UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN THE MATTER OF:	:	
	:	Docket No. EPCRA-III-2015-0127
	:	
Eagle Brass Company,	:	
Respondent	:	
	:	
Eagle Brass Company	:	
1243 Old Bernville Road	:	
Leesport, PA 19533-9115,	:	
Facility	:	
	:	

THE RESPONDENT'S PREHEARING EXCHANGE

1.(A) RESPONDENT'S WITNESSES

Jonathon Anderton. Mr. Anderton is Vice-President of Operations and was so employed at all times relevant to the litigation. Mr. Anderton will testify regarding the reports prepared and submitted by Eagle Brass Company.

Charles Bernard. Mr. Bernard is the President and Owner of Eagle Brass Company. Mr. Bernard will testify regarding the facts and circumstances of the case and the inequity of the proposed penalties.

1.(B) DOCUMENTS AND EXHIBITS TO BE PRODUCED AS EVIDENCE

The documents that the Respondent intends to produce as evidence at the hearing in this matter have been filed concurrently with this document.

The Respondent reserves the right to rely on any exhibit offered by the Complainant.

1.(C) LOCATION, TIME FOR HERING AND NEED FOR TRANSLATION SERVICES

The location should be Philadelphia, PA.

The Respondent needs two (2) hours to present its case.

No translation services are necessary.

2.(A) SERVICE

The Respondent acknowledges that service was made.

2.(B) LIABILITY

In Paragraphs 16, 20, and 24 of the EPA's Complaint, it alleges that the Respondent has failed to file a Form R for copper and therefore, violated the following section of the U.S. Code:

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

42 U.S.C.A. §11023(a). It also asserts that the Respondent has violated the following section of the Code of Federal Regulations:

> §370.30 What information must I provide and what format must I use?
>
> (a) You must report the hazardous chemicals present at your facility that meet or exceed the applicable threshold levels (threshold levels are in §1A370.10) by either:
>
> (1) Submitting an MSDS for each hazardous chemical present at your facility that meet or exceed its applicable threshold level; or
>
> (2) Submitting a list of all hazardous chemicals present at your facility at or above the applicable threshold levels. The hazardous chemicals on your list must be grouped by Hazard Category as defined under §370.66. The list must contain the chemical or common name of each hazardous chemical as provided on the MSDS.
>
> (b) Within 30 days of a request by the LEPC (as provided in §370.10(b)), you must also submit an MSDS for any hazardous chemical present at your facility for which you have not submitted an MSDS.

40 C.F.R. §370.30.[1]

[1] The Respondent contends that 40 C.F.R. §370.30 does not give rise to any penalties.

As a result of the foregoing alleged violations, the EPA is seeking enforcement penalties pursuant to *42 U.S.C.A. §11045*. In relevant part, that statute provides the following:

> (c) Civil and administrative penalties for reporting requirements
>
> (1) *Any person (other than a governmental entity) who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.*
>
> (2) Any person (other than a governmental entity) who violates any requirement of section 11021 of 11043(b) of this title, and any person who fails to furnish to the Administrator information required under section 11042(a)(2) of this title shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.
>
> (3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.
>
> (4) The Administrator may assess any civil penalty for which a person is liable under this subsection by administrative order or may bring an action to assess and collect the penalty in the United States district court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

42 U.S.C.A. §11045. (Emphasis added).

As a matter of law, the civil penalties contained in Section 11045 apply to violations of Section 11045. They do not apply to 40 C.F.R. §370.30.

Essentially, this case presents a dispute of misfeasance versus nonfeasance. "Misfeasance" involves the performance of an act that one is required to perform, albeit in an improper manner. "Nonfeasance" is the omission to perform an act that a person is required to perform. See, *e.g.*, *Alpart v. General Land Partners, Inc., 574 F.Supp. 2d 491 (E.D.Pa. 2008)*. At worst, the actions of Eagle Brass constituted misfeasance.

The crux of the dispute here lies in the fact that the Respondent processed an alloy that contains both nickel and copper. *There is no dispute that the Respondent filed a Form R* and that

the information in the Form R was correct in all respects except for one and that it has identified the chemical as nickel rather than the alloy. The EPA contends that this is a failure to report copper. The Respondent contends that under the EPA's best case scenario, this is an inaccurate report and not a failure to report.

