

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 SEP 28 PM 2:42

Docket No. TSCA-08-2007-0017

EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
TW Services, Inc.)
1606 NE 3rd Street)
Madison, SD 57042)
)
Respondent.)

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

COMPLAINT

1. This civil administrative enforcement action is authorized by Congress in section 16 (a) of the Toxic Substances Control Act (TSCA, 15 U.S.C. §2615(a). The United States Environmental Protection Agency ("EPA") regulations governing polychlorinated biphenyls ("PCBs") authorized by TSCA are set out in part 761 of Title 40 of the Code of Federal Regulations (CFR) and violations of the regulations constitute violations of the section 15 of TSCA, 15 U.S.C. §2614. The rules for this proceeding are the "*Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*" ("*Rules of Practice*"), 40 CFR part 22, a copy of which is enclosed.
2. The undersigned EPA officials have been properly delegated the authority to issue this action.
3. EPA alleges that Respondent has violated section 15 of TSCA, 15 U.S.C. section 2614, and proposes the assessment of a civil penalty as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.
5. To disagree with the complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk, U. S. EPA, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, within 30 days of receiving this Complaint. The answer must clearly admit, deny or explain the factual allegations of the

Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the *Rules of Practice* for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in the Complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the *Rules of Practice* for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this Complaint, payment must be made, within thirty (30) calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

A copy of the check must be mailed simultaneously to the attorney listed below.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Mr. Dana J. Stotsky, Esq., at 1-800-227-9441, extension 312-6905, or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to each count of this Complaint:

8. EPA has jurisdiction of this matter under section 16 of TSCA, 15 U.S.C. § 2615.

9. Respondent, TW Services, Inc., a corporation organized on or about April 30, 1999 and presently in good standing in the State of South Dakota, is a "person" within the meaning of 40 C.F.R. § 761.3, and thus subject to regulation.
10. Respondent was, at all times relevant to this action, the owner and operator of the facility located at 1606 NE 3rd Street, Madison, SD 57042.
11. On or about December 14, 1999, EPA Region 8 approved the ownership transfer from HELPER to TW Service, Inc.
12. Respondent received a PCB Commercial Storage Facility approval extension from EPA Region 8 on or about April 27, 2004.
13. Respondent established a "Trust Agreement" on or about March 22, 2000, with First American Bank & Trust in Sioux Falls, South Dakota, a national bank, as the "Trustee," in order to comply with financial assurance for closure requirements for commercial storers of PCBs. 40 C.F.R. sections 761.65(d) and (g).
14. EPA Region 8 approved the Trust Agreement described in the preceding paragraph on or about May 8, 2000.
15. The PCB regulations define the term "Commercial Storer of PCB waste" as:

"Commercial storer of PCB waste means the owner or operator of each facility that is subject to the PCB storage unit standards of § 761.65(b)(1) or (c)(7) or meets the alternate storage criteria of § 761.65(b)(2), and who engages in storage activities involving either PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal. The receipt of a fee or any other form of compensation for storage services is not necessary to qualify as a commercial storer of PCB waste. A generator who only stores its own waste is subject to the storage requirements of § 761.65, but is not required to obtain approval as a commercial storer. If a facility's storage of PCB waste generated by others at no time exceeds a total of 500 gallons of liquid and/or non-liquid material containing PCBs at regulated levels, the owner or operator is a commercial storer but is not required to seek EPA approval as a commercial storer of PCB waste. Storage of one company's PCB waste by a related company is not considered commercial storage. A "related company" includes, but is not limited to: a parent company and its subsidiaries; sibling companies owned by the same parent company; companies owned by a common holding company; members of electric cooperatives; entities within the same Executive agency as defined at 5 U.S.C. 105; and a company having a joint ownership interest in a facility from which PCB waste is generated (such as a jointly owned electric power generating station)

where the PCB waste is stored by one of the co-owners of the facility. A "related company" does not include another voluntary member of the same trade association. Change in ownership or title of a generator's facility, where the generator is storing PCB waste, does not make the new owner of the facility a commercial storer of PCB waste. 40 C.F.R. section 761.3.

16. The "Approval to Commercially Store Polychlorinated Biphenyls (PCBs) 2004" issued to Respondent by EPA Region 8 on April 27, 2004, provides at section F.8 the following:
 8. TW Services shall submit documentation of continued financial assurance annually to the Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance, no later than five (5) working days from the anniversary date of the establishment of the Trust Agreement [May 8, 2000] to meet the requirements of Paragraph[s] 4 and 6 of this section.

