9/30/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

In the Matter of	
KAW VALLEY, INC.	Docket Number: EPCRA-VII-89-T-356
Respondent	Judge Greene

Emergency Planning and Community Response Act [EPCRA] 42 U.S.C § 11001, et seq.: §§ 313, 325, 42 U.S.C. §§11023, 11045: In the circumstances presented here the appropriate civil penalty is $4250.00 per violation, or $12,750.00. Circumstances included publication of final regulations which differed in a significant respect from those discussed at an EPA sponsored seminar upon which respondent relied in believing it was not subject to EPCRA; and respondent's failure to file reporting forms after being advised that it was subject to the Act and final regulations.

Appearances:

Becky Ingram Dolph, Esquire, and Julie M. Van Horn, Esquire, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, for complainant;

John C. Tillotson, Esquire, Tillotson & Van Parys, 606 Delaware, P. O. Box 10, Leavenworth, Kansas 66048, for respondent.

BEFORE: J. F. Greene, Administrative Law Judge

September 30, 1992

DECISION AND ORDER

This matter arises under section 325 of the Emergency and Community Response Act ["the Act"], 42 U.S.C. §11045. granting summary judgment as to liability for the three v of section 313 of the Act charged in the complaint was favor of complainant herein on June 7, 1991. Therea parties were unable to reach a settlement as to the amo civil penalty, and sought a hearing with respect to tha

The issue presented for decision is whether t ($15,000) sought by complainant for the violations fou to file toxic chemical release reporting forms by Ju should be reduced in consideration of the circumstances respondent's failure to file the forms on or befo specified by the Act and the implementing regulations

On December 1, 1987, seven months before the form be filed, respondent's Director of Regulatory Affai day-long seminar, sponsored jointly by the U. S. Protection Agency ("EPA") and the Kansas Depar Environment, on the then newly-passed Act. Proposed implement section 313 of the Act had been published Register.[1] Both the Act[2] and the proposed regulati

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[1] June 4, 1987.

[2] At §313(b)(1)(A), 42 U.S.C. §11023(requirements of this section shall apply to owners facilities that have 10 or more full-time employe

the release reporting requirements of section 313 do not apply to businesses having less than ten full-time employees. (Neither the Act nor the proposed regulations define the term "full-time employee"). Likewise, information presented at the seminar made clear that section 313 of the Act does not apply to businesses having less than ten full-time employees.[3] Final regulations had not yet been published but were expected to be published on December 31, 1987. Materials distributed at the seminar stated that the final regulations had not been published.[4]

When the final regulations were published,[5] a definition of "full-time employee" had been added such that, even though respondent did not have ten employees who worked "full time," e.g. 40 hours per week all year, the facility now fell within the definition under a newly provided method of calculation.[6] In essence, "full-time" had become a determination based upon total hours worked by all employees. Relying upon statements made at the seminar about ten full-time employees, however, respondent did not read the final regulations in the belief that the Act did not apply to its business. The first year for which reports had to be filed

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[3] Stipulation between the parties.

[4] R.X.2; TR at 102-103. See also TR 22-23, where an EPA official testified in effect that he probably told attendees that final regulations had not been issued.

[5] Federal Register, February 16, 1988. See 40 C.F.R. §312.3.

[6] 40 C.F.R §312.3 provides that "full-time employee" means 2000 hour per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totaling the hours worked during the calendar year by all employees, including contract employees, and dividing that total by 2000 hours."

pursuant to the Act was 1987. The reports were due on July 1, 1988. Respondent did not file the reports by July 1, 1988. On January 10-11, 1989, respondent's facility was inspected by EPA, and, on those dates, respondent was informed that under the (final) regulation it had ten or more full-time employees and should file the reporting forms. [TR 31, 108] On June 21, 1989, the complaint herein was filed. At some point after that, possibly as soon as July 7, 1989, the forms were received. Accordingly, respondent was found liable for failure to file 1987 reporting forms by July 1, 1988.[7]

It appears that EPA's important and commendable "outreach" program, which assisted the regulated community in knowing and understanding its obligations under the new Act, needs to place far more emphasis upon the importance of final regulations when the programs take place before the issuance of final regulations. Here, however, considering that the audience was not composed of regulatory lawyers who could instantly recognize the significance of statements to the effect that the regulations being discussed were not final, it is hardly surprising that misunderstandings occurred. For instance, Respondent's Exhibit 2 [a pamphlet entitled Title III Release Reporting Requirements -- A New Federal Law], which was distributed at the seminar, contains the following statement: "(T)he proposed Toxic Chemical Release Inventory rule under Section 313 was published in the Federal Register on June 4,

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[7] See June 7, 1991, Order Upon Motion for Summary Judgment as to Liability, In re Kaw Valley, Inc., Docket No. EPCRA-VII-89-T-356.

