance to determine if manufacture, processing, distribution in commerce, use or disposal should be limited, delayed or prohibited because data is insufficient to evaluate the health and environmental effects or because the substance or the new use presents or will present an unreasonable risk of injury to health or the environment.
>
> The provisions of the section reflect the conferees' recognition that the most desirable time to determine the health and environmental effects of a substance, and to take action to protect against any potential adverse effects, occurs before commercial production begins. Not only is human and environmental harm avoided or alleviated, but the cost of any regulatory action in terms of loss of jobs and capital investment is minimized. For these reasons the conferees have given the

Administrator broad activity to act during the notification period.[18]

Hence, in assessing the penalty herein, it would be entirely inappropriate to consider the fact that, after the violations were committed and the PENs' were subsequently submitted, the Agency determined that these chemical substances would not present an unreasonable risk to health or the environment.

Complainant contends that the "penalty in this action must deter both 3M ("specific deterrence"), as well as other companies in the regulated community ("general deterrence"), from future illegal or improper behavior. To be sufficient to accomplish this, EPA argues the penalty must be high enough to deter those persons from accepting a penalty as a "cost of doing business." Indeed, the Respondent concedes the deterrent value of penalties but argues that the penalties which Complainant seeks far exceed any requirement for deterrence presented by the circumstances of this case.

The Federal Courts have held that civil penalties are intended, inter alia, to deter illegal or wrongful conduct.[19] However, that alone would not justify my consideration of

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[18]H.R. Rep. No. 94-1679, 94th Cong., 2d Sess. 65-66, reprinted in Legislative History of the Toxic Substances Control Act . . . Prepared by the . . . Library of Congress for the House Comm. on Interstate and Foreign Commerce, 678-79 (Comm. Print 1976).

[19]U.S. v. Papercraft, 393 F. Supp. 415, 420 (W.D. Pa. 1975), aff'd in part and rev'd in part, 540 F.2d. 131 (3rd Cir. 1976); EPA v. Environmental Waste Control, Inc., 710 F. Supp. 1172, 1242 (N.D. Ind. 1989); U.S. v. Reader's Digest Association, Inc., 494 F. Supp. 770, 779 (D. Del. 1980), aff'd, 662 F. 2d 955 (3rd Cir. 1981), cert. denied, 455 U.S. 908 (1982).

deterrence as a separate factor in assessing a penalty in this matter.

After determining the appropriate penalty in accordance with the factors/criteria prescribed in the statute itself, it would be inappropriate and, indeed, inconsistent with the statute for me to increase the penalty because in my personal subjective judgment I did not believe that the penalty so calculated would provide sufficient deterrence to future violations by the Respondent or by others. Likewise, it would be inappropriate to decrease the penalty because in my subjective judgment a lesser amount would provide sufficient deterrence.

Had Congress intended that I explicitly and independently consider the deterrent effect for any penalty calculated in this case, Congress easily could have added that factor to the list of those included within Section 16(a)(2)(B) of TSCA. Since Congress did not include deterrence as a specific factor to be weighed in determining the penalty, I will not consider deterrent effect as a separate and independent factor. To do so would constitute, in effect, a wholly inappropriate amendment to Section 16 by one charged with the adjudication of complaints brought under TSCA. It would mix legislating with adjudicating. While there can be no doubt, as both parties have conceded, that Congress intended TSCA to have both a specific and a general deterrent effect upon, respectively, specific respondents, such as 3M, and upon others in the regulated community, it is my considered view that such deterrence was intended by Congress to be part of the ultimate

result of the penalty calculated under the specific factors in Section 16(a). In other words, the penalty reached through the proper application of those factors would inherently constitute an appropriate deterrence to future violations of the statute in similar circumstances and thereby constitute a part of the overall scheme of deterrence incorporated in the statute.

E. Adjustments to the Gravity Based Penalties

In agreement with the Agency I would reduce the GBP for each count by 25% because 3M voluntarily disclosed the violations and by an additional 25% because 3M immediately reported the violations to EPA. The Agency proposed no other adjustments. However, I believe that the evidence introduced at hearing warrants two additional adjustments.[20]

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[20]It would not be appropriate to consider the adjustment factors of "culpability," "history of prior violations" and "economic benefit." The Section 5 ERP provides that culpability may be taken into account "when a violator does not have control over the violation charged;" it may not be taken into account here because 3M did have control. The history of any prior violations are disregarded in calculating the penalty for a self-disclosed violation. As for economic benefit, the Section 5 ERP provides that no reductions are permitted (except for voluntary disclosure) "if the reduced penalty does not exceed the economic benefit gained from noncompliance." However, the ERP goes on to state that the Agency "should require the company to present information concerning economic benefits." The record is bereft of fiscal or financial evidence upon which such a comparative judgment can be made. One witness for the Agency testified that it was his "understanding by allowing them [3M] to continue to process and use this chemical substance during the review period . . . all the sales and profits that they would have received during that review period was an economic benefit." (Tr. 118.) Concerning economic benefits prior to the submission of the PEN, this witness testified: "I don't know what economic benefits they could have received" (Tr. 120) which on redirect he clarified to mean "personally I wasn't aware of any economic benefit based on the evidence I had." (Tr. 164.) [Footnote continued on next page.]

