3/1/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Adolph Coors Company	)	Docket No. RCRA-VIII-90-09
and its unincorporated	)	
affiliate,	)	
Coors Brewing Company,	)	
	)	
Respondent	)	

ORDER DENYING MOTIONS
FOR AN ACCELERATED DECISION
AND TO DISMISS

The complaint in this proceeding under section 3008 of the Solid Waste Disposal Act, as amended (42 U.S. C. § 6928), commonly referred to as RCRA, issued on June 19, 1990, charged Respondent Coors with violations of the Act and applicable regulations. Specifically, Count I charged Coors with disposal of hazardous waste without a permit during the period October 1981 to August 1984, to-wit: spent solvents 1,1,1-Trichloroethane (TCA) and Tetrachloroethylene (PCE) designated as F001 and F002, respectively, in the list of hazardous wastes appearing in 40 CFR § 261.31. The disposal allegedly occurred through leaks from sewer lines beneath Coors' container plant. Count II charged Coors with failure to truthfully disclose information required by 40 CFR §§ 270.10(d) and 270.30(11) and Count III charged Coors with failing to truthfully disclose information required by an EPA "call-in" letter. Count IV charged Coors with failing to certify its

response to an EPA section 3007(a) information request as required by 40 CFR § 270.11(d).

In its answer and request for a hearing, dated July 24, 1990, Coors, among other things, denied that it allowed solvents identified in the complaint to leak from sewer lines at its container plant and alleged that upon discovery of an unanticipated sewer line failure it took steps to prevent leakage from the sewer line and to mitigate the effects of such leakage. Among affirmative defenses raised by Coors are the statute of limitations and laches.[1/] In a motion to amend its answer submitted with its prehearing exchange, Coors moved that its answer to Count I be amended to admit that the "Halaby letter" states that two solvents leaked from sewer lines at its container plant from October 1991 to August 1984, but to deny that such leakage in fact occurred. This motion was granted by an order, dated January 15, 1991.

The "Halaby letter" referred to above reports the result of an investigation, initiated by Coors, of internal water system problems at its container plant during the period 1981 to 1984 and of remedial measures instituted by the Company. The letter is dated February 19, 1990 (C's Exh 2) and was furnished to EPA by a letter from Mr. Peter H. Coors, Coors' President, dated February 20, 1990 (C's Exh 1). The Halaby investigation concerned two problems: (1), the discovery in the fall of 1981 of

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[1/] Complainant's motion to strike affirmative defenses as well as other motions were decided by an Order On Motions, dated January 4, 1991. Decision on the statute of limitations issue was deferred.

groundwater contamination under Coors' container plant and (2) extremely low levels of one of the organic chemicals causing the mentioned contamination in drinking water at the container plant. The letter concluded, inter alia, that neither problem created a health risk to consumers or employees. It stated that sewer lines under the container plant were defective, resulting in inorganic solvents used as degreasers leaking into the ground under the plant, thus affecting groundwater and nearby springs. This contamination was reportedly isolated and contained in 1982. All floor drains feeding the defective sewer lines under the container plant were assertedly capped in August 1984. The letter concluded that the contamination probably should have been reported to the Colorado Department of Health in 1982, but that Coors failed to do so until July of 1988.

After receipt of the "Halaby letter," EPA submitted several information requests to Coors pursuant to section 3007(a) of RCRA. The first of these requests, letter dated March 14, 1990 (C's Exh 10), asked, inter alia, for construction details, including the slope of the drain lines showing where the suspected leaks originated. Coors was also asked to indicate whether there was sufficient information to understand the potential for continued contamination of the groundwater from these lines and to provide a summary explanation of the function of these drain and/or sewer lines and the types of materials transported. Additionally, Coors was asked whether any other spills or leaks in or around the

container plant involved halogenated organic solvents and compounds listed on page 2 of the Turner letter.[2/]

