

connection with items containing polychlorinated biphenyls ("PCBs") and the Act based upon an inspection of respondent's facility on January 30, 1990. The inspection allegedly revealed that respondent was storing one PCB transformer which had not been registered by serial number² with "the appropriate fire response personnel having primary jurisdiction," in violation of 40 C.F.R. § 761.30(a)(1)(vi);³ that respondent had failed to conduct a visual inspection of the transformer for the third and fourth quarters of 1981 and for the first two quarters of 1982 in violation of 40

² The complaint alleged that the serial number of the transformer was # 689984. Compare note 16, *infra*, at 8.

³Count I of the complaint, issued April 11, 1991, at 2-3.

40 C.F.R. § 761.30(a)(1)(vi) provides as follows:

(vi) As of December 1, 1985, all PCB Transformers (including PCB Transformers in storage for reuse) must be registered with fire response personnel with primary jurisdiction (that is, the fire department or fire brigade which would normally be called upon for the initial response to a fire involving the equipment. Information required to be provided to fire response personnel includes:

(A) The location of the PCB Transformer(s); the address(es) of the building(s) and the physical location of the PCB Transformer(s) on the building site(s)

(B) The principal constituent of the dielectric fluid in the transformer(s) (e.g., PCBs, mineral oil, or silicone oil).

(C) The name and telephone number of the person to contact in the event of a fire involving the equipment.

C.F.R. § 761.30(a)(1)(ix)⁴ which requires quarterly visual inspections; that respondent had failed to mark the transformer with the caution label prescribed by 40 C.F.R. § 761.40 and illustrated at 40 C.F.R. § 761.45⁵; that respondent had failed to

⁴ Counts II, III, IV, and V of the complaint, at 3-5.

40 C.F.R. § 761.30(a)(1)(ix) provides as follows:

A visual inspection of each PCB Transformer (as defined in the definition of "PCB Transformer" under § 761.3) in use or stored for reuse shall be performed at least once every 3 months. These inspections may take place any time during the 3 month periods: January-March, April-June, July-September, and October-December as long as there is a minimum of 30 days between inspections. The visual inspection must include investigation for any leak of dielectric fluid on or around the transformer. The extent of the visual inspections will depend on the physical constraints of each transformer installation and should not require an electrical shutdown of the transformer being inspected.

⁵ Count VI of the complaint, at 5-6.

40 C.F.R. § 761.40, **Marking Requirements**, provides:

(a) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in § 761.45(a): The mark illustrated in Figure 1 is referred to as M₁ throughout this subpart.

(1) PCB Containers;

(2) PCB Transformers at the time of manufacture, at the time of distribution in commerce if not already marked, and at the time of removal from use if not already marked. [Marking of PCB-Contaminated Electrical Equipment is not required]; . . .

[Note 5 continued on page 4]

prepare an "annual document" as required by 40 C.F.R. § 761.180(a) for the years 1979 through 1988,⁶ which must contain the information specified at 40 C.F.R. §761.180(a)(1)-(3). All of the violations charged in the complaint constitute violations of 15 U.S.C. § 2614, Section 15 of TSCA.⁷ Complainant proposed a total penalty of \$22,000 for the violations charged, as follows: \$3000 each for Counts I through VI, and \$1000 each for Count VII (failure to prepare "annual documents" for years 1979 - 1985), Count VIII, Count IX, and Count X.

(b) As of January 1, 1979, the following PCB Articles shall be marked with mark M_L as described in § 761.45(a):

(1) All PCB Transformers not marked under paragraph (a) of this section [marking of PCB-Contaminated Electrical Equipment is not required].

⁶ Counts VII, VIII, IX, and X of the complaint, at 6-9. Count VII relates to the years 1979 - 1985; Count VIII charges the same violation for 1986; Count IX charges the same violation for 1987. Count X charges the same violation for 1988.

40 C.F.R. § 761.180(a) provides that:

Beginning July 2, 1978, each owner or operator of a facility using or storing at one time . . . one or more PCB Transformers . . . shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year. . . .

