

8/18/93

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

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IN THE MATTER OF )  
 )  
BROAD TOP METAL PROCESSING )  
INC., )  
 )  
Respondent )

Docket No. TSCA-III-52

ORDER ON DEFAULT

I. Preliminary Statement

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the United States Environmental Protection Agency (EPA or Complainant) pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615 and regulations promulgated thereunder. The complaint charges, in two counts, that Broad Top Metal Processing, Inc. (Broad Top or Respondent) has violated 40 C.F.R. § 761.60(a)(1) and Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

II. Initial Findings of Fact

1. On September 28, 1990, EPA issued a Complaint and Notice of Opportunity for Hearing (complaint) against Respondent, alleging Respondent disposed of PCBs in two separate areas on Respondent's property in a manner not authorized by 40 C.F.R. § 761.60(a)(1) thereby violating Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). The complaint was served by certified mail, return receipt requested, on Albert Hess, President, Broad Top Metal Processing, Inc., P.O. Box 104, Routes 26 & 913, Saxton, PA 16678. Receipt of

the complaint is evidenced by acknowledgement of such receipt in Respondent's answer, which is part of the record of this matter.

2. The Complainant advised Respondent that this administrative proceeding would be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and the Consolidated Rules of Practice (CROP), 40 C.F.R. Part 22, 45 Fed. Reg. 24360 (April 9, 1990). Furthermore, a copy of the CROP was enclosed with the complaint.

3. In a letter dated October 22, 1990, Respondent filed its answer denying the alleged violations in Count I and Count II of the complaint.

4. On December 18, 1990, the undersigned Presiding Officer issued an order requiring, among other things, that the parties submit their first prehearing exchanges by February 25, 1991. Both parties were served via certified mail, return receipt requested. The return receipt from Respondent shows that this directive was received on December 22, 1990.

5. On February 21, 1991, EPA submitted its first prehearing exchange. Respondent failed to file its required prehearing exchange.

6. On March 12, 1991, the undersigned Presiding Officer issued an Order to Show Cause, requiring the Respondent to explain, within 10 days, why its prehearing exchange or a motion for extension of time in which to file its prehearing exchange, had not been filed in this matter. The order was served on the parties by certified mail. The return receipt from Respondent shows that this

order was received on March 21, 1991. No response from Respondent was forthcoming.

7. On July 22, 1991, EPA submitted a status report stating that a settlement in principle had been reached, but that some details needed to be resolved in order to complete the agreement.

8. On January 29, 1992, the undersigned Presiding Officer directed the Complainant to report on the status of settlement negotiations.

9. On February 12, 1992, in response to that order, EPA submitted a status report explaining that Respondent has assured EPA that compliance with settlement conditions would be achieved by the end of March 1992. However, in a subsequent status report on April 2, 1992, EPA stated that Respondent had failed to contact EPA concerning the arrangements to satisfy the conditions of the agreement previously reached in principle. Complainant went on to say that "settlement discussions . . . have broken down" and requested that the case be placed back in active status.

10. On April 14, 1992, the undersigned Presiding Officer issued an order requiring Respondent to submit its prehearing exchange by May 14, 1992. Once again, Respondent failed to comply and, as a result, another Order to Show Cause was issued on June 17, 1992 and served by certified mail. The return receipt from Respondent shows that this order was received on June 23, 1992. Pursuant to the June 17, 1992 order, Respondent was required to show cause, by June 27, 1992, why its prehearing exchange or a motion for extension of time in which to file its prehearing

exchange, had not been filed. The order stated that "[f]ailure of Respondent to comply with this directive will compel the undersigned to issue a default judgment against Respondent."

11. By letter dated July 20, 1992, Respondent filed an untimely motion for extension of time in which to file its prehearing exchange which motion was received by the undersigned on July 27, 1992.

12. In the meantime, on July 22, 1992, the undersigned Presiding Officer issued an order directing Complainant to draft and submit a proposed default order in accordance with 40 C.F.R. § 22.17(c), to be issued sua sponte against Respondent in this matter.

13. On July 28, 1992, Complainant filed an answer in opposition to Respondents's motion for extension of time.

14. On August 6, 1992, the undersigned Presiding Officer issued an order denying Respondent's motion for extension of time and directed Complainant to comply with my order of July 22, 1992, to draft and submit for my approval a proposed default order no later than August 26, 1992.

