UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:	:	
University of Hawaii Manoa Campus	:	Docket No. TSCA-09-92-0014
	:	Judge Greene
Respondent	:	

ORDER UPON MOTION FOR RECONSIDERATION

Complainant seeks reconsideration of an Order in which its motion for summary judgment as to liability was denied with respect to Respondent's alleged lack of protection against sustained low electrical current faults on certain higher secondary voltage radial PCB Transformers in service at the University of Hawaii campus as of October 1, 1990.[1] It is urged that Respondent: (1) never asserted its transformers did in fact have sustained low current fault protection by October 1, 1990; (2) never provided evidence to establish complete compliance with the pertinent regulation; and (3) opposed the motion for summary decision merely by stating that "substantial compliance" with

[1] *Orders Upon Cross Motions for Summary Decisions*, served July 1, 1998.

intent of the regulation in question had been achieved. Complainant, arguing that "substantial compliance" with the regulation in question is not a defense to the complaint, believes summary decision must be granted as to liability for the low current fault protection charges set forth in the complaint.[2]

Respondent opposes the motion on the grounds that (1) the alleged violation had been denied in the amended answer; and (2) evidence of "substantial compliance" adequate to show the existence of unresolved questions of material fact regarding the adequacy of the sustained low current fault protection measures had been set forth in Respondent's briefs.

It is noted in passing that "substantial compliance," where used to denote lack of full compliance, does not constitute a *defense to a charge* that a regulation has been violated[3] particularly where, as here, liability for a violation is absolute.[4] However, the term "substantial compliance" need not invariably signify lack of full compliance. In appropriate circumstances, it might well refer to remedial measures that are arguably

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[2] Paragraphs 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30 of the Complaint, at 4-9.

[3] This is fully consistent with note 15, at 8 of the Order of June 29, 1998 (cited by Complainant in its motion for reconsideration at 3) wherein it was stated that "substantial compliance," *where that term is used to indicate that the required protections were not in place by October 1, 1990, or that such protections did not fully comply with [the regulation] as of that date, does not constitute a defense to the violations charged . . . .*" [Emphasis added].

[4] As observed in a previous order in this matter, substantial compliance with a regulation might be relevant to a determination of the amount of penalty, in situations where a penalty must be assessed. See Section 16(a) (2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

equivalent to a regulator's particular view of what constitutes compliance and which might -- again in appropriate circumstances -- ultimately be held to constitute full compliance. Accordingly, the term cannot be construed as an admission against interest in the absence of further inquiry.

In any event, the use of the term "substantial compliance," whatever degree of compliance it may refer to as applied to the facts here, does not in and of itself aid analysis of whether issues of material fact remain to be resolved, *or* whether Complainant is entitled to liability judgment as a matter of law. Regardless of what descriptive terminology is applied by the parties to the compliance efforts here, both elemental fairness -- particularly in view of Complainant's $129,000 penalty proposal -- and the summary judgment standard[5] require that appropriate inquiries are made of the record to determine whether issues of material fact have been raised *as well as* whether Complainant is entitled to judgment as a matter of law. As the parties well know, Respondent need not establish complete compliance with the regulation in question in order to withstand a motion for partial summary judgment, just as Complainant need not fully "prove" a violation before moving for partial summary decision.

In this case, the appropriate inquiries to be made include: (1) what steps Respondent took to comply with section 40 C.F.R. §§ 761.30(a)(v) and 761.30(a)(v)(A), (B), (C) ; and (2) did these steps arguably bring about compliance, or is there a

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[5]Respondent's evidence is to be viewed in the strongest possible light for purposes of deciding a summary judgment motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-159 (1970) construing Fed. R. Civ. P. 56.

reasonable possibility they could be shown to have resulted in compliance if specific additional evidence offered or pointed to by Respondent were taken. If there is a question as to whether the measures taken could have brought about compliance, or even an equivalent of compliance, Complainant's motion will fail either because issues of material fact have been raised (viewing Respondent's case in its strongest light), *or* because Complainant is not entitled to judgment as a matter of law on the record as it stands. Further evidence must then be adduced. If, however, the measures Respondent took clearly did not result in full compliance or an arguable equivalent, *and could not reasonably have been expected* to do so even with further evidence -- that is, if additional testimony or other evidence offered or suggested by Respondent could not be expected to change the situation --, then it will be clear that no material facts remain at issue as regards the sustained low current fault protection charges.

Complainant's evidence, indirect as it is, must be considered to constitute a *prima facie* case with respect to these charges, but if the record were to be weighed as it stands, such evidence lacks that degree of certainty which would make it genuinely persuasive. It consists of the following, with respect to Respondent's alleged failure to equip the higher secondary voltage radial PCB transformers[6] with sustained low electrical current fault protection:

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[6] It was specifically determined that no material fact remained at issue respecting whether the transformers were in fact higher secondary voltage radial PCB Transformers, since this matter was in dispute originally. *Orders Upon Cross Motions for Summary Decisions*, July 1, 1998, at 9.

