UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Transformer Substation Supply, Inc.,	**Docket No. TSCA-III-703**
RESPONDENT	

ORDER ON DEFAULT

On October 17, 1995, Complainant filed a motion for a Default Order against the Respondent, Transformer Substation Supply, Inc. (TSS), in this proceeding under the Toxic Substances Control Act (15 U.S.C. § 2615(a)). The stated basis of the motion is the failure of TSS to file a prehearing exchange as ordered by the ALJ. In accordance with Rule 22.17 of the Rules of Practice (40 C.F.R. Part 22), a party may be found in default "after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer...." For the reasons discussed below, Complainant's motion will be granted and TSS found to be in default.

The complaint, filed on December 22, 1993, charged TSS in six counts with violations of the polychlorinated biphenyls (PCB) rule, 40 C.F.R. Part 761.[(1)] Count I alleged failure to mark PCB Containers with the PCB Label, M_L, as required by 40 C.F.R. § 761.40(a)(1); Count II alleged improper storage of PCB containers without continuous curbing, as required by 40 C.F.R. § 761.65(b)(1); Count III alleged failure to inspect stored PCB containers for leaks at least once every 30 days, as required by 40 C.F.R. § 761.65(c)(5); Count IV alleged failure to display, on PCB articles and containers, the date they were placed into storage, as required by 40 C.F.R. § 761.65(c)(8); Count V alleged failure to maintain batch records, as required by 40 C.F.R. § 761.65(c)(8); and Count VI alleged failure to notify EPA of PCB storage activities prior to the commencement of such activities, as required by 40 C.F.R. § 761.205(a)(2). For these alleged violations, Complainant proposes to assess TSS a civil penalty of $65,500.

TSS, appearing pro se, filed an undated letter-answer, received by the Regional Hearing Clerk on March 21, 1994, which

essentially admitted the facts underlaying Counts I-IV and VI, but denied liability for Count V.[(2)] Although Respondent did not specifically request a hearing, the complaint at 9 states that the denial of any material fact or the raising of any affirmative defense shall be construed as a request for hearing.[(3)] Complainant filed a motion, on April 8, 1994, to schedule an expedited prehearing exchange to encourage Respondent to submit information, allegedly promised in settlement discussions, that was necessary before EPA could undertake to settle this matter. TSS did not respond to this motion.

The undersigned ALJ was designated to preside in this matter on April 15, 1994. By an order, dated August 11, 1994, the parties, absent a settlement, were directed to exchange specified prehearing information on or before October 14, 1994. On September 16, 1994, Complainant reported that settlement appeared unlikely because Respondent had not provided promised documents, despite repeated requests therefor, had not returned Complainant's telephone calls, and was unresponsive to Complainant's attempts at settlement. In a motion for an extension of time, dated October 14, 1994, Complainant reported that each party had attempted to contact the other without success and, in order to provide TSS a final opportunity to furnish information requested in a letter, dated March 17, 1994 (copy attached), asked that the time for filing prehearing exchanges be extended by 30 days. This motion was granted and Complainant filed its prehearing exchange on the due date as extended, November 21, 1994. TSS did not respond to the motion and has not to the date of this order submitted a prehearing exchange or responded in any manner to the order directing that such information be submitted.

As stated above, Complainant, noting TSS' failure to comply with the ALJ's order to file a prehearing exchange, filed a motion for a default order on October 17, 1995. TSS did not respond to the motion. Because it appeared that TSS had an explanation for several of the counts which would, at a minimum, mitigate the proposed penalty and because TSS had in the past indicated an interest in settling this matter, the ALJ issued an Order to Show Cause on May 29, 1996. TSS was directed to show cause, if any there be, why Complainant's motion for default should not be granted. TSS was directed to submit the information specified in the order for prehearing exchange, dated August 11, 1994, or to explain why the information would not be submitted. TSS was requested to submit any other information, financial or otherwise, which might mitigate the proposed penalty. TSS was

directed to file its response to the order on or before June 21, 1996. TSS did not respond to the order in any manner and has failed to provide any of the information which the order directed be furnished.

