UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Isochem North America, LLC,	)	**Docket No. TSCA-02-2006-9143**
	)	
Respondent.	)	
	)	

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL

On January 9, 2008, Isochem North America LLC (Isochem or Respondent) filed a Motion for Interlocutory Appeal (Motion), requesting certification of the Order on Complainant's Motion for Accelerated Decision and on Respondent's Cross-Motion to Amend Answer and to Dismiss the Complaint, dated December 27, 2007 (Order), for immediate appeal to the Environmental Appeals Board (EAB), under 40 C.F.R. § 22.29 of the Rules of Practice. Complainant submitted an Opposition to the Motion on January 16, 2008 (Response). For the reasons stated below, the Motion is denied.

I. Background

The Complaint in this matter was filed on March 21, 2006, alleging that Respondent failed to timely submit its 2002 "Partial Updating of the Inventory Data Base Production and Site Report," known as a "Form U," as required by 40 C.F.R. § 710.33(b) of the Inventory Update Rule, in regard to 19 chemical substances Respondent manufactured or imported in excess of 10,000 pounds during the relevant period. The Complaint alleges that each of these chemical substances not reported constitutes a separate violation of Section 15(3)(B) of the Toxic Substances Control Act (TSCA). Respondent filed an Answer denying that its actions constituted violations of TSCA and setting forth affirmative defenses.

On March 14, 2007, Complainant filed a Motion for Accelerated Decision on Liability. On April 19, 2007, Respondent submitted a Response in Opposition to the Motion for Accelerated Decision and Cross-Motion to Amend Answer and to Dismiss the Complaint. The parties each replied to the opposing party's motion. The December 27th Order granted Complainant's Motion for Accelerated Decision as to the 14 alleged violations regarding Respondent's New Jersey facility, and held that each of the chemical substances not reported timely on a Form U constituted a separate violation. The Order denied Complainant's request for accelerated decision as to the remaining five alleged violations on the basis that Respondent had raised a genuine issue of material fact as to whether it owned the Texas facility at which those five chemical substances were allegedly manufactured or imported. Respondent's motion

for dismissal, on the basis that Respondent was exempt from reporting as a "small manufacturer" within the meaning of Section 704.3 of TSCA, was denied in the Order. Also denied in the Order was Respondent's request to amend its Answer to add as an affirmative defense the "small manufacturer" exemption, on the basis that to do so would be futile.

Respondent requests certification for interlocutory appeal as to the following conclusions in the Order:

1. That Isochem was required to raise the issue of its status as a "small manufacturer" as an affirmative defense, and may not amend its Answer to do so at this point because it would be futile to do so; and

2. That each of the chemical substances required to be reported and not reported timely on a Form U constitutes a separate violation of TSCA.

II. Standard for Approving Requests for Interlocutory Appeal

The Rules of Practice provide at 40 C.F.R. § 22.29 that a party may file a motion requesting that the Presiding Judge forward an order or ruling to the EAB for review, and that the Presiding Judge may recommend the order or ruling for EAB's review, when --

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; *and*

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b) (italics added).

III. Parties' Arguments

In its Motion, Respondent asserts that the December 27th Order involves "important questions of law and policy for which there are substantial grounds for difference of opinion," that an immediate appeal "will materially advance the ultimate termination of the proceeding," and that precluding amendment of the answer to assert the small manufacturer defense until after review of the initial decision "will be inefficient in that, if successful, it will require remand and an additional hearing on that issue." Motion at 2-3.

As to the first issue for appeal, Respondent asserts that the *Complainant* must prove that Isochem is subject to the requirement to file a Form U under 40 C.F.R. § 710.28, which it cannot do without first proving that Isochem is not excluded from doing so because it is a small manufacturer under 40 C.F.R. § 710.29. Respondent asserts that small manufacturer status is an

automatic exclusion to the obligation to file Form U, not a "relatively narrow exception," as referenced in the Order. Respondent argues further that Complainant would not be prejudiced if Isochem were allowed at this point to add the small manufacturer issue as an affirmative defense because Complainant has had access to Respondent's sales information since November 2004, and that the issues are only questions of law as to the interpretation of "total annual sales" in the first standard defining "small manufacturer." Additionally, Respondent suggests to this Tribunal that "[g]iven the applicability of these issues far beyond this limited case, these important questions deserve to be considered and determined by the [EAB]." Motion at 2.

