

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENNECO CHEMICALS, INC.,

Petitioner

v.

ECKARDT C. BECK, Regional
Administrator, United States
Environmental Protection
Agency et al.

Respondent.

1-7-80
No. 79-2567

HOOKEE CHEMICAL COMPANY

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION II.

Respondent.

No. 79-2194

ENVIRONMENTAL PROTECTION AGENCY'S
REPLY TO MEMORANDA OF HOOKEE CHEMICAL
COMPANY AND TENNECO CHEMICALS, INC.,
IN OPPOSITION TO MOTION TO DISMISS

The memoranda of petitioners Hooker Chemical Company (Hooker) and Tenneco Chemicals, Inc. (Tenneco) in opposition to the Environmental Protection Agency's (EPA) Motion to Dismiss rely almost exclusively on this Court's opinion in Dow Chemical Company v. EPA, 605 F.2d 673 (1979). While the instant actions brought by Hooker and Tenneco involve the similar situation of an agency action subsequently withdrawn, the similarities to Dow end there.

In Dow the Environmental Protection Agency promulgated and later withdrew regulations under Section 8 of the Toxic Substances Control Act, 15 U.S.C. 2607, requiring the submission to EPA of existing health and safety studies. Petitioners in Dow challenged these regulations as exceeding the authority conferred by the statute.

As stated by the Court in Dow, a justiciable controversy under Article III of the Constitution requires a "legal controversy that is real and not hypothetical," 605 F.2d at 678.

In Dow the Court concluded that the controversy between the parties remained sufficiently concrete following the withdrawal of the regulations because of two circumstances existing in Dow but lacking here. First, following the withdrawal of the regulations in Dow, EPA maintained its substantive stance with respect to the issue before the Court, i.e., the scope of its authority under the statute. Second, at the time of the Court's review, EPA had proposed new regulations taking the same substantive position adopted in the withdrawn regulations.

In the present cases, petitioners contend that EPA has maintained its substantive stance on the basis of a single sentence in the transmittal letter sent with the order of withdrawal which stated that EPA continues to believe Hooker and Tenneco are in violation of the vinyl chloride regulation for relief valve discharges of vinyl chloride. Hooker and

Tenneco argue that a controversy sufficient to support the court's jurisdiction continues with respect to the agency's barebones conclusion that there is a continuing violation. This is simply insufficiently concrete and definite to satisfy the requirements of Article III of the Constitution.

The memorandum of Hooker makes clear the lack of definition which remains to the case following the withdrawal of the compliance orders. Hooker identifies internal EPA memoranda which it believes are "evidently" the basis for the compliance orders and the agency's continuing belief that petitioners are in violation of the regulations. Hooker Memorandum at 13, 22. Lacking any knowledge of the basis for EPA's continuing posture with respect to Hooker and Tenneco violations, it is simply impossible to give adequate definition to the issue which remains before the Court under the reasoning of Dow.

Second, it was important to the Court's conclusion in Dow that EPA had proposed regulations substantially similar to the withdrawn regulations which raised the same issue of agency authority under the statute. Here there is no indication that there will be a repetition of the action which has been withdrawn. To the contrary, EPA has stated in the letter transmitting the order of withdrawal that further action against Hooker and Tenneco for violation of the vinyl chloride regulations would be in the form of commencement of an enforcement action in the district court under Section 113(b) of the Clean Air Act.

It is entirely speculative what the basis for such action would be, but if such enforcement action is brought and if similar issues are raised, the arguments which petitioners are eager to make can be fully aired and resolved in the context of real and concrete adjudication. Unlike Dow, "additional information and insights" will certainly be gained by awaiting further action by EPA. More importantly, such further action in this case would place the factual issue of compliance in the district court where it is intended to be heard under the enforcement scheme of the Clean Air Act. See, Union Electric Company v. EPA, 593 F.2d 299 (8th Cir. 1979).

The Court in Dow expressly provided that the requisites for a justiciable controversy would be lacking in a situation, such as here, where the continuing posture of the agency was uncertain. While withdrawing its compliance orders, EPA did not retreat from the conclusion that Hooker and Tenneco are in violation of the vinyl chloride standard. Until an enforcement action is brought which identifies the basis for EPA's belief, the nature of the controversy between the parties remains speculative. As the Court stated in Dow, the case has been rendered non-justiciable because the controversy has become "hypothetical inasmuch as it would depend on the mere possibility of future action by the EPA," 605 F.2d at 678. Indeed, unlike the situation in Dow where recurrence of the same agency action had already occurred, the possibility

of future action in this case would take a different form than the withdrawn order and would come within the jurisdiction of a district court. If EPA were to bring an enforcement action under 113(b) the factual issue of whether petitioners are in violation of the vinyl chloride standard would be subject to bifurcated review in this Court and the district court. This result should be avoided.