Coors' response, dated April 19, 1990, enclosed a drawing of drain lines beneath the Coors' container plant, identified as Exh 3 but which is not in the record, showing suspected leaks highlighted in blue. Drawings reflecting the slope of the drain lines had reportedly not been located. The function of the drain lines was to provide a means for elimination of industrial waste from the container plant. These lines were connected to a sewer line to the Golden Wastewater Treatment Plant. Coors expressed the belief that there was sufficient information to determine the potential for further contamination from sources in the drain lines and that no such potential existed for reasons stated in the Coors' letter of March 16, 1990, apparently the "Turner letter" (supra at note 2). Coors stated that various core drillings, unearthing of sections of the suspected drain lines and use of video camera inside the drain lines during the period 1982 to 1983 confirmed that the drain lines were the source of the contamination. As to other leaks and spills in and around the container plant, Coors referred to another letter from Caroline Turner to Patricia Nelson, Colorado Department of Health, dated April 12, 1990, which is also not in the record.

[2/] The "Turner letter" is a letter, dated March 16, 1990, from Caroline Turner, Director of Coors' Law Department, to Patricia Nelson, Colorado Department of Health. This letter and several other documents referred to in EPA's information request and Coors' response are not in the record.

In a subsequent request, letter dated July 3, 1990 (C's Exh 12), Coors was asked when it determined that can plant drain pipes, previously referred to as sewer lines, were the source of contamination found in Wells, sometimes referred to as springs, 14 and 19, in 1981. Coors' answer, dated August 6, 1990 (C's Exh 15), was that it determined a plant drain pipe was the likely source of contamination in Springs 19 and 14 after taking core samples near the can plant in 1982 and 1983. Records reflecting when the core sampling had been conducted had not been located.

In a third information request, dated September 28, 1990 (C's Exh 16), Coors was asked, inter alia, to submit a modified diagram of the container plant drain system, including all sinks, floor drains and other disposal routes, to specify how many floor drains led to the leaking sewer lines and to identify on the diagram any and all pipes which join the drain pipe system from floor drains, including those that were plugged in 1984. Coors' response, dated November 2, 1990 (C's Exh 20), stated in part ". . . that recent investigations for purposes of responding to this information request have revealed that floor drains along the south end of the container plant, running from east to west below the press area of can line in building 20, were plugged in 1978, rather than 1984, as first asserted in the February 1990 'Halaby letter.' These drains were first temporarily plugged in 1978 with metal plates and/or expandable rubber plugs, and were later concrete filled." (Id. at 11, 14). The response further stated that the "sewer line" to

which the plugged drain lines once connected was abandoned in 1978. The requested modified diagram was assertedly in preparation.

Among other questions, Coors was asked whether waste entering the drain pipe system from other disposal routes could pass through the leaking sewer lines which were the source of groundwater contamination in the area. Coors' response was in the negative, stating that "(a)ll direct disposal routes leading to the sewer line found to be leaking in 1978 were promptly plugged or severed upon discovery." (Id. at 13). While acknowledging that there are a number of other sources of waste which entered other sewer lines, some of which were laterally connected to the abandoned line along the south side of the container plant, Coors stated that it would be mere speculation as to whether wastes entering the drain pipe system from these sources passed through the abandoned sewer line.

In compliance with an order of the ALJ, Coors answered three interrogatories filed by Complainant, two of which are pertinent here (Response To Complainant's Interrogatory Numbers 4, 14 and 20, dated January 18, 1991). Interrogatory No. 14 asked for an explanation of why Coors listed sewer line repair projects including repair of the sewer line from Manhole 7B and Manhole 56 in 1984, when this line was allegedly abandoned in 1978. Coors' response was that, as is the case with many of its facilities engineering projects, sewer line abandonment often occurred in stages. The first stage assertedly always consisted of plugging points of waste entry to the sewer line being abandoned. Follow-up measures might include filling with concrete previously plugged

sewer lines and related manholes. In the case of the line first abandoned in 1978, a manhole to which that line was connected and the abandoned collection line itself were the subject of such follow-up work in 1984.

Interrogatory No. 20 referred to the fact the "Halaby letter" indicated [floor] drains were plugged in 1984, while Coors' November 2, 1990, response to EPA's information request stated the drains were first plugged in 1978. Coors was asked to describe with particularity all evidence relied upon to make the statement referred to in the November 2 response letter. Coors' response was that it relied on the personal recollection of Mr. Harry Pytlar, Jr. and Mr. James Russell Willis, II (positions not stated), in making the statement that certain drains were plugged in 1978 instead of 1984. A search of Coors' records for documentary evidence to support the personal recollection of Messrs. Pytlar and Willis reportedly was unsuccessful.

