UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the matter of | ) | |
| | ) | |
| American Tube Company, Inc., | ) | Docket No. EPCRA-3-99-0010 |
| | ) | |
| Respondent | ) | |

ORDER GRANTING IN PART, AND DENYING IN PART, EPA's MOTION TO STRIKE DEFENSES 4 AND 6

The U.S. Environmental Protection Agency ("EPA") filed a complaint against the American Tube Company, Inc. ("American"), charging six violations of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). 42 U.S.C. § 11001 *et seq*. All six violations involve the alleged failure by respondent to comply with EPCRA's chemical processing reporting requirements.

American filed an answer denying each of the violations. It also raised several defenses. In defense No. 4, American stated: "The reporting requirements under Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 CFR § 372.22-38, are unconstitutionally vague and do not provide fair notice." In defense No. 6, American stated: "The provisions of EPCRA and the regulations promulgated thereunder which require public reporting of private internal business operations, including amounts of materials handled and generated, are violative of the Due Process and Takings Clause of the Constitution, as well as federal privacy laws, in that the information reported is often used by competitors to the detriment of the submitter."

EPA moves to strike defenses Nos. 4 and 6. As grounds for its motion, EPA argues that in an administrative proceeding a party may not challenge the constitutionality of an Act of Congress or an agency's implementing regulations. American disagrees, arguing that "this tribunal has the power to consider the defenses in the context of applying EPCRA and the regulations to Respondent in this particular case." Response at 3.

EPA is correct in asserting that the general rule is that administrative agencies do not have jurisdiction to decide the constitutionality of congressional enactments. *Califano v. Sanders*, 430 U.S. 99, 109 (1977)("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures."); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *but see, Thunder Basin Coal Company v. Reich*, 510 U.S. 200, 215 (1994)("This rule is not mandatory … and is perhaps of less consequence where … the reviewing body is not the agency itself but an independent commission ….") . American has not shown why this "general rule" should not be applicable to the present administrative proceeding. Accordingly, to the extent that American, through defense No. 4 and defense No. 6, seeks to challenge the

constitutionality of the applicable EPCRA provisions, EPA's motion to strike these defenses is *granted*.

American also argues that EPA's implementing regulations fail to provide "fair notice of what is or is not required." Response at 1. Whether the regulations as applied by EPA in this particular case provided fair notice as to what conduct is prohibited, or what conduct is required, is a defense that may be pursued by respondent. *See CWM Chemical Services, et al.*, 6 E.A.D. 1, 17 (1995)("we conclude that the PCB disposal regulation allegedly violated did not give fair warning that dry weight concentrations are required; therefore, due process principles preclude a finding that CWM violated the disposal regulation."); *see also General Electric Co. v. EPA*, 53 F.3d 1324, 1328-31 (D.C. Cir. 1995).[1] Accordingly, EPA's motion to strike is *denied* to the extent that the agency seeks to strike American's defense that, as applied in this case, the implementing regulations did not afford it fair notice.

Carl C. Charneski
Administrative Law Judge

Issued: December 3, 1999
Washington, D.C.

[1] In *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 194-95 (1997), the Environmental Appeals Board cited the D.C. Circuit's decision in *General Electric Co. v. EPA, supra,* for the proposition that "[t]he prohibition against vagueness applies to administrative regulations as well as statutes." *Id.* Nonetheless, in *B.J. Carney* the Board also commented that "the mere assertion of a constitutional claim alone does not amount to a compelling circumstance justifying a deviation from the general rule against reviewing the validity of regulations in administrative enforcement actions." 7 E.A.D. at 194, citing *In re Echevarria*, 5 E.A.D. at 637. Given the fact that the present case is in a very early stage, it is found that the respondent's raising a "fair notice" defense in its answer sufficiently satisfies the standard set forth in the *B.J. Carney* case.