Based upon the entire record, primarily the PCB Inspection Report included in Complainant's prehearing exchange, I make the following:

Findings of Fact

1. Transformer Substation Supply, Inc (TSS) owns and/or operates, and, at all times relevant to the complaint in this matter, has owned or operated, a business located at 2923 Park Avenue, Huntington, West Virginia. (PCB Inspection Report, dated July 26, 1993, at 2). TSS is, or was, engaged in the testing and external refurbishing of customer owned electrical equipment including switch gear, circuit breakers, and transformers.

2. A firm known as Compton Electrical Industries (CEI) operated at the above address from March 1989 until late 1990, at which time CEI ceased operations. The inventory and business were sold to one Bud Snyder who operated at the mentioned location from July 1991 to July 1992. (Inspection Report at 1). The business was then acquired by TSS (John Einsterin III) who commenced operations on July 3, 1992. Mr. Einsterin is erroneously referred to as "John Einstein" in the inspection report.

3. On March 17, 1993, the Park Avenue location was visited by EPA inspectors.[(4)] They were aware that CEI no longer operated at that location, but unaware of what other business, if any, was being conducted at that address. . The facility had last been inspected by EPA on February 14, 1990, at which time several tanks containing PCB contaminated oil, that is, oil containing PCBs at a concentration of less than 500 ppm, were on the premises. The primary purpose of the inspection was to determine the disposition of the PCB contaminated oil.

4. The inspectors ascertained that 5,480 gallons of PCB contaminated oil had been manifested for disposal on March 13, 1991. They visited the shop floor and observed as many as 100 transformers, some of which had been serviced, others awaiting servicing, and still others which had been segregated for salvage. The inspectors also observed three oil storage tanks on the shop floor. The largest tank was of 10,000 gallon capacity and displayed a label indicating a PCB concentration of less

than 50 ppm. A sample from this tank was tested and showed a PCB concentration of 28 mg/kg.

5. The second "green-colored" tank was of unstated capacity and was one of two tanks which had been the source of 5,480 gallons of PCB contaminated oil manifested for disposal in 1991. Although this tank was considered to be empty, it had several inches of oil in the bottom. This tank displayed a label stating "PCB Contaminated Electrical Equipment." An EPA test on a sample drawn from this tank showed a PCB concentration of 243 mg/kg.

6. Adjacent to the oil tanks were a number of 55-gallon drums (Inspection Report at 3). These drums reportedly contained 600 gallons of PCB contaminated oil which was awaiting shipment for disposal. The drums were stored on the concrete floor which lacked any type of secondary containment, that is, continuous curbing having a minimum six-inch high curb as required by 40 CFR § 761.65(b)(1)(ii). Additionally, the dates the drums were placed into storage for disposal were not marked on the drums. The drums displayed a label "PCB Contaminated Electrical Equipment", but not the M_L label described at 40 CFR § 761.45. Samples drawn from two of the drums showed PCB concentrations of 60 mg/kg and 90 mg/kg.

7. EPA conducted a second unannounced inspection of TSS on April 17, 1993. The twenty drums of PCB contaminated oil, which had previously been reported as awaiting shipment for disposal remained on the shop floor. Fifteen of these drums were full or nearly so, while five were only partially filled. A sample collected from one of two additional drums located in the southwest corner of the building showed a PCB concentration of 215 mg/kg. These drums in common with all other drums on the shop floor did not contain the date the PCBs were removed from service. A sample from a 23rd drum located near the paint spray booth showed a PCB concentration of 41 mg/kg. This drum also contained a label: "PCB Contaminated Electrical Equipment".