(1) Report of inspection (May, 1991) wherein it was said that Respondent's personnel had told the EPA inspector they "were unaware of any enhanced electrical protection being installed on the transformers."[7]

(2) Written statements contained in an October, 1991, study performed by Respondent's consultant, which expressed doubt as to whether the transformers had been equipped as provided at 40 C.F.R. § 761.30(a)(v)(A), (B), and (C).[8] These statements are as follows:

> Federal regulations require that PCB transformers in or near commercial buildings either be replaced by October 1, 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. [Emphasis added]

These record statements, which have not been directly refuted by Respondent, were the basis for denial of Respondent's cross-motion for summary decision as to charges

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[7] EPA Inspection Report, at 4-5, Complaint's pretrial exhibit 1. No determination was made on the occasion of the May, 1991, inspection as to whether enhanced electrical protection had been added to the transformers.

[8] *Exterior Electrical Distribution System Study at the University of Hawaii, Manoa Campus*, October 23, 1991, Section II - Technical, at ¶ 2.1.1.6 (Complainant's pretrial exhibit 11, at 30).

involving high current fault protection,[9] largely because one statement is attributable to consultants who appeared to have seen or knew about the transformers in question and/or who presumably had sufficient expertise to determine whether electrical fault protection had been added as required. Put simply, on its face Complainant's evidence was sufficient to defeat Respondent's summary motion as to high current fault protection, but inadequate as a basis for summary decision in Complainant's favor (either as to high current *or* sustained low current fault protection) given the requirement that Respondent's evidence must be viewed in the strongest possible light. In doing this, it is clear that issues of material fact were present, and remained to be determined.

Respondent's memorandum in opposition to Complainant's motion for summary decision did not contain a discussion of the evidence as it pertained to sustained low current fault protection. However, attached to the memorandum were certain declarations submitted by University electrical and mechanical engineering and plant management personnel, and a consulting electrical engineer. The declaration of a registered mechanical engineer and certified plant manager employed by Respondent states that the transformers were protected against sustained low current faults in a manner that substantially complies with 40 CFR §§ 761.30 (a)(v) and 761.30 (a)(v)(A), (B), and (C), and that this was accomplished in a timely fashion.[10] Documents which

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[9] *Order Upon Cross Motions for Summary Decisions,* at 6.

[10] Declaration of Mike Yoneda, Director of the Facilities Planning and Management Office of Respondent's Manoa Campus, particularly at 1, 2 (where Mr. Yoneda states that he has extensive electrical engineering training), and 4. See also Exhibit F, "Certificate."

are apparently intended to confirm this are attached, but such confirmation must await additional interpretation from a qualified source. Sworn statements from persons presumably qualified to make them are adequate in appropriate circumstances to raise a question of material fact and defeat a motion for summary decision. Here, the statements are not sworn, and so are not affidavits within the usual meaning of the term, but will be taken at face value nonetheless in connection with this aspect of this matter.[11] This having been done, it is apparent that there is a question as to whether the measures described[12] could have brought about timely compliance.[13] As long as there is a reasonable question as to this central issue of material fact, the matter cannot be decided on a summary motion.

Accordingly, since Respondent's case must be viewed in its strongest light, it must be held that a question of material fact has been raised as to whether low current fault protections were in place in a timely manner and would have complied with the regulation at issue. Moreover, it cannot be found that the "substantial compliance with the intent of the regulations" that Respondent asserts it achieved is inadequate to overcome Complainant's motion for summary decision as to low current fault protection.

Accordingly, the motion for reconsideration must be denied.

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[11] It is assumed that Respondent would be willing to submit the same information in affidavit form. The determination regarding the effect of these declarations is limited to the facts of this particular situation, and cannot correctly be interpreted more expansively .

[12] See the evidence set forth in n.10, supra,

[13] See supra, p. 4, ll. 2-4.

A schedule for additional discovery and filing of dispositive motions will be discussed with the parties in a conference call. It is anticipated that discovery, which is expected to take the form of depositions, will be concluded and additional motions for judgment filed during the next forty-five (45) to sixty (60) days.

ORDER

Complainant's motion for reconsideration is denied for the reasons set out above.

J. F. Greene
Administrative Law Judge

March 22, 2999
Franklin Court Building
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this **Order Upon Motion For Reconsideration**, copies were sent to the counsel for the complainant and counsel for the respondent on March 23, 1999.

Shirley A. Smith
Legal Staff Assistant
To Judge J. F. Greene

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DOCKET NUMBER: TSCA-09-92-0014

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