Contrary to the EPA's assertions, at best, the regulations establish what is supposed to be reported. What they do not establish is how it is supposed to be reported and how a Form R is to be prepared. The reporting instructions are really no clearer. They state:

> EPCRA Section 313 chemicals contained in mixtures and other trade name products must be factored into threshold determinations and release and other waste management calculations.
>
> If your facility processed or otherwise used mixtures or other trade name products during the calendar year, you are required to use the best readily available dates (or reasonable estimates if such data are not readily available) to determine whether the toxic chemicals in a mixture meet or exceed the *de minimis* concentration and, therefore, whether they must be included in threshold determinations and release and other waste management calculations. If you know that a mixture or other trade name product contains a specific EPCRA Section 313 chemical, combine the amount of the EPCRA Section 313 chemical in the mixture or other trade name product with other amounts of the same EPCRA Section 313 chemical processed or otherwise used at your facility for threshold determinations and release and other waste management calculations. If you know that a mixture contains an EPCRA Section 313 chemical but it is present below the *de minimis* level, you do not have to consider the amount of the EPCRA Section 313 chemical present in that mixture for purposes of threshold determinations and release and other waste management calculations. PBT chemicals are not eligible for the *de minimis* exemption except lead when it is contained in stainless steel, brass or bronze alloy.
>
> Observe the following guidelines in estimating concentrations of EPCRA Section 313 chemicals in mixtures when only limited information is available:
>
> - If you only know the upper bound concentration, you must use it for threshold determinations (40 CRF Section 372.30(b)(ii)).
>
> - If you know the lower and upper bound concentrations of an EPCRA Section 313 chemical in a mixture, EPA recommends you use the midpoint of these two concentrations for threshold determinations.

- If you know only the lower bound concentration, EPA recommends you subtract out the percentages of any other known components to determine a reasonable upper bound concentration, and then determine a midpoint.

Regardless of the EPA's position, this does not state how their form is to be prepared.

The EPA contends in its Complaint that the proposed penalty was determined through application of the Enforcement Response Policy for Section 313 of the Emergency Planning Right-To-Know Act (1986). This becomes very important to its complaint. For the purpose of this action, the following sections are relevant:

NOTICES OF NONCOMPLIANCE (NON)

Summary of Circumstances Generally Warranting an NON

- *Form R reports which are incorrectly assembled; for example, failure to include all pages for each Form R or reporting more than one chemical per Form R.*

- *Form R reports which contain missing or invalid facility or chemical identification information; for example, the CAS number reported does not match the chemical name reported.*

- Submission of §313 and Pollution Prevention Act data on an invalid form.

- Incomplete Reporting, i.e., reports which contain blanks where an answer is required.

- Magnetic media submissions which cannot be processed.

- The submission of a Form R report with trade secrets without a sanitized version, or the submission of the sanitized version of the Form R report without the trade secret information.

- Form R reports which are sent to an incorrect address.

* * *

Discussion

A Notice of Noncompliance (NON) is the appropriate response for certain errors on Fom R reports detected by the Agency. Generally, these are errors which prevent the information on the Form R from being entered into EPA's database. The NON will state that corrections must be made within a specified

time (30 days from receipt of the NON). Failure to correct any error for which a NON is issued may be the basis for issuance of a Civil Administrative Complaint.

The decision to issue NONs for the submission of a Form R report with a trade secret claim without a sanitized version, or of the sanitized version without the trade secret information, is being treated the same as a Form R report with errors. This is a violation of EPCRA §313 as well as the trade secret requirements of EPCRA.

CIVIL ADMINISTRATIVE COMPLAINTS

A Civil Administrative Complaint will be the appropriate response for: failure to report in a timely manner; data quality errors; failure to respond to a NON; repeated violations; failure to supply notification and incomplete or inaccurate supplier notification; and failure to maintain record and failure to maintain records according to the standard in the regulation.

Definitions:

Failure to Report in a Timely Manner. This violation includes the failure to report in a timely manner to either EPA or to the state for each chemical on the list. There are two distinct categories for this violation. A circumstance level one penalty will be assessed against a category I violation. A "per day" formula is used to determine category II penalties; see this per day formula on page 13.

- Category I: Form R reports that are submitted one year or more after the July 1 due date.

- Category II: Form R reports that are submitted after the July 1 due date but before July 1 of the following year.

EPCRA §313 Subpart (a) requires Form R reports to be submitted annually on or before July 1 and to contain data estimating releases during the preceding calendar year. Facilities which submit Form R reports after the July 1 deadline have failed to comply with this annual reporting requirement and have defeated the purpose of EPCRA §313, which is to make this toxic release data available to states and the public annually and in a timely manner.

Data Quality Errors: Data Quality Errors are errors which cause erroneous data to be submitted to EPA and states. Generally, these are errors which are not readily detected during EPA's data entry process. Below are the range of actions which constitute data quality errors; generally, these are a result of a failure to comply with the explicit requirements of EPCRA §313:

- Failure to calculate or provide reasonable estimates of releases or off-site transfers.

- Failure to identify all appropriate categories of chemical use, resulting in error(s) in estimates of release or off-site transfers.

- Failure to identify for each wastestream the waste treatment or disposal methods employed, and an estimate of the treatment efficiency typically achieved by such methods, for that wastestream.

- Failure to use all readily available information necessary to calculate as accurately as possible, releases or off-site transfers.

- Failure to provide the annual quantity of the toxic chemical which entered each environmental medium.

- Failure to provide the annual quantity of the toxic chemical transferred off-site.