8. The third oil storage tank observed during the inspection on March 17, 1993, was sampled and showed a PCB concentration of 26 mg/kg. This tank contained a label "PCB Contaminated Electrical Equipment". A fourth tank located on a skid adjacent to the spray paint booth was sampled and showed a PCB concentration of 61 mg/kg. This tank had an estimated capacity of 50 gallons and did not display a label of any kind.

9. The inspectors reported that TSS had over one hundred drums in its shop and that a few additional drums were stored outside

the main entrance. Some of these drums were labeled as containing new transformer oil. Other drums were not labeled and the inspectors concluded that an extensive sampling and analytical program would be required to determine the regulatory status of the contents of the drums.

10. TSS had not filed a notification of PCB Waste Activity and had not applied for approval as a commercial storer of PCBs. TSS had nevertheless accepted PCB waste for storage without having a facility for such storage which conformed with regulations.

11. As indicated previously, the complaint in this matter, charging TSS with six counts of violating the PCB rule, was issued on December 22, 1993. TSS' answer acknowledged its failure to mark PCB containers with the M_L label described in 40 CFR § 761.45 as alleged in Count I, but emphasized that the drums and tanks displayed labels indicating the PCB content. TSS acknowledged that tanks and drums containing PCBs were stored on a floor lacking continuous curbing having a minimum height of at least six inches as required by § 761.65(b)(1)(ii) and as alleged in Count II.

12. Count III of the complaint alleged that TSS had admitted not inspecting 24 PCB containers for leaks every 30 days as required by § 761.65(c)(5). Mr. Einsterin stated that he understood the question to be whether it had a formal procedure for visually inspecting PCB containers every 30 days. He acknowledged that the answer to this question was "no". He alleged, however, that the drums and tanks were in an area adjacent to work areas and could be seen on a daily basis. Although he asserted that "we" have not had any leaks or spills, he stated that it was "our" policy to cure all leaks as discovered.

13. As to Count IV, which alleged that TSS had not labeled PCB containers with the date placed in storage for disposal, TSS admitted that this was true, but stated that it had internal records from which the proper labels could be completed. Concerning Count V of the complaint, which alleged that TSS had failed to maintain batch records showing addition of PCBs to two storage tanks, TSS stated that the oil in these tanks was present when it acquired the company and that no [oil having] high PCB [content] had been pumped into the tanks. Count VI alleged, inter alia, that TSS had accepted at least 12 drums of PCB contaminated oil from Terry Eagle Coal Company and at least four drums of PCB contaminated oil from Dale-Tex Coal Company, and that, therefore, TSS was a commercial storer of PCB waste. TSS allegedly failed to file a notification of PCB waste

handling activity prior to engaging in such activity as required by 40 CFR § 761.205(a)(2). TSS asserted that it had assumed that the notification had been filed by the former owner.

14. As recited in the introduction to this order, TSS has failed to submit prehearing information as directed by the ALJ. Information TSS was directed to submit included financial data, if it were contending that the proposed penalty exceeded its ability to pay. TSS has not responded in any manner to the Order to Show Cause why it should not be found in default, dated May 29, 1996. The receipt for certified mail shows that TSS received this order on June 3, 1996.

15. The complaint alleges that the proposed penalty of $65,500 was determined in accordance with the "PCB Penalty Policy", dated April 9, 1990, and the "Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act", 45 Fed. Reg. 59770 (September 10, 1980). The 1990 PCB Penalty Policy provides, however, that "[t]his policy is immediately applicable and will be used to calculate penalties in all administrative actions concerning PCBs issued after the date of this policy, regardless of the date of the violation." (Id. 1). The extent to which the 1980 "penalty guidelines" were used to determine the proposed penalty is not clear. Any references herein to the "penalty policy" or "policy" will be to the 1990 version unless otherwise indicated.[(5)] The policy provides that penalties are determined in two stages: (1) determination of a "gravity based penalty" (GDP) and (2) adjustments to the gravity based penalty. The policy further provides that the amount and concentration of PCBs involved in a violation will determine the extent of potential damage and thus whether a violation is considered to be major, significant, or minor. (Id. 3). Additionally, the policy states that the PCB rules fall into two broad categories: non-disposal violations and disposal violations. Minor non-disposal violations are those involving quantities of 200 gallons or less and significant non-disposal violations are those involving between 220 gallons and 1,100 gallons of PCBs. (Id. 4). These categories are shown in a matrix which has the extent of potential damage as major, significant, minor on a horizontal axis and the circumstances, probability of damage, as high range, medium range and low range on a vertical axis. (Id. 5). Each range is divided into two levels for a total of six levels of potential damage. The penalty amount is determined by reading the amount from the appropriate cell in the matrix.