Indeed, this Court has held in West Penn Power Company v. EPA, 522 F.2d 302 (1975), cert. denied, 426 U.S. 947 (1976) that EPA's determination that a source is in violation of the act is not a final action subject to the Court's review. In that case challenge to a formal notice of violation under Section 113(a) was dismissed. The skeleton of a controversy which remains in this case consists of no more than an informal assertion of violation. Under the Court's analysis in West Penn Power, the informal assertion of violation here is even less amenable to judicial review than ^{1/} the formal notice of violation involved in that case.

^{1/} Even had EPA not withdrawn the compliance orders against Tenneco and Hooker, there would have been a serious question of the court's jurisdiction. Citing West Penn v. EPA, supra, the Eighth Circuit, has ruled that Congress foreclosed the opportunity for review of pre-enforcement procedures under the Clean Air Act because pre-enforcement judicial review "would unreasonably delay achieving the objectives of the Act." Union Electric Co. v. EPA, 593 F.2d 299, 307 (1979) reaffirming Lloyd A. Fry Roofing v. EPA, 554 F.2d 885 (8th Cir. 1977). See also, Getty Oil Co. v. Ruchelshaus, 467 F.2d 349 (3d Cir. 1972). Should the Court deny EPA's Motion to Dismiss on mootness grounds this question (continued)

In Dow the Court expressed concern for the present impact on petitioners faced with the "non-speculative threat" of the agency reimposing the requirement of its withdrawn regulations. There is no such present impact on Hooker and Tenneco. First, the order, now withdrawn, created no requirements other than compliance with the vinyl chloride regulations (which petitioners do not and could not challenge in this proceeding). Second, EPA has withdrawn the compliance orders and does not intend to reissue them, or seek judicial relief for possible violations of the orders themselves.

1/ (continued): would be further briefed for the Court.

Moreover, it should be noted that if the withdrawn compliance orders are reviewable, Hooker relies on the wrong portion of Section 307(b) for the source of its jurisdiction in this Court. Hooker cites the provision of Section 307(b)(1) which provides for review of EPA orders issued under Section 112(c). Hooker Memorandum at 4. The compliance orders were not, however, issued under Section 112(c) but rather under Section 113(a)(3). (Examples of 112(c) orders would be a certification order to a new source under Section 112(c)(1)(A) or a waiver of compliance under 112(c)(1)(B)(ii).) The basis for jurisdiction in the court of appeals could only be the provision of 307(b)(1) which provides for review in the courts of appeals of "any other final action of the Administrator under this Act." This provision is currently the subject of Supreme Court review in *PPG v. Harrison*, No. 78-1918 (cert. granted October 1, 1979). It further follows Section 307(b)(2) that would not bar the raising of petitioners' arguments in an enforcement proceeding. To construe the Act to preclude review of the fact of violation, which petitioners here wish to challenge, in an enforcement proceeding is obviously meritless.

The only obligation which Hooker and Tenneco bear is their responsibility under the statute and its implementing regulations to conform to the vinyl chloride emission standards. They are, of course, subject to the enforcement powers of the agency if they fail to comply. The continuing obligation to comply with the law is certainly not an impact sufficient to "provide the factual predicate for reasoned adjudication" in the context of this case. Id. 605 F.2d at 678. Petitioners' arguments that they are not in fact violating the vinyl chloride regulation for relief valve discharges can be fully aired in the district court if an enforcement action is brought under Section 113(b).

CONCLUSION

For the reasons stated herein and in EPA's Motion to Dismiss, the Environmental Protection Agency respectfully asks this Court to dismiss as moot the petitions for review filed by Hooker Chemicals Company and Tenneco Chemicals, Inc.

Respectfully submitted,

Nancy L. Long
Pollution Control Section
Department of Justice
Washington, D.C. 20530
(202) 633-2793

Of Counsel:

Jane Axelrad, Esquire
Todd Joseph, Esquire
United States Environment
Protection Agency

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