7/13/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	DOCKET NO. II-TSCA-PCB-88-0116
ROLLINS ENVIRONMENTAL SERVICES (N.J.), INCORPORATED, RESPONDENT	

INTERLOCUTORY ORDER GRANTING MOTION FOR PARTIAL ACCELERATED DECISION

By Complaint filed June 15, 1988, by the Director of Environmental Services Division, United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant"), Region II, Respondent, Rollins Environmental Services (N.J.), Incorporated (hereinafter "Respondent" or "Rollins"), is charged with violation of the Toxic Substances Control Act (hereinafter "TSCA" or "the Act") and regulations promulgated pursuant thereto.

On or about May 19, 1989, the parties jointly stipulated that:

1. Rollins is a "person" within the meaning of 40 C.F.R. §761.3 and is the owner/operator of a hazardous waste facility located at Route 322 and I-295, Logan Township, New Jersey.

2. Polycholorinated biphenyls (hereinafter "PCBs") were maintained at the Rollins facility and Rollins was subject to the regulations at 40 C.F.R. Part 761 relating to their handling and disposal.

3. Pursuant to its Basin Closure Plan with the New Jersey Department of Environmental Protection, Rollins began the process of Basin 210 closure on August 16, 1982. Basin 210 constituted a PCB container as defined in 40 C.F.R. §761.3.

4. Basin 210 was a concrete basin with a hypalon liner containing approximately 35,000 gallons of liquids and sludges with a PCB concentration of 1874.8 parts per million (hereinafter "ppm"). This material was removed and ultimately incinerated at Rollins Environmental Services (TX), Inc., a facility approved for the incineration of PCBs in accordance with 40 C.F.R. §761.70.

5. The hypalon liner was removed and sent off-site to a secure landfill in accordance with 40 C.F.R. §761.75.

6. The basin was then triple rinsed with fuel oil and each rinse was sampled and analyzed and determined to be less than 50 ppm PCBs. These rinses (along with a rain water layer which collected during the operation which was also determined to be less than 50 ppm PCBs) were incinerated on-site by Rollins (approximately 22,700 gallons). The on-site Rollins incinerator was not a facility approved for the incineration of PCBs under 40 C.F.R. §761.70.

7. On or about April 14, 1987, duly designated representatives of the EPA conducted an inspection at Rollins' facility.

8. The Complaint in this matter was issued on June 15, 1988, and received by Rollins on June 30, 1988. Rollins filed its Answer and Request for Hearing on July 28, 1988.

The parties thus agree that Respondent disposed of on-site rinsate used to decontaminate a PCB container which contained more than 500 ppm of PCBs and that disposal of said rinsate was in an incinerator not approved for the incineration of PCBs under 40 C.F.R. §761.70.

On April 25, 1989, the parties agreed during a teleconference with the undersigned that if a partial accelerated decision is rendered on the question of whether Respondent violated the Act and regulations, the parties could then

agree on the amount of the civil penalty, if any, to be properly assessed. Pursuant to said agreement, the parties submitted Briefs on June 16, 1989, and Reply Briefs on June 30, 1989.

Respondent raises the following defenses, which will be discussed in the order listed:

1. The Complaint is barred by the Statute of Limitations.

2. Rollins did not violate the Act or regulations by incinerating less than 50 ppm PCB rinsate in a non-TSCA permitted incinerator.

Statute of Limitations

It is admitted that Respondent's actions which are the subject of the Complaint took place on or about August 16, 1982, and the instant Complaint was filed June 15, 1988 (Joint Stipulations 3 and 8). EPA's inspection of Respondent's facility was conducted April 14, 1987.

Respondent in its Brief acknowledges that TSCA does not contain a Statute of Limitations but contends that the general federal five-year Statute of Limitations, 28 U.S.C. Section 2462, governing enforcement actions, is here applicable. Said section provides, in pertinent part, 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 (5) years from the date when the claim first accrued . . . (emphasis supplied).

In the matter of TREMCO, Inc. (Docket No. TSCA-88-H-05, April 7, 1989), the Court explicitly held that Section 2462 is "not applicable to proceedings involving a TSCA administrative complaint". TREMCO points out that the word "enforcement" is significant. An administrative proceeding is not one which

enforces but it merely assesses a fine or penalty and thus comprises the initial stage of a larger enforcement process. The importance of the word "enforcement" in said Section 2462 is noted in U.S. v. Meyer, 808 F.2d 912, l.c. 915 (1st Circuit 1987), where it is held that said statute presupposes the existence of an actual penalty to be enforced and - in reference to the phrase "when the claim first accrued" - held that the claim did not accrue until the conclusion of the administrative action.