16. The proposed penalty of $6,500 for Count I, failure to mark PCB containers with M_L label, consisted of $3,000 for failing to so label 20 drums and one tank on the shop floor, significant extent, Circumstances Level 5; $500 for failing to so label two drums located in the southwest corner of the building, minor extent, Circumstances Level 5; and $3,000 for the tank on a skid near the paint spray booth, minor extent, Circumstances Level 2. The proposed penalty for Count II, failure to properly store PCBs, was $13,000, significant extent, Circumstances Level 2. The proposed penalty for Count III, failure to inspect PCB containers at least once every 30 days, was a also determined to be $13,000, significant extent, Circumstances Level 2.

17. The proposed penalty for Count IV, failure to display the date PCBs or PCB items were placed in storage for disposal, was determined to be $6,000, significant extent, Circumstances Level 4. The proposed penalty for Count V, failure to prepare and maintain batch addition records for two storage tanks, was determined to be $10,000, significant extent, Circumstances Level 3. The proposed penalty for Count VI, failure to notify EPA of PCB waste activities was determined to be $17,000, significant extent, Circumstances Level 1.

18. In its prehearing exchange, Complainant indicated its conclusion that TSS had the ability to pay the proposed penalty was based in part on a Dun & Bradstreet Report. Complainant has submitted a Dun & Bradstreet Report which reflects information in D & B's file as of June 10, 1996. The report states that TSS started its business in 1992, that it employed 4 people and that D & B lacked sufficient historical data for assessing a payment or credit rating. No sales or revenue data were included and the report states that payments to suppliers, weighted by dollar amounts, average 51 days beyond terms. The highest "now owes" account was $250.00 and the highest "past due" account was also $250.00.

Conclusions

1. TSS has failed and refused to participate in the prehearing exchange directed by the ALJ's letter-order, dated August 11, 1994, and, pursuant to 40 CFR § 22.17(a), is found to be in default. TSS' default constitutes an admission of the facts alleged in the complaint and a waiver of its right to a hearing on such allegations.

2. TSS has violated Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C) and the PCB rule, specifically 40 CFR §§

761.40(a)(1), 761.65, 761.65(c)(5), 761.65(c)(8), and 761.205(a)(2), as set forth above and as alleged in the complaint.

3. In accordance with TSCA § 16, 15 U.S.C. § 2615, TSS is liable for a civil penalty for the violations found herein. "Ability to pay, and effect on ability to continue in business", which are sometimes considered as one factor, are among factors which § 16(2)(b) of the Act requires be considered in determining a penalty. It is concluded that, although Complainant has not shown that TSS has the ability to pay the proposed penalty, TSS has failed and refused to participate in a prehearing exchange and has deprived the ALJ of any evidentiary basis for assessing an alternate lower amount. The proposed penalty of $65,500 will be assessed.

