

1/23/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of *
*
B & B WRECKING AND * Docket No. TSCA-V-C-40-90
EXCAVATING, INC., *
*
Respondent *

ORDER ON DEFAULT

This proceeding was initiated by the U.S. Environmental Protection Agency, Region V ("U.S. EPA" or "Complainant"), pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615, against Respondent, B&B Wrecking and Excavating, Inc. ("B&B Wrecking" or "Respondent"). The Complaint, filed on March 9, 1990, alleged in three counts that B&B Wrecking had violated Section 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614, and the Polychlorinated Biphenyls (PCBs) Disposal and Marking regulations, 40 C.F.R. Part 761.

Count I alleged that B&B Wrecking failed to develop and maintain annual records on the disposition of its PCB items for at least the previous seven calendar years, in violation of 40 C.F.R. § 761.180(a) and Section 15 of TSCA, 15 U.S.C. § 2614. Count II alleged that B&B Wrecking failed to develop and maintain quarterly inspection and maintenance records of its PCB transformers and to register its PCB transformers with local fire response personnel by December 1, 1985, in violation of 40 C.F.R. § 761.30(a)(1)(vi), (ix) and (xii), the Interim Measures Program,

Appendix B(III), 46 Fed. Reg. 16090 (March 10, 1981), and Section 15 of TSCA, 15 U.S.C. § 2614. Count III alleged that B&B Wrecking failed to properly label its PCB transformers, in violation of 40 C.F.R. § 761.40(a)(2) and Section 15 of TSCA, 15 U.S.C. § 2614. The Complaint proposed a total penalty of \$29,000 for the three counts.

Complainant received Respondent's Answer to the Complaint on or about May 14, 1990. Complainant filed its Prehearing Exchange on January 30, 1991. Respondent filed a Motion for Leave to File Pre-Hearing Exchange Instantly and Respondent's Pre-Hearing Exchange on March 11, 1991.

On May 14, 1991, Complainant filed a Motion for Leave to Take Written Discovery. Respondent did not respond to Complainant's motion. I granted Complainant's Motion for Leave to Take Written Discovery on June 12, 1990, which required Respondent's discovery response within 30 days.

Respondent did not respond to Complainant's discovery request and Complainant filed a Motion for a Default Order on October 16, 1991, pursuant to 40 C.F.R. §§ 22.17 and 22.19, for Respondent's failure to comply with an order issued by the Presiding Officer. The motion requested that the Respondent be found in default and the full amount of the proposed penalty of \$29,000 be assessed against it.

FINDINGS OF FACT

1. Respondent, B&B Wrecking and Excavating, Inc., is a "person" as defined in 40 C.F.R. § 761.3 and is subject to the prohibitions set forth in 40 C.F.R. Part 761.

2. Respondent is the owner and operator of the facility located at 5801 Train Avenue, Cleveland, Ohio.

3. At the time of U.S. EPA inspections on November 2, 1988 and December 8, 1988, Respondent had five PCB transformers, which are defined as PCB items in 40 C.F.R. § 761.3.

4. On March 9, 1990, Complainant filed a Complaint and Notice of Opportunity for Hearing against Respondent, pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615. The Complaint alleged in three counts that the Respondent had violated 40 C.F.R. §§ 761.30(a)(1)(vi), (ix) and (xii), the Interim Measures Program, Appendix B(III), 46 Fed. Reg. 16090 (March 10, 1981), 40 C.F.R. § 761.40(a)(2), 40 C.F.R. § 761.180(a) and Section 15 of TSCA, 15 U.S.C. § 2614.

5. Complainant received Respondent's Answer to the Complaint on or about May 14, 1990.

6. Complainant filed its Prehearing Exchange on January 30, 1991.

7. Respondent filed its Motion for Leave to File Prehearing Exchange on March 11, 1991.

8. Complainant filed a Motion for Leave to Take Written Discovery on May 14, 1991. Respondent did not respond to Complainant's motion.

9. Complainant's Motion for Leave to Take Written Discovery was granted on June 12, 1991. The Respondent's discovery response was due within 30 days.

10. Complainant filed a Motion for Default Order on October 16, 1991, for Respondent's failure to comply with Complainant's discovery request. Respondent filed a Motion for Leave to Respond dated October 30, 1991, which was granted until December 2, 1991, by Order of this Court.

11. Respondent filed its Response to Complainant's Motion for Default Order, dated November 27, 1991, with its Response to Discovery attached.

CONCLUSIONS OF LAW

1. Complainant has the authority to institute enforcement proceedings concerning violations of federal PCB regulations, pursuant to Section 16 of TSCA, 15 U.S.C. § 2615.

2. Respondent's Answer to the Complaint does not raise any questions which could support a decision that Complainant has failed to establish a prima facie case.

3. Complainant's Prehearing Exchange supports the allegations in the Complaint and establishes a prima facie case that the Respondent has violated federal PCB regulations and Section 15 of TSCA, 15 U.S.C. § 2614.

4. Respondent is in default for failing to comply with a prehearing order issued by the Presiding Officer. 40 C.F.R. §§ 22.17(a) and 22.19(f)(4).

5. Respondent's default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

6. Respondent violated Section 15 of TSCA, 15 U.S.C. § 2641 and 40 C.F.R. § 761.180(a) by failing to develop and maintain annual records on the disposition of its PCB items for at least seven calendar years previous to the filing of the Complaint.