1987. The target date for the final rule is December 31, 1987." This sort of statement is wholly inadequate, even taken with statements to the same effect which complainant's witness believes he or others made [TR 31], to suggest to the regulated community that significant changes in the rules, particularly changes pertaining to what businesses are covered, could be made -- or at least could not be ruled out -- in the final regulations.[8] Or, considering the size of the outreach effort already made, perhaps it would not have been burdensome to notify seminar participants of a major change in the regulations in these circumstances.

A change of the magnitude seen here between the proposed regulations as discussed at the seminar and the final version could certainly have formed the basis for a significant reduction in the penalty proposed[9], if respondent had been diligent in determining its responsibilities upon being advised, on January 10-11, 1989, that it had ten full-time employees and had corrected its error. Although the record is not clear as to what the inspector may have said about sending further information (respondent's official testified that she asked him to send the forms to her) [TR 108-109] it is clear that respondent was then placed on notice that an EPA official believed respondent was subject to the regulations as published in final form on February 16, 1988. [TR 94, 108] It then became respondent's responsibility to find out, if doubt still

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[8] See TR 102-103, where complainant counsel calls this statement to respondent's attention.

[9] This relates only to seminar participants.

existed on its part as to the requirements of the final rule.[10] This it did not do. The reports for 1987 were not received, as has been noted, until July, 1989, at the earliest. Respondent's lack of diligence at this point weighs against a significant reduction of the penalty, although the original failure to file stems from a misunderstanding that should result in a small reduction, in the circumstances here.

Accordingly, recognizing the requirements of Section 325(b)(2) of the Act, i.e. taking into account the nature, circumstances, extent, and gravity of the violations, any prior history of "such violations,"[11] the degree of culpability, and other such matters as justice may require[12], it is determined that a reduction of $750.00 in the proposed civil penalty for each count should be made, for a total of $12,750. A reduction is deemed necessary in the interests of fairness in this unfortunate situation, considering that a fundamental change, from respondent's point of view, took place between the date of the seminar and the publication of the final regulations. This in no way minimizes respondent's failure to act at once after the January 10-11, 1989, inspection.

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[10] A telephone number which could be used in case seminar participants had questions about the Act and regulations had been provided, TR 32.

[11] The record does not show any history of prior violations of the Act.

[12] In this case, "such other matters as justice may require" include the insufficient emphasis at the seminar upon the possible extent of changes to the final regulations which resulted in respondent failing to examine them.

Reference was made in the Order Upon Motion for Summary Judgment as to Liability issued in this matter on June 7, 1991 [at page 9, slip opinion] to decisions in CBI Services, Inc., Docket No. EPCRA-05-1990 and cases cited therein, including Riverside Furniture, Docket No. EPCRA-88-H-VI-406S, to the effect that penalty reductions made in those cases based upon distinctions between "failure to file" violations and "late filing" violations might be considered here. However, arguments of counsel for complainant are persuasive that those issues do not arise in this case since the reporting forms had not been filed by the time the complaint was issued. As a consequence, the degree of violation selected by complainant in preparing the complaint did not depend upon the date respondent was contacted by complainant for inspection, as it did in CBI Services and Riverside Furniture. In a related argument, respondent suggests that the "circumstance level" set forth in EPA's Enforcement Response Policy for section 313 violations of the Act should be reduced because less than 180 days had elapsed between the date upon which respondent was advised of the contents of the final rule and the date upon which respondent says it filed the reports, June 29, 1989. [TR 97] The violations would then be a question of "late reporting" rather than "failure to file." However, according to the Enforcement Response Policy, the period runs only from the date upon which the reports were initially due (July 1, 1988). This is entirely reasonable. In the absence of an argument to the contrary, or in the absence of abuse of discretion, there is no basis for finding otherwise.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A fair and reasonable civil penalty in the circumstances presented here is $4250 per violation.