Thus, the administrative action represents the "assessment phase" of the process provided in TSCA. The enforcement phase cannot be contemplated until the conclusion of the subject administrative proceeding. (See 15 U.S.C. §2615(a)(2)(A) and also 15 U.S.C. §2615(a)(4), which provides that the U.S. Attorney General shall recover the amount assessed, if unpaid, in an appropriate District Court of the United States.)

Respondent cites cases where said Statute of Limitations was applied under the Clean Water Act, Clean Air Act and the Resource Conservation and Recovery Act. Said authorities are misplaced as I do not find said Acts analogous to TSCA. TSCA provides for civil penalty assessment with enforcement left to the Federal District Court whereas said cited programs include enforcement provisions.

Complainant submits that the date when the claim accrued was April 14, 1987, when Complainant inspected subject facility and discovered the alleged violation (Complainant Reply Brief, pages 3-4, and cases there cited). I find that said "claim" did not accrue at the time of the alleged violation but at the time of the EPA inspection because only then could EPA "know that it had a cause of action".

For the reasons stated hereinabove, I reject Repondent's claim that the

instant Complaint is barred by a Statute of Limitations.

Incineration of Rinsate (Less Than 50 ppm PCB) After Its Use to Decontaminate a PCB Container Which Contained 1874 ppm PCBs.

The issue here presented turns on the interpretation of 40 C.F.R. §761.79(a). Said section provides:

> Any PCB container to be decontaminated shall be decontaminated by flushing the internal surfaces of the container three times with a solvent containing less than 50 ppm PCB. The solubility of PCBs in the solvent must be five percent or more by weight. Each rinse shall use a volume of the normal diluent equal to approximately ten (10) percent of the PCB container capacity. The solvent may be reused for decontamination until it contains 50 ppm PCB. The solvent shall then be disposed of as a PCB in accordance with §761.60(a). (Emphasis supplied.)

Said section must be read together with §761.1(b) which requires that substances which contain less than 50 ppm of PCBs because of any dilution must be treated for disposal purposes as though they contained their original PCB concentration.

Respondent contends that Section 761.79 calls for disposal as a PCB in accordance with Section 761.60(a) only once the solvent rinsate contains 50 ppm PCB; and that, since the PCB level of 50 ppm was never reached, TSCA-permitted incineration (pursuant to Section 761.60(a)) was not required. I do not agree. 40 C.F.R. §761.79(a) provides, first, that

> Any PCB container . . . shall be decontaminated by flushing the internal surfaces . . . with a solvent containing less than 50 ppm PCB. . . .

It further provides, consistent with the cited provision of §761.1(b), supra, that "The solvent shall then be disposed of as a PCB in accordance with 761.60(a)." The other language in said section merely provides the consistency and volume of

the solvent which may be used and reused. After the solvent contains 50 ppm PCB it may no longer be reused.

I agree with Complainant's interpretation and conclusion, stated on pages 11 and 12 of its Brief, that Section 761.60 requires that PCBs in concentrations greater than 500 ppm be disposed of in an approved TSCA incinerator (Section 761.70). Respondent's failure to dispose of rinsate, deemed by the regulations to contain 1874.8 ppm of PCBs, in a TSCA-approved incinerator, is violation of 40 C.F.R. §761.60 and 761.70 and, on this record, I find that Respondent, having so violated said regulations, is subject to the assessment of an appropriate civil penalty for said violation.

Pursuant to 40 C.F.R. §22.20(b)(2), I further find that the issue of the amount of the civil penalty which appropriately should be assessed for subject violation remains controverted.

It is, therefore, ORDERED that the parties shall, upon receipt of this Interlocutory Order, confer as contemplated in an effort to agree concerning the amount of civil penalty appropriately to be assessed herein and report the results of such conference or conferences on or before 20 days from the date hereof. If, at the time of said report, no penalty amount has been agreed upon so that this case can be finally concluded, the requested hearing will be scheduled for the purpose of deciding said issue.

SO ORDERED.

DATED: July 13, 1989

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the Original of the foregoing INTERLOCUTORY ORDER GRANTING MOTION FOR PARTIAL ACCELERATED DECISION was forwarded via Certified Mail, Return Receipt Requested, to Ms. Karen Maples, Regional Hearing Clerk, Office of Regional Counsel, U.S. EPA, Region II, 26 Federal Plaza, New York, New York 10278; that a True and Correct Copy was forwarded in the same manner and to the same address to Counsel for Complainant, Amy Chester, and that a True and Correct Copy was forwarded in the same manner to Respondent:

Louis A. Minella, Esquire
Rollins Environmental Services (DE), Inc.
One Rollins Plaza
Post Office Box 2349
Wilmington, Delaware 19899;

all such Service effected this 13th day of July, 1989.

Mary Lou Clifton

Mary Lou Clifton
Secretary to ALJ