On January 16, 1991, Coors filed a motion for summary judgment as to Counts I and II of the complaint, alleging that there was no dispute as to material fact and that it was entitled to judgment as a matter of law. The motion emphasized that Coors has answered the equivalent of four section 3007 information requests during the past 12 months and that Complainant has not disputed Coors' answers. Because the disposal referred to in the complaint occurred prior to the effective date of the implementing regulations (November 19, 1980), Coors contended it was not a violation of the Act.

In support of the motion, Coors attached an affidavit of Mr. Harry Pytlar, Jr., dated January 14, 1991, who states that he was employed as an engineer by Adolph Coors Company from approximately 1960 to October 1989, and is presently retired. Mr. Pytlar further states that in 1978 he, in conjunction with Mr. Dale Carlson, his supervisor at the time, recommended abandonment of a sewer line running from east-to-west along the south side of Building 20 at the Coors' container plant. This recommendation was based on Mr. Pytlar's personal evaluation of core samples taken at various locations adjacent to the sewer line. He states that in the fall of 1978, he personally implemented abandonment of the mentioned sewer line over an approximate four-week period through the removal of mop sinks and the plugging of floor drains. Mop sinks were physically disconnected from drainage lines and the drainage lines were capped. Floor drains were plugged with concrete to prevent the movement of fluids into the sewer line. Mr. Pytlar states that the mentioned activities eliminated mop sinks and floor drains as sources of fluids into the sewer line along the south side of Building 20 and resulted in the abandonment of that line.

Also attached to the motion is an affidavit of Mr. James Russell Willis, II, dated January 10, 1991, who states that he is currently employed as an engineer by Coors Brewing Company and has been so employed since approximately October 1976. Mr. Willis further states that in 1984 he worked on the abandonment of a manhole and connected sewer line in Buildings 20 and 21 of the

Coors' container plant. This work involved filling with concrete a manhole at the west end of a sewer line running east-to-west along the south side of Building 20, ending in the manhole just inside the east boundary of Building 21. Mr. Willis states that at the time he participated in the described work, he was unaware of prior abandonment work performed on the same line in 1978.

An affidavit, dated January 16, 1991, by Mr. Theodore S. Halaby, author of the "Halaby letter," states that during the course of the investigation reported in said letter, he had no contact whatsoever with Mr. Harry Pytlar, Jr., identified above.

Coors argues that Count II is inextricably bound with Count I and that, if Count I fails, Count II must also fail. Alternatively, Respondent argues that the federal statute of limitations (28 U.S.C. § 2462) has run and that Counts I and II are barred for that reason.

Opposing the motion, Complainant argues that a multitude of genuine issues of material fact exist, that the disposal of hazardous waste as alleged in the complaint constitutes a statutory violation and that the statute of limitations does not bar this action (Complainant's Motion In Opposition To Respondent's Motion For Summary Judgment On Counts I and II, dated February 1, 1991).

D I S C U S S I O N

I. Motion For An Accelerated Decision

Because I need decide the statute of limitations issue only if I deny the motion for summary judgment (accelerated decision), the latter issue will be decided first.

In support of the contention that a multitude of issues of material fact exist, Complainant points to the "Halaby letter" as constituting an admission that disposal of hazardous waste at the Coors' container plant occurred during the period October 1981 to August 1984. Noting that information supplied by Coors since the initiation of this action contradicts this and other statements in the "Halaby letter," Complainant emphasizes that these contradictions favor Coors and argues that, without the crucible of cross-examination, it cannot be determined [whether] these subsequent self-serving statements are simply attempts to confuse the issues.