2. Respondent's facility was inspected by EPA on Janaury 10-11, 1989, at which time respondent was informed that, in the opinion of the inspector, respondent had more than ten full-time employees as calculated pursuant to the final version of the reporting regulations at 40 C.F.R. §312.3 published on February 16, 1988. At that time, it became respondent's responsibility to investigate and determine its obligations, if it doubted the inspector's opinion.

3. Respondent was not diligent in investigating to determine its obligations under the final regulations, upon learning that it has ten full-time employees under the final section 313 regulations, or, subsequently, in filing the reporting forms.

4. The date upon which the Enforcement Response Policy circumstance level period of 180 days begins to run is the date upon which the toxic release reports are due -- in this case, July 1, 1988 --, not when respondent was advised that it was subject to the Act (January 10-11, 1989).

ORDER

Accordingly, it is ordered that, pursuant to section 325 of the Act, 42 U.S.C. §11045, respondent shall pay a civil penalty of $12,750 for violations of the Act and regulations, within sixty (60) days from the date of final service of this Order, by

forwarding to the Regional Hearing Clerk a cashier's check or a certified Check for the said amount payable to:

Environmental Protection Agency
Regional Hearing Clerk
Region VII
Post Office Box 360748M
Pittsburgh, PA 15251

J. F. Greene
Administrative Law Judge

Dated: September 30, 1992
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAW VALLEY, INC., Plaintiff,	)	
vs.	)	CIVIL ACTION No. 92-2402-GTV
ENVIRONMENTAL PROTECTION AGENCY OF THE UNITED STATES, Defendant.	)	

MEMORANDUM AND ORDER

This case is before the court on the Cross-Motions for Summary Judgment (Docs. 13 and 15) filed by the parties to this action. Additionally, the court has before it plaintiff's Motion for Oral Argument (Doc. 25). Because the court does not believe that oral argument will materially aid in deciding the issues before it, the motion for oral argument is denied. For the reasons set out in this memorandum and order, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

This case concerns a challenge to the EPA's assessment of civil penalties against plaintiff for the violation of certain reporting requirements of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001-11050. The Act requires the owner or operator of a facility subject to its provisions to complete and file a toxic chemical release form providing certain prescribed information regarding the release of listed toxic

chemicals. Plaintiff has set forth several theories on which it contends the civil penalties assessed against it should be overturned. First, plaintiff contends that the EPA exceeded its authority in promulgating a regulation defining "full-time employee." Second, plaintiff contends that the EPA failed to comply with the notice requirements of the Administrative Procedures Act [APA] in promulgating the regulation concerning "full-time employee." Finally, plaintiff appeals the civil penalty assessment amount of $12,750.00.

I. SUMMARY JUDGMENT STANDARDS

In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party. Bee v. Greaves, 744 F.2d 1387, 13396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985). A moving party is entitled to summary judgment only if the evidence indicates "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine factual issue is one that "can reasonably be resolved only be a finder of fact because [it] may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may

be discharged by "showing" that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id.

II. STATEMENT OF UNDISPUTED FACTS

The relevant facts are largely undisputed. The facts established by the parties in accordance with D. Kan. Rule 206(c) are as follows:

The EPA brought an enforcement action against Kaw Valley pursuant to section 325 of the Emergency Planning and Community Right-to-Know Act [the Act], 42 U.S.C. § 11045. In that action, the EPA alleged that Kaw Valley committed three violations of section 313 of the Act by failing to file certain "right to know" forms relating to information on chemicals present in the community and released into the environment within 180 days of the due date prescribed by the Act. Section 313 of the Act requires facilities with ten or more full-time employees to file such forms. 42 U.S.C. § 11023. Section 313 subjects facilities

with ten or more full-time employees to its filing requirements. Id.

The EPA's administrator devised and published final administrative regulations relating to the Act on February 16, 1988. Included in these regulations was a definition of "full-time employee" for purposes of section 313, which defined a full-time employee as a person performing 2,000 hours per year of full-time equivalent employment. 40 CFR § 372.3. Prior to the publication of the final regulations, the EPA published a notice of this rulemaking in 52 Fed. Red. 211552. No specific reference to or definition of the phrase "full-time employee" appeared in the notice of the proposed regulations.

On December 7, 1987, Kaw Valley's Director of Regulatory Affairs attended a seminar sponsored by the EPA and the State of Kansas with regard to the Act. The proposed regulations relating to the Act had been published at the time of the seminar, and it was stated at the seminar that in order to be subject to the reporting requirements of the Act, a facility must have ten or more full-time employees. Subsequent to the seminar, the February 16, 1988, the final regulations were published and included a definition of the term "full-time employee." Neither the EPA or the State of Kansas contacted seminar participants concerning this post-seminar definition.

