UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Mafix, Inc.,	)	Docket No. EPCRA-III-113
	)	
Respondent	)	

ORDER GRANTING IN PART, AND DENYING IN PART,

RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This civil penalty proceeding arises under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11045. The United States Environmental Protection Agency ("EPA") has filed a complaint against Mafix, Inc. ("Mafix"), charging the company with twelve counts of violating EPCRA. EPA seeks a civil penalty of $84,000 for these violations.

In its answer, Mafix denied the charges of violation. In an amended answer, respondent raised the affirmative defense that EPA is barred by the statute of limitations from prosecuting Counts I through VI of the complaint. Relying upon this statute of limitations defense, Mafix filed the present Motion for Judgment on the Pleadings requesting that Counts I through VI be dismissed.

For the reasons that follow, respondent's motion to dismiss is denied as to Counts I, II, and III, and it is granted as to Counts IV, V, and VI.

I. The Emergency Planning And Community Right-To-Know Act: An Overview

EPCRA was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986). It is intended "to provide the public with important information on the hazardous chemicals in their communities and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 281, *reprinted in* 1986 U.S.C.C.A.N. 3374.

To achieve this end, EPCRA imposes upon industrial and commercial facilities a system of notification requirements, as well as mandating the creation of state

emergency response commissions and local emergency planning committees. The local emergency planning committees are charged with developing emergency response plans based upon the information provided by the facilities. 42 U.S.C. §§ 11001-11003. In addition, the public has a right to know the information reported by the facilities and the contents of the emergency response plans. 42 U.S.C. § 11044. *See Huls America, Inc.* v. *Browner,* 83 F.3d 445, 446-447 (D.C. Cir. 1996).

Commenting upon the purpose of EPCRA, the Seventh Circuit observed, the "Right-to-Know component ... aims to compile accurate, reliable information on the presence and release of toxic chemicals and to make that information available at a reasonably localized level." *Citizens For A Better Environment v. The Steel Company, a/k/a Chicago Steel and Pickling Company,* 90 F.3d 1237, 1239 (1996), *cert. granted,* 137 L.Ed.2d 214 (1997).

II. The Statutory Sections Involved

EPCRA Sections 311 and 312 are the statutory provisions at issue in this case.

42 U.S.C. §§ 11021 & 11022. Counts I, II, and III allege violations of Section 311 and Counts IV, V, and VI allege violations of Section 312.

Section 311 is titled, "Material safety data sheets." It provides in part that "[t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall submit a material safety data sheet for each such chemical, or a list of such chemicals." Section 311(a)(1). This material safety data sheet, also known as an MSDS, is to be submitted to the local emergency planning committee ("LEPC"), to the State emergency response commission ("SERC"), and to the fire department having jurisdiction over the facility. Section 311(a)(1)(A)(B) & (C). The MSDS is to be submitted no later than *"12 months after October 17, 1986"* or *"3 months after the owner or operator of a facility is required to prepare or have available a material safety data sheet."* Section 311(d)(1) (*emphasis added).*

Section 312 is titled, "Emergency and hazardous chemical inventory forms." This section provides in part that "[t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form" to the LEPC, the SERC, and the fire department with jurisdiction over the facility. Section 312(a)(1)(A)(B) & (C). This emergency and hazardous chemical inventory form, also referred to as an "inventory form," "*shall be submitted on or before March 1, 1988, and annually thereafter on March 1*, and shall contain data with respect to the preceding calendar year."

Section 312(a)(2)*(emphasis added).*

III. The Complaint

Counts I, II, and III of EPA's complaint each allege a violation of EPCRA Section 311. Count I charges that Mafix violated EPCRA by not submitting an MSDS, or a list of hazardous chemicals, to the Erie County Emergency Planning Committee by October 17, 1987. Count II charges that Mafix violated EPCRA by not submitting an MSDS, or a list of hazardous chemicals, to the Pennsylvania State Emergency Response Commission by October 17, 1987. Count III charges respondent with an EPCRA violation for failing to submit an MSDS, or a list of hazardous chemicals, to the Millcreek Township Fire Department by October 17, 1987.

Counts IV, V, and VI each allege a violation of EPCRA Section 312. Count IV cites Mafix with a failure to submit to the Erie County Planning Committee by March 1, 1988, a completed emergency and hazardous chemical inventory form for nickel sulfamate present in calendar year 1987. Count V cites a failure of respondent to submit a similar chemical inventory form by March 1, 1988, to the Pennsylvania State Emergency Response Commission. Finally, Count VI cites Mafix for a failure to submit an inventory form for nickel sulfamate by March 1, 1988, to the Millcreek

Township Fire Department.