17. The "Approval to Commercially Store Polychlorinated Biphenyls (PCBs) 2004" issued to Respondent by EPA Region 8 on April 27, 2004, provides at sections F.4 and F.6 the following:
 4. Financial assurance equivalent to that specified in 40 C.F.R. 761.65(g) and 40 C.F.R. Part 264, Subpart H, shall be maintained to provide for:
 - (a) funding of proper closure of the operation. The closure plan shall include the decontamination and/or disposal in an EPA-approved PCB disposal facility of PCB-contaminated equipment and materials;
 - (b) compensating others for bodily injury and property damage caused by accidents arising from operations of the facility.

 6. TW Services shall adjust annually for inflation the closure cost estimate within sixty (60) days prior to the anniversary date of the establishment of the Trust Agreement in accordance with 40 C.F.R. section 761.65(f).

18. The "Approval to Commercially Store Polychlorinated Biphenyls (PCBs) 2004" issued to Respondent by EPA Region 8 on April 27, 2004, provides at section F.9 the following:
 9. The cost estimate for closure shall be based on worst-case conditions and shall be updated annually or whenever a change in the Closure Plan increases the closure cost, and maintained on-site with the Closure Plan. The updated closure cost estimates shall be submitted to the Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance

within thirty (30) days of TW Services' modification of the estimated closure cost.

19. The EPA's PCB regulations, at 40 C.F.R. section 761.65(f), require various conditions regarding financial assurance for closure from commercial PCB storers:

(f) *Closure cost estimate.*

(1) A commercial storer of PCB wastes shall have a detailed estimate, in current dollars, of the cost of closing the facility in accordance with its approved closure plan. The closure cost estimate shall be in writing, be certified by the person preparing it (using the certification defined in § 761.3) and comply with all of the following criteria:

(i) The closure cost estimate shall equal the cost of final closure at the point in the PCB storage facility's active life when the extent and manner of PCB storage operations would make closure the most expensive, as indicated by the facility's closure plan.

(ii) The closure cost estimate shall be based on the costs to the owner or operator of hiring a third party to close the facility, and the third party shall not be either a corporate parent or subsidiary of the owner or operator, or member in joint ownership of the facility.

(iii) The owner or operator shall include in the estimate the current market costs for off-site commercial disposal of the facility's maximum estimated inventory of PCB wastes, except that on-site disposal costs may be used if on-site disposal capacity will exist at the facility at all times over the life of the PCB storage facility.

(iv) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of wastes, facility structures or equipment, land, or other assets associated with the facility at the time of closure.

(2) During the active life of the PCB storage facility, the commercial storer of PCB waste shall adjust annually for inflation the closure cost estimate within 60 days prior to the anniversary date of the establishment of the financial instruments used to demonstrate financial responsibility for closure, except that owners or operators who use the financial test or corporate guarantee shall adjust their closure cost estimates for inflation within 30 days after the close of the storer's fiscal year. The adjustment may be made by recalculating the maximum costs of closure in current dollars, or by using an inflation factor derived from the most

recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business. The Implicit Price Deflator for Gross National Product is included in a monthly publication titled Economic Indicators, which is available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. The inflation factor used in the latter method is the result of dividing the latest published annual Deflator by the Deflator for the previous year. The adjustment to the closure cost estimate is then made by multiplying the most recent closure cost estimate by the latest inflation factor. 40 C.F.R. section 761.65(f).

COUNT 1

(Failure to Submit Financial Assurance Support Documentation for 2004)

20. Respondent failed to timely and adequately submit to EPA Region 8 the annual inflation adjustment for the closure cost estimate for 2004 within sixty (60) days prior to the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.6 of TW Services Storage Approval dated April 27, 2004, and 40 CFR 761.65(f)(2).
21. Respondent failed to submit documentation of continued financial assurance for 2004 to the Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance within five (5) working days from the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.8 of the Approval.
22. Respondent's above-described conduct, failing to properly submit financial assurance support documentation in 2004, as required by Conditions F.6 and F.8 of TW Services Storage Approval dated April 27, 2004, and 40 C.F.R. § 761.65(f)(2), constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 2

(Failure to Submit Financial Assurance Support Documentation for 2005)

23. Respondent failed to timely and adequately submit to EPA Region 8 the annual inflation adjustment for the closure cost estimate for 2005 within sixty (60) days prior to the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.6 of TW Services Storage Approval dated April 27, 2004, and 40 CFR 761.65(f)(2).
24. Respondent failed to submit documentation of continued financial assurance for 2005 to the Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance

within five (5) working days from the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.8 of the Approval.