Kaw Valley considered itself to have fewer than ten individual full-time employees at all times pertinent to this

action. However, when the number of full-time equivalent employees was calculated pursuant to the EPA's February 16, 1988, regulations, Kaw Valley was determined to have fourteen full-time employees and thus to be subject to the Act's reporting requirements. The first reports pursuant to the Act were due on July 1, 1988, but Kaw Valley filed no reports.

On January 10 and 11, 1989, Kaw Valley's facility was inspected by the EPA and, at that time, Kaw Valley was notified that, under the final regulations, it had ten or more full-time employees and was subject to the Act's filing requirements. On June 22, 1989, the EPA still had not received Kaw Valley's reports and instituted an administrative proceeding against Kaw Valley alleging three counts of failure to submit a toxic chemical release form by July 1, 1988, as required by section 313 of the Act. The EPA requested an assessment of civil penalties totalling $15,000.

Kaw Valley states that it submitted its forms for all three chemicals in question on June 29, 1989. The documents were received by the EPA on or about July 7, 1989. On August 13, 1990, the EPA filed a motion for an accelerated decision as to liability in the administrative proceeding. The Administrative Law Judge [ALJ] ordered that Kaw Valley respond to the EPA's motion by August 27, 1990. Kaw Valley filed no response contesting liability, and on June 7, 1991, the ALJ entered a judgment finding Kaw Valley liable on all three counts of

violating the Act's reporting requirements.

A hearing as to the amount of penalties to be assessed was held before the ALJ on October 24, 1991. An attorney representing Kaw Valley attended the hearing. In an initial decision dated September 30, 1992, the ALJ assessed a civil penalty against Kaw Valley in the amount of $12,750. Kaw Valley did not appeal the ALJ's penalty assessment to the Environmental Appeals Board, but instead filed the present action on October 29, 1992.

III. EPA'S RULEMAKING AUTHORITY

In its first contention, plaintiff argues that the EPA's definition of "full-time employee" is outside the scope of its rulemaking authority under the Act. See 42 U.S.C. § 11048. Specifically, plaintiff argues that the EPA's definition contradicts Congress's intent and the plain meaning of the phrase "full-time employee." Defendant argues that it acted within its authority to define a statutory term and that its definition is consistent with the purpose of the Act.

In section 328 of the Act, Congress delegated authority to the EPA to prescribe such regulations as may be necessary to carry out the Act. 42 U.S.C. § 11048. Courts have generally held that the validity of a regulation promulgated under such a grant of authority will be sustained if it is reasonably related to the purpose of the enabling legislation. Mourning v. Family

Publication Serv., Inc., 411 U.S. 356, 369 (1973). However, an agency is not empowered to establish regulations which run far afield from the substance of the Act. Central Forwarding, Inc. v. Interstate Commerce Comm'n, 698 F.2d 1266, 1277 (5th Cir. 1983). At issue in the present case is the regulation which defines the term "full-time employee" for purposes of compliance with the Act's reporting requirements.

The regulation challenged by plaintiff is set forth at 40 CFR § 372.3:

> Full-time employee means 2,000 hours per year of full-time equivalent employment. A facility would calculate the number of full-time employees by totalling the hours worked during the calendar years by all employees, including contract employees, and dividing that total by 2,000 hours.

Because the regulation at issue is an agency interpretation of a statutory term, the court will evaluate the definition in accordance with the standards set out by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

In Chevron, the Court articulated a two-step analysis to be used in determining whether an agency has exceeded its authority:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnote omitted); see Rives v. Interstate Commerce Comm'n, 934 F.2d 1171, 1174 (10th Cir. 1991), cert. denied, 112 S. Ct. 1559 (1992).

If the agency's construction is based on a permissible construction of the statute, it will be permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

Applying the first step of the Chevron analysis, the court is satisfied that Congress has not defined the term "full-time employee" in the Act. Moreover, Congress has not unambiguously expressed its intent with regard to the definition of the term. Contrary to plaintiff's contention, the court is not convinced that Congress intended section 313's phrase "ten or more full-time employees" to mean ten or more individual full-time employees. "Full-time employee" appears to the court to be a term open to some interpretation.

