UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ATLAS REFINERY, INC.,	)	**DOCKET NO. TSCA-02-99-9142**
	)	
	)	
RESPONDENT	)	

ORDER ON MOTIONS

The complaint in this proceeding initiated by the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA"), Region II ("Complainant"), pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), on March 31, 1999, charged Respondent, Atlas Refinery, Inc. ("Atlas"), with violating regulations promulgated pursuant to TSCA § 8(a), 15 U.S.C. § 2607(a), set forth at 40 C.F.R. Part 710 ("Inventory Reporting Regulations"), thereby violating TSCA § 15(3)(B), 15 U.S.C. § 2614(3)(B).[1/] Specifically, the complaint alleged that, since at least 1992, Respondent has been a corporation that owned a facility in Newark, New Jersey in which it has manufactured "chemical

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[1/] TSCA § 15 provides in pertinent part that: It shall be unlawful for any person to

.....

(3) fail or refuse to.....(B) submit reports, notices, or other information,....

substances" for "commercial purposes"; and that, since at least 1992, the chemical substances have been subject to TSCA requirements and regulations related to Inventory Reporting as set forth in 40 C.F.R. Part 710; and that, since at least 1992, Respondent has been subject to the requirements of Section 8(a) of TSCA, 15 U.S.C. § 2607(a), and the regulations promulgated pursuant thereto set forth at 40 C.F.R. Part 710, which regulations require reporting for the chemical inventory established and maintained pursuant to Section 8(b) of TSCA, 15 U.S.C. § 2607(b). The complaint further alleged that Respondent failed to submit a "Partial Updating of the TSCA Chemical Inventory Data Base" (also known as "Form U"; 40 C.F.R. § 710.39) during the period from August 25, 1994 to December 23, 1994 for seven chemical substances;[2/] and that each failure to submit a Form U for a chemical substance during the mentioned period constituted a separate and distinct failure or refusal to comply with a

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[2/] The seven chemical substances are as follows:

Chemical Name	CAS NUMBER
a) Octadecanoic acid, 9 (or 10)-(sulfooxy)-, 1-butyl ester, sodium salt	42808-36-6
b) Fats and Glyceridic oils, herring, sulfated, sodium salts	61788-83-8
c) Fats and Glyceridic oils, herring, sulfonated	61788-84-9
d) Fatty acids, tall-oil, sulfated, sodium salts	68082-60-0
e) Lard, oil, sulfated, sodium salts	68153-10-6
f) Cod-liver oil, sulfated, ammonium salt	68514-69-2
g) Nonene, hydroformylation products, high-boiling, sulfated, sodium salts	71243-86-2

requirement of 40 C.F.R. § 710.33, and thus a separate and distinct violation of TSCA § 15(3)(B). For these alleged violations, Complainant proposed to assess Atlas a civil penalty of $17,000 for each of the seven failures to report a chemical substance for a total of $119,000.

Atlas filed an answer on May 28, 1999, admitting, inter alia, that it was a person and a corporation organized under the laws of the State of New Jersey, that since at least 1992 it had owned and controlled a facility located in Newark, New Jersey, and that since at least 1992 it had manufactured for commercial purposes chemical substances as defined in TSCA § 3(2) at said facility. Atlas admitted that its corporate fiscal year was the calendar year and that its sales were greater than four million dollars during the calendar years 1993 and 1994. Atlas denied manufacturing tanning oils, but admitted manufacturing "fat liquors and leather finishing oils" at its facility and that these materials were chemical substances. Atlas also admitted that during the calendar year 1993, it manufactured more than 100,000 pounds of each of the seven "chemical substances" identified in the complaint (supra note 2) at its facility and that it failed to submit a Form U for any of these chemical substances during the period from (and including) August 25, 1994 to December 23, 1994. However, Atlas denied Complainant's allegations that its failure to submit a Form U for each of the chemical substances during the period from August 25,

1994 to December 23, 1994 constituted a separate and distinct failure or refusal to comply with 40 C.F.R. § 710.33. Instead, Atlas asserted that, because all seven chemical substances would have been reported on one Form U, failure to file the Form U constituted only one failure to comply with 40 C.F.R. § 710.33. (Answer ¶ 26). Respondent requested a hearing.

