

12/1/83 *John D. ...*
M. ...



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

IN RE

COMMONWEALTH EDISON COMPANY

Respondent

)
) TSCA-V-C-133
)
) ORDER ON
) MOTION TO DISMISS

By Motion dated September 19, 1983, the Respondent moved to dismiss the Amended Complaint or alternatively to dismiss certain designated portions of Counts I, II, IV and V and that Count III be dismissed in its entirety.

The reasons for the requested dismissal are as follows:

1. Counts 1 through V, inclusive, of the Complaint apply the regulations in a manner such that respondent could not have had adequate notice of the prescribed conduct and deny respondent due process of law guaranteed by the Constitution of the United States.
2. Counts I through V, inclusive, of the Complaint are premised upon an arbitrary and capricious interpretation of the regulations and are, therefore, in excess of the Agency's authority.
3. Counts I through V, inclusive, of the Complaint, in charging a failure 'to fully and properly abate' the PCB discharges, fail to state a violation of the statute or regulations.
4. Counts I through V, inclusive, of the Complaint, in charging a failure 'to prevent...improper PCB discharges,' fail to state a violation of the statute or regulations.
5. Count III is barred by the statute of limitation, 28 U.S.C. §2462 and by the Agency's own interpretations of its authority under the 1978 regulations, 40 C.F.R. Part 761."

The Agency filed a brief in opposition thereto, and the Respondent filed a reply brief. I have carefully read all of these filings.

INTRODUCTION

The parties are in agreement that the events giving rise to the five Counts in the Amended Complaint all involve the same type of event--failure of pole-mounted distribution capacitors containing PCB fluid.

The Complaint, in all five Counts, alleged that the offense, for which a civil penalty totally \$330,000.00 is sought, is:

- A. "The release of PCBs into the environment (at various dates) at levels over 50 ppm, and the failure to fully and properly abate said releases, constitutes uncontrolled discharges and are improper disposals under 40 CFR §§ 761.60(a) and (d) (1)."
- B. "The failure to prevent or properly abate improper PCB discharges as required by regulations lawfully promulgated pursuant to Section 6 of TSCA constitutes a violation of Section 15 of TSCA, 15 U.S.C. § 2614, and 40 CFR §§ 761.60(a) and (d) (1)."

Apparently, the Agency's position is that the failure of the capacitors and the release of the PCBs contained therein to the environment constitutes an uncontrolled discharge and improper disposal which, coupled with the failure to properly abate such releases, violates 40 CFR §§ 761.60(a) and (d) (1).

As pointed out by the Respondent and agreed to by the Agency, no violation of the Act occurs if, following a failure of a pole-mounted capacitor, the owner thereof initiates adequate clean-up measures within 48 hours.¹ It is not alleged that the Respondent did not initiate clean-up measures within the prescribed time period, but rather that such measures were not "adequate". When EPA first proposed regulations dealing with this issue, it included explicit standards for such cleanups. However, when the regulations were finally promulgated, the Agency deleted this language and thus no guidance to the regulated community as to what constitutes adequate cleanup exists.²

¹ 47 Fed. Reg. 37354 (Aug. 25, 1982).

² 47 Fed. Reg. 17441 (April 22, 1982).

It is in this context that the Respondent's Motion seeks dismissal of the five Counts in the Complaint. Their argument is: How can a person be held liable for failure to meet a standard when no standard exists? Their argument has merit and it is quite likely that in a criminal case, an indictment based upon this set of facts would be quashed. However, we are here dealing with a civil action based upon a statute enacted to protect the health and welfare of the Public and as such must be broadly and liberally interpreted.

In that light, it occurs to me that even the Respondent agrees that some degree of clean-up is required. Absent specific standards, therefore, one must apply a standard of reasonableness. The Agency argues that residual PCBs were found, following the Respondent's clean-up efforts, at levels in the 13,000 ppm range. The Respondent denies this. A crucial conflict in the evidence therefore exists.

Accordingly, I am of the opinion that the Motion to Dismiss, on these grounds, is unwarranted.