Therefore, the court will move on to the second prong of the Chevron test: whether or not the agency's interpretation of the phrase is a permissible construction of the statute. In applying this prong of the test, the court is governed by the following standard:

> Th[e] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].

Rives, 934 F.2d at 1175 (quoting Chemical Mfgrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985).

The EPA asserts that it considered two factors in developing the definition of full-time employee. First, the EPA decided that the definition should apply to the annual basis of reporting so that the standard would apply equitably to businesses with large seasonal variations in employment. 53 Fed. Reg. 4506. Second, the EPA wanted to make sure that businesses with large numbers of contract employees would not be able to avoid the reporting requirements. Id.

The court concludes that the EPA's interpretation of the phrase "full-time employee" as set forth in 40 CFR 372.3 is a permissible and rational construction of the statute. Although a more obvious interpretation of the phrase might focus on the number of individual employees working forty hours per week, that does not make the EPA's definition unreasonable. See Rives, 934 F.2d at 1175. Two thousand hours is a generally accepted level of annual full-time work, and the EPA's definition allows a facility to make an easy determination of whether it meets a ten employee equivalent level by dividing the total annual hours worked by all employees -- including contract employees -- by 2,000. See 53 Fed. Reg. 4506-07.

IV. EPA'S COMPLIANCE WITH THE APA'S NOTICE REQUIREMENTS

Plaintiff next contends that the EPA failed to comply with

the notice requirements of the Administrative Procedures Act [APA] in promulgating its definition of "full-time employee." First, plaintiff argues that there was no solicitation of comments by the agency with respect to the definition of "full-time employee." Second, although plaintiff's brief is somewhat unclear, it appears that plaintiff contends that the EPA failed to rationally and explicitly justify its definition of "full-time employee" by a thorough and comprehensible statement pursuant to section five of the APA. 5 U.S.C. § 553(3).

The EPA has responded by asserting that its rulemaking was procedurally adequate. Defendant contends that its proposed rulemaking regarding section 313 of the Act included a detailed description of the statutory reporting scheme and put the public on notice that all requirements described in its proposal were open for comment and clarification, including the regulation subjecting facilities to the Act's reporting requirements based on their number of full-time employees. Defendant asserts that the final rule, which includes the definition of "full-time employee" at issue here, was the outgrowth of the proposed rule and public comments on it. In the alternative, the EPA argues that an agency has the inherent authority to interpret terms in statutes over which it has enforcement authority; such an interpretation is not subject to the notice and comment provisions of the APA.

Under either of the two theories set forth by the EPA, the

procedure by which the EPA promulgated its definition of "full-time employee" was adequate. Section 553 of the APA requires notice of proposed rulemaking, including "either the terms or substance of the proposed rule." 5 U.S.C. § 553(b)(3). Interested parties must be given an opportunity to participate in the rulemaking through submission of written comments. 5 U.S.C § 553(c). Once a proposal is set forth and the public is given an opportunity for comment, a new opportunity for comment is not required merely because the final rule differs from the proposal. The Court of Appeals for the Tenth Circuit has stated:

> It is a well settled and sound rule which permits administrative agencies to make changes in the proposed rule after the comment period without a new round of hearings . . . . To hold otherwise would 'lead to the absurdity that in rule making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.'

Bierne v. Secretary of Agriculture, 645 F.2d 862, 865 (10th Cir. 1981) (quoting International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

Here, the EPA's proposed rule included the requirement in section 313(b)(1)(A) that a facility have ten or more full-time employees to be subject to the reporting requirements. 52 Fed. Reg. 21168. In response to one commenter's request, the final rule set out at 53 Fed. Reg. 4506-07 includes the EPA's definition of full-time employee at issue here. The rule also explains the EPA's reasons for adopting such a definition. Under the standards set out in section 553 of the APA, the EPA gave

general notice of a proposed rule, including the terms or substance of the rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). Moreover, as the Tenth Circuit stated in Bierne, an agency may make changes in a proposed rule in response to comments without a new round of hearings. 645 F.2d at 865. Here, the definition of full-time employee was a clarification in response to one commenter and was a logical outgrowth of the original proposed rule. See American Mining Congress v. Thomas, 772 F.2d 617, 639 (10th Cir.), cert. denied, 476 U.S. 1158 (1985). Thus, no new notice or solicitation of comments need be given.