Complainant purports to find a contradiction between the statement in Coors' Memorandum of Points and Authorities In Support Of Its Motion For Summary Judgment at 1 to the effect that lines leading to the broken sewer line[3/] were capped and filled with concrete in 1978, thereby completely eliminating them as a pathway to the sewer line referenced in paragraph 13 of the complaint and the statement in response to Interrogatory No. 20 that "certain drains" were plugged in 1978 rather than 1984. Additionally, Complainant points to a statement in Coors' November 2, 1990, information response letter to the effect that in 1978 the sewer line running east-west along the south side of the plant from Building 20 to Building 21, Manhole 6, was abandoned and that in

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[3/] It is noted that both the "Halaby letter" and paragraph 13 of the complaint refer to "sewer lines" beneath or at the container plant.

1984 Manhole 6 was also concrete filled. It is argued that this contradicts the assertion that the lines leading to the broken sewer line were capped and filled with concrete in 1978. According to Complainant, these and other apparent contradictions in the record are genuine issues of material fact, precluding an accelerated decision in favor of Coors.

Although not binding, federal court decisions interpreting the Federal Rules of Civil Procedure (FRCP) are useful guides in interpreting the Consolidated Rules of Practice. In deciding a motion for summary judgment under FRCP Rule 56, the function of the trial judge is not to weigh the evidence and determine truth, but to determine whether there are genuine issues of material fact for trial.[4/] Material issues are only those which might effect the outcome of the action and summary judgment is not proper where a reasonable jury (factfinder) could find in favor of the nonmoving party. On the other hand, summary judgment as well as a directed verdict, are appropriate where the evidence permits only one reasonable conclusion and one party must prevail as a matter of law. In deciding such motions, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. The plaintiff, however, in order to defeat a properly supported motion for summary judgment must present affirmative

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[4/] See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). While Anderson was a libel action involving the public figure and actual malice standards required in such actions by the Supreme Court, there seems no sound reason why the Rule 56 principles therein are not applicable to other civil litigation.

evidence such that the jury (factfinder) might find in his favor and this is true even if, as here, the evidence is in possession of the defendant, provided there has been a full opportunity for discovery. Of course, the trial judge may deny the motion, if he concludes that under the circumstances a trial would be appropriate.

Applying the above principles of Anderson here, it is concluded that the motion be denied, because, resolving the evidence and all justifiable inferences therefrom in favor of Complainant, the nonmoving party, a reasonable factfinder might find that some of the contamination at issue occurred subsequent to October 1981, and thus after November 19, 1980, the effective date of the regulation at issue.[5/]

There is, of course, no dispute but that contamination of soil and groundwater beneath the Coors' container plant was discovered in 1981. The material fact at issue here is whether this contamination or any part thereof occurred prior or subsequent to November 19, 1980. Coors' present evidence is that mop sinks were removed, floor drains were plugged and the sewer line to which the plugged drains once connected abandoned in 1978. Its evidence also shows, however, that work on the abandonment of a manhole and connected sewer line in Buildings 20 and 21 of the Coors' container

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[5/] Evidence to defeat a motion for summary judgment in a case requiring a jury trial need not be extensive. See, e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) (mere presence of police officer in store at time plaintiff was refused service, sufficient evidence from which a conspiracy could be inferred).

plant occurred in 1984. The "Halaby letter," as we have seen, states that all floor drains feeding the defective sewer lines under Building 20 were capped in August 1984. The basis for this statement of the "Halaby letter" and that there were multiple defective sewer lines at the container plant does not appear in the record. It should be noted, however, that Coors has acknowledged that there are a number of sources of waste which entered other sewer lines and that some of these lines were laterally connected to the abandoned line along the south side of the container plant (ante at 4).

On February 11, 1991, Coors filed a reply to Complainant's opposition to the motion for summary judgment. Accompanying the Reply is an affidavit by Mr. Scott B. Smith, who is identified as Director, Environmental Special Projects for Coors. Mr. Smith answered interrogatories previously referred to filed by Complainant. He states that "certain drains" in the answer to Interrogatory No. 20 referred to the floor drains in the can plant leading to the sewer line running east-to-west along the south side of Building 20, ending in the manhole located just inside the east boundary of Building 21, as distinguished from other drains which exist in that building. He further states that floor drains are distinct from manholes, including manhole 6, which provides worker access to sewer lines, but are not a point for wastes to enter the sewer line system. The broken sewer line running east-to-west along the south side of the plant from Building 20 to Building 21 drains in a westerly direction. Mr. Smith states that Manhole 6 is

located to the west of the sewer line break, and, thus, could not have contributed to any discharge alleged to be up-gradient from the manhole access.