As to Count III, the Respondent argues that this violation is barred by the statute of limitations. 28 U.S.C. §2462 bars enforcement actions brought more than five years after the event. Respondent further argues that Agency policy and legislative intent indicate that the Agency has no authority to require clean-up of spills occurring before promulgation of the April 18, 1978 regulations. The Agency apparently does not dispute this conclusion, but rather insists that it has an "eye-witness" who saw the release in the summer of 1982.

In support of its position, the Respondent included, as an attachment to its brief, the affidavit of Mr. James A. Smalley, one of its employees having supervision of the events in question. Attached to Mr. Smalley's affidavit are copies of Respondent's business records which indicate that a spill of PCBs did,

in fact, occur at the location in question, but that it occurred on September 1, 1977. The affidavit and the records show that the event which occurred in 1982, was the failure of a cut-out fuse and not a capacitor. Inspections at that time and later, in 1983, disclosed that all capacitors at that location were intact. These documents, when read together, demonstrate that no spills occurred after April 18, 1978 nor within five years of the bringing of the Complaint.

In response to this argument, the Agency merely states that it has an eye-witness who will testify at the hearing to the effect that he saw the release of fluids from the capacitor. I do not doubt that the Agency has such a witness, however, it is unlikely that he will testify at the hearing. As the Respondent correctly points out in its reply brief, the time for this witness to tell us what he knows is now. The only evidence before me is the affidavit of Mr. Smalley. The proper procedure would have been to have attached the affidavit(s) of the eye-witness to the Agency's brief. Absent this evidence, I must conclude that Count III is barred by the statute of limitations and must be dismissed.

In view of my ruling, I need not address the other arguments made by the Respondent except to say I am of the opinion that I lack the authority to rule on constitutional issues. That does not mean that parties may not raise them, but that EPA's Administrative Law Judges lack the power to rule on them. The Agency itself (the Administrator) may do so, but not us. In essence, an EPA Administrative Law Judge will simply note his lack of authority and allow the constitutional issues to remain in the Record for review by some higher authority thus protecting the rights of the proffering party to argue them later.


Additionally, I am concerned about the tenor of the Agency's brief. It is more a sermon than a legal document, full of sanctimonious platitudes and little

law. The notion that the Respondent's Motion is somehow an affront to the Agency's efforts to regulate PCBs is inappropriate. I hope and expect the Agency's presentation at the trial of this matter to be more substantive.

ORDER

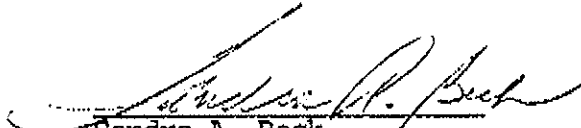
Consistent with the above discussion, the following order is issued:

1. The Motion to Dismiss all or portions of Counts I, II, IV and V of the Complaint is denied.
2. The Motion to Dismiss Count III of the Complaint on the basis that it is barred by the statute of limitations is granted.
3. The parties shall immediately confer and prepare a stipulation of agreed-upon facts to the end that the issues for trial may be narrowed.
4. The standard to be applied as to the adequacy of the clean-up conducted by the Respondent will be one of reasonableness considering all of the facts and circumstances involved.
5. Within fifteen (15) days of the completion of the stipulation referred to in Paragraph 3, supra, and in no event later than February 1, 1984, the parties shall file their initial responses to my prehearing letter of May 23, 1983.
6. Replies to the initial responses shall be filed no later than February 22, 1984.
7. Upon completion of the prehearing exchanges, a time and place for the hearing will be determined after consultation with the parties.


Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, EPA Region V; and that true and correct copies were served on: Michael J. Walker, Esquire, U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604; and A. Daniel Feldman, Esquire, and Susan D. Proctor, Esquire, Isham, Lincoln & Beale, 3 First National Plaza, Suite 5200, Chicago, Illinois 60602, (all service by Certified Mail, Return Receipt Requested). Dated in Atlanta, Georgia this 1st day of December 1983.



Sandra A. Beck
Secretary to Judge Yost

JUDGE THOMAS B. YOST
U. S. ENVIRONMENTAL PROTECTION AGENCY
345 COURTLAND STREET
ATLANTA, GEORGIA 30365
FTS 257-2681
COMM. 404/881-2681