UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Environmental Protection Services, Inc.,	)	**Docket No. TSCA-03-2001-0331**
	)	
Respondent	)	

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENT'S MOTION TO AMEND ANSWER TO SECOND AMENDED COMPLAINT

Respondent, Environmental Protection Services, Inc. ("EPS"), moves to file an Amended Answer to the Second Amended Compliant filed by the U.S. Environmental Protection Agency ("EPA"). EPA opposes the proposed amendment. As explained below, the motion to amend is *granted in part*, and *denied in part*.

On April 23, 2003, EPA filed a Second Amended Complaint in this matter charging EPS with three violations of Section 15(1)(C) of the Toxic Substances Control Act. 15 U.S.C. § 2614(1)(C). Respondent elected not to file a formal answer and, instead, incorporated its previously filed answer. Thereafter, a hearing was held in this case from June 17-20, 2003. This hearing will be continued on August 18, 2003. During this interim period respondent seeks to amend its answer so as to raise two new affirmative defenses.[1] EPS seeks to employ these defenses against the charge in Count III that it had failed to comply with the oven and temperature requirements of 40 C.F.R. 761.72(a)(3).

With respect to the first affirmative defense, "EPS maintains that no rational connection exists between the specific burn time requirement that EPA seeks to enforce and the effective decontamination of PCB-contaminated articles, and should, therefore be reversed as arbitrary and capricious." Mot. at 2. Regarding this assertion, EPA correctly points out that this is not a rulemaking proceeding and that the time to raise any substantive challenges to this regulation has long since passed.[2]

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[1] Respondent's motion to amend was served on July 31, 2003.

[2] In any event, EPA submits that respondent already has had its opportunity to comment upon 40 C.F.R. 761.72 during rulemaking. In that regard, EPA states that EPS twice commented on the disposal regulations during rulemaking, and it has attached a two-page document purporting to show respondent's participation. *See* Ex. 2 to EPA Response. Complainant adds, "[u]pon information and belief, Respondent did not comment upon or challenge the two and one half hour operating parameter for scrap metal ovens in 40 C.F.R. Section 761.72." Resp. at 4-5.

Moreover, EPS's own argument illustrates the wisdom in not mixing substantive rulemaking with this enforcement matter. The company states:

> In this case, the administrative record provides no basis as to why 2 ½ hours was selected over any number of other time options. The EPA has provided no evidence that demonstrates that a burn time of less than 2 ½ hours would not effectively remove PCBs from the surface of PCB-contaminated articles.

Mot. at 3 (emphasis in original).[3]

Accepting respondent's argument would effectively require EPA to resurrect the rulemaking record in this enforcement proceeding before it can even begin to carry its burden that the promulgated regulation was violated. This cumbersome approach would make no sense.

Accordingly, for the foregoing reasons, this tribunal will not entertain what is essentially a collateral attack upon 40 C.F.R. 761.72(a)(3).

The second affirmative defense which respondent wishes to raise is that Section 761.72(a)(3) "was improperly promulgated according to the Administrative Procedures Act's notice and comment requirements." Mot. at 5. Here, respondent asserts that even though the regulation states that the primary oven chamber of scarp metal recovery ovens must operate for 2 ½ hours, no such minimum burn time is referenced in either the Advanced Notice of Proposed Rulemaking or the Notice of Proposed Rulemaking. *Id.* This is a different argument from EPS's earlier substantive rulemaking challenge, or at least at this stage it appears so. In that regard, the company is contending that EPA did not follow the proper procedure in promulgating the Section 761.72(a)(3), insofar as the regulation relates to a minimum burn time.

In response, EPA offers the same arguments to EPS's raising this affirmative defense as it did to the affirmative defense already discussed. This situation, however, is different. Here, EPS is raising a legal challenge only. There will be no testimony on this legal issue. Thus, the fact that EPA has presented its case-in-chief during the first phase of this hearing will not in any way prejudice complainant. Respondent, therefore, will be allowed to amend its answer so as to challenge the involved regulation on the ground that the agency failed to comply with the applicable notice and comment rulemaking requirements.[4]

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[3] EPS also states that the testimony of Dr. John Smith supports its position, but respondent provides no transcript citations to that effect. *Id.*

[4] All this means is that EPS can advance this notice and comment rulemaking argument. Respondent must still show that to be the case and further, that this tribunal has jurisdiction to make such an evaluation.

Accordingly, EPS may amend its answer consistent with this order.

Carl C. Charneski
Administrative Law Judge

Issued: August 15, 2003
Washington, D.C.