15. Complainant filed a proposed order on default on August 25, 1992. On the same date, Complainant submitted a letter addressed to the undersigned Presiding Officer with enclosed financial documents under seal, in the interest of maintaining their confidentiality, that were provided to Complainant by Respondent. Based upon Complainant's internal analysis of Respondent's financial documents, Complainant recommended that the penalty in this matter be assessed at \$0.

16. Respondent subsequently filed status reports on October 5, 1992, on October 26, 1992 and on December 18, 1992, stating that the work that EPA requires for a settlement had not been completed and a settlement had not been reached.

17. On December 24, 1992, Complainant stated that it did not oppose Respondent's request for an additional extension of time until March 30, 1993, but requested that the undersigned Presiding Officer consider issuing a default judgment against Respondent if the parties had not reached a settlement by that date.

18. On March 26, 1993, Complainant stated that it did not oppose Respondent's request for an additional extension of time until May 1, 1993, but requested that this be the last extension of time granted to Respondent in this matter and that the undersigned Presiding Officer consider issuing a default judgment against Respondent if the parties had not reached a settlement by that date. The undersigned granted the extension of time to May 1, 1993.

19. On May 14, 1993, the undersigned Presiding Officer ordered the Complainant to report on the status of settlement efforts.

20. In a letter dated May 17, 1993, to the undersigned Presiding Officer, Broad Top and Mr. Albert Hess indicated their need to file for Chapter Eleven Bankruptcy. Respondent sent a copy of the letter to Counsel for EPA.

21. On May 26, 1993, Complainant requested that the undersigned Presiding Officer issue a default order in this matter. Respondent has not filed a reply to Complainant's request.

### III. Conclusions of Law

1. Respondent has failed to comply with the order of the undersigned Presiding Officer to file its prehearing exchange, and has failed to comply with the presiding Chief Administrative Law Judge's order to show cause, or in any other way to show cause as to why its prehearing exchange has not been filed, and is, therefore, in default pursuant to 40 C.F.R. § 22.17(a).

2. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the complaint and a waiver of Respondent's right to a hearing on such factual allegations.

Therefore, I make the following:

### IV. Additional Findings of Fact and Conclusions of Law as Alleged by Complainant

1. Respondent is a corporation which at all times relevant to this complaint has been doing business in the State of Pennsylvania.

2. Respondent owns and/or operates a metal processing yard ("the Facility") in Saxton, Pennsylvania.

3. On September 28, 1989, authorized representatives of the EPA inspected Respondent's facility to determine its compliance with the PCB Rule, 40 C.F.R. Part 761, promulgated under the

authority of Sections 6, 8, and 12 of the Act, 15 U.S.C. §§ 2605, 2607 and 2611.

4. The September 28, 1989 inspection revealed that two separate areas of soil on the site were PCB contaminated. One of the areas was contaminated with a PCB concentration of 51.6 parts per million (ppm), and the other area had a PCB concentration of 1,339 ppm.

5. At the time of the September 28, 1989 inspection, one of Respondent's partners, Mr. Albert Hess, informed the inspector that Respondent had purchased approximately 200 transformer casings in 1984 or 1985. Most of these transformer casings had been salvaged or sold at the time of the inspection. The area on the site where the soil had a PCB concentration of 1,339 ppm was identified by Mr. Hess as the area where the transformer casings had been dismantled (hereinafter referred to as the "Teardown Area").

6. At the time of the September 28, 1989 inspection, several transformers were on site. None of the transformers on site were PCB by nameplate information.

7. The soil with a PCB concentration of 51.6 ppm was in the area near where the transformers referred to in paragraph 6 above were located during the September 28, 1989 inspection.

8. Pursuant to 40 C.F.R. § 761.60(a)(1), with exceptions not relevant here, PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with 40 C.F.R. § 761.70.

9. Spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs, as stated in 40 C.F.R. § 761.60(d)(1).

10. There were at least two occasions in or after 1983 of improper disposal of PCB dielectric fluids having a PCB concentration in excess of 50 ppm from at least one of the approximately 200 transformer casings purchased by Respondent in 1984 or 1985, and/or from at least one of the transformers referred to in paragraph 6 above, which were located on Respondent's facility on September 28, 1989.

11. Respondent's disposal of PCBs in the Teardown Area in a manner not authorized by 40 C.F.R. § 761.60(a)(1) violates Section 15(1)(C) of the Act, 15 U.S.C. § 2614(1)(C).

