UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
	:	
UNIVERSITY OF HAWAII	:	Dkt. No. TSCA-09-92-0014
	:	
	:	Judge Greene
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION

This administrative matter arises under Section 15(1)(C) of the Toxic Substances Control Act ("TSCA" or "the Act"). The complaint charges Respondent University of Hawaii with thirteen violations of Section 15(1)(C), 15 U.S.C. § 2614(1)(C), and the implementing regulations governing use of polychlorinated biphenyls (PCBs) set forth at 40 C.F.R. Part 761. All thirteen counts pertain to Respondent's alleged failure to equip 18 PCB radial transformers with specific electrical protection in various buildings at the University of Hawaii. For these alleged violations Complainant proposes a civil penalty of $129,000 against Respondent pursuant to Section 16 of TSCA, 15 U.S.C. § 2615.

Respondent's answer raised circumstances in mitigation, but contained no specific denial of the allegations. Thereafter, in its amended answer and second amended answer, Respondent denied the material allegations of the complaint; it then raised an affirmative defense based upon "sovereign immunity." Subsequently Respondent moved for "accelerated" decision based upon the "principles of federalism," which appeared to be an expanded version of sovereign immunity, and urged that EPA has no authority to impose a civil monetary penalty upon a governmental agency of the State of Hawaii.

In substance, however, this motion is more akin to one seeking a declaration that EPA lacks authority to impose penalties against Respondent. It also bears some resemblance to a motion to dismiss the complaint pursuant to 40 C.F.R. § 22.20(a).[1] What it is not, clearly, is a motion for "accelerated" or summary judgment, the basis of which properly would be that no material issues of fact remain to be determined and the movant is entitled to judgment as a matter of law.[2] Here, now that Respondent has denied the factual allegations of

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[1] 40 C.F.R. §22.20 provides in pertinent part for the dismissal of an action upon motion of a respondent on the basis of failure to establish a prima facie case "or other grounds which show no right to relief on the part of the complainant."

[2] 40 C.F.R. § 22.20 (a) provides that upon motion of a party or sua sponte by the judge the matter may at any time be determined in favor of the movant "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

the complaint in its amended answer, all of the facts are at issue and remain to be determined. Likewise, whether either party is entitled to judgment as a matter of law is entirely open to question at this point.

The nub of the motion is that Respondent University of Hawaii is an agency of a sovereign state, and cannot be proceeded against for civil penalties under Section 16(a) of TSCA in the absence of a clear statement of intent on the part of the Congress that sovereign immunity of the states is to be abrogated for purposes of a TSCA enforcement action. Respondent noted that while EPA has authority under the Act to assess a penalty against "any person" for violations of the Act and regulations, the Act does not define "person." EPA in defining "person" by regulation to include "any State" exceeded the authority granted to it by Congress, because the Act did not define "person" to include states and did not otherwise clearly express an intent to treat states as "persons". Therefore, Section 16, which authorizes the imposition of penalties against "persons," does not refer to states. In other words, "the imposition of a monetary penalty upon a governmental agency of the State of Hawaii is unconstitutional and exceeds the constitutional and statutory authority of the Environmental Protection Agency, Region IX."[3]

Complainant responded that the Act does contain clear

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[3] Respondent's Motion for Accelerated Decision, January 27, 1995, at 1-2.

expressions of Congressional intent that a state shall be treated as a "person" at Section 20[4] and again at Section 211.[5] Consequently, according to Complainant, the regulation which defines "person" to include the states is within EPA's authority to issue.

In its reply to Complainant's opposition, Respondent asserted that it lacked access to a decision relied upon by Complainant from another administrative law judge.[6] Complainant provided a copy of the case, and Respondent was permitted to reply further. On May 10, 1996, Respondent supplemented its motion with a filing based upon the recent Supreme Court decision in Seminole Tribe of Florida v. Florida, 64 U.S.L.W. 4167 (March 27, 1996). Respondent urges that Seminole bars Congress from imposing penalties upon any state. In response, Complainant sees no connection between the matter at hand and Seminole.

At the outset it is noted that administrative tribunals,

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[4] Section 20 provides that ". . . . any person may commence a civil action against **any person (including** (A) the United States, and (B) **any other governmental instrumentality or agency** . . . ."

[5] Section 211 provides that "no State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this subchapter **to any other person, including a State** or the Federal Government. (Emphasis added).

[6] In re Virginia Department of Emergency Services, TSCA-III-579, March 3, 1993.

including this one, lack authority to declare a duly promulgated, final regulation to be unconstitutional. The regulation in question was duly promulgated, is final, and cannot be reconsidered in this administrative proceeding. Nevertheless, in the interests of clarity and in aid of further settlement efforts the following discussion is provided.

