UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | : | Docket No. TSCA-09-92-0014 |
| UNIVERSITY OF HAWAII | : | Judge Greene |
| Respondent | : | |

ORDERS UPON CROSS MOTIONS

FOR SUMMARY DECISIONS

This matter arises under Section 15(1)(C) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614(1)(C).

The complaint charges Respondent University of Hawaii with numerous violations of TSCA § 15(1)(C) and implementing regulations which govern the use of polychlorinated biphenyls ("PCBs "), 40 C.F.R. Part 761. It is alleged that Respondent failed to equip eighteen higher secondary voltage radial PCB transformers used in or near commercial buildings on its Manoa Campus with enhanced electrical protection by October 1, 1990, as required by 40 C.F.R. §§ 761.30(a)(1)(iv), (v) for PCB transformers still in service on that date.

In its third amended answer to the complaint Respondent denied that the transformers at issue lacked high and low current fault protection, denied that they were in violation of the various fault protection requirements, and denied further that the transformers were in fact radial PCB transformers with higher secondary voltages as described in the regulations.(1)

Complainant moved for summary decision as to liability for all counts. Respondent opposed the motion, and moved for summary decision with respect to the violations alleged in connection with high current fault protection, 40 C.F.R. § 761.30(a)(1)

(iv).

In a motion for summary judgment the moving party has the initial burden of establishing that (1) no genuine issue as to any material fact remains to be determined, and (2) the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat the motion, the opposing party must set forth specific evidence, by affidavits or otherwise, which reveals the existence of a material fact to be tried or submitted; such evidence is to be construed in the light most favorable to the opposing party, and all reasonable inferences will be drawn in that party's favor.[(2)] The determinate question is "whether the evidence [when so viewed] presents a sufficient disagreement as to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986).

The issues presented for summary decision here are whether Respondent's eighteen higher secondary voltage radial PCB transformers were equipped with enhanced electrical protection systems as of October 1, 1990, in accordance with applicable regulations, for the purpose of preventing fault-related transformer failures, *i. e*. those which result from overcurrent [40 C.F.R. § 761.30(a)(iv)] as well those failures which result from sustained low current [40 C.F.R. § 761.30(a)(v)] to the transformers.[(3)]

Complainant's Motion as it Relates to High Current Fault Protection, and Respondent's Cross-Motion, 40 C.F.R. § 761.30(a)(iv).

The record discloses that the University's facility was inspected by a U. S. Environmental Protection Agency ("EPA") official on May 8, 1991, at which time the facility was using eighteen higher secondary voltage radial PCB transformers in or near commercial buildings. The inspector reported that "facility representatives were unaware of any enhanced electrical protection being installed on the transformers;" and he says he told Respondent's employees that "radial transformers with secondary voltages of 480 volts or greater *may be* in violation of the October 1, 1990, deadline for removal, *if* the equipment does not have enhanced electrical protection for low and high current faults."[(4)] In addition, an October, 1991, study prepared for Respondent by a consulting electrical engineering firm contains the following statement:

> Federal regulations require that PCB transformers in or near commercial buildings either be replaced by October l, 1990 or be protected from high and low current faults. The PCB transformers at the University did not appear to be in compliance with those EPA regulations and thus, the University could be fined by the EPA.[(5)]

These statements and others in the same study, together with certain of Respondent's earlier pleadings (which were amended pursuant to motion before the instant motions were filed), are relied upon by Complainant in an effort to demonstrate that no material facts remain at issue with respect to the alleged absence of high current fault protection required by 40 C.F. R. § 761.30(2)(1)(iv).[(6)]

However, the record does contain probative evidence that Respondent had overcurrent protection on the eighteen transformers, or some of them, at some point. In order to establish the presence of the enhanced protection against high current faults required by 40 C.F.R. § 761.30(a)(1)(iv), Respondent relies upon (1) other portions of the same October, 1991, study relied upon by Complainant;[(7)] (2) statements of two University of Hawaii employees who are engineers;[(8)] (3) a letter from an engineer employed by the consulting firm which conducted the October, 1991, study;[(9)] and (4) certain 1997 materials obtained from Westinghouse Electric Corporation, a subcontractor in that study. Respondent urges that the 1997 Westinghouse materials confirm "documentation"[(10)] in the 1991 report that shows the PCB transformers in question to have been protected from overcurrent fault-related failures.

It is clear, therefore, that material issues of fact remain to be determined with re-spect to whether such protection was added, and, if so, when and to which transformers. Accordingly, Complainant's motion as it relates to high current fault protections must be denied in light of Respondent's evidence to the contrary. Viewed in its strongest light, which is the test of the opposing party's case in considering a motion for summary judg-ment, this evidence is adequate to defeat the motion.