In accordance with a July 7, 1999 letter-order of the ALJ, the parties have filed prehearing exchanges. On November 16, 1999, Respondent, in accordance with a schedule established by the ALJ, filed a Motion for an Order Determining Unit of Violation ("Respondent's Motion"). In response, Complainant submitted a Memorandum of Law in Opposition to Respondent's November 16, 1999 Motion, and in Support of Complainant's Cross-Motion for Partial Accelerated Decision on Liability ("Complainant's Motion"), dated December 22, 1999. On January 6, 2000, Respondent filed a Brief in Opposition to Complainant's Motion.

Respondent's Motion

By way of background, Atlas states that it is a small company with annual sales of approximately $14,000,000 and that it has been located at a single site in Newark, New Jersey for over 100 years (Brief on Motion for an Order Determining Unit of Violation, Brief, at 1). Atlas says that it employs approximately 35 people and

manufactures fat liquors for use in the tanning of leather.[3/] Atlas asserts that it was unaware of its obligation to report regarding its manufacture of the chemicals identified in the complaint until it was visited by EPA inspectors in August of 1998. Thereafter, Atlas states that it promptly filed a Report on Form U including the seven chemicals which it then learned were included in the EPA Inventory (Form U, dated 1/25/99, Exh A).

Atlas points out that the complaint alleges that it violated regulations issued under TSCA § 8(a), Inventory Reporting Regulations, set forth at 40 C.F.R. Part 710, thus constituting a violation of TSCA § 15(3)(B). Additionally, Atlas notes that paragraph 26 of the complaint alleges that Atlas' failure to submit a Form U for each of seven chemical substances constituted a separate and distinct failure or refusal to comply with the requirements of 40 C.F.R. § 710.33. Atlas asserts that whether a case arises under TSCA or FIFRA, the primary inquiry as to multiple violations and the penalties to be assessed therefor is the intent of Congress as expressed in the statutes (Brief at 3). Atlas says that it found no specific provisions in TSCA regarding either multiple violations or specific penalties. It does contend, however, that penalties are uniformly required to be reasonable.

[3/] Fat liquors are oils manufactured primarily from lard and fish oils which are used to replace the fat in the hide of an animal during the tanning process.

Regarding the regulations, Atlas again states that it found no specific mandate concerning multiple violations or penalties. Atlas acknowledges that TSCA authorizes EPA to require Reports and to fix reasonable penalties for failure to file such reports. According to Atlas, EPA Policy Statements, merely "express the opinion of the Agency and are essentially guidelines for administration under the Act." (Id.). Although the Agency's Policy Statements mandate that the failure to file a Report for multiple chemical substances must be viewed as a failure to file multiple Reports (one for each chemical), Atlas points out that the reported cases uniformly conclude that neither Administrative Law Judges nor the Environmental Appeals Board are bound by EPA Policy Statements. Moreover, Atlas says that the Policy Statements have mixed the matter of multiple penalties into procedures for determining appropriate penalties, thereby potentially elevating the penalties beyond that which an independent court might view as reasonable (Id. 4).

Atlas argues that neither the applicable sections of TSCA nor EPA regulations issued thereunder support the EPA Policy which directs that the complaint specify multiple violations when, in fact, only one violation occurred, namely its failure to file a single report (Form U). In this regard, Form U is entitled "Partial Updating of TSCA Inventory Data Base Production and Site Report" (Brief Exh B, 1994). According to Atlas, all that TSCA and

the regulations thereunder require is that reports be submitted and the focus is on the report itself and not the number of chemicals to be listed in the report (Brief at 5). Atlas cites McLaughlin Gormley King Co., 6 E.A.D. 339 (EAB, Mar. 12, 1996), holding that the determination of whether an act of proscribed conduct constitutes multiple offenses under a statutory provision is not a matter of enforcement discretion; but is, rather, a matter of statutory interpretation. The Board upheld the ALJ's conclusion that a false certification that a study submitted in support of a pesticide registration was conducted in accordance with Good Laboratory Practice Standards (GLPS) constituted a single violation of FIFRA even though the study deviated from GLPS in four independent respects.

