

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

GARRISON-JONES ARCHITECTS, INC.

Docket No. TSCA-V-C-96-015

Respondents

ORDER DENYING MOTION FOR ACCELERATED DECISION
OR, IN THE ALTERNATIVE, DECISION TO DISMISS,
AND ESTABLISHING PROCEDURES

Introduction

On September 6, 1996, Respondent, Garrison-Jones Architects, Inc., filed a motion for accelerated decision or, in the alternative, decision to dismiss. Respondent alleges that the complaint was filed after the expiration of the five-year statute of limitations prescribed by 28 U.S.C. § 2462. By pleading dated September 30, 1996, Complainant¹ asserts that since the alleged violation in question is a continuing violation, the case should not be dismissed. By pleading dated October 7, 1996, Respondent filed a motion for leave to file a response to Complainant's September 30, 1996 pleading, along with a response to that pleading. By pleading dated October 22, 1996, Complainant states that it does not oppose the filing of Respondent's October 7, 1996 pleading. However, Complainant requests that it be entitled to file a "Sur-Reply" to Respondent's October 7, 1996 pleading and states further that Respondent has no objection to that request. By pleading dated November 4, 1996, Complainant responded to Respondent's October 7, 1996 pleading. Because of the complexity of the issue argued, waiver of the regulation is granted to permit consideration of Respondent's October 7, 1996 pleading and Complainant's November 4, 1996 pleading. For the reasons set forth below, Respondent's motion for accelerated decision, or in the alternative, decision to dismiss, is **denied**.

Background and Argument

This proceeding commenced with a complaint submitted by Complainant on August 22, 1996. The complaint alleges that the case is a "civil action instituted pursuant to section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), which provides for the assessment of a civil penalty against any person who violates a provision of section 15 of TSCA, 15 U.S.C. § 2614. TSCA was subsequently amended by the Asbestos Hazard Emergency Response Act (AHERA), 15 U. S. C. § § 2641-2654, which was codified as subchapter II of TSCA." More specifically, the complaint alleges that Respondent inspected the Jordan Elementary School and the Centralia Junior High School for the presence of asbestos during the spring and summer of 1988 in order to effect the District's compliance with Section 203 of AHERA. However, the complaint alleges that during the 1988 inspection, Respondent failed to identify certain materials as required by 40 C.F.R. § 763.85(a) (4).

Respondent states that the complaint was filed after the five-year statute of limitations had expired and that it should therefore be dismissed as untimely. Respondent states that administrative proceedings, such as the instant case, are subject to 28 U.S.C. § 2462 entitled "Time for commencing proceedings," which provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within **five years** from the date when the claim first accrued if, within the same period, the offender or the property is found with the United States in order that proper service may be made thereon. (emphasis added)

As support for the applicability of this statutory provision to this proceeding, Respondent cites 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). Further, Respondent states that the cases cited by Complainant do not support Complainant's position.

In response, Complainant argues that the violations of TSCA were of a continuing nature. Complainant agrees that 3M stands for the proposition that 28 U.S.C. § 2462 applies to the instant case; however, it does not address the question of how that provision would apply to a case of continuing violation. In addition to case law, Complainant cites section 16(a) of TSCA as support for its arguments.

Decision

Respondent's argument is not persuasive. Section 16 (a) (1) of TSCA states as follows:

(1) Any 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 \$25,000 for each such violation. **Each day such a violation continues shall, for purposes of this sub-section, constitute a separate violation of section 2614 or 2689 of this title.**

Thus, it is possible that the violation alleged is continuing in nature, so as to make the violations occurring within the five years preceding the filing of the complaint within the statute of limitations. However, it is premature to determine conclusively at this early stage of the proceeding that a violation has, in fact, occurred or, if it has, that the violation is continuing in nature, such that Respondent may be liable for continuing violations which have occurred five years prior to the filing of the complaint in this proceeding. However, sufficient doubt has been raised by Complainant as to this issue to support denial of Respondent's motion. The record is not sufficient at this time to show that Respondent's alleged violation is a single act, or whether it is continuing in nature.² Accordingly, Respondent's motion is denied.

Further Procedures

At this point, it is appropriate to set procedural dates in this case. To allow for a more focused presentation of the issues, the schedule shall provide for the filing of prehearing exchanges³ in seriatim fashion pursuant to the following schedule:

May 16, 1997 - Complainant's Initial Prehearing Exchange

June 30, 1997 - Respondent's Answering (Direct and Rebuttal)

Prehearing Exchange

July 15, 1997 - Complainant's Rebuttal Prehearing Exchange

(if necessary)

In the prehearing exchange each party shall submit the names of the expert and other witnesses intended to be called at the hearing with a brief narrative summary of their expected testimony, and copies of all documents and exhibits intended to be introduced into evidence. See Section 22.19(b) of the Rules. Each party shall submit its views as to the place of hearing. See Sections 22.21(d) and 22.19(d) of the Rules. Failure of the Complainant to meet the deadline for the initial prehearing exchange shall result in a dismissal of the case for failure to prosecute.

Some words of caution to the parties--every motion filed in this proceeding must be served in sufficient time to permit a response by opposing counsel and to permit the issuance of an order before the deadlines set by this order or any subsequent order. EPA Rule 22.16(b), 40 C.F.R. § 22.16(b), allows a ten-day response period for answers to motions. Rule 22.07(c), 40 C.F.R. § 22.07(c), further provides that where a pleading or document is served by mail, an additional five days is added to the ten-day period.

The original of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this order shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the undersigned.

In its Answer to the Complaint, the Respondent exercised its right to request a hearing in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. See also 15 U.S.C. § 2615(a). If the parties cannot settle, APA § 554(c)(2) calls for a hearing under APA § 556. "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C § 556(d). Thus, the Respondent has the right to defend itself against the EPA's charges by way of direct evidence, rebuttal evidence or through cross-examination of the EPA's witnesses. It is entitled to elect any or all three means to pursue its defense. If the Respondent elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence, it shall serve a statement to that effect on **June 30, 1997**.

Charles E. Bullock
Administrative Law Judge

Dated: March 11, 1997
Washington, D.C.

IN THE MATTER OF GARRISON-JONES ARCHITECTS, INC., Respondent

Docket No. TSCA-V-C-96-015

CERTIFICATE OF SERVICE

I certify that the foregoing order dated March 11, 1997, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Ms. Sonja Brooks
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copies by Regular Mail to:

Counsel for Complainant:

Robert Guenther, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region 5 (C-29A)
77 West Jackson Boulevard
Chicago, IL 60604-3590

Counsel for Respondent:

Richard J. Zalasky, Esquire
RABBITT, PITZER & SNODGRASS, P.C.
One Boatmen's Plaza
800 Market Street, Suite 2300
St. Louis, MO 63101-2608

Marion Walzel
Legal Assistant

Dated: March 11, 1997

¹ Complainant is the Director of the Waste Pesticides and Toxics Division, United States Environmental Protection Agency, Region 5.

² See generally, U.S. v. ITT Cont'l Baking Co., 420 U.S. 223 (1975) ; Lazarus, Incorporated, Columbus, Ohio, TSCA-V-C-32-93 (Initial Decision, Harwood, Judge, May 25, 1995) (Appeal pending, TSCA Appeal #95-5) ; Sasser v. Administrator, 990 F.2d 127, 129 (4th Cir. 1993).

³ See generally Section 22.19(b) of the Rules.