As to the second issue, Respondent argues that the conclusion in the Order regarding the number of violations is contrary to the principle articulated by the EAB in *McLaughlin Gormley King Co.*, 6 E.A.D. 339 (EAB 1996), in which under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), a respondent was held liable for only one violation for falsification of a compliance statement (a single form) on which were multiple deviations from the Good Laboratory Practice Standards.

In response to the Motion, Complainant asserts that Respondent has failed to meet the burden for interlocutory appeal under 40 C.F.R. § 22.29. Specifically, Complainant argues that Respondent does not present with the requisite particularity any argument, supporting case law or policy analysis to demonstrate that the criteria of 40 C.F.R. § 22.29 are met, noting that general requirements for a motion set forth in 40 C.F.R. § 22.16(a)(2) are to state the grounds for the relief sought with particularity. Response at 4-5. Complainant points out that mere disagreement with the ruling is insufficient to meet the criteria, citing, *inter alia, American Society for the Prevention of Cruelty Animals v. Ringling Bros. Barnum & Bailey Circus*, 246 F.R.D. 39, 43 (D.D.C. 2007) and *Puerto Rico Aqueduct and Sewer Authority (PRASA)*, EPA Docket No. EPCRA-02-99-4003 (ALJ, Order Denying Motion for Interlocutory Appeal, Jan. 24, 2000). Further, Complainant cites to case law in addition to that cited in the Order holding that the burden is on the defendant to plead and prove a statutory exception, and cites to case law indicating that the principle is especially applicable when the provision at issue is remedial. Citing to case law in support, Complainant asserts that the absence of cases on the small manufacturer exemption does not render the issue subject to substantial disagreement.

Moreover, interlocutory appeals represent the exception, not the norm, as the Rules of Practice make clear and as is the practice in federal courts, Complainant asserts. If the Motion were granted, this proceeding would be delayed, but if it were denied, Respondent would not suffer prejudice, Complainant asserts, because on appeal from an initial decision the EAB may review any issue raised by Respondent during the proceeding. Finally, Complainant argues, even under federal court practice, the factors to obtain interlocutory review under the collateral order doctrine would not be met here.

IV. Discussion

Complainant's points are well taken that Respondent has not supported its assertion that the Order "involves an important question of law or policy concerning which there is substantial

grounds for difference of opinion," and that Respondent's mere disagreement with the rulings is insufficient to meet that criterion.

The general principle that statutory exceptions must be pled and proved by the alleged violator is well established and the EAB has adhered to this principle in cases presented to it. *See e.g., J. Philip Adams,* CWA Appeal No. 06-06 (EAB, June 19, 2007), slip op. at 12. Therefore, even though the issue of whether the particular regulatory exception applicable here, *i.e.* whether the "small manufacturer" exception to the Form U reporting requirement is an affirmative defense, is apparently a question of first impression, the general principle would apply, unless there is controlling legal authority indicating the contrary.