Atlas emphasizes that the focus of TSCA § 8(a)(1) is upon the requirement that the Administrator shall promulgate rules under which each person who manufactures or processes or proposes to manufacture or process a chemical substance, with specified exceptions, shall maintain such records and submit to the Administrator such reports as the Administrator may reasonably require. Atlas also emphasizes the requirement of the regulation, 40 C.F.R. § 710.32(a), providing in part that any person who chooses to report information to EPA in writing must do so by completing the reporting form available from EPA at the address set forth in § 710.39(b).

Atlas points out that § 710.39 reinforces the requirement that Form U is to be used for submitting written information [required by Part 710] and that the form clearly contemplates that more than one chemical will be listed on each form (Brief at 6). Additionally, Atlas notes that the first place where the number of chemicals listed in a report becomes a primary focus is in the EPA Enforcement Response Policy for TSCA Reporting (ERP) where the following appears:

Multiple penalties are to be used if there is more than one violation of the same rule or violations of different rules. Violations will be determined as follows:

TSCA § 8(a) Inventory Update	Per Chemical Per Site
.....	
TSCA § 8(a) Chemical Specific Rules	Per Chemical (Per Chemical Per Site if Site-Specific Reporting Is Required)[4/]

In McLaughlin Gormley King, supra, the EAB observed that the GLP ERP, which had never been put out for notice and comment was a non-binding Agency policy whose application is open to attack in any particular case (6 E.A.D. at 350). See also Allied Signal, Inc., RCRA Appeal No. 90-27, 4 E.A.D. 748, 765 (EAB, July 29, 1993), same with respect to proposed regulations. Atlas also notes

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[4/] Recordkeeping and Reporting Rules-TSCA Sections 8, 12 and 13 (ERP May 15, 1987, revised August 5, 1996, at 12), C's Pxh 7. It should be noted that the ERP for TSCA §§ 8, 12, and 13 was revised on March 31, 1999, effective June 1, 1999. The provisions quoted in the text were not changed (Id. 13, 14).

the disclaimer in the ERP to the effect that the ERP does not constitute rule making by EPA and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or equity, by any person.[5/]

Atlas argues that the arbitrary requirement of the ERP that the unit of violation for failure to file a report must be treated as each chemical which should have been listed on the report may elevate the penalty far beyond what is reasonable under the circumstances (Brief at 8). Atlas says that this practice may result in the initial penalty being so high that application of the statutory adjustment factors in TSCA § 16(2)(B) will not be sufficient to reduce the penalty to a reasonable amount. Atlas cites Microban Products Company, Docket No. FIFRA 98-H-01, Order Determining Number of Violations, etc., 1999 EPA ALJ LEXIS 4 (ALJ, February 18, 1999), where the issue was the number of violations of FIFRA § 12(a)(1)(B) to be charged for 32 shipments of a pesticide where claims differing substantially from those made in connection with its registration were made in five separate documents as part of the pesticide's distribution or sale. In concluding that the gravamen of the offense involved claims differing from those permitted under the pesticide's registration, i.e., that the harm or potential harm involved unapproved claims rather than unapproved

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[5/] Brief at 7, 8. The statement cited by Atlas appears only in the "Applicability" section of the 1999 ERP effective June 1, 1999 (Id. 6).

sales, and thus that there were five violations of the Act rather than 32 as claimed by the Agency, Judge Moran noted that having the number of violations mechanically determined in all instances by simply counting the number of sales or distributions could produce unreasonable results under certain circumstances. Implicitly, Atlas contends that determining the number of violations by the number of chemicals which should have been included on a single Form U could also lead to an unreasonable result.

Atlas notes that what it describes as the "arbitrary and mechanical" approach was approved in Caschem Inc., Docket No. II-TSCA-PMN-89-0106, Order Upon Cross-Motions for Partial Accelerated Decision, 1992 WL 340774 (E.P.A.) (ALJ, October 30, 1992), wherein the failure to file a report which would have included 29 chemicals at $17,000 for each chemical resulted in an initial penalty determination of $493,000. (Brief at 9). Atlas argues that a start point penalty of $493,000 makes adjusting the penalty to a reasonable amount based upon the factors specified in TSCA § 16(a)(2)(B) almost impossible.

Atlas says that it finds the following language in Caschem particularly puzzling:

> "In order to reject application of the penalty policy guidelines, there must be a demonstration of arbitrariness, caprice, failure to take certain evidence or arguments into account, or unreasonableness in penalty assessment resulting from application of the guideline."