Respondent's view of the "clear statement" rule as discussed by Professor Tribe appears to be misplaced. The "clear statement" rule is used as a strict test to determine whether Congress has sufficiently expressed an intent to abrogate the sovereign immunity[7] of the states in connection with suits brought by private parties against unconsenting states in federal court. Seminole Tribe of Florida v. Florida, No. 94-12, slip op. at 8-10 (U.S. March 27, 1996) (emphasis added). Nowhere does it appear that the "clear statement" rule has any application to administrative actions by the federal government against a state for violations of federal statutes. It has long been established

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The sovereign immunity doctrine is a constitutional limitation on the federal judicial power in Article III to entertain a suit brought by private parties against a State without its consent. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984). The Eleventh Amendment sets forth this specific limitation and clarified the intent of the Framers concerning the reach of the federal judicial power. Id. at nn.7-8. Thus, while Respondent is correct in its contention that a State's Eleventh Amendment immunity is rooted in principles of federalism, these doctrines act as a jurisdictional bar to entertain suits brought by private parties, not administrative actions brought by the federal government.

that states retain no sovereign immunity when being sued by the federal government in federal court. E.g., West Virginia v. U.S., 479 U.S. 305, 311 (1987) [citing U.S. v. Texas, 143 U.S. 621, 646 (1892)]; Seminole Tribe of Florida, slip op. at 26 - 27 n.14.[8] Thus, an analysis based upon the "clear statement" rule would seem not to be helpful here. Further, Respondent cites no case where it has been held that the federal government cannot assess a civil penalty following an administrative enforcement action against a state government for violations of environmental statutes such as TSCA. Such a holding would appear to be inconsistent with the clear dictates and broad purposes of the Act as expressed by Congress at Section 2(a), (b), and (c) of TSCA [15 U.S.C. § 2601 (a), (b), and (c)]:

> The Congress finds that --
>
> (1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;
>
> (2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and
>
> (3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of in-

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[8] The majority's statement to the effect that the Eleventh Amendment has come to be understood "not so much for what it says," as for the presupposition which it confirms. Seminole, slip op. at 8, 14.

trastate commerce in such chemical substances and mixtures.[9]

In any case, should this issue come on again for decision at a later point significant additional argument will be required if Respondent is to be persuasive that Seminole is authority for the proposition that Congress cannot impose a penalty, i. e. that it cannot delegate authority to impose a penalty, in administrative enforcement actions against states for violations of federal environmental statutes.

On the other hand, if an implementing regulation is unconstitutional, it does not become acceptable by virtue of past successful enforcement actions where this issue was not raised, or by virtue of states having not acted within sixty days to contest the regulation, and certainly not by virtue of Congress's failure to amend the Act.

Sections 20 and 211 of TSCA cited by Complainant do include states within the ambit of "person." As Respondent notes, however, those sections have no direct relation to the Section 16 statement of authority for the imposition of civil penalties. Their usefulness in this discussion is limited to whether they evidence an intent to treat the states as "persons" generally in TSCA -- the answer may well be "yes," -- and whether, based upon

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[9] Respondent's moving papers indicate that it doubts it is in interstate commerce. Attached is a copy of a recent decision, In re Tri State Motor Transit, Docket No. TSCA-VII-92-T-382, March 4, 1966, in which the question of interstate commerce is considered at some length.

this, the states may be considered "persons" for Section 16 purposes. As Respondent correctly observed, the Act does not contain a definition of "person" in so many words. The term simply does not appear in the section of the Act which contains specific definitions, 15 U.S.C. § 2602. Respondent's argument would be stronger if "person" had been defined without mention of the states.

In any event, it is clear that states can be sued for violations of TSCA and the regulations,[10] and are even subject to civil suits by individuals to restrain violations of TSCA and the regulations.[11] There is no reason why this matter cannot proceed to a resolution of the factual and legal issues presented, excluding the matter of penalty. There is no reason why, if Respondent should ultimately be found to have violated the Act, such findings cannot simply remain a matter of record. Accordingly, it is held that the question of what penalty, or whether

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[10] Respondent does not dispute this. See Respondent's Reply to Complainant's Opposition to the Motion for Accelerated Decision, at 5:

> Respondent is not asserting that Complainant lacks authority to pursue administrative or civil injunctive action against Respondent. Respondent is asserting that, if Complainant does so, Complainant cannot seek as a remedy payment of civil penalties pursuant to Section 16 of TSCA.
>
> Respondent is not asserting that the Eleventh Amendment per se bars the instant action . . . .

[11] Section 20(a) of TSCA, 15 U.S.C. § 2619(a), ***Citizens' civil actions.***

any penalty, should be or may be imposed against Respondent is premature, in the absence of a resolution of the factual issues.

ORDER

It is ordered that Respondent's motion for "accelerated" decision shall be, and it is hereby, denied.

And it is further ordered that this matter will proceed to a resolution of the factual and legal issues.

And it is FURTHER ORDERED that the parties shall resume earlier attempts to reach settlement, and shall report upon the status of their effort during the week ending July 26, 1996.

J. F. Greene
Administrative Law Judge

Washington, DC
June 5, 1996

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER, was filed with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on June 6, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: University of Hawaii
DOCKET NUMBER: TSCA-09-92-0014

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CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER**, was filed with the Regional Hearing Clerk and copies were sent to the counsel for complainant and counsel for the respondent on June 10, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

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WASHINGTON, D. C. 20460

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Respondent	:	Judge Greene

ORDER OF SUBSTITUTION

The attached **Order Denying Respondent's Motion for "Accelerated" Decision** is hereby substituted for the Order served on June 6, 1996. Attached also is a copy of the decision in Tri-State Motor Transit, which is mentioned at page 7 of the Order. And it is further ordered that the Order served on June 6, 1996, which was an earlier and incomplete draft, is hereby withdrawn.

J. F. Greene
Administrative Law Judge

Dated: June 10, 1996
Washington, D. C.