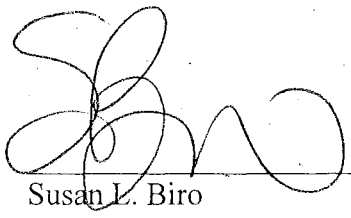
Respondent has not pointed to any controlling authority that would indicate that, contrary to the general rule, the small manufacturer exception is an element of Complainant's prima facie case, rather than its own as an affirmative defense. Instead, Respondent merely refers to one of two factors courts have used to determine whether the exception is an element of the prima face case or an affirmative defense, where any questions arise. That is, citing the Ninth Circuit's decision in *United States v. Gravenmeir*, 121 F.3d 526, 528 (9th Cir. 1997), Respondent notes that courts have held that where the "statutory prohibition is broad and the exception is narrow, it is more probable that the exception is an affirmative defense," suggesting that if the contrary is true - that the statutory provision is narrow and the exception broad, then the exception would be part of the government's prima facie case. However, Respondent does not provide any support for its assertion that the small manufacturer exception is broad and the statutory provision narrow and its mere characterization of the exception as an "automatic exclusion," does not bear on how narrow or broad it is. Moreover, in the case cited by Respondent, the Court also acknowledged that there is a second factor it often considers in allocating the burden of proof regarding statutory exceptions. That second factor involves giving consideration to the relative burdens of the government and defendant regarding the production of evidence. *Id.* at 528. This second factor clearly weighs in favor of Respondent having the burden, in that, as indicated in the December 27th Order, the Respondent company has unfettered access to its own data relevant to the small manufacturer exception, whereas EPA does not. Also considered in making the determination as to which party must plead and prove an exception is whether the offense can be described without reference to the exception, and as indicated in the Order, the requirement to file the Form U clearly can be described without reference to the small manufacturer exemption. Therefore, this criterion also weighs in favor of Respondent having the burden. In view of Respondent's failure to support its arguments, to address these criteria, or to explain why the general principle as to the burden of proof for exceptions should not apply here, it is concluded that Respondent has not shown that imposing on it the burden of proof as to it falling within the small manufacturer exception is a question of law or policy concerning which there is substantial grounds for difference of opinion.

As to the second issue Respondent wishes to appeal, the assessment of separate violations for each chemical substance not timely reported, Respondent merely cites to the same opinion that it cited in its Motion to Dismiss - *McLaughlin Gormley King Co.*, 6 E.A.D. 339 (EAB 1996), which involves not a Form U but a different type of document, involving a different statute. Respondent, however, does not provide any support, nor has any authority been

otherwise found, for applying that opinion to the case at hand, or for departing from established administrative case law under TSCA. *See Atlas Refinery, Inc.*, EPA Docket No. TSCA-02-99-9142, 2000 EPA ALJ LEXIS 12 (ALJ, Feb. 16, 2000); *Caschem, Inc.*, EPA Docket No. II-TSCA-PMN-89-0106, 1992 EPA ALJ LEXIS 146 (ALJ, Oct. 30, 1992); *C.P. Hall,* EPA Docket No. TSCA-V-C-61-89 (ALJ, Order dated June 9, 1992). Without any such support, Respondent has not shown that there is any question of law or policy concerning which there is substantial grounds for difference of opinion on this issue either.

Respondent having failed to meet the first criterion for interlocutory appeal under 40 C.F.R. § 22.29(b), it is not necessary to address the second criterion, that "[e]ither an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective." Nevertheless, it is noted that resolution of this proceeding, which has been pending for almost two years already, would be significantly further delayed if interlocutory review was granted. If, as expected, Complainant prevailed before the EAB on the interlocutory appeal, however long that would take, a hearing then on remand to conclude this matter could not be scheduled until some months thereafter, with the intervening time creating the potential loss of witnesses and relevant documents, and the inevitable fading of witnesses' memories.

Accordingly, the Respondent's Motion for Interlocutory Appeal is **DENIED.** The hearing will proceed as scheduled, unless a fully executed Consent Agreement and Final Order is filed before the close of business on Friday, February 29, 2008.



Susan L. Biro
Chief Administrative Law Judge

Dated: February 7, 2008
Washington, D.C.

In the Matter of ISOCHEM North America LLC, Respondent
Docket No. TSCA-02-2006-9143

CORRECTED CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion for Interlocutory Appeal**, dated February 7, 2008 was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: February 7, 2008

Original One Copy by Pouch Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Pouch Mail and Facsimile to:

Carl Howard, Esquire
Lee Spielmann, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Regular Mail and Facsimile to:

Jon Schuyler Brooks, Esquire
Phillips Nizer LLP
666 Fifth Avenue, 27th Floor
New York, NY 10103-0084