Other language in Caschem that Atlas finds troublesome is the assertion that if the penalty policy provisions should suggest an unfair or unreasonable result, the per chemical penalty will be reduced as appropriate, and the flexibility in determining the amount of the penalty accorded the Administrator [and by delegation the Administrative Law Judge] by the language of § 16(a)(2)(B) that there shall be taken into account "such other matters as justice may require." According to Atlas, this seems to say that the Administrator is in control of the entire process and that ALJ's must exercise the judicial function within the guidelines set by the Administrator (Brief at 10). Atlas asks rhetorically how the legal issue of multiple violations can be swept into the area of the circumstances of the case when the motion regarding multiple penalties is being made before any evidence is presented. Atlas claims that this puts the cart before the horse and leaves Respondent in an inequitable and unfair position to negotiate a settlement. Atlas submits that this reasoning equates to the proposition that respondents cannot look to an independent judicial process within the Agency because the rules are set by the Administrator. In conclusion, Atlas states that the circumstances involved as pleaded in its answer are such that the ERP should not be followed to create a $119,000 starting point for the determination of a penalty for the failure to file a single report. Atlas states that the ALJ should not be subordinated to the EPA

Policy and argues that the ALJ and not the EPA have a responsibility to determine a reasonable penalty based upon the facts of the case and the applicable statute. Atlas requests that the ALJ issue an order finding that the unit of violation in this instance is one, not seven.

Complainant's Opposition

Opposing Atlas' motion, Complainant has filed a cross-motion for a partial accelerated decision on liability holding Atlas liable for seven separate and distinct violations of TSCA and its implementing regulations, for Atlas' failure timely to file an Inventory Update Report pursuant to 40 C.F.R. § 710.33 for seven chemical substances as alleged in the complaint (Notice of Motion, dated December 22, 1999). In support of its motion, Complainant has filed a Memorandum of Law (Memorandum) and the Declarations of Lee A. Spielmann, counsel for Complainant, and of Michael Bious, a chemist and an EPA inspector.

Complainant asserts that Atlas' claim, that its failure to report seven chemical substances for the 1994 updating of the TSCA Inventory should be treated as a single violation of TSCA and the relevant implementing regulations at 40 C.F.R. Part 710, is untenable and is directly contrary to the leading Agency decisions construing the relevant provisions of Part 710 (Memorandum at 2). Additionally, Complainant maintains that Atlas' position that its

admitted failure to timely report seven chemicals constitutes a lone violation negates and runs counter to the Congressional purposes underlying enactment of TSCA, which granted EPA broad and expansive powers, including authority to obtain information on chemicals manufactured in the United States. Complainant says that Congress intended EPA to have wide-ranging and flexible authority to address what Congress deemed to be a major problem and alleges that Atlas' position would severely circumscribe the discretion Congress intended the Agency to exercise. Moreover, Complainant avers that acceptance of Atlas' arguments would likely create a disincentive for comprehensive reporting (Memorandum at 3).

Complainant cites and quotes TSCA § 8(b) which requires the Administrator to "...compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States." (Memorandum at 5). This list is also referred to as the "Master Inventory File" (40 C.F.R. § 710.23(a)) (1974). Complainant emphasizes that TSCA § 8(a), quoted infra, requires the Administrator to promulgate regulations under which each person who manufactures or processes a chemical substance shall maintain such records and submit to the Administrator such reports as the Administrator may reasonably require.

As to the facts, Complainant points out that Atlas has admitted that it failed to timely file (during the period the required August 25, 1994, to December 23, 1994) TSCA inventory

update reporting form (Form U) for the seven chemicals identified in the complaint, that Atlas as a corporation is a person as defined in § 710.2, that it manufactured for commercial purposes the mentioned chemicals in quantities exceeding 100,000 pounds and thus in excess of the 10,000 pound threshold of § 710.28, at a single site during the calendar year 1993 and that it owned and controlled that site, i.e., its facility in Newark, New Jersey during the calendar years 1993 and 1994 (Memorandum at 10, 11). Complainant notes that because its sales exceed $4,000,000 annually, Atlas does not qualify for the "small manufacturer" exemption and that Atlas has not claimed such an exemption. Complainant cites the Bious Declaration for the fact that the chemical substances identified in the complaint were on the Master Inventory File at the beginning of the 1994 reporting period, that Atlas has admitted that each of the chemicals identified in the complaint was a chemical substance during the 1994 reporting period and that Atlas has not claimed that any of the exclusions in § 710.26 apply (Memorandum at 12-14).