⁷ Section 15 of TSCA provides in pertinent part that "(I)t shall be unlawful for any person to -- (1) fail or refuse to comply with . . . (B) any requirement prescribed by section . . . 2605 of this title, (C) any rule promulgated or order issued under section . . . 2605 of this title . . . (3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information"

In its answer to the complaint respondent admitted only paragraphs 1, 2, and 5 of Count I [that respondent is a "person" as defined by regulation, that it owns and operates the W. C. Hollins Electric and Engineering Company located at 2037 Lincoln Park Avenue, Los Angeles, California, that a representative of EPA inspected the facility to determine compliance with Part 761, and that the transformer was not registered with the Los Angeles Fire Department]. Respondent denied all of the charges set forth in the complaint,⁸ and denied further that complainant had shown the transformer in question to be a PCB transformer. Complainant moved for partial "accelerated decision," asserting that no material issue of fact remains to be determined, and that complainant is entitled to judgment as matter of law. Complainant urges that respondent admitted that the transformer in question was a "PCB

⁸ In connection with Count I, respondent denied that it had a PCB transformer in use at its facility and that respondent is subject to 40 C.F.R. § 761.30(a), which regulates the use of PCB transformers. **Answer to Complaint**, at 1. Respondent further denied that PCB transformers must be registered with appropriate fire response personnel having primary jurisdiction, and that specified information must be provided as part of the registration, as provided by 40 C.F.R. § 761.30(a)(1)(iv). *Id.* However, respondent admitted that "the PCB transformer identified by serial number 689964 was not registered with the Fire Department," and added that "the Los Angeles Fire Department does not have the facility or the clerical capacity to register the foregoing described PCB Transformer." *Id.* Based upon its denial that the transformer in question was a "PCB Transformer," it is concluded that respondent denied all of the charges in the complaint.

Transformer".⁹ Alternatively, complainant argues that respondent has not raised an issue of fact as to whether the transformer contained PCBs. Further, complainant states that respondent admitted failure to register the transformer with the local fire department¹⁰, and admitted failure to perform visual inspections of the transformer¹¹. Complainant considers it undisputed that respondent did not mark the transformer with the required "caution" symbol, and did not prepare annual documents.¹²

In response to complainant's motion, respondent did not seriously contend that had it conducted inspections as contemplated by the regulations, or that it had marked the transformer or had prepared and maintained annual documents. Rather, respondent

⁹ Complainant points to paragraph 3 of respondent's **Answer to the Complaint**, wherein respondent states that "(R)espondent admits that the PCB Transformer identified by serial number 689964 was not registered with the Fire Department." Complainant construes this as an admission that the transformer was a "PCB transformer". However, respondent specifically denied paragraph 3 of the complaint (**Complaint**, at 2), and bases its defense to complainant's Motion chiefly upon the proposition that the transformer was not a "PCB Transformer" as defined at 40 C.F.R. § 761.3.

¹⁰ Paragraph 3 of respondent's **Answer to Complaint** [see note 9, supra, at 5.] Complainant also cites a statement from respondent's representative to the inspector that the transformer had not been registered. See complainant's **Memorandum in Support of Complainant's Motion for Partial accelerated Decision**, at 7, 11. 19-21

¹¹ Complainant cites the report of inspection, Exhibit 1 in pretrial exchange. See **Memorandum in Support of Complainant's Motion for Partial Accelerated Decision**, at 8, 11. 22-24.

¹² See complainant's **Memorandum**, supra, notes 10-12, at 10, line 15.

attempts to raise an issue as to whether the transformer identified by the inspector as having serial number 689984 on January 30, 1990 was in fact a "PCB Transformer" as alleged in the complaint. This allegation underlies each of the violations charged. Respondent argues that the serial number recorded by the inspector establishes the transformer to be a mineral oil transformer manufactured in 1909, well before the introduction of PCB dielectric fluid in General Electric transformers.¹³ It is undisputed that the transformer in question bore a "Pyranol" nameplate. Respondent states that "[the fact] (T)hat a label marked "Pyranol" might have been superimposed over the nameplate on the transformer is unavailing to the Complainant. Such evidence is hearsay, but, even if admitted, it would only support an inference that the subject transformer was a mineral oil transformer." ¹⁴ Respondent asserts further that the transformer had to be "tested and found actually to contain 500 ppm PCBs or greater"¹⁵ by EPA, in order for complainant to prevail.