12. Respondent's disposal of PCBs in the area near the location of the transformers referred to in paragraph 6 above, in a manner not authorized by 40 C.F.R. § 761.60(a)(1) violates Section 15(1)(C) of the Act, 15 U.S.C. § 2614(1)(C).

#### V. Discussion and Ultimate Conclusion

An examination of the prehearing exchange documents submitted by Complainant supports the allegations in the complaint and establishes a prima facie case that Respondent violated Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C), as alleged. I therefore find that Respondent has violated Section 15(1)(C) of the Act, 15 U.S.C. § 2614(1)(C), by improperly disposing PCBs in concentration of 50 ppm or greater in at least two separate spills

or other uncontrolled discharges on Respondent's site as prohibited the applicable regulation, 40 C.F.R. § 761.60(a)(1).

VI. The Penalty

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), states that "[i]n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of any prior violations, the degree of culpability, and such other matters as justice may require."

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.27(b)) states, in pertinent part:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decisions in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The complaint in this action proposed the assessment of a civil penalty of \$10,000.00 against the Respondent. The penalty was calculated in accordance with the "Environmental Protection Agency Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act," published at

45 Fed. Reg. 59770 on September 10, 1980, and the "Environmental Protection Agency Polychlorinated Biphenyls (PCB) Penalty Policy," dated April 9, 1990. For the purpose of this penalty calculation, Complainant determined that there were two separate contaminated areas of soil, the first where some transformer casings were dismantled and the second near the area where some other transformers were located on the date of inspection. Complainant concluded that the two areas of contamination were the result of two separate spills. According to the penalty policy, a PCB spill constitutes a major disposal, which is a level one violation. However, Complainant had no evidence regarding the amount of PCBs that were spilled in each instance and made an assumption in favor of the Respondent that each violation should be considered a minor extent violation. While using the gravity based penalty matrix, Complainant determined that a penalty of \$5,000.00 for a level one, minor extent violation for each spill was appropriate. Complainant determined that there was no justification for an upward adjustment as may be appropriate when considering other factors set forth in 15 U.S.C. § 2615(a)(2)(B) and assessed a total penalty of \$10,000.00.

To summarize the proposed penalty calculation by Complainant:

Count I

Improper Disposal of PCB Dielectric Fluid in "Teardown Area."	\$ 5,000
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Count II

Improper Disposal of PCB Dielectric Fluid "near the transformers."	<u>\$ 5,000</u>
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Total Proposed Penalty	\$10,000
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By order of the undersigned Presiding Officer dated December 18, 1990, Respondent was directed to "furnish certified copies of Respondent's statement of financial position for the last fiscal year," if the Respondent intended to claim an inability to pay the proposed penalty. Respondent did not provide any financial information to the undersigned Presiding Officer, but did provide some financial documents to the Complainant in the settlement process. As noted above,<sup>1</sup> Complainant subsequently recommended to the undersigned Presiding Officer that the penalty in this matter be assessed at \$0. Based upon a review of these financial documents, which were provided by the Complainant to the Court under seal, I conclude that the penalty should be adjusted. I adopt Complainant's recommendation with regard to the penalty which was submitted with Complainant's proposed order on default.

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<sup>1</sup> Supra p 5.

DEFAULT ORDER AND FINAL ORDER

Under the authority of the TSCA and the CROP, 40 C.F.R. Part 22, Respondent is found to be in default.

NOW THEREFORE, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of \$0 dollars (\$0).

SO ORDERED.

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated: August 12, 1993  
Washington, DC

Certificate of Service

I hereby certify that on this 27th day of August 1993, copies of the Order on Default in the matter of Broad Top Metal Processing, Inc., Docket No. TSCA-III-527, were distributed as follows.

Certified Mail To:

Albert L. Hess, President  
Broad Top Metal Processing, Inc.  
P.O. Box 104  
Routes 26 & 913  
Saxton, PA 16678

Joseph E. Bass, Jr.  
One Hundred North  
2121 8th Avenue  
Altoona, PA 16602

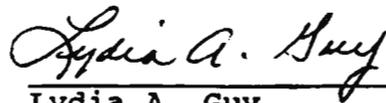
First Class Mail To:

Bessie Hammiel  
Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
401 M Street, S.W. (A-110)  
Washington, D.C. 20460

Hand Delivered To:

Cecil A. Rodrigues, Esquire, (3RC11)  
Assistant Regional Counsel  
U. S. Environmental Protection Agency  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107

Date: AUG 27 1993

  
Lydia A. Guy  
Regional Hearing Clerk