7. Respondent violated Section 15 of TSCA, 15 U.S.C. § 2614 and 40 C.F.R. § 761.30(a)(1)(vi), (ix) and (xii), the Interim Measures Program, Appendix B(III), 46 Fed. Reg. 16090 (March 10, 1981), by failing to develop and maintain quarterly inspection records of its PCB transformers and to register its PCB transformers with local fire response personnel by December 1, 1985.

8. Respondent violated Section 15 of TSCA, 15 U.S.C. § 2614 and 40 C.F.R. § 761.40(a)(2) by failing to properly label its PCB transformers.

THE PENALTY

Section 16 of TSCA, 15 U.S.C. § 2615 authorizes U.S. EPA to assess a civil penalty of up to \$25,000 per day for each violation of TSCA. Pursuant to this statutory authorization, U.S. EPA developed the "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy" ("Policy") for the assessment of penalties in TSCA PCB cases. The penalty assessed in this case was based upon

the criteria and factors prescribed in the Policy. In accordance with the Policy, the penalty amount for each violation alleged is based upon determination of a gravity based penalty by evaluating three factors, the nature of the violation, the circumstances level and the extent of the environmental harm.

The circumstance level for Count One of the Complaint, failure to maintain annual records on the disposition of its PCB items, is a level 4 because it is a major recordkeeping violation at a facility that uses or stores PCBs. The Respondent's failure to develop and maintain annual records on the disposition of its PCB items is a major recordkeeping violation under the penalty policy because the Respondent failed to develop the annual records for at least seven consecutive years prior to the November 2, 1988 inspection. The extent of the violation in Count One is at a significant level, pursuant to the penalty policy, based on the estimated over 220 gallons of PCB fluid in the Respondent's transformers. Applying a circumstances level 4 to a significant extent on the penalty matrix (45 Fed. Reg. 59777) results in a penalty of \$6,000 for Count One.

The violations in Count Two of the Complaint, failure to maintain quarterly inspection records of the PCB transformers and failure to register the PCB transformers with the local fire personnel by December 1, 1985, constitute an improper use of PCBs and therefore fall under circumstance level 2 in the penalty policy. The extent of the violation in Count Two is at a significant level based on the estimated over 220 gallons of PCB

fluid in the Respondent's transformers. Applying a circumstances level 2 to a significant level on the penalty matrix results in a gravity based penalty of \$13,000 for Count Two.

The circumstance level for Count Three, failure to properly label five PCB transformers with the PCB warning label, is level 3 because it is a major marking violation. Failure to label the PCB transformers is a major marking violation because of its association with the recordkeeping violations thereby increasing the potential risk that someone investigating the situation would not know that PCBs are present. The extent of the violation in Count Three is at a significant level based on the estimated over 220 gallons of PCB fluid in the Respondent's transformers. Applying a circumstances level 3 to a significant level on the penalty matrix results in a gravity based penalty of \$10,000 for Count Three. Thus, the total penalty for all three counts is \$29,000.

After determining the gravity based penalty, upward or downward adjustments were considered based on the factors listed in the penalty policy and Section 16 of TSCA, 15 U.S.C. § 2615. In regard to Respondent's culpability, the violations do not appear to be egregious or willful, which would result in an upward adjustment of 25%. However, it also does not appear that the Respondent lacked sufficient knowledge of the potential hazard created by the violation nor lacked control over the situation, which would lower the penalty by 25%. Similarly, no

adjustment to the penalty is made for history of violations or ability to pay, since there is no substantiating evidence.

ORDER

It having been determined that Respondent, B&B Wrecking and Excavating, Inc., violated TSCA and the PCB regulations as alleged in the Complaint, a penalty of \$29,000 is assessed against it in accordance with Section 16 of TSCA, 15 U.S.C. § 2615.

This initial decision shall become the final order of the Administrator within 45 days of its service upon the parties and without further proceedings, unless it is appealed to the Administrator or the Administrator elects, sua sponte, to review the initial decision. Respondent shall pay the penalty within 60 days of the receipt of this Order by the submission of a cashier's or certified check in the amount of \$29,000 payable to the Treasurer of the United States, to the following address:

U.S. Environmental Protection Agency, Region V
P.O. Box 70753
Chicago, Illinois 60673

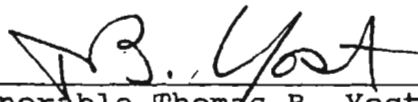
Respondent shall send a copy of the check to:

Branch Secretary (5SP-14J)
Pesticides and Toxic Substances Branch
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Failure to make payment in accordance with this Order, may result in this matter being referred to the United States Department of Justice in accordance with Section 16(a)(4) of TSCA for the institution of an action to recover the penalty in an appropriate U.S. District Court.

IT IS SO ORDERED.

Dated: 1/23/92



Honorable Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

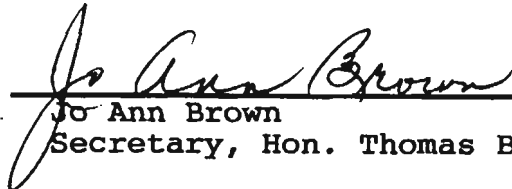
I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing ORDER ON DEFAULT of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Beverly Shorty-Winston, Regional Hearing Clerk, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 6064, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said ORDER ON DEFAULT to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said ORDER ON DEFAULT to the Administrator.

Dated: _____

1/23/92



Jo Ann Brown
Secretary, Hon. Thomas B. Yost