As to the dispositive issue, i.e. whether Atlas' failure to report seven chemical substances required by the TSCA inventory update rule constitutes one violation or seven, Complainant asserts that Atlas ignores, misreads and/or distorts Agency case law holding that the failure to timely submit inventory update information for multiple chemicals constitutes multiple TSCA

violations. Complainant cites and relies on Caschem, Inc., supra, and C.P. Hall Co., Docket No. TSCA-C-89, Order on Cross-Motions for Accelerated Decision, etc. (June 9, 1992), both decisions holding that charging and assessing penalties on a per chemical basis for failure to timely report chemicals manufactured or processed as required by the inventory update rule more nearly accorded with the purposes of TSCA and was within EPA's discretion. Additionally, both decisions recognize that neither the statute nor the regulations are definitive on the number of violations which may be charged in a situation like the instant one and that the first clear statement of the per chemical per site position is in the ERP which is a policy document and not a binding regulation.

Complainant notes that Atlas cites DIC Americas, Inc., TSCA Appeal No. 94-2, 1995 WL 646512 (E.P.A.) (EAB, September 27, 1995), a situation where DIC Americas had filed Form U covering 18 chemicals, but had simply omitted five additional chemicals which were required to be reported. Atlas asserts that this is a different situation from the failure to file a single report herein and emphasizes that the EAB highlighted the ALJ's recognition of the fact that she was free to deviate from the Guidelines if warranted by the circumstances. Complainant, on the other hand, points out that the EAB sustained the ALJ's assessment of an $85,000 penalty, $17,000 per omitted chemical, and thus implicitly approved the conclusion that each chemical not reported for

inventory updating constituted a separate and distinct violation of TSCA (Memorandum at 25, 26).

Complainant argues that McLaughlin Gormley King, supra, is inapposite because that case involved a single pesticide while seven separate chemicals are involved here (Memorandum at 27, 28). Moreover, Complainant points out that the EAB specifically limited its holding to FIFRA § 12(a)(2)(Q) as applied in that case Complainant asserts that it is well settled that administrative agencies have wide latitude in developing appropriate sanctions and that interposing penalty considerations at this stage of the proceeding, when the amount of the penalty is to be determined in further proceedings, only serves to divert attention from the actual issue (Memorandum at 31-33). Complainant emphasizes that the number of violations is legally and factually independent of any penalty which may be assessed and asserts that the law requires that Atlas be given an opportunity to demonstrate the inappropriateness of any penalty which may be sought (Memorandum at 34, 35).

Complainant requests that the ALJ issue an order denying Atlas' motion in all respects; rule that Atlas' failure to timely report seven chemicals to EPA in compliance with TSCA Inventory update reporting requirements constitutes seven and distinct failures or refusals to comply with 40 C.F.R. § 710.33(b), each of which in turn constitutes separate and distinct violations of TSCA

§ 15(3)(B); to rule that for each of said violations Atlas is liable to the United States pursuant to TSCA § 16(a), and to grant Complainant's motion for a partial accelerated decision establishing Atlas' liability (Memorandum at 40, 41).

Atlas' Opposition

Opposing Complainant's motion for a partial accelerated decision on liability, Atlas avers that, although the Agency [appears] to agree that the issue of single or separate unit of violation is a matter of statutory interpretation, the primary focus as expressed in Complainant's Memorandum of Law is the enforcement needs of the Agency (Opposition at 1) Atlas again quotes the language from Caschem, Inc., supra (ante at 11), and takes issue with the conclusion that the ALJ must find an abuse of discretion in order to rule against the Agency. Atlas says that the law is as expressed in Mclaughlin Gormley King, supra, wherein the EAB stated that the Agency position is only entitled to as much deference as is normally owed to Agency interpretation of statutes and ruled that, because the EAB was the final decision maker for the Agency, concepts of Chevron and Skidmore deference were not applicable.

In any event, Atlas emphasizes that, even if the ALJ decides that there are seven violations rather than one, the amount of the penalty remains controverted and Atlas has the right to present

evidence with respect to the factors which control the amount of the penalty (Opposition at 2, 3).

Discussion

As Atlas points out, TSCA § 15, which it is charged with violating, provides that it is unlawful for any person to "(3) fail or refuse to...(B) submit reports, notices, or other information,...." (emphasis added). Additionally, TSCA § 8, 15 U.S.C. § 2607, entitled "Reports and retention of information", paragraph (a) of which is entitled "**Reports,**" provides in pertinent part:

> (1) The Administrator shall promulgate rules under which-
> (A) each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process a chemical substance (other than a chemical substance described in subparagraph (B)(ii) [small quantities]) shall maintain such records, and submit to the Administrator such reports, as the Administrator may reasonably require,.....(emphasis added).

The implementing regulation, 40 C.F.R. § 710.32, provides in pertinent part:

> § 710.32, **Reporting information to EPA**
> Any person who must report under this part must submit the information prescribed in this section for each chemical substance described in § 710.25 that the person manufactured for commercial purposes in an amount of 10,000 pounds (4,150 kilograms) or more at a single site during a corporate fiscal year described in § 710.28.
> The regulation, 40 C.F.R. § 710.25, sets forth the chemical substances which are to be reported: "Any chemical substance which is in the Master Inventory File at the beginning of a reporting period set forth in § 710.33, unless the chemical substance is specifically excluded by § 710.26."

Applicable reporting periods are set forth in § 710.33 with the first reporting period being from August 25, 1986 to December 23, 1986 (§ 710.33(a)). The first recurring reporting period is from August 25, 1990 to December 23, 1990, and while subsequent periods are from August 23 to December 23 at four year intervals thereafter (§ 710.33(b)). Any person described in § 710.28(b) must report for each chemical substance described in § 710.25 that the person manufactured during the applicable corporate fiscal year described in § 710.28(b).

Section 710.32(a), Reporting in writing, provides:

> Any person who chooses to report information to EPA in writing must do so by completing the reporting form available from EPA at the address set forth in § 710.39(b). The form must include all information prescribed in paragraph (c) of this section. Persons reporting in writing must submit a separate form for each site for which the person is required to report.

Both Caschem and C.P. Hall, supra, upon which Complainant relies, were decided prior to the EAB's decision in McLaughlin Gormley King, supra, and regard the issue of the number of violations to be charged for failure to comply with the TSCA Inventory update rule as a matter of prosecutorial discretion. Viewed in this light, the language in Caschem that Atlas finds so disturbing to the effect that the Agency position will be upheld unless it is shown to be an abuse of discretion is readily understandable. McLaughlin Gormley King, of course, holds that the unit of violation is a matter of statutory interpretation. Mclaughlin Gormley King, however, is

distinguishable, not because there was only one pesticide in contrast to the seven chemicals at issue here as contended by Complainant, but because the gravamen of the offense in that case was the false certification that a study submitted in support of a pesticide registration was conducted in accordance with Good Laboratory Practice Standards. Because there was only one certification and one study, the fact that the study differed from GLPS in several respects was not relevant to the number of violations.

Here, Atlas is correct that TSCA § 15(3)(B), which it is charged with violating, makes it unlawful for any person to fail or refuse to submit "reports, notices, and other information." Atlas recognizes that § 15(3)(B) is not definitive as to the unit of violation for failing to timely report multiple chemicals on Form U in accordance with the TSCA Inventory update rule (40 C.F.R. § 710.33). Atlas relies on the fact that the regulation requires that chemicals for the TSCA Inventory update be reported on Form U and clearly contemplates that more than one chemical will be reported on each Form U. Thus, Atlas argues that the unit of violation must be the form. Some support for this contention is provided by the title of the form "Partial Updating of TSCA Inventory Data Base Production and Site Report." It cannot, however, have been the purpose of TSCA to merely require the submission of "reports...and other information" apart from the

specific chemicals to be identified and information to be furnished. This is seemingly especially true as to the inventory or list of chemical substances manufactured or processed in the United States which TSCA § 8(b) requires the Administrator to "compile, keep current and publish." The list can hardly be compiled or kept current unless each chemical within the specified limits is reported. This is reinforced by the opening sentence of § 710.32 that "(a)ny person who must report under this part must submit the information prescribed in this section for each chemical substance described in § 710.25...." The interpretation advocated by Atlas would treat the failure to report ten or any number of chemicals for that matter as the same unit of violation as the failure to report one chemical. This does not seem reasonable and it is concluded that an interpretation which treats the failure to report each chemical for the TSCA Inventory update rule as a separate and distinct violation of TSCA § 15(3)(B) more nearly accords with the purpose and spirit of TSCA. Atlas' motion that an order be entered finding that there was only violation for the failure to timely report seven chemical substances in accordance with § 710.33 will, therefore, be denied.