25. Respondent's above-described conduct, failing to properly submit financial assurance support documentation in 2005, as required by Conditions F.6 and F.8 of TW Services Storage Approval dated April 27, 2004, and 40 C.F.R. § 761.65(f)(2), constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 3

(Failure to Submit Financial Assurance Support Documentation for 2006)

26. Respondent failed to timely and adequately submit to EPA Region 8 the annual inflation adjustment for the closure cost estimate for 2006 within sixty (60) days prior to the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.6 of TW Services Storage Approval dated April 27, 2004, and 40 CFR 761.65(f)(2).
27. Respondent failed to submit documentation of continued financial assurance for 2006 to the Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance within five (5) working days from the anniversary date of the establishment of the Trust Agreement (May 8, 2000), as required in Condition F.8 of the Approval.
28. Respondent's above-described conduct, failing to properly submit financial assurance support documentation in 2006, as required by Conditions F.6 and F.8 of TW Services Storage Approval dated April 27, 2004, and 40 C.F.R. § 761.65(f)(2), constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 4

(Failure to Provide Correct Disposal Costs in the 2005 Revised Closure Cost Review- Fluff and Plastic)

29. Respondent provided to EPA Region 8 incorrect disposal cost estimates for PCB fluff and plastic in its 2005 Revised Closure Cost Review.
30. The TW Services Storage Approval dated April 27, 2004, provides that Respondent may store PCB fluff and plastic derived from cable and wire.
31. Respondent provided to EPA Region 8 its certified 2005 Closure Cost Estimate which contained incorrect disposal cost estimates for fluff and plastic disposal.

32. Respondent provided to EPA Region 8 disposal cost estimates for disposal of fluff and plastic as \$17.50 per ton (Brookings City Landfill receipt for the cost of dirt per ton dated 10/7/2005 – last page in TW Services, Inc. 2005 Revised Cost Review, received by EPA on 1/26/2006) to the disposal cost of PCB fluff and plastic (page 1, part 2.1 of TW Services, Inc. 2005 Revised Cost Review, received by EPA on 1/26/2006).
33. On February 2, 2006, the EPA Region 8 (Mr. Francis Tran, Regional PCB Co-ordinator) contacted the Brookings City Landfill (BCL) to verify the disposal cost of PCB fluff and plastic, and spoke with Mr. Bob McGrath of BCL who confirmed that the charge for disposal of PCB fluff and plastic is \$37.50 per ton.
34. Respondent's above-described conduct, failing to provide correct disposal costs in the 2005 Closure Cost Review for fluff and plastic, as required by Condition F.9 of the Storage Approval, constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 5
(Failure to Provide Correct Disposal Costs in the
2005 Revised Closure Cost Review- Asphalt/Soil/Bore Analyses)

35. Respondent provided to EPA Region 8 incorrect disposal cost estimates for PCB asphalt/soil/bore analyses in its 2005 Revised Closure Cost Review.
36. The TW Services Storage Approval dated April 27, 2004, requires Respondent to establish estimated costs for asphalt/soil/bore analyses of PCB materials.
37. Respondent provided incorrect cost estimates for PCB asphalt/soil/bore analyses in its 2005 Revised Closure Cost Review. Respondent provided to EPA a certified 2005 Closure Cost Estimate which included the cost of PCB analyses for oil samples at \$9.50 per analysis (Jerry's Electric letter to TW Services, Inc. dated 12/1/2005 attached in the 2005 Revised Closure Cost Review, received by EPA on 1/26/2006).
38. EPA Region 8's evaluation of costs associated for asphalt/soil/bore analyses of PCB materials in 2005 is \$178.26 per sample.
39. Respondent's above-described conduct, failing to provide correct disposal costs in the 2005 Closure Cost Review for asphalt/soil/bore analyses of PCB materials, as required by Condition F.9 of the Storage Approval, constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 6

(Failure to Properly Estimate 2005 Closure Costs for Waste Transportation)