Discussion

Although TSS did not mark the PCB containers located at its facility with the M_L label described at 40 CFR § 761.45, the containers did bear stickers indicating PCB content. The stickers accurately reflected PCB concentrations in the containers some of which were below the regulatory threshold of 50 ppm. Warning of the presence of PCBs is not, however, the sole purpose of the label requirement and it has been held that labels which, inter alia, do not contain advice to contact the nearest EPA office for disposal information may not be regarded as compliance with the requirement that PCB containers and equipment display the M_L label. In the Matter of Briggs & Stratton Corporation, TSCA Appeal No. 81-1, 1 EAD 653 (JO, February 4, 1981). The same rationale is applicable to labels which do not contain directions to contact the National Response Center and its telephone number in case of an accident or spill.

TSS has acknowledged that it did not have a formal procedure to inspect monthly the tanks and drums containing PCBs stored for disposal for leaks as required by 40 CFR § 761.65(c)(5). TSS alleges, however, that these containers were located in an area where they could be seen by employees on a daily basis and thus, that any and all leaks could be cured as they were discovered. The fact that transformers were frequently inspected for maintenance purposes, thus minimizing the risk that a leak would escape detection, was held to be a mitigating factor warranting a substantial reduction in the penalty for failing. to strictly follow the inspection and recordkeeping requirements of the use authorization regulation (40 CFR § 761.30(a)(1)(ix) and (xii)). See In re Ketchikan Pulp Company, Docket No. TSCA-X-86-01-14-

2615 (Initial Decision, December 8, 1986). While the allegation that the tanks and drums containing PCBs could be observed on a daily basis by TSS' employees may well be true, TSS is in default and has waived its right to present evidence to support this assertion. It is recognized that TSS has denied that it had encountered any leaks in the tanks and drums through the date of its answer and that there is no evidence to the contrary. The issue in assessing a penalty here, however, is not whether there was actual damage, but the potential for such damage.

TSS has asserted that, although it did not mark the PCB drums with the date the drums were placed in storage, it had internal records that would allow compilation of the proper information. The purpose of dating the drums is to facilitate enforcement of the one-year maximum storage requirement of 40 CFR § 761.65(a) and perhaps to remind management of when drums containing PCBs must be manifested for disposal. Viewed in this light, the fact that TSS may have records from which the date particular drums were placed in storage for disposal may be determined does little to advance the purpose of the dating requirement and prima facie warrants little or no reduction in the penalty. Be that as it may, by its default TSS has waived the right to present evidence to support its assertions.

TSS alleged that the PCB contaminated oil was in the tanks when the business was acquired and that "to the best of Mr. Einsterin's knowledge", it had not pumped any "high" PCB into the tanks. There is no evidence of PCBs at a concentration above 500 ppm and presumably by "high" PCB TSS means oil having a PCB concentration of between 50 ppm and 500 ppm. While it may seem anomalous to require batch records of the date and quantity of PCBs added to the tanks, if no PCBs were in fact added (40 CFR § 761.65(c)(8) does not expressly require negative entries), TSS has waived its right to present evidence in this regard.

Finally, TSS (Mr. Einsterin) alleged that he had assumed that the notification of PCB waste activity required by 40 CFR § 761.205 had been submitted by the prior owner of the business. Because § 761.205(a)(1) provides that all commercial storers, transporters, and disposers of PCB waste who were engaged in PCB waste handling activities on or prior to February 5, 1990 shall notify EPA of their PCB waste activities by filing EPA Form 7710-53 no later than April 4, 1990, there is some basis for Mr. Einsterin's assumption. Section 761. 205(a)(2), however, provides that commercial storers, transporters, and disposers of PCB waste who first engage in PCB waste handling activities after February 5,1990, shall notify EPA of their PCB waste

activities by filing EPA Form 7710-53 prior to engaging in PCB waste handling activities. Therefore, the requirement to notify EPA prior to engaging in PCB waste handling activities applied to TSS irrespective of whether the prior owner submitted such a notification. Mr. Einsterin's understanding in this respect and the basis therefor may demonstrate good faith or lack of culpability and are therefore relevant to the penalty determination. TSS by its default, however, has waived the right to present evidence relevant to these matters.