Alternatively, the EPA's interpretation of the phrase "full-time employee" might be considered to be within the agency's inherent authority to interpret terms in statutes over which it has enforcement authority. Mere interpretations of language are not subject to either the notice and comment procedure under 5 U.S.C § 553 or the formalities of an agency hearing under 5 U.S.C §§ 556-557. York v. Secretary of Treasury, 774 F.2d 417, 420 (10th Cir. 1985)(interpretation of statutory term "machine gun" by Bureau of Alcohol, Tobacco and Firearms).

Finally, the court notes that to the extent plaintiff is arguing that the EPA's definition of "full-time employee" is invalid because it did not include a statement of purpose, plaintiff's argument is not adopted. The final rule promulgated by the EPA which defines the term does include a detailed

explanation of why the definition was adopted. 53 Fed. Red. 4506-07. Such an explanation satisfies the requirement in 5 U.S.C. § 553(c) that a concise statement of basis and purpose be included in all final rules.

V. APPEAL OF THE CIVIL PENALTY

In Count II of its complaint and in its motion for summary judgment, Kaw Valley contends that the civil penalty of $12,750 fixed by the ALJ should be reduced to $1,500. Plaintiff asserts that a lower penalty would be appropriate in light of the ALJ's findings that the seminar attended by plaintiff's Director of Regulatory Affairs was inadequate, that the EPA would not have been burdened by notifying seminar participants of the definition of "full-time employee," and that Kaw Valley's failure to file was the result of a misunderstanding. Plaintiff further argues that $1,500 would be the equivalent of a penalty for late reporting of 180 days.[1] In response, the EPA argues that Count II should be dismissed because plaintiff failed to exhaust its administrative remedies under the Act before filing this lawsuit. In its reply, Kaw Valley contends that the EPA has waived any defense based on failure to exhaust by neglecting to plead it as

[1] Plaintiff is apparently arguing that it would be equitable to penalize it only for the 180-day lag time between the time it was notified by the EPA that it was subject to the Act's reporting requirements in January, 1989, and when it actually filed its reports in July, 1989.

an affirmative defense in its answer. The EPA in turn asserts that it has not waived the defense, or in the alternative, should be allowed to amend its answer to assert it. Finally, the EPA asserts that it did not abuse its discretion in assessing a penalty of $12,750 for plaintiff's failure to comply with the Act's reporting requirements and that the penalty amount should be affirmed.

The court notes but does not decide the parties' arguments concerning exhaustion of administrative remedies and waiver of an affirmative defense because the court concludes that there is no basis for overturning the ALJ's civil penalty assessment in this case on its merits. "[O]nce an agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." Robinson v. United States, 718 F.2d 336, 339 (10th Cir. 1983). The Tenth Circuit has clearly stated that "[i]n reviewing an agency's imposition of a sanction within limits specified by a statute, we will not overturn an agency's choice of sanctions unless we find that those sanctions are unwarranted in law or without justification in fact." Chapman v. Department of Health and Human Servs., 821 F.2d 523, 529 (10th Cir. 1987)(citing Butz v. Glover Livestock Comm'n, 411 U.S. 182, 185, reh'g denied, 412 U.S. 933 (1973)).

In the present case, plaintiff's argument that the civil penalty imposed is excessive is based upon the following factors: (1) the seminar attended by plaintiff's Director of Regulatory

Affairs was inadequate, (2) the EPA would not have been burdened by notifying seminar participants of the new regulation defining full-time employee, and (3) that plaintiff's failure to comply with the Act's reporting requirements was a result of a misunderstanding. The Administrative Record indicates that the ALJ considered these factors, as well as the fact that even though plaintiff was informed by the EPA that it was covered by the reporting requirements on January 10, 1989, the EPA did not receive plaintiff's reports until July, 1989. The ALJ specifically found that plaintiff's lack of diligence weighed against a significant reduction of the penalty.

In light of the ALJ's weighing of both aggravating and mitigating factors, the court concludes that the penalty assessment cannot be considered an abuse of discretion. See Chapman, 821 F.2d at 529. The penalty assessed was well under the statutory maximum of $75,000 and was in fact even lower than the $15,000 penalty requested by the government. Accordingly, the court finds no basis for overturning the ALJ's penalty assessment in this case.

IT IS, THEREFORE, BY THE COURT ORDERED that Plaintiff's Motion for Summary Judgment (Doc. 13) is denied.

IT IS FURTHER ORDERED that Defendant's Cross-Motion for Summary Judgment (Doc. 15) is granted. The case is dismissed.

Copies of this order shall be mailed to counsel of record for the parties.