I would reduce by 15% the penalty for each count because immediately upon discovery of the violations, 3M shut down the operations in which Chemical A and Chemical B were used or processed and ceased all importation of these chemicals until it filed the PMN's (i.e, PEN's) and until after Chemical A and Chemical B cleared the review period without being a candidate for a TSCA Section 5(e) or Section 5(f) action.[21] 3M did not recommence operations with respect to Chemical A or Chemical B until authorized to do so by EPA. 3M, in a timely manner, took all steps requested by EPA to provide EPA with the information necessary for EPA to determine whether violations had occurred.

Further, in mitigation 3M contacted its thousands of manufacturers and suppliers of the thousands of raw materials which 3M purchased and reverified their status on the TSCA Inventory.[22] As a result of the Chemical A and Chemical B violations, 3M revised its procedures to require that a letter certification be on file

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[Footnote 20 continued.]
A second Agency witness testified that those who developed the penalty policy felt "that the cost from economic benefit as well as--the profits or gains, that is, from the violative activity--are subsumed into the base penalty on a per-day basis" (Tr. 491) in that it is "generally . . . related to the poundage produced" (Tr. 492) and "related to the days of production, the volumes produced on those days." (Tr. 493.) One witness for Respondent testified that 3M did not gain any advantage from the violations because the company "got a penalty, and lost manufacturing time." (Tr. 596.) For these several reasons, no adjustments to the GBP amount based upon any possible economic benefit which may have flowed from the violations is deemed appropriate.

[21]See TSCA Section 5 Enforcement Response Policy (August 5, 1988).

[22]Supra, at 35-36.

from each vendor of each product purchased, whereas 3M previously had required such a certification for each raw material, but not necessarily from each vendor where there were multiple vendors.[23]

I also conclude that a 15% reduction in the GBP amount for each count is appropriate because of 3M's attitude. 3M immediately halted the violative activity, took steps to rectify the situation and there has been no finding of culpability on 3M's part. 3M had systems in place to ensure compliance with the Section 5 PMN requirements and to track import certifications and to comply with TSCA Section 13 requirements. Brokers had been trained and they properly utilized the Section 13 compliance system which 3M had established and submitted the required certifications. Unfortunately, because of the inadvertent errors which produced the Section 5 violations, brokers (or those at 3M whom the brokers may have contacted) made faulty assumptions that Chemical A and Chemical B were on the TSCA Inventory and filed incorrect certifications. Those inadvertent errors and faulty assumptions do not alter the fact that 3M, both before and after the violations were discovered, sincerely desired to comply with Sections 5 and 13 of TSCA and, as a reflection of that attitude, had established complex company-wide programs and systems designed to produce such compliance.

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[23] Supra, at 40.

With these adjustments/reductions, the final penalty calculation is as follows:

Total GBP amount:	$558,900
80% Adjustment:	.80
	$447,120
	$558,900
	-447,120
Final Penalty Amount	$111,780

ORDER

Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), a civil penalty in the amount of $111,780.00 is hereby assessed against the Respondent, 3M Corporation, for the violations of the Act found herein.[24]

[24]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding a cashier's check or certified check payable to "Treasurer of the United States of America" to:

U.S. Environmental Protection Agency
Region V
Attn: Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: November 8, 1990
Washington, DC

CERTIFICATE OF SERVICE

I do hereby certify that the original of the foregoing Initial Decision was filed in re 3M Company (Minnesota Mining and Manufacturing); Docket No. TSCA 88-H-06 and copies of the same were mailed to the parties as indicated below:

(Interoffice) Jon D. Silberman, Esq.
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Dated: November 8, 1990

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
3M COMPANY (MINNESOTA MINING AND MANUFACTURING),	)	Docket No. TSCA-88-H-06
	)	
Respondent	)	

E R R A T A

The Initial Decision issued in this matter on November 8, 1990 is corrected to read as follows:

1. Page 45, lines 17-19 are corrected to read:

   10 batches imported x $1,300 = $ **13,000**

   137 batches imported x $2,000 = **$274,000**

   Total GBP amount for Count I **$287,600**

2. Page 49, line 12 is corrected to read:

   Count I: **$287,600**

3. Page 49, line 16 is corrected to read:

   Total **$523,600**

4. Page 57, the final penalty calculation is corrected to read:

   Total GBP amount: **$523,600**
   .80
   $418,880

   $523,600
   -418,880
   Final Penalty Amount **$104,720**

5. Page 57, line 11 is corrected to read:

"civil penalty in the amount of **$104,720.00** is hereby assessed"

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: December 13, 1990
Washington, DC

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Errata was filed in re 3M Company (Minnesota Mining & Manufacturing); Docket No. TSCA-88-H-06 and copies of the same were mailed to the parties indicated below:

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Dated: December 17, 1990