While the state of the record is not such as to preclude the existence of sources of contamination other than the broken sewer line or lines, Complainant has not made any such contention. It is, of course, clear that an alleged necessity or desire for cross-examination will not ordinarily defeat a properly supported motion for summary judgment. Nevertheless, Coors' claim that the drains or lines in question were plugged and abandoned in 1978 apppears solely dependant on the recollection of Mr. Pytlar. The basis for contrary statements in the "Halaby letter" does not appear in the record. Mr. Willis, whose employment by Coors dates from 1976, was unaware of the 1978 work described by Mr. Pytlar. Under these circumstances, credibility is in issue and a trial is considered appropriate. See, e.g., Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962). See also In re Japanese Electronic Products Litigation, 723 F.2d 238 (3rd Cir. 1983), rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) ("if--there is any evidence in the record from any source from which a reasonable inference [in the nonmoving party's] favor may be drawn, the moving party simply cannot obtain summary judgment.")[6/]

[6/] 723 F.2d at 258, quoted in Celotex Corp. v. Catrett, 477 U.S. 317, 339 (1986) at 330. While it has survived summary judgment, Complainant is reminded that Rule 22.24 places the burden of establishing the violations alleged in the complaint on it.

O R D E R

Coors' motion for an accelerated decision (summary judgment) is denied.

II. Statute of Limitations

As indicated previously, Coors raised the statute of limitations as an affirmative defense in its answer to the complaint. Coors was ordered to brief this issue in its prehearing exchange.

In a memorandum of law, dated December 17, 1990, accompanying its prehearing exchange, Coors argued that the claims in this action are subject to the five-year statute of limitations established by 28 U.S.C. § 2462.[7/] Acknowledging that RCRA, in common with other environmental statutes, does not contain a specific statute of limitations governing the time in which an action or proceeding for the imposition of a civil penalty may be brought, Coors says that the general rule adopted by the courts is to borrow the limitation period applicable to an analogous cause of action established by state law. Applicable federal statutes of limitation apply, however, where a federal statute does not contain a specific limitation period and there is a need for a consistent

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[7/] The statute, 28 U.S.C. § 2462, provides:

> Except as otherwise provided by act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, precuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued, if within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

federal standard. Citing cases applying the Clean Water Act and other acts,[2/] Coors asserts that the five-year statute of limitations contained in 28 U.S.C. § 2462 applies to this action.

Pointing out that the most recent violations alleged in Counts I and II of the complaint occurred in August 1984, Coors contends that the five-year limitations period set forth in 28 U.S.C. § 2462 expired no later than August 31, 1989. Because the complaint herein was not filed until June 19, 1990, it is argued that Counts I and II of the complaint are time barred and must be dismissed.

Responding, Complainant asserts that the federal government is not bound by a statute of limitations unless Congress has clearly manifested an intent that the government should be so bound (Response Memorandum, dated December 20, 1990). Assuming, arguendo, that 28 U.S.C. § 2462 is applicable, Complainant says that the crucial issue is whether the statute of limitations begins to run from the time the substantive violation occurs or whether it begins to run from the time a civil penalty is imposed as a result of final agency action. Complainant argues that "claim" as appearing in section 2462 can only mean an established, imposed civil penalty, the result of final agency action. According to Complainant, civil fines, penalties or forfeitures must be first

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[2/] See among others, Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440 (D. Md. 1985); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987) and Friends of the Earth v. Facet Enterprises, Inc., 618 F.Supp. 532 (W.D. N.Y. 1984). See also United States v. SCM Corp., 667 F.Supp. 1110 (D. Md. 1987) (Clean Air Act) and United States v. Central Soya, Inc., 697 F.2d 165 (7th Cir. 1982) (Rivers and Harbors Act).

established in order to be enforceable. It says that this interpretation is supported by the federal circuits, citing United States v. Meyer, 808 F.2d 912 (1987).