IV. Discussion

The issue is whether EPA's prosecution of Counts I through VI is barred by the statute of limitations, as Mafix contends is the case. EPA brought this action approximately six years after the violations in Counts I through III allegedly were committed, and approximately five and one-half years after the violations charged in Counts IV through VI.

EPCRA itself contains no statute of limitations for measuring the timeliness of EPA's prosecution. Accordingly, the five-year federal statute of limitations contained in 28 U.S.C. § 2462 applies to this administrative proceeding. *See 3M Co. (Minnesota Min. And Mfg.) v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994); *Lazarus, Inc.,* TSCA Appeal No. 95-2 (September 30, 1997)(EAB).[(1)]

If all that this case involves is a plain application of § 2462's five-year statute of limitations, then Mafix would prevail as to each of the six counts at issue. After all, EPA initiated this action more than five years after the violations charged in Counts I through VI allegedly occurred. In fact, dismissal of these counts would be in harmony with the overall purpose of statutes of limitations. As expressed by the D.C. Circuit in *3M Co. v. Browner, supra,* "[s]tatutes of limitations ... reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'" 17 F.3d at 1456-57.

Respondent's motion to dismiss, however, is not so easily resolved. Analysis of the statute of limitations issue presented in this case requires more than a simple application of a five-year yardstick. It requires a consideration of whether any of the six violations at issue qualify as "continuing violations," as the EPA asserts is the case. If so, then application of the five-year statute of limitations of § 2462 may well obtain a result other than dismissal.

Under the "continuing violations" theory, a new claim accrues each day the violation is extant. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 502 n.15 (1968). As explained by the Fifth Circuit in *Interamericas Investments v. Board Of Governors,*

111 F.3d 376 (5th Cir. 1997), a case involving the assessment of civil sanctions under the Bank Holding Company Act, "[a] continuing violation applies where the conduct is ongoing, rather than a single event." 111 F.3d at 382. The net effect of the continuing violation theory is to extend the statute "beyond its stated term." *See Toussie v. United States,* 397 U.S. 112, 115 (1970)(discussion of continuing violation theory in criminal context).

Applicability of the continuing violations theory has been recognized by the Environmental Appeals Board ("EAB" or "Board"), first under the Resource Conservation and Recovery Act ("RCRA"), and subsequently under the Toxic Substances Control Act ("TSCA"). *See Harmon Electronics, Inc.*, RCRA (3008) Appeal No. 94-4 (March 24, 1997); *see also, Lazarus, Inc.,* TSCA Appeals No. 95-2 (September 30, 1997).

In *Harmon*, the EAB observed that "[a] continuing violation accrues when the course of illegal conduct is complete, not when the an action to enforce the violation can first be maintained." Slip op. at 26. Accordingly, the EAB reasoned that "a claim for civil penalties in a case to which the continuing violations doctrine applies may be maintained at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed." Slip op. at 28.

The Board reached a similar conclusion in *Lazarus* as to when a continuing violation accrues and when an administrative enforcement action may be initiated by EPA. Slip op. at 63. There, the EAB stated:

> The *Harmon* methodology for determining whether requirements are

> continuing in nature looks first to the statutory language that serves as the basis for the specific violation at issue. Legislative history may be consulted in analyzing the statutory language. The implementing regulations may also contain indications of the nature of a requirement.... Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.

Slip op. at 65-66.

Thus, whether any of the violations alleged in Counts I through VI are continuing violations is a critical inquiry in ruling upon Mafix's motion to dismiss.

Counts I, II, and III

Section 311 of EPCRA is the statutory provision at issue in Counts I, II, and III. Section 311 states that if you have an MSDS (*i.e.,* a material safety data sheet) filing obligation under the Occupational Safety and Health Act of 1970, you also have a filing obligation under the Emergency Planning and Community Right-To-Know Act of 1986. Specifically, the EPCRA filing obligation mentioned in Section 311 requires that the MSDS, or a list of the hazardous chemicals, be submitted to the local emergency planning committee, the State emergency response commission, and the fire department with jurisdiction over the facility.

A review of Section 311 shows that the filing of the MSDS with the LEPC, the SERC, and the fire department is essentially a one-time filing obligation. While this section does contain certain updating filing requirements, the EPCRA filing obligation of the owner or operator of a covered facility is nonetheless a one-time event. As discussed below, this is an important consideration in determining whether a violation of Section 311 may be considered a continuing violation until such time as the statutory filing obligation is satisfied.