It is held that an issue of fact is not created by the matter of the serial number, which may have been recorded erroneously by

¹³ See Declaration of Willis H. Hollins and attached exhibits.

¹⁴ Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision, at 4.

¹⁵ Id.

the inspector¹⁶, and in any case is not material, for the following reasons:

1. The Pyranol nameplate indicates that the transformer contains PCB dielectric fluid, which requires the owner to assume that the transformer is a "PCB Transformer," as defined at 40 C.F.R. § 761.3.¹⁷

2. If the owner or operator "has any reason to believe that the transformer contains PCB dielectric fluid," it must be assumed

¹⁶ The Uniform Hazardous Waste Manifest, No. 90467602 lists the serial number as 6899647, which, according to complainant, means that the transformer was manufactured in 1942, well after the introduction of PCB dielectric fluid. [Complainant's Memorandum in Reply to Respondent's Opposition to Motion for Partial Accelerated Decision, Exhibit 2.] On this manifest, which was signed by Mr. W. H. Hollins, the transformer is listed as "transformer containing oil with 500 ppm PCBs." Exhibit 4 of Complainant's Memorandum appears to indicate that the fluid was tested by the disposal facility and found to contain 276,949 parts per million.

A subsequent statement by Mr. Hollins purports to explain the final digit in the serial number (i. e. the 7, which was not recorded by the inspector) as something that was added by Mr. Hollins himself at the suggestion of the Chemical Waste Management truck driver who removed the transformer. Mr. Hollins says that this digit was in fact was not a "7" but "dash 1", to indicate that there was only one item in the shipment. Declaration of Willis Hollins to Support the Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision, February 14, 1992, at 3. It is noted again that Uniform Hazardous Waste Manifest, No. 9046767602, Exhibit 2 attached to Complainant's Memorandum in Reply to Respondent's Opposition shows the item to be 6899647, as does Exhibit 4, Chemical Waste Management's "TSCA Certificate of Destruction," showing receipt of the transformer on February 5, 1991, Id.

¹⁷ 44 Federal Register 31514, at 31517, May 31, 1979, Classification of Transformers Under This Rule: 1. PCB Transformers.

that the transformer is a "PCB Transformer".¹⁸ It is noted that respondent's owner and president has been in the industrial electrical machinery business for more than forty years.¹⁹ The Pyranol nameplate clearly constitutes a "reason to believe" that the transformer contained PCB dielectric fluid. Of course, respondent should have tested the fluid if it had any doubt as to its contents, but there is no evidence in this record that respondent did so. The failure to test in these circumstances is significant.²⁰

¹⁸ 44 Fed. Reg. 31517, at the section designated "4. Discussion of Transformer Categories" which states that "(T)he owner . . . must ascertain which of these three categories, PCB Transformer, PCB-Contaminated Transformer, or Non-PCB Transformer, is applicable. . . . a. Determining Appropriate Categories: Transformers originally designed to use concentrated PCBs usually have a nameplate indicating that they contain PCB dielectric fluid. Such transformers must be assumed to be PCB Transformers unless tested and found to contain less than 500 ppm PCB . . . (I)f a transformer does not have a nameplate or if there is no information available to indicate the type of dielectric fluid in it, the transformer must be assumed to be a PCB Transformer."

See also at p. 31517, section designated "3. Non-PCB Transformers," which states:

Non-PCB Transformers are transformers that contain less than 50 ppm PCB. No transformer may ever be considered to be a Non-PCB Transformer unless its dielectric fluid has been tested or otherwise verified to contain less than 50 ppm PCB. A person who tests his transformers to classify them as Non-PCB Transformers should also take precautions to insure that these transformers are not later contaminated in servicing operations

¹⁹ Declaration of Willis H. Hollins, January 10, 1992, at 1.

²⁰ See *The Celotex Corporation*, TSCA Appeal No. 91-3, December 16, 1991. Also *Lang Machinery Company, Inc.*, June 20, 1990, Docket No. TSCA-III-409.