In reply, Coors states that EPA's contention no statute of limitations applies to enforcement actions under RCRA, and by analogy other environmental statutes, is simply wrong and must be rejected (Respondent's Reply To Complainant's Response Regarding Respondent's Statute Of Limitations Defense, dated January 3, 1991). Coors relies on cases previously cited (supra at note 8). Moreover, Coors argues that EPA's interpretation of section 2462 leads to nonsensical results, because EPA could wait an indefinite period of time after the violation, even 100 years, to institute an administrative proceeding to assess a penalty, and then, upon completion of the administrative proceeding, the five-year period established by section 2462 would commence to run. According to Coors, this interpretation renders the statute meaningless and must be rejected.

Coors says that Complainant's reliance on United States v. Meyer, supra, is misplaced, because there the issue was when the statute commenced to run as to an action for the recovery of an administratively assessed penalty, the parties having concluded that 28 U.S.C. § 2462 required that any action to impose a penalty must be brought within five years of the alleged violation.

Coors has renewed its contention that Counts I and II are time barred by 28 U.S.C. § 2462 (Respondent's Memorandum of Points and Authorities In Support Of Its Motion For Summary Judgment at 7).

D I S C U S S I O N

United States v. Meyers, supra, holds that the statute of limitations, 28 U.S.C. § 2462, begins to run on an action for the recovery of a penalty when the penalty is administratively imposed. The court did not have to decide the question whether the statute applied to an action or proceeding to assess or impose a penalty, because the parties had agreed that the statute was so applicable and there was no question but that the administrative proceeding had been commenced within five years of the alleged violation. Meyers, of course, involved a statutory scheme, antiboycott provisions of Export Administration Act of 1979, whereby the government was effectively precluded from bringing suit to enforce or recover a penalty until the penalty was administratively determined and assessed. It is in this context that the court's statement the noun "enforcement" in section 2462 ". . . presupposes the existence of an actual penalty to be enforced" (808 F.2d at 915) must be viewed. As stated, this argument would apply as well to a judicial proceeding for violations of various environmental or other statutes which empower the courts to levy a penalty and yet, many cases hold that section 2462 is applicable, for example, to judicial proceedings alleging violations of the Clean Water Act. In addition to cases cited supra at note 8, see Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3rd Cir. 1990) (28 U.S.C. § 2462 applicable to citizen suit under CWA).

In 3M Company (Minnesota Mining and Manufacturing), Docket No. TSCA-88-H-06 (Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, August 7, 1989), presently on appeal to the Administrator, Judge Frazier concluded that 28 U.S.C. § 2462 was not applicable to administrative proceedings for the assessment of civil penalties under section 16(a)(2) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2) (Slip Opinion at 13). He relied firstly on settled principles that the United States is not bound by statutes of limitation unless Congress has explicitly directed otherwise and that statutes of limitation sought to be applied to bar rights of the government must be strictly construed.[9/] He concluded that an action or proceeding for the enforcement of a civil penalty contemplated by 28 U.S.C. § 2462 clearly applied to an action for the recovery of a civil penalty, instituted by the Attorney General in U.S. district court against a person failing to pay a penalty which has been administratively assessed and which has become final, contemplated by section 16(a)(4) of TSCA (Slip Opinion at 15). The rationale of United States v. Meyer, supra, is clearly pertinent to such a situation, because a penalty in accordance with section 16(a) of TSCA may only be assessed by the Administrator after respondent has had an opportunity for a hearing in accordance with the Administrative Procedure Act.

[9/] This is simply a variation of the rule that waivers of sovereign immunity are to be strictly construed. See, e.g., St. Louis Fuel and Supply Co., Inc. v. F.E.R.C., 890 F.2d 446 (D.C. Cir. 1989) (applicability of Equal Access To Justice Act).