- Failure to provide information required by §6607 of the Pollution Prevention Act of 1990 and by any regulations promulgated under §6607 of the Pollution Prevention Act of 1990.

- Under the requirements of §6607 of the Pollution Prevention Act of 1990, claiming past or current year source reduction or recycling activities which are not in fact implemented by the facility. This does not apply to activities which the facility may estimate for future years.

- A facility's Form R reporting demonstrates a pattern of similar errors or omissions as manifested by the issuance by EPA of NONs for two or more reporting years for the same or similar errors or omissions.

NOTE: If an error is made in determining a facility's toxic chemical threshold which results in the facility erroneously concluding that a Form R report for that chemical is not required, this is not a data quality error, but a "failure to report in a timely manner" violation.

Failure to respond to an NON When a facility receives a Notice of Noncompliance (NON) and fails to comply with the Notice of Noncompliance, i.e., fails to correct the information EPA requests to be corrected in the NON by the time period specified in the NON, the violation is "failure to respond to an NON." Included here is the failure to also provide the state with corrected information requested in the NON within 30 days of receiving the NON.

The fallacy of the EPA's argument is whether an erroneous, although factual report constitutes a failure to report. This is important because pursuant to the aforementioned

standards, if the information was incorrect, the Respondent contends that a notice of noncompliance should have issued and provided the Respondent the opportunity to correct its filing.

A timely filed report, albeit containing an inaccuracy, is not a failure to file a report. The EPA could have very easily issued a notice of noncompliance and requested the report be amended.

Since the evidence does not support a conclusion of a failure to report, a genuine issue of material fact exists and the motion for accelerated decision should be denied.

2.(C-D) PROPOSED PENALTY

The Respondent incorporates by reference its comments regarding liability.

It is axiomatic that in order to preserve an issue for subsequent review, it must be raised at the earliest possibility. Even if the presiding officer does not believe he has the authority to decide a constitutional issue, which the Respondent disputes, the Respondent must raise the issue to preserve it for subsequent review.

Under the law, there is a distinction between a statute being unconstitutional on its face and being unconstitutional as applied.[2] In this case, the Respondent contends that these laws are being applied unconstitutionally under the circumstances of this case

As noted, there are two (2) types of constitutional challenges to a statute. A facial challenge to a statute asks whether the statute may be constitutionally applied under *any* set of factual circumstances. *United States v. Salerno, 481 U.S. 739, 746 (1987). See also City Council of L.A. v. Taxpayers, 466 U.S. 789, 796 (1984)* ("There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face' - either because it is

[2] The Respondent concedes that an administrative law judge determining that a statute is unconstitutional on its face is of no moment. On the other hand, an administrative law judge can and should satisfy himself that a statute is being constitutionally applied in all cases.

unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.") *See also Township of Exeter v. Zoning Hearing Board of Exeter Township, 599 Pa. 568, 962 A.2d 653 (2009)* (discussing the difference between a *de jure* attack on the face of an ordinance and a *de facto* attack on its implementation).

A challenge to a statute as applied requires review of how the statute is implemented. The Supreme Court has explicitly stated that statutes that have survived facial challenges are not protected from as applied challenges. *Wisc. Right to Life v. FEC, 546 U.S. 410, 411-12 (2006).* The Supreme Court has also stated that a statute may be facially constitutional but, when applied to a particular set of facts, it may be unconstitutional. *Nashville, C. & St. L. Ry. V. Waiters, 294 U.S. 405, 415 (1935).* Therefore, it is possible that a law that is constitutionally applied in one matter may be unconstitutional as applied to another matter. *Id. See also Ala. State Fed. of Labor v. McAdory, 325 U.S. 450 (1945); Watson v. Buck, 313 U.S. 387 (1941).*

The EPA is seeking to impose an astronomical fine for failure to fill in one box on a form they created incorrectly. The Respondent contends now and will continue to contend for so long as necessary, that it is constitutionally prohibited. It is penal in nature and excessive.

Respectfully submitted,

MASANO ♦ BRADLEY

James E. Gavin, Esquire
Attorneys for Respondent,
Eagle Brass Company

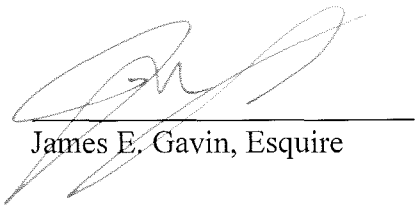
CERTIFICATE OF SERVICE

I, James E. Gavin, Esquire, hereby certify that I have this 30th day of October, 2015, served a true and correct copy of the Respondent's Pre-Hearing Exchange upon the party listed below, electronically and via overnight delivery:

Attorney for Complainant:

Joyce A. Howell (3RC30)
Senior Assistant Regional Counsel
EPA Region III
1650 Arch Street
Philadelphia, PA 19103

MASANO ♦ BRADLEY



James E. Gavin, Esquire