

ILLINOIS POLLUTION CONTROL BOARD
October 6, 1983

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 83-83
)
 JOSLYN MFG. AND SUPPLY CO.,)
 an Illinois corporation, and)
 HERMAN ZELDENRUST,)
)
 Respondents.)

ORDER OF THE BOARD (by D. Anderson):

On August 25, 1983 Respondent Joslyn Manufacturing and Supply Company (Joslyn) filed a motion to dismiss the July 11, 1983 complaint in this enforcement action, along with a memorandum in support of the motion. On August 30 Respondent Herman Zeldenrust joined in this motion to dismiss. On September 1 the Complainant responded and filed a memorandum in support of the response. On September 2 Complainant filed two different attachments to the response. On September 19 Joslyn replied, and Herman Zeldenrust joined in the reply. On September 21, Complainant filed a rejoinder entitled a "response to reply memorandum."

In addition to the above substantive motions, the parties filed the following procedural motions: On August 25 Joslyn filed a motion for leave to file its motion to dismiss. On August 30 Herman Zeldenrust filed a motion for leave to file. On September 1 Complainant responded to these motions. On September 7 Joslyn filed a motion for leave to reply. On September 12 Complainant responded. All of these procedural motions are granted. On September 21 Complainant filed a motion to strike reply memorandum. This motion is denied.

The complaint alleges violations of the Act and Board rules arising from open dumping of polychlorinated biphenyls (PCBs). Respondents have moved to dismiss on the grounds that regulation of PCBs have been preempted by the Federal Toxic Substances Control Act (TSCA) (15 U.S.C. §2617), and that the Board has previously held that Chapter 9 did not apply to PCBs.

A complaint alleging the same violations, among others, was previously filed in the Circuit Court of Cook County, People v. Joslyn Mfg. & Supply Co. and Herman Zeldenrust, 82 CH 4220. On April 21, 1983 the Circuit Court denied a motion to dismiss which was made on similar grounds. At the same time the Circuit Court stayed the action before it "on the grounds of primary jurisdiction", pending the outcome of proceedings before the Board.

The general intent of TSCA is to prevent unreasonable risk of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use or disposal of certain chemicals, including PCB's. This is much broader than the provisions of the Act and Board rules which limit disposal. USEPA has promulgated regulations which deal with disposal, with marking and with manufacturing, processing, distribution and use of PCB's (40 CFR 761). The disposal regulations allow for disposal by incineration and landfilling.

Section 18(a) of TSCA provides that in general nothing in it "shall effect the authority of any State...to establish or continue in effect regulation of any chemical substance...". However, Section 18(b)(2)(B) provides:

(B) if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of Section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement establish or continue in effect, any requirement which is applicable to such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

The Attorney General argues that TSCA has not preempted the provisions of the Act and regulations alleged in the complaint on two grounds: first, that the provisions alleged are not designed to protect against the same risk as USEPA's TSCA regulations; and, second, that provisions alleged were adopted "under the Clean Air Act or other Federal law."

The violations alleged in the complaint are as follows: open dumping in violation of Section 21 of the Act and Rules 201, 202(a), 301, 310, 313 and 315 of Chapter 7; transportation of special waste without a permit and, contrary to regulations, in violation of Rules 201, 301, 302(A), 302(B), 401 and 501 of Chapter 9; and, deposit of contaminants on the land so as to create a water pollution hazard, in violation of Sections 12(a) and 12(d) of the Act and Rule 203(h) of Chapter 3 (Section 302.210).

Both Chapter 7 and USEPA's TSCA regulations deal with disposal. It is clear that Chapter 7 would be preempted to the extent that it could authorize disposal by landfilling under circumstances which would violate TSCA. However, the allegation is open dumping, an activity which is not an authorized "disposal" under the TSCA rules. Indeed, the complaint alleges that the spill residues were subsequently excavated and disposed of under TSCA. With respect to open dumping, Congress and USEPA intended that State prohibitions should supplement TSCA (44 Fed. Reg. 31515, 31528, May 31, 1979). Congress obviously did not intend to provide a defense which would authorize open dumping of toxic substances.

Chapter 9 provides a manifest system with cradle-to-grave tracking of special wastes to be hauled by permitted special waste haulers. Although the TSCA rules require marking, they provide no comparable protection from waste transportation risks. Again Congress and USEPA intended State regulations to supplement the TSCA requirements.

Section 302.210 sets a water quality rule limiting substances toxic to aquatic life to one-tenth of the 96-hour median tolerance limit. The TSCA rules have no comparable provisions to protect against risks to aquatic life. Again Congress and USEPA intended the State Regulations to supplement the TSCA requirements.


The Attorney General has also argued that the provisions of the Act and Board rules alleged were adopted under the authority of other Federal law. Although there are provisions in the Act and Board rules which establish programs under Federal law, such as those establishing the NPDES and RCRA programs, the provisions alleged to have been violated are independent of Federal law. Hence the Board has not based its denial of the motion to dismiss on this argument.

In support of its second contention, Joslyn quotes the Board's January 21, 1982 proposal for inquiry hearings in R81-31. The statements concerning PCB's in that Order were questions which were to have been answered in the proceeding being initiated. That proceeding was dismissed on October 5, 1982, with no findings of fact on PCB's.

The motion to dismiss is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 6th day of October, 1983 by a vote of 4-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board