There being no dispute as to material fact that Atlas was subject to the TSCA Inventory update reporting rule, 40 C.F.R. Part 710, and failed to timely report seven chemical substances, which were on the Master Inventory File at the beginning of the reporting

period (August 25 to December 23, 1994), in accordance with §§ 710.25, 710.32, and 710.33, Complainant's motion for an accelerated decision that Atlas is liable for seven separate and distinct violations of TSCA § 15 (3)(B) will be granted.

The amount of the penalty remains at issue. In this regard, Complainant's assertion that Atlas has the right to present evidence as to the appropriateness of the penalty is, of course, accurate. Consolidated Rule 22.24, 40 C.F.R. Part 22, however, places the burden of establishing the appropriateness of the relief sought, in this instance the penalty, on Complainant and Atlas has no obligation to present evidence relating to the penalty until Complainant has established a prima facie case that the relief [penalty] sought is appropriate.[6/] Complainant facilely claims that

[6/] The Consolidated Rules of Practice were revised, 64 Fed. Reg. 4017 (July 23, 1999) effective August 23, 1999. Although this proceeding was commenced under the prior rules, proceedings commenced before August 23, 1999, became subject to the revised rules on August 23, 1999, unless to do so would result in substantial injustice.

it meets this burden by citing the “Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act”, 45 Fed. Reg. 59770 (September 10, 1980) and EPA’s TSCA Sections 8, 12, and 13 Enforcement Response Policy (1996) (ERP), resulting in a uniform penalty of $17,000 per chemical not timely reported. This makes determining the proposed penalty a simple mechanical process, in effect shifting the burden of penalty evidence to the respondent before the Agency has presented a prima facie case that the proposed penalty is appropriate after considering the factors in TSCA § 16(2)(B). This situation is neither altered nor alleviated by ALJ recognition of the fact that he or she is not bound by any penalty guidelines. It is difficult to escape the conclusion that permitting the Agency to begin with what is in effect a presumption that an appropriate penalty is $17,000 per chemical not reported or reported late without having produced any evidence other than the penalty Guidelines or the ERP is arbitrary. In this regard, the former Chief Judge was reversed when he ruled that, if the Agency were to rely on the PCB Penalty Policy to establish a prima facie case that the penalty proposed was appropriate, it must present some evidence as to the factual basis for the policy as applied to the matter before him.

Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735, 763 (EAB, February 11, 1997). The EAB's language is nonetheless instructive: "Indeed for that reason [the policy had not been subject to notice and comment rule making and was not a regulation] the ALJ could simply have considered the Penalty Policy's analytical framework and concluded that, in this particular case, application of the TSCA § 16 criteria in the manner suggested by the Penalty Policy did not yield an 'appropriate' penalty." (Id. 759). The parties are invited to consider Group Eight as they contemplate further proceedings in this matter.

Order

1. Atlas' motion for an order determining that its failure to timely report the seven chemicals identified in the complaint which it manufactured or processed as required by the TSCA inventory update rule (40 C.F.R. §§ 710.25, 710.32, and 710.33) constitutes but one violation of TSCA § 15(3)(B) is denied.

2. Complainant's motion for an accelerated decision that Atlas is liable for seven separate and distinct violations of TSCA § 15(3)(B) for failure to timely report the seven chemicals identified in the complaint in accordance with the TSCA Inventory update rule (40 C.F.R. §§ 710.25, 710.32 and 710.33) is granted.

3. The amount of the penalty remains at issue and will be determined after further proceedings including a hearing if necessary.[7/]

Dated this 16th day of February 2000.

Original signed by undersigned
_____
Spencer T. Nissen
Administrative Law Judge

[7/] In the near future, I will be in telephonic contact with counsel for the purpose of scheduling a date and location for a hearing on this matter.