3. It is clear that it was respondent's responsibility to test the transformer fluid even if -- unlike the situation here -- there were no reason to believe the transformer contained PCBs.²¹

Last, respondent asserts in connection with the violations alleged in Counts II, III, IV, and V of the complaint -- failure to inspect visually each quarter [see note 4, supra, at 3] -- that the transformer in question was neither "in use" nor "stored for reuse". Respondent asserts that the transformer was ". . . . visually inspected virtually daily . . . [I]t never leaked, was at all times in plain view" ²² These assertions do not raise an issue in connection with whether respondent performed the required quarterly inspections. The transformer does not appear to have been stored for disposal -- there is no evidence that this was the case, and respondent does not claim it -- and in any event was clearly not "stored for disposal," which contemplates a temporary situation, as defined at 40 C.F.R. § 761.3.²³ The storage here cannot be considered temporary. There is likewise no evidence that the transformer was in active use. Its status, therefore, can only be a form of storage which is covered by the intent of the

²¹ See 44 Federal Register 31517, May 31, 1979, at paragraph 3, **Non-PCB Transformers**. See also note 18, supra, at 9.

²² Elsewhere, respondent's counsel states that the transformer was ". . . . innocently retain[ed] in his warehouse. . . ." See **Declaration of Willis Hollins to Supplement the Memorandum and in Opposition to Complainant's Motion for Partial Accelerated Decision**, February 14, 1992, covering page.

²³ See Respondent's Memorandum at 5-6.

inspection regulations, in view of the fact that long term possession without disposal is at the heart of the need to inspect and to keep track of PCBs in use or in storage in the regulated community. Obviously, the need to follow PCBs in existence in transformers in use or stored for reuse [or simply "stored"] cannot be overcome by a mere suggestion that respondent had no particular plans for this transformer -- it was "just there," so to speak, and had been for 15 years. Regulations must not be interpreted in such a way as to reach a result that is ludicrous. In any event, respondent has brought forth no evidence that it prepared and maintained the required records. Storage with no particular plans for the transformer on the part of the owner, which appears to be respondent's assertion, must be considered inactive use or storage for reuse. It is held that "just sitting there since 1965 in plain sight with no particular future plans for it having been made by the owner" does not raise an issue with respect to the "in use" or "storage for reuse" portion of the visual inspection requirements of 40 C.F.R. § 761.30(a)(1)(ix). The status of this transformer cannot be put at issue with mere assertions that it was not in use and was not being stored for reuse. This is little more than the general denial of the charge set forth in respondent's answer to the complaint. Respondent must do more than deny, under summary judgment practice, in response to complainant's challenge to

respondent's evidence.²⁴

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Hollins Electric and Engineering, Inc., is and has been at all relevant times a corporation formed under and operating pursuant to the laws of the State of California. Re-

²⁴ See *Hahn v. Sargent*, 523 F. 2d 461 (1st Cir. 1975) at 464, which sets forth the standard very clearly:

The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both 'genuine' and 'material'. A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes, a material issue must be established by 'sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial.' *First National Bank of Arizona v. Cities Service Co., Inc.*, 391 U.S. 253, 289 (1986). The evidence manifesting the dispute must be 'substantial,' *Fireman's Mutual Ins. Co. v. Aponaug Mfg. Co., Inc.*, 149 F. 2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. *Beal v. Lindsay*, 468 F. 2d 287, 291 (2d Cir. 1972). [Emphasis added].

And further, *Liberty Leasing Co. v. Hillsum Sales Corp.*, 380 F. 2d 1013, 1015 (5th Cir. 1967):

. . . . (R)ule 56 requires that the opposing party be diligent in countering a motion for summary judgment . . . and mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment. . . . [Emphasis added]

spondent is a "person" as defined at 40 C.F.R. § 761.3. Respondent owns and operates the W. C. Hollins Electric and Engineering Company located at 2037 Lincoln Park Avenue, Los Angeles, California, and is subject to the Act and regulations duly promulgated in final form on May 31, 1979, at 44 **Federal Register** 31514, and published thereafter in the **Code of Federal Regulations** [C.F.R.] at 40 C.F.R. Part 761.

2. Respondent's facility at the above address was inspected on January 30, 1990. At that time, respondent was storing for use or inactively using one "PCB Transformer" which it had had at the facility since 1965,²⁵ and was subject to 40 C.F.R. § 761.30(a).

