

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
CHARLESTON CORRECTIONAL FACILITY,) Docket No. TSCA-I-93-1094
DEPARTMENT OF CORRECTIONS,)
STATE OF MAINE)
)
Respondent)

ORDER DENYING MOTION TO DISMISS
AND SETTING PROCEEDING FOR HEARING

Background

The Region I staff of the United States Environmental Protection Agency (the "Complainant" or "Region") served a Complaint on the Charleston Correctional Facility, State of Maine Department of Corrections ("Respondent" or "Maine"), on September 30, 1993. The Complaint charges Respondent with four counts of violations of Section 15(1)(C) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2614(1)(C), and the Act's implementing regulations governing management of polychlorinated biphenyls ("PCBs"), 40 C.F.R. Part 761. The charges relate to Respondent's alleged improper storage of some 40 PCB-containing electrical transformers at the Charleston Correctional Facility. Pursuant to TSCA §16(a), 15 U.S.C. §2615(a), the Region seeks assessment of a civil penalty of \$42,000 against Respondent for these violations.

Respondent filed an Answer on November 3, 1993, in which it denied the material allegations of the Complaint and raised several defenses. Respondent then filed a Motion to Dismiss the Complaint on August 9, 1995. Maine contends, as alleged in its first affirmative defense, that it is not a "person" within the meaning of TSCA §15(1)(C) and §16(a) and is therefore not subject to the assessment of civil penalties pursuant to that statute. Complainant has filed a memorandum in opposition to Respondent's Motion to Dismiss, and both parties have filed reply briefs.

This ruling addresses the sole legal issue raised in Respondent's Motion to Dismiss: whether the EPA has jurisdiction to assess civil penalties against Maine for violations of TSCA and the PCB regulations. This ruling concludes that the State of Maine is a person within the meaning of TSCA and is subject to the assessment of civil penalties. Hence, Respondent's Motion to Dismiss is denied.

Discussion

Section 15 of TSCA states it shall be unlawful for "any person" to "(1) fail or refuse to comply with . . . (C) any rule promulgated . . . under section 2604 or 2605 of this title . . ." 15 U.S.C. §2614. The PCB rules Respondent is charged with violating, in 40 C.F.R. Part 761, were promulgated by EPA under 15 U.S.C. §2605(e). TSCA Section 16(a) provides that "[a]ny person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$20,000 for each violation."

Respondent's entire argument is based on the absence of a definition of the term "person" in TSCA. However, the EPA, pursuant to its delegated authority, has promulgated such a definition in the the PCB regulations. In 40 C.F.R. §761.3, "person" is defined as "any natural or judicial person including any individual, corporation, partnership, or association; any State or political subdivision thereof; any interstate body; and any department, agency or instrumentality of the Federal Government." (emphasis added). Respondent argues that this regulation is not valid and not binding since it is contrary to Congress' intent in promulgating TSCA. However, an analysis of Respondent's arguments fails to support that position.

Initially, an administrative agency tribunal is not generally empowered to rule on the facial validity of its own regulations. Matter of Virginia Department of Emergency Services, Docket No. TSCA-III-579 (Order Granting in Part and Denying in Part Motion for Accelerated Decision, March 2, 1993, p. 22). The regulation defining "person" as including states was duly promulgated in 1979 in accordance with the Administrative Procedure Act, 5 U.S.C. §553, as well as with special procedures under TSCA requiring notice and comment by interested parties, and public hearings if warranted. (See 15 U.S.C. §2605[e][4] referencing §2605[c][2]). As pointed out by Complainant, the proper forum for challenges to such rulemaking is the United States Courts of Appeals, within 60 days of the promulgation of the rule, pursuant to TSCA §19(a), 15 U.S.C. §2618(a). Neither Maine nor any other State has challenged the rule defining "person" as including states. Congress has not seen fit to amend TSCA with regard to further defining "person" in the sixteen years since this rule was promulgated. This history indicates Respondent cannot properly now challenge that rule in this administrative proceeding by characterizing its challenge as "jurisdictional."

In addition, TSCA and its PCB regulations have been enforced against states in several prior EPA administrative enforcement proceedings. In one of those, Virginia Department of Emergency Services, above, the Administrative Law Judge ruled on essentially the same contention made by Maine in this proceeding. Judge Nissen

stated that challenges to the facial validity of an EPA regulation are "rarely if ever entertained in an enforcement proceeding." (Order, p. 22). He further held that the regulatory definition including States as "persons" was validly promulgated pursuant to authority delegated by Congress, and remained fully in effect.¹

The validity of the rule defining "person" as including states is alone sufficient reason to deny Respondent's motion. I will nevertheless briefly address Respondent's additional arguments below.

Respondent points out that in other major federal environmental laws, Congress has specifically defined the term "person", as including states, while in TSCA the term is not defined. In TSCA, however, Congress delegated the authority to EPA to promulgate rules implementing the Act. As described above, EPA has validly promulgated such a rule defining person as including states. As Respondent itself points out, the legislative history is silent on Congressional intent regarding enforcement of TSCA against states. In view of the definition by rule and subsequent application of the rule, enforcement against states must be construed as consistent with Congressional intent, not contrary to it, as Respondent infers.

Certainly the plain purpose of TSCA to comprehensively regulate the management of toxic chemicals is consistent with the inclusion of states in the regulatory scheme. A state's handling of PCBs poses the same danger to the environment as would the similar actions of any other "person." It is irrelevant that the handling by the state is incidental to the carrying out of a state function such as constructing and operating prisons, building and maintaining highways, or running a state university.

Complainant has pointed out that another provision in TSCA, Section 20(a), authorizes enforcement of TSCA by citizens' civil suits against "any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)" Respondent attempts to harmonize this provision by conceding that states may be bound to comply with the substantive requirements of TSCA, but, due to sovereign immunity, are not subject to civil

¹ See also In re State of West Virginia, Department of Highways, Docket No. TSCA-III-136 (Initial Decision, March 21, 1986), TSCA Appeal No. 86-2 (EAB Final Decision, January 21, 1987), assessing and upholding a \$22,950 civil penalty against the State of West Virginia; In re University of Maryland, Docket No. TSCA-III-226 (Order Denying Motion for Accelerated Decision, November 23, 1987); In re University of Delaware, Docket No. TSCA-III-452 (Order Granting in Part Motion for Accelerated Decision, February 15, 1991).

penalties. This argument is not persuasive. "It is a normal rule of statutory construction . . . that identical words used in different parts of the same act are intended to have the same meaning." Commissioner of Internal Revenue v. Keystone Consolidated Industries, 508 U.S. ____, 113 S.Ct. 2006, 124 L.Ed. 71, 80 (1993) (citations omitted). There is no indication that Congress intended different meanings for the word "person" in Sections 15, 16(a), and 20(a) of TSCA.

Respondent's arguments claiming sovereign immunity for Maine are also misplaced. Respondent argues that TSCA §20(a), by allowing citizens' suits against the United States, as well as against the states, indicates that the states, like the United States, are not subject to civil penalties due to sovereign immunity. However the United States and the states are in entirely different positions concerning their respective sovereign immunity from federal enforcement. It is true that it is difficult to overcome the strong presumption against waiver of federal sovereign immunity. However, it is well established that the "States have no sovereign immunity as against the Federal Government." West Virginia v. United States, 479 U.S. 305, 311 (1987).

Also in this vein, Respondent suggests it would be "absurd" for EPA to assess penalties against its sister agencies or instrumentalities of the federal government. While the concept of one federal agency seeking penalties from another may seem a bit odd, it is done. Under statutes where federal sovereign immunity has been unequivocally waived, the EPA has undertaken enforcement against other federal agencies, including seeking the assessment of civil penalties.² These federal administrative enforcement proceedings may be distinguished from the attempted state assessment of punitive penalties against the federal government that was held prohibited under the doctrine of federal sovereign immunity in the cases cited by Respondent: United States Department of Energy v. Ohio, 503 U.S. 607, 112 S.Ct. 1627 (1992); and Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir., 1990). We need not explore the distinctions any further since the issue of waiver of federal sovereign immunity under TSCA is not before us in this proceeding.

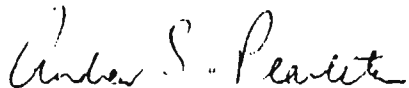
Accordingly, the Respondent, an instrumentality of the State of Maine, is a "person" within the meaning of TSCA §16(a). EPA has jurisdiction to assess civil penalties against Respondent for violations of TSCA and its PCB regulations. Therefore, Respondent's Motion to Dismiss this proceeding is denied.

² See Matter of Lackland Training Annex, Docket No. RCRA-VI-311-H (Order on Motions; May 12, 1995); and Matter of Department of Veterans Affairs, Medical Center, Docket No. [MWTA] RCRA I-90-1084 (Initial Decision; March 11, 1992).

Order Setting Further Proceedings and Hearing

The parties may submit replies to the Prehearing Exchanges previously filed, no later than February 28, 1996. Also by that date, Complainant is directed to submit a Status Report indicating the status of any settlement negotiations and the likelihood of settlement without a hearing.

The hearing in this proceeding will be held beginning at 9:30 A.M. on April 17, 1996, in Augusta, Maine, continuing if necessary on April 18, 1996. The Regional Hearing Clerk, in consultation with the Respondent, shall make arrangements to obtain appropriate hearing accommodations and the services of a stenographic reporter to transcribe the proceedings. When these arrangements have been made, the Regional Hearing Clerk shall notify the undersigned and all parties.



Andrew S. Pearlstein
Administrative Law Judge

Dated: January 25, 1996
Washington, D.C.

In the Matter of Charleston Correctional Facility,
State of Maine Department of Corrections
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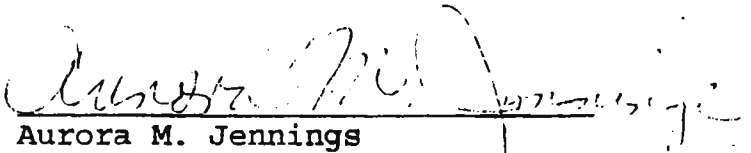
CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion to Dismiss and Setting Proceeding for Hearing, dated January 25, 1996, was sent by regular mail to the addressees listed below:

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Dated: January 25, 1996
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