Respondent's cross-motion cannot succeed for several reasons. First, it does not overcome the unambiguous statement, relied upon by Complainant and contained in Section I - Executive Summary of the same report, that "[t]he PCB transformers at the University did not appear to be in compliance . . . and thus the University could be fined by the EPA."(11) No explanation for the contradiction(12) appears or has been offered by Respondent. The presence of this statement in the study creates an issue of material fact not addressed by the other statements and documents relied upon by Respondent. Moreover, none of this evidence goes specifically to whether the high fault protection had been added to the transformers by October 1, 1990; and none establishes that such high current fault protection as Respondent did have complied with subparagraph (A) of 40 C.F.R. § 761.30(a)(1)(iv).(13) In short, Complainant's evidence, viewed in its strongest light, is adequate to resist the cross-motion, and raises the question of whether such high current fault protection as Respondent had was in place on October 1, 1990, the date specified by regulation; or by the date of the EPA inspection (May, 1991); or even by the date of the study itself (October, 1991). Comments attributed to Respondent's employees during the inspection(14) might, if they stood alone, be explainable in some way, but here they add to the inconsistency raised by the Executive Summary, and to the clear showing of unresolved material facts. Accordingly, Respondent's cross-motion will be denied in part because of the unexplained -- and not insignificant given its source -- statement that high current fault protection was not in place by October, 1991, and in part because Respondent's other evidence also does not establish that adeqiate high current fault protection was in place by October 1, 1990. In the absence of settlement, additional evidence should be adduced by trial or otherwise with respect to whether the enhanced electrical protection required by the 40 C.F.R. § 761.30(a)(1)(iv) and (iv)(A) had been added by October 1, 1990.(15)

Complainant's Motion as it Relates to Low Current Fault Protection, 40 C.F.R. § 76l.30(a)(1)(A)(v).

As with the charges that Respondent's transformers lacked high current fault protection, Complainant relies again upon (1) pleadings that were subsequently amended pursuant to motions granted,(16) (2) statements which appear in studies performed for Respondent, and (3) the inspection report to assert that no material issue of fact remains to be determined with respect to the alleged absence of sustained low current fault protection.

The record contains probative evidence that Respondent had sustained low current fault protection on the transformers in question at some point, and on some if not all of the transformers. This evidence, particularly that provided by the Director of Respond-ent's Manoa Campus Facilities Planning and Management Office with respect to an "en-hanced monitoring program,"(17) which he says was in place by October l, 1990, shows that Respondent had taken steps which it believed went to compliance with 40 C.F.R. § 761. 30 (a)(1)(v). Accordingly, the record is adequate to resist Complainant's motion because it raises material issues of fact despite the lack of information as to whether

Respondent's low current fault protection complied with the specific requirements of subparagraphs (A), (B), and (C) of 40 C.F.R. § 761.30(a)(1) (v) so as to protect the transformers against sustained low current faults. Here, again, in the absence of settlement, additional evidence should be adduced.

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In conclusion, it is found that the complaint states a cause of action under the

Act, that the eighteen transformers described in the complaint are high secondary voltage radial PCB transformers, that they were in use [*i. e*. not removed from service as provided by 40 C.F.R. § 761.30(a)(1)(iv)(b) at all relevant times, and were located in or near commercial buildings. However, the parties have not shown and the record is not adequate to permit findings to the effect that no genuine issues as to any material facts remain to be decided in connection with the alleged absence of adequate enhanced electrical protections as of the regulatory date.

The foregoing conclusions are not the result of a *weighing of the evidence,* as would have been the case following trial or submission of the record for decision. They represent rulings upon the threshold questions posed by the parties in their motions: whether the evidence presents a sufficient disagreement as to require submission for the finding of additional facts, weighing of the evidence, and decision based thereon. This Order constitutes a ruling that there is significant evidentiary disagreement as to the major issues, and that, consequently, if the matter is not settled, fuller factual development should be made before the evidence is weighed and decision on the merits rendered. Summary procedures, however useful when evidence on the factual issues is clear and one-sided, ought not to be applied -- and is not favored by the law -- in the absence of a more solid basis for findings obtained by means either of trial or additional evidence, in fairness to both parties.

Authority to Exact a Monetary Penalty against the State of Hawaii.

Respondent has argued throughout these proceedings that "neither the United States Congress nor a federal executive agency such as the U. S. Environmental Protection Agency possesses the legal constitutional authority to exact funds from the Treasury of a sovereign state, absent consent of that state." To the extent that this position has not already been addressed in the *Order Denying Respondent's Motion for Accelerated Decision* of June 10, 1996, it need not be reached here since its application is solely to the penalty phase of this matter, if any. Even if Respondent should ultimately prevail with this argument, that would not preclude findings and conclusions with respect to the events which gave rise to these proceedings.

**ORDER**

It is ordered that Complainant's motion for partial summary judgment shall be, and it is hereby, denied.