Another important consideration is the remedial purpose of Section 311. In that regard, Section 311 imposes a filing duty only with respect to hazardous chemicals, and even then only with entities responsible for emergency planning or emergency response. The obvious purpose for informing the LEPC, the SERC, and the local fire department regarding the presence of hazardous chemicals is to enable these groups to prepare for and, if need be, to respond to an emergency. The very name of the involved statute, the Emergency Planning and Community Right-To-Know Act, underscores this point.

Thus, the fact that the MSDS filing required by Section 311 is essentially a one-time event, and the fact that this filing serves an important public safety and health purpose, supports the holding that the Section 311 violations cited in Counts I, II, and III are continuing violations. In other words, the legal requirement to file the MSDS with the LEPC, the SERC, and the fire department remains until the statutory filing requirements are satisfied. The need for the LEPC, the SERC and the fire department to have this information regarding hazardous chemicals doesn't lessen with the passage of time. The state and local governments', as well as the public's right and need to know, is as great five years and one day after the Section 311 responsibility for the filing of the MSDS arises, as it is on the first day. Therefore, only the actual filing of the MSDS will satisfy the requirements of EPCRA Section 311 and begin the running of the five-year statute of limitations contained in 28 U.S.C. § 2462.

Thus, given the continuing nature of the violations cited in Counts I, II, and III, EPA's complaint against Mafix is not barred by the statute of limitations.

Counts IV, V, and VI

Counts IV, V, and VI involve EPCRA Section 312. Like Section 311, Section 312 requires certain hazardous chemical filings with the LEPC, the SERC, and the local fire department. Specifically, Section 312 requires the filing of emergency and hazardous chemical inventory forms. Unlike Section 311, however, this chemical

inventory form submission is not a one-time event. Rather, Section 312 requires that this filing be performed annually. The inventory forms are to be submitted on, or before, March 1, 1988, and "annually thereafter on March 1."

For purposes of deciding whether the violations cited in Counts IV through VI are continuing violations, this Section 312 annual filing requirement is critical. *See Lazarus, supra,* slip op. at 66 ("a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.") In that regard, a plain reading of Section 312, particularly in light of that section's annual filing requirement, supports a holding that the violations cited in Counts IV, V, and VI are not continuing violations.

For example, requiring the submission of chemical inventory forms allows the state and local governments, as well as the fire department, to prepare contingency plans for responding to hazardous chemical emergencies. If the owner or operator of a covered facility fails to make a chemical inventory form submission by the March 1 filing date, then a violation of Section 312 accrues. An owner's or operator's failure to satisfy this March 1 filing obligation does not in any way relieve the responsible party from compliance. It simply marks the end of the period for which the preceding year's chemical inventory form was required to be submitted and the period for which the offending party may be held liable under EPCRA Section 312. Continued failure to submit hazardous and emergency chemical inventory forms for future years will expose the owner or operator to additional Section 312 liability. For each separate failure, however, the five-year statute of limitations of § 2462 must be measured from the date that each separate violation accrued. Given the annual filing requirement of Section 312, the statute of limitations contained in § 2462 begins to run from the time that the owner or operator should have filed the emergency and hazardous chemical inventory form, but didn't.[(2)]

Accordingly, inasmuch as more than five years have passed since the filing deadline applicable in Counts IV, V, and VI, to the time that EPA filed the complaint in this case, prosecution of these counts is barred by the applicable statute of limitations.

V. Conclusion

Respondent's Motion for Judgment on the Pleadings is *denied* as to Counts I, II, and III, and it is *granted* as to Counts IV, V, and VI. Accordingly, Counts IV, V, and VI of the administrative complaint are *dismissed, with prejudice.*

Carl C. Charneski
Administrative Law Judge

Issued: February 12, 1998
Washington, D.C.

1. 28 U.S.C. § 2462 provides:

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

2. EPA relies upon the language of EPCRA Section 325(c)(3), 42 U.S.C. § 11045(c)(3), that each day of noncompliance gives rise to a new violation, as proof that the violations cited in Counts IV, V, and VI are continuing violations. Compl. Reply at 3. This argument is unpersuasive; it simply is not clear that in Section 325(c)(3) Congress intended that each violation of Section 312 would be a continuing one. Also, in *Harmon*, the Board concluded that the inclusion of similar language in the Resource Conservation and Recovery Act was not controlling as to the continuing

violations issue in that case. Rather, the Board concluded that the language simply established that the statute "assumes the possibility of continuing violations." *Harmon,* Slip op. at 29.