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EXPRESS MAIL

December 20, 1979

Mr. Thomas F. Quinn
Clerk
United States Court of
Appeals for the Third
Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Tenneco Chemicals, Inc. v. EPA
No. 79-2567

Dear Mr. Quinn:

Enclosed please find for filing an original and three copies of Tenneco Chemicals, Inc. Memorandum In Opposition To EPA's Motion To Dismiss. Counsel for EPA and counsel for Hooker Chemical Company have been served.

Sincerely,

Allan Topol
Allan Topol

Enclosures

COLORITE 017144

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENNECO CHEMICALS, INC.
Park 80 Plaza West-1
Saddle Brook, New Jersey 07662

Petitioner,

v.

ECKARDT C. BECK
Regional Administrator
United States Environmental
Protection Agency
Region II
26 Federal Plaza
New York, New York 10007

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20450

Respondents.

No. 79-2567

PETITION FOR REVIEW

MEMORANDUM OF TENNECO CHEMICALS, INC.
IN OPPOSITION TO EPA'S MOTION TO DISMISS

On its face, EPA's Motion to Dismiss is deceptively simple. The Agency argues (1) that Tenneco sought Judicial Review of an Administrative Order, (2) that the Administrative Order was withdrawn by the Agency, and (3) that, therefore, the controversy between the parties is moot and the case should be dismissed.

The difficulty is that the Agency's approach does not accurately reflect the true factual situation existing at the present time. Nor is it consistent with the law.

COLORITE 017145

The Agency reached the conclusion in June, 1979, that certain of Tenneco's discharges through relief valves at the Company's Burlington, New Jersey and Flemington, New Jersey plants violated EPA's vinyl chloride emission standard. See 40 C.F.R. § 61.65(a). Tenneco vigorously disagreed, arguing that the emissions at issue were emergency discharges which were made in conformance with, and not in violation of, the applicable emission standard. At that point in time there was a controversy between the parties as to whether or not a violation of the standard occurred. The Agency had three options before it: (1) it could have entered an Administrative Order requiring that remedial steps be taken; (2) it could have referred the matter to the U.S. Attorney for possible criminal or civil action; or (3) it could have agreed with Tenneco's position and taken no action at all. 42 U.S.C. § 7413. The Agency selected the first of these alternatives and entered on July 2, 1979, two Administrative Orders concerned with these discharges at these two Tenneco plants.

Tenneco filed a Petition for Review of these Administrative Orders in the United States Court of Appeals for the Second Circuit. That petition was transferred to this court because of the similarity with the earlier filed Hooker petition for review.

Then EPA suddenly, and without any explanation, simply withdrew its Administrative Orders on October 5,

1979. At first blush, Tenneco was delighted with this state of affairs. It believed that the October 5th withdrawal meant that the Agency had agreed with Tenneco that the emissions which were the subject of the Administrative Orders did not constitute a violation of the standard.

But then Tenneco carefully read the cover letter that accompanied the withdrawal order. See Exhibit F to the Motion. That cover letter stated that the Agency had no intention to seek judicial relief against Tenneco for possible violations of the Administrative Orders themselves. The Agency did not preclude the possibility of taking enforcement action, e.g., the filing of a civil complaint, with respect to the very same discharges which were the basis for the Administrative Orders. Indeed, the Agency explicitly stated that "it is EPA's continuing belief that Tenneco has violated" the standard and that "EPA will take appropriate enforcement measures."

Stated simply, the basic controversy between the parties as to whether or not the discharges constituted a violation of the standard has not been resolved. Rather, EPA is apparently unhappy with the forum that Tenneco has selected, namely this Court, to resolve the controversy between the parties and would prefer another forum. As a matter of policy, such procedural maneuvering should not be permitted -- even if done by an agency of the United States Government.

Tenneco seeks a proper resolution of the underlying substantive controversy which remains, notwithstanding the qualified withdrawal of the Administrative Orders. Unless that controversy is resolved by some stipulation adequately recognizing the permissibility of the relief value discharges in issue under the EPA Standard, then EPA should proceed to certify the record.

In support of its position, Tenneco directs the Court's attention to its very recent opinion in Dow Chemical Co. v. U.S. EPA, 605 F.2d 673, 677-680 (3rd Cir. 1979), which is squarely on point. In the Dow case, EPA promulgated a rule; Dow filed a petition for review challenging EPA's statutory authority to promulgate the rule; and EPA then withdrew the rule. At the time of the withdrawal, the Agency insisted that it did have statutory authority to promulgate the rule, that the rule was being withdrawn only for procedural irregularities, and that the case had become moot as a result of the withdrawal of the rule. The court rejected the Agency's contention that the case had become moot. The crucial factor, according to the court's analysis, was that "the EPA has not altered its substantive stance." 605 F.2d at 679. That factor is applicable here.

Equally applicable is the court's comment in Dow.

"If this action by the EPA were alone sufficient to render a live dispute moot, the timing and venue of judicial review could be effectively controlled by the agency. We are reluctant, then, to dismiss a genuine and concrete controversy for

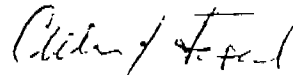
what in this case amounts to a technical reason, brought about by the party seeking such a dismissal." 605 F.2d at 679 (footnote omitted).

Finally there is a policy reason here, of the type relied upon in Dow, which argues against dismissal. The issue of what constitutes lawful emergency discharges under the standard is a continuing controversy. It will have to be resolved sooner or later in order that the parties can order their conduct. The parties are now before the court. It makes no sense to defer that resolution.

Indeed the present case is even stronger than Dow in support of the Court's jurisdiction. EPA's cover letter with the withdrawal order makes it crystal clear that the controversy still exists.

For the foregoing reasons, Tenneco urges this Court to deny EPA's Motion to Dismiss.

Respectfully submitted,



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Dated: December 20, 1979

Certificate of Service

I hereby certify that a copy of the Memorandum
Of Tenneco Chemicals, Inc. In Opposition To EPA's Motion
To Dismiss was served by first class mail, postage prepaid,
this 20th day of December, 1979, on counsel for EPA and
counsel for Petitioner, Hooker Chemical Company, as follows:

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