40. 40 C.F.R. section 761.65(f)(1)(ii) requires closure cost estimates to be based on the costs to the owner of the operator of hiring a third party to close the facility, and also that the third party shall not be either a corporate parent or subsidiary of the owner or operator, or member of joint ownership of the facility.
41. Respondent submitted its certified 2005 Revised Closure Cost Review to EPA Region 8, listing TW Company as its waste, hazardous waste, and / or PCB waste hauler.
42. Mr. Tom Arnold, president of Respondent, is also the registered agent and owner of TW Company.
43. Respondent's above-described conduct, providing to EPA Region 8 a certified 2005 Closure Cost Estimate relying on waste transportation from TW Company, an entity which is not a third-party to Respondent as required by 40 CFR 761.3 & 761.65(f)(1)(ii) and Condition F.9 of TW Services Storage Approval dated April 27, 2004, constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

PROPOSED TSCA PENALTY

Section 16 of TSCA, 15 U.S.C. § 2615, as amended, and the regulations promulgated under section 6 of TSCA, 15 U.S.C. § 2605, authorize the assessment of a civil penalty of up to \$27,500 per day of violation for each violation of TSCA. Additionally, on February 13, 2004, the EPA Administrator caused to be promulgated, at 69 FR 7121, a Final Rule which implements the Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996, and authorizes EPA to assess civil penalties of up to \$32,500 per day for TSCA violations occurring on or after March 15, 2004

In arriving at a penalty, EPA will take into consideration those factors required by section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(b), which include: the nature, circumstances, extent, and gravity of the violation, and, with respect to respondent, the ability to pay, effect on ability to continue to do business, any history of prior violations, degree of culpability, and other matters as justice may require.

EPA's actions with respect to the assessment of civil penalties are guided by its Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990, which provides a rational and consistent method for applying the TSCA statutory factors to the circumstances of a specific case.

Pursuant to section 15 of TSCA, Respondent may be assessed a penalty of up to \$32,500

per day per violation of TSCA. EPA herein below provides a brief explanation of the severity of each violation alleged, as allowed by 40 C.F.R. § 22.14(a)(4)(ii). A penalty calculation justification memorandum specifies the proposed penalty assessment and is contained in Attachment 1 hereto:

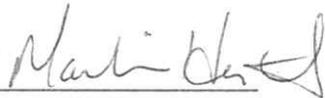
COUNT	PROPOSED PENALTY
Count 1	\$25,000.00
Count 2	\$25,000.00
Count 3	\$25,000.00
Count 4	\$25,000.00
Count 5	\$25,000.00
Count 6	\$25,000.00
<u>TOTAL PROPOSED PENALTY</u>	<u>\$150,000.00</u>

ATTACHMENTS

1. Memorandum on Penalty Calculation Justification dated September 27, 2007.
2. Consolidated Rules of Practice, 40 CFR part 22.
3. EPA PCB Penalty Policy dated April 9, 1990.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

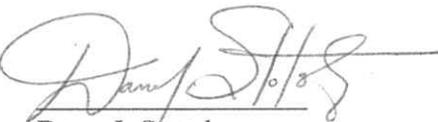
Date: 9/28/07

By: 
Martin Hestmark, Director
Technical Enforcement Program

Date: 9/28/07

By: 
Michael T. Risner, Director
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: 9/28/2007

By: 
Dana J. Stotsky
Senior Enforcement Attorney, Legal Enforcement Program
U.S. EPA Region 8- Mail Code: 8ENF-L
1595 Wynkoop Street
Denver, Colorado 80202-1146
Colorado Bar # 14717
Phone: (303)-312-6905
FAX: (303) 312-6953
stotsky.dana@epa.gov

IN THE MATTER OF: TW Services, Inc.,
EPA Docket No. TSCA-08-2007-0017

CERTIFICATE OF SERVICE

I hereby certify that the attached COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING dated was served as follows:

The original and one copy was hand carried to:

Regional Hearing Clerk
U.S. EPA, Region VIII (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

A copy was sent via CERTIFIED MAIL, RETURN RECEIPT REQUESTED, postage prepaid, to:

Mr. Thomas Pardy, Registered Agent for
TW Services, Inc.
106 S. Egan Avenue
Madison, South Dakota 57042-2910

9/28/07

Date

Ms. Judith McTernan

Ms. Judith McTernan