3. The transformer identified by the inspector bore a "Pyranol" nameplate. "Pyranol" is a trade name used by General Electric for PCBs.²⁶ Respondent was required to assume that the transformer in question was a "PCB Transformer".²⁷ Further, the Pyranol nameplate constitutes a "reason to believe" that the transformer was a PCB Transformer, 44 **Federal Register** 31517, May 31, 1979. Respondent has not shown sufficient evidence to raise an issue of fact as to whether the transformer contained PCB dielectric fluid. The serial number of the transformer is not

²⁵ Respondent's Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision, at 1.

²⁶ Respondent's Exhibits A, C, and D attached to Declaration of Willis H. Hollins, January 10, 1992.

²⁷ See discussion at 44 **Federal Register** 31517, May 31, 1979, under the paragraph entitled "1. PCB Transformer".

material, in view of the Pyranol nameplate and in view of the preamble to the 40 C.F.R. Part 761 regulations at 44 **Federal Register** 31514, at 31517 (May 31, 1979) of which respondent is charged with knowledge. Accordingly, it is found that the transformer was a "PCB Transformer" within the meaning of 40 C.F.R. § 761.3.

4. Respondent failed to register the transformer with fire response personnel having primary jurisdiction, in violation of 40 C.F.R. § 761.30(a)(1)(vi) and 15 U.S.C. § 2614(1)(C).

5. Respondent failed to inspect its PCB Transformer visually for the third and fourth quarters of 1981, and for the first and second quarters of 1982, in violation of 40 C.F.R. § 761.30(a)(1)(ix). On the facts shown in this record, a transformer that is neither in active use nor "stored for disposal" (as defined at 40 C.F.R. § 761.3) but has been on the premises for fifteen years must be considered to be, and is being, stored for reuse.

6. Respondent failed to mark the PCB transformer identified by serial number 689964 with the PCB caution label (M_L) as illustrated at 40 C.F.R. § 761.45, in violation of 40 C.F.R. § 761.40 and 15 U.S.C. § 2614(1)(C).

7. Respondent failed to prepare an annual document in connection with its PCB Transformer for calendar years 1979 through 1988, in violation of 40 C.F.R. § 761.180(a) and 15 U.S.C. § 2614(1)(C).

8. No issues of fact remain to be determined. Complainant is

entitled to judgment as to liability for the violations recited in the complaint.

9. A civil penalty may be assessed against respondent pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

10. The sole issue remaining to be determined in this matter is whether a penalty should be imposed for the above violations, and, if so, in what amount.

ORDER

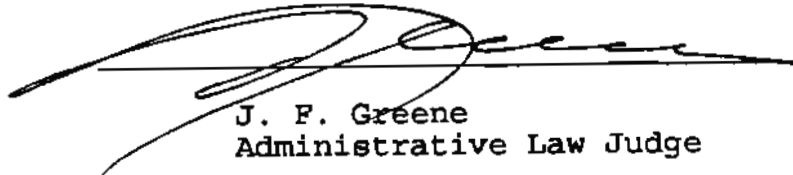
Accordingly, it is ORDERED that complainant's motion for partial "accelerated decision" shall be, and it is hereby, granted.

And it is FURTHER ORDERED that, no later than April 2, 1993, complainant shall clarify to respondent and to this office the penalty proposals set forth in the complaint. Specifically, complainant shall explain why it proposes a penalty of \$1000 for Count VII (failure to prepare annual documents for 1979 through 1985), and separate penalties of \$1000 each for failure to prepare annual documents for 1986 (Count VIII), for 1987, (Count IX) and for 1988 (Count X).

And it is FURTHER ORDERED that, no later than April 14, 1993, the parties shall have conferred for the purpose of pursuing settlement as to the penalty issue.

And it is FURTHER ORDERED that, no later than April 16, 1993, the parties shall report upon the status of their effort.

If the parties report that no progress has been made with respect to this issue, the matter will be set for trial.

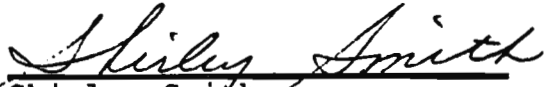


J. F. Greene
Administrative Law Judge

March 15, 1993
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent.


Shirley Smith
Legal Staff Assistant
To Judge J. F. Greene

NAME OF RESPONDENT: HOLLINS ELECTRIC AND ENGINEERING
DOCKET NUMBER: TSCA-09-90-0082

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Dated: March 16, 1993