It has been concluded above that Complainant has not demonstrated that TSS has the ability to pay the proposed penalty of $65,500 and "ability to pay" is the only matter warranting further discussion. The Rules of Practice provide that, in the event of a finding of default, "...the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued on default...." 40 C.F.R. § 22.17(a). Notwithstanding the quoted language, at least one court has made it clear that the record in an appeal from a default order must reflect that the factors which the statute requires be taken into account in assessing a penalty were adequately considered. Katzson Bros., Inc. v. EPA, 839 F.2d 1396 (10th Cir. 1988). In reviewing an appeal from a default order, the Chief Judicial Officer has followed Katzson Bros. In re Beurge Feed and Seed, FIFRA Appeal No. 88-1 (CJO, August 31, 1988). In other contexts, however, the CJO has indicated that Katzson Bros should be followed only in the Tenth Circuit. In re Custom Chemical & Agricultural Consulting, Inc. And David H. Fulstone II, FIFRA Appeal No. 86-3, 2 EAD 748 (CJO, March 6, 1989), note 21.

Custom Chemical & Agricultural Consulting indicates that the problem of ability to pay can be addressed in the drafting of the complaint so that upon a respondent's default the facts alleged in the complaint, which are admitted by the default, include facts demonstrating an ability to pay the proposed penalty. Be that as it may, the complaint herein only alleges that the proposed penalty was determined in accordance with the PCB Penalty Policy (April 9, 1990) and the "Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act", published at 45 Fed. Reg. 59770 (September 10, 1980). TSS' admission of this allegation is not an admission of ability to pay any particular penalty amount and certainly not a penalty of the magnitude proposed here.

The Environmental Appeals Board has made it clear that, notwithstanding a respondent's default and the language of Rule

22.17(a), it is under no obligation to assess the penalty proposed in the complaint. In re Rybond, Inc., RCRA (3008) Appeal No. 95-3 (EAB, November 8, 1996). In Rybond the penalty assessed in the default order ($178,896) was reduced to $25,000. Here a penalty reduction of similar magnitude might be warranted based solely upon ability to pay considerations. The record, however, lacks an evidentiary basis for such a reduction and the penalty of $65,500 proposed in the complaint will be assessed.

ORDER

Transformer Substation Supply, Inc. having violated the PCB rule (40 CFR Part 761) and Section 15 of the Toxic Substances Control Act (15 U.S.C. § 2614) as alleged in the complaint, a penalty of $65,500 is assessed against it in accordance with Section 16 of the Act (15 U.S.C. § 2615).[6] Payment of the full amount of the penalty shall be made by sending a certified or cashier's check in the amount of $65,500 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk

EPA - Region III

P.O. Box 360515

Pittsburgh, PA 15251-6515

Dated this 21st day of October 1997.

Spencer T. Nissen

Administrative Law Judge

1. TSCA § 6(e), 15 U.S.C. § 2605(e) requires the Administrator to promulgate regulations concerning the storage, disposal, manufacture, process, distribution in commerce, or use of PCBs. TSCA § 15, 15 U.S.C. § 2614, makes it unlawful for any person to fail or refuse to comply with, inter alia, any rule promulgated under Sections 5 or 6 of the Act. TSCA § 16(a), 15 U.S.C. § 2615(a), provides that any person who violates a provision of section 15 shall be liable for a civil penalty not to exceed $25,000 per day of violation.

2. When a respondent wishes to contest any material fact upon which the complaint is based, the amount of a proposed penalty,

or considers that he is entitled to judgment as a matter of law, the Rules of Practice require the respondent to file a written answer with the Regional Hearing Clerk within 20 days after service of the complaint. Rule 22.15(a). Service of the complaint is complete when the return receipt is signed. Rule 22.07(c). The return receipt evidencing service on TSS is not part of the record herein. Complainant has, however, alleged that, although TSS' answer was to be filed with the Regional Hearