7/17/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
HALOCARBON PRODUCTS CORPORATION,	)	**Docket No. TSCA-90-H-18**
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE

For the reasons stated in its motion of February 12, 1991,[1] complainant seeks to strike respondent's second affirmative defense from the answer. Respondent served its opposition to the motion on March 11. By order of March 21, the Administrative Law Judge (ALJ) directed complainant to reply to respondent's opposition, with particular reference to respondent's affirmative defense on the penalty issue. Complainant submitted its reply on March 22, and respondent served its response to this submission on April 3.

Respondent argues that administrative proceedings are not bound by the Federal Rules of Civil Procedure (Fed. R. Civ. P.) It urges the ALJ to follow a less stringent standard than Fed. R. Civ. P. 12 (f). (Submission, March 11 at 4-6). It is true, as respondent states, that administrative agencies have freedom to

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[1] Unless otherwise stated, the year is 1991.

fashion their own rules of procedure which differ from Fed. R. Civ. P.[2] Yet, such rules have often directed the decision process in motions to strike, especially when the Consolidated Rules of Federal Practice of the Environmental Protection Agency (EPA), as here, are silent concerning such a pleading.[3]

Under Fed. R. Civ. P. 12 (f), motions to strike defenses are generally disfavored by the courts because they are a drastic remedy and they cause unnecessary delay.[4] Although disfavored, such a motion is proper when the defense is insufficient as a matter of law. Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, 677 F.2d 1045, 1057 (5th Cir. 1982), Reh'g denied, 683 F.2d 1373 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). Moreover, a defense that "might confuse issues in the case and would not under the facts alleged, constitute a valid defense to the action, can and should be deleted."[5] (emphasis added). Furthermore, the motion to strike is recognized as a useful and appropriate tool for weighing the legal implications to be drawn

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[2] See, e.g., In the Matter of Katzon Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision Nov. 13, 1985); Silverman v. Commodities Future Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

[3] See In re Nello Santacroce and Dominic Fanelli, d/b/a Gilroy Associates, Docket No. TSCA-09-89-0014 (Order Denying Motions to Strike Affirmative Defenses and for Accelerated Decision, Nov. 2, 1990); In re PPM, Inc. of Georgia, Docket No. TSCA VII-88-T-559, et al. (Order Granting Complainant's Motion to Strike in Part and Denying in Part, Jul. 12, 1989).

[4] Wright and Miller, Federal Practice and Procedure: Civil 2d § 1381 at 672 (1990).

[5] Wright and Miller, Federal Practice and Procedure: Civil 2d § 1381 at 665 (1990).

from uncontroverted facts. U.S. v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975).

With this backdrop, the ALJ turns to the specific affirmative defense, which is as follows:

> Notwithstanding the First Affirmative Defense, if Halocarbon Products Corporation had any additional notification obligation, it fulfilled that obligation by notice to and cooperation with other agencies of the United States government.

Respondent's assertion that it notified the Occupational Safety and Health Administration (OSHA) of the death and injury to its employees does not relieve it of the duty under section 8(e) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2607(e), hereinafter Section. The Section states explicitly that persons "shall immediately inform the Administrator" of such information. Respondent argues, in part, that it is relieved from reporting, because published articles appeared "many years prior to [the] incident that set forth the toxic effects . . . involved in this incidence." (Response to opposition at 2-3). This is not persuasive. The Section is abundantly clear on this point; it states that the Administrator shall be informed immediately unless such person [respondent] has "actual knowledge that the Administrator has been adequately informed of such information." Respondent also urges that because it reported full information concerning the incident to the OSHA, another federal government agency, it is relieved of its duty set forth in the Section. This argument rests upon a frail reed, indeed. To extend respondent's

argument would mean that advising any federal agency would be notice to the Administrator.

The purpose behind notification is to alert immediately EPA of substantial risks which can have serious effects to health or the environment. That EPA receives fortuitously the information from other agencies does not achieve the goal of the Section. Even if there were some sort of an exchange system for information between EPA and other agencies, there is absolutely no guarantee that the Administrator would receive the information unless a person took adequate steps to insure its delivery. Here EPA did not learn of the February 1, 1989 incident until it inspected the plant on March 9, 1989. (Motion at 3). Thus, by not informing the Administrator immediately and directly, EPA was not alerted until over a month after the accident.

Respondent's assertion that EPA is derelict in performing a duty to establish information exchange systems is without merit. In EPA's response to Comment 21 of TSCA Statement of Interpretation and Enforcement Policy Notification of Substantial Risk, no specific time period is stated as to when the system will be completed. 43 Fed. Reg. 11115 (March 16, 1978). Furthermore, EPA's response specifically requires substantial risk information to be reported directly to EPA until this system is established. Hence, since no system has been established yet, respondent is still responsible to report information to the Administrator.

Respondent also postulates that section 9(d), 15 U.S.C. § 2608(d), concerning "Coordination", places an affirmative duty on the Administrator to coordinate with the heads of other federal agencies "for the purpose of achieving the maximum enforcement of this chapter while imposing the least burdens of duplicative requirements . . . ." Assuming arguendo, that the Administrator has such an affirmative duty, nothing in section 2608(d) obviates respondent's duty of notification under the Section. It is concluded that respondent's second affirmative defense is insufficient as a matter of law, and complainant's motion shall be granted.

Affirmative defenses, however, need not be confined solely to issues of liability.[6] Although respondent's affirmative defense is stricken on the issue of liability, it may have some bearing concerning the penalty question. For example, if or when liability is established, it may be apposite to permit the introduction of evidence concerning pertinent factors to be weighed in determining the civil penalty as expressed in section 16(b) of TSCA, 15 U.S.C. § 2615(b). Complainant cites no persuasive legal authority which would preclude the asserting of affirmative defenses touching the penalty question in this matter.

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[6] Supra, Note 3.

IT IS ORDERED that complainant's motion to strike respondent's second affirmative defense be **GRANTED** regarding the issue of liability.

Frank W. Vanderheyden
Administrative Law Judge

Dated: July 16, 1991

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order was filed in re HALOCARBON PRODUCTS CORPORATION; Docket No. TSCA 90-H-18 and a copy of the same was mailed to the following:

(Inter Office) Andrew Cherry, Esq.
Toxics Litigation Division (LE-134P)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

(Certified Mail) Richard A. Levao, Esq.
Shanley & Fisher, P.C.
131 Madison Avenue
Morristown, NJ 07962-1979

Counsel for Halocarbon Products Corporation

Howell W. Leftwich III
Office of The Hearing Clerk
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington D.C. 20460

Dated: July 17, 1991