

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
RO-BANKS TOOL & MANUFACTURING) DOCKET NO. CWA-VIII-95-04-PII
COMPANY)
Respondent)

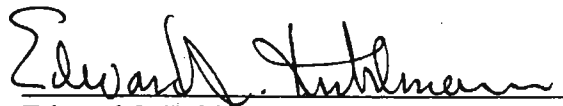
MEMORANDUM OPINION AND ORDER

Under consideration is respondent, Ro-Banks Tool & Manufacturing Company's motion for leave to amend its answer, filed July 30, 1996. Respondent moves to amend its answer filed April 17, 1995 to include the claim that 33 U.S.C. § 1319 (g) "is unconstitutional in that it is in violation of the Seventh Amendment of the United States Constitution." The reason that respondent provides for amending, over a year after its answer was filed, is that the issue is a matter of fundamental law and "it should be addressed in this proceeding." Complainant opposes the motion on the ground that the agency is not able to rule on the constitutionality of a federal statute. Respondent filed no reply.

Respondent has not shown good cause for amending its answer. A presiding officer may not entertain a defense to a complaint that is based on the argument that the statutory section under which the complaint has been made is unconstitutional. In re Norma J. Echevarria and Frank J. Echevarria d/b/a Echeco Environmental Services, CAA Appeal No. 94-1, 5 E.A.D. 626, 637 (Dec. 21, 1994). The motion for leave to amend will, therefore, be denied. With regard to the merits of respondent's legal argument, its reliance on Tull v. United States, 481 U.S. 412 (1987), is misplaced. The court recognized that: "[It] has also considered the practical

limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings.” Id. at 418 n. 4 (citations omitted). There is no reason to conclude from the court’s statement regarding administrative remedies, or its holding in *Tull*, that in civil penalty cases, the Constitution’s Seventh Amendment would require a jury trial where Congress has, instead, provided for an administrative hearing. The note just cited recognizes that the law is otherwise. In *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), the court held that Congress is constitutionally permitted to legislate that penalty complaints may be resolved in administrative proceedings where jury trials are not available. Respondent has failed to present any authority to support a contrary proposition.

ACCORDINGLY, IT IS ORDERED that the motion for leave to amend response filed by the respondent IS DENIED.


Edward J. Kuhlmann
Administrative Law Judge

September 10, 1996
Washington, D.C.

IN THE MATTER OF RO-BANKS TOOL & MFG CO. Respondent
CWA-VIII-95-04-PII

CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum Opinion and Order, dated, Sept, 10, 1996, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 8
999 - 18th St.
Denver, CO 80202

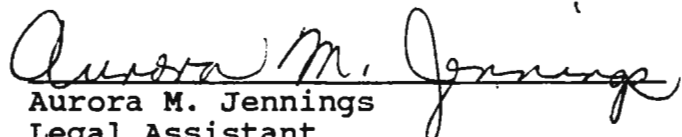
Copy by Regular Mail to:

Counsel for Complainant:

Carl L. Castillo, Esquire
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region 8
999 - 18th St., Suite 500
Denver, CO 80202

Counsel for Respondent:

J. P. Dosland, Esquire
Dosland, Nordhougen, Lillehaug
& Johnson, P.A.
730 Center Ave. Suite 203
P.O. box 100
Moorhead, Minn. 56561-0100


Aurora M. Jennings
Legal Assistant
Office of Administrative
Law Judges
U.S. EPA
Wash. DC 20460

Dated:

Sept 10, 1996
Washington, DC