And it is further ordered that Respondent University of Hawaii's motion for summary determination in its favor as to charges that eighteen transformers were not equipped with high current fault protections shall be, and it is hereby, denied.

_____ J. F. Greene
Administrative Law Judge

Washington, D. C.
June 29, 1998

1. Respondent moved for leave to amend its answer to the complaint twice. Both motions were granted in the interest of fairness, since Respondent had represented that new evidence had been discovered, and because no unfairness or prejudice to Complainant could be detected. As a result of amended pleadings, however, Complainant has been required to meet a different and better pleaded defense. *See Busam Motor Sales v. Ford Motor Co*., 203 F.2d 469 (6th Cir. 1953).

2. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157-59 (1970), construing Fed. R. Civ. P. 56.

3. No material issue of fact remains to be determined with respect to whether the transformers in question were higher secondary voltage radial PCB transformers. *See, inter alia*, Section 2.6 of the *Westinghouse Electric Corporation and Report for University of Hawaii, Manoa Campus* (Respondent's PTX 12); and Section III -

Field Data, § 3.4, *Exterior Electrical Distribution System Study at University of Hawaii, Manoa Campus* by Ronald N.S. Ho & Associates, Inc. (Respondent's PTX 11). Both these studies provide detailed data on Respondent's electrical facilities, including the 18 transformers at issue and their secondary voltage capacities, which are listed as either 480 or 480/277. Since Respondent offered only a denial as to this aspect of the issues, rather than specific evidence in opposition, no showing has been made that a genuine issue exists with respect to the type of transformer being used. *See* Fed. R. Civ. P. 56(e): "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts . . . ."; and *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

4. EPA Inspection Report, at 4-5 (emphasis added). The inspector did not make a determination on site as to whether enhanced electrical protection had been added to the transformers.

5. *Exterior Electrical Distribution System Study at the University of Hawaii, Manoa Campus* by Ronald N. S. Ho & Associates, Inc., October 23, 1991. The quotation is from Section II - Technical, at § 2.1.1.6 of the study (Complainant's pretrial exhibit 11, at 30).

In Part I - Executive Summary, §2.1.1, Primary Electrical Distribution System, ¶ 6, the following statement is made: "The University presently owns and maintains PCB transformers. This section discusses government restrictions on PCB equipment and the University's obligations for that equipment. A priority recommendation of this study is the immediate removal of all PCB equipment at the University. This section explains the basis for this recommendation." (Complainant's pretrial exhibit 11, at 5-6).

Sections III - Field Data and IV - Appendices were filed by both parties. Section I - Executive Summary and Section II - Technical were filed by Complainant.

6. Statements that were removed from pleadings pursuant to motion granted will not support a motion for summary judgment. The statements in question, which Complainant viewed as admissions, are no longer pleadings.

7. *Exterior Electrical Distribution Systen Study at the University of Hawaii, Manoa Campus* by Ronald N. S. Ho & Associates, Inc., October 23, 1991,Section III - Field Data, § 3.6, Transformer One-Line Diagrams.

8. *Respondent University of Hawaii's Memorandum in Opposition to Complainant's Motion . . . and Cross-Motion*, November 5, 1997, Declarations of Dennis Kamite and Mike Yoneda with attached exhibits.

9. *Id.*, Declaration of Gary I. Funasaki with attached Exhibit A.

10. *Id.*, Declaration of Mike Yoneda, at 3-4, § 8.

11. That is, as of October 23, 1991, the date on which the study was submitted to Respondent.

12. *Cf*. Section III - Field Data, § 3.6, One-Line Transformer Drawings, of the October 23, 1991, study where a general statement is made to the effect that high current fault protection is present on the PCB transformers.

13. Subparagraph (A) requires, *inter alia*, that "Current-limiting fuses or other equivalent technology must . . . provide the the complete deenergization of the transformer (within several hundredths of a second) . . . ."

14. According to the May, 1991, EPA inspection report, Respondent's representatives were 'unaware' of any protective equipment 'being installed' on the transformers.

15. It is noted that "substantial compliance," where that term is used to indicate that the required protections were not in place by October l, 1990, or that such protections did not *fully comply* with 40 C.F.R. § 761.30(a)(1)(iv)(A) *as of that*

*date*, does not constitute a defense to the violations charged, because liability under TSCA is absolute. However, evidence of "sub-stantial compliance" as used in that sense may well be relevant to the amount of penalty to be imposed in the event that violations of TSCA are ultimately found.

16. Statements that were excised from pleadings pursuant to motion granted cannot be used to support a motion for summary judgment. The statements in question, which Complainant viewed as admissions, are no longer pleadings.

17. *Respondent University of Hawaii's Memorandum in Opposition to Complainant's Motion . . . and Cross Motion for Partial Accelerated Decision* as to high current fault protection, November 5, 1997, Declaration of Mike Yoneda and attached Exhibit F.