Secondly, after an exhaustive analysis of the origin and legislative history of 28 U.S.C. § 2462, Judge Frazier concluded that there was no evidence Congress intended section 2462 to be applicable generally to administrative proceedings (Slip Opinion at 26). He found unpersuasive the only apparent federal court decision holding the statute applicable to administrative proceedings, because the holding was obiter dicta and because the court purported to rely on the distinction between "action" and "proceeding" in section 2462, while apparently using the terms interchangeably in the course of its opinion.[10/]

In Waterville Industries, Inc., RCRA-I-87-1086 (Order, June 23, 1988), Judge Vanderheyden concluded that 28 U.S.C. § 2462 was the relevant statute of limitations applicable to an enforcement action under RCRA § 3008(a). He cited without discussion Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517 (9th Cir. 1987). Sierra Club was a judicial proceeding, i.e., citizen

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[10/] Slip Opinion at 33-37. The decision, United States v. N.O.C., Inc., unpublished, 28 ERC 1461 (D. N.J. 1988), was an action instituted by the United States for the recovery of an administratively assessed penalty under the Toxic Substances Control Act, which had been upheld by the courts and had become final. In the course of addressing N.O.C.'s contention that the claim was time barred by 28 U.S.C. § 2462, the court ruled that TSCA created two distinct causes, one for the assessment of a penalty and the other for enforcement of the penalty. The court ruled that the government's claim for the penalty first accrued within the meaning of section 2462 when the penalty assessment became final. Although considering itself precluded from deciding the question of whether section 2462 applied to administrative proceedings for the assessment of penalties by the fact review of such penalties was vested in the courts of appeals, the court opined that section 2462 applied separately to the distinct causes of action created by TSCA.

suit in U.S. district court for violations of the Clean Water Act, and thus is not authority for the view that section 2462 is generally applicable to administrative proceedings. Although holding that section 2462 was applicable, Judge Vanderheyden ruled that the statute did not begin to run until the violations were discovered in an EPA inspection of Waterville's facility and thus the proceeding was not time barred.

RCRA § 3008(a) does not mandate administrative proceedings for violations of the Act, but instead provides that the Administrator may issue an order assessing a civil penalty for any past or current violation or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction. In accordance with the cited decisions holding section 2462 applicable to judicial proceedings under the Clean Water and the Clean Air Acts, it would appear to be clear that section 2462 is also applicable to a judicial proceeding under section 3008(a) of RCRA. It would seem anomalous indeed to hold that a judicial proceeding under RCRA § 3008(a) was time barred by 28 U.S.C. § 2462, while the government had an unlimited period of time to commence an administrative proceeding under the same section of RCRA. Moreover, different considerations apply when resort to administrative proceedings is optional rather than mandatory. See, e.g., Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953) (in an action by the United States to recover liquidated damages under the Walsh-Healey Act for employment of

child labor, liability accrued at time minors were employed and statute of limitations began to run on that date; filing of administrative complaint did not toll statutory period).

In view of the foregoing, I agree with Judge Vanderheyden that 28 U.S.C. § 2462 is applicable to administrative as well as judicial proceedings under section 3008(a) of RCRA. It does not follow, however, that Counts I and II of the complaint are time barred as claimed by Coors. In Public Interest Research Group. v. Powell Duffryn Terminals, Inc., supra, it was held that, in citizens suit for violations of Clean Water Act, a claim within the meaning of section 2462 first accrued when DMR's showing violations were filed by defendant.[11/] Application of this rule here would mean that the statute did not begin to run until Coors informed EPA of the apparent violations by sending the "Halaby letter" to EPA in February 1990. Even if the claim were deemed to have accrued in 1988 when Coors notified the Colorado Department of Health of the contamination, this action would be timely. Accordingly, this action was timely brought and 28 U.S.C. § 2462 is not an obstacle to this proceeding.

[11/] This follows logically from the rule that a cause of action for personal injuries does not accrue until the injured party either knew, or should have known, not only of the injury, but also the basis for an actionable claim. See, e.g., Goodman v. Mead Johnson & Co., 534 F.2d 566 (3rd Cir. 1976), applying New Jersey law.

O R D E R

The motion to dismiss this action as time barred is denied.[12/]

Dated this 1st day of March 1991.

Spencer T. Nissen
Administrative Law Judge

[12/] A final ruling on Complainant's motion to amend the complaint will be forthcoming.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTIONS FOR AN ACCELERATED DECISION AND TO DISMISS**, dated March 1, 1991, in re: Adolph Coors Co. and its unincorporated affiliate, Coors Brewing Co., Dkt. No. RCRA-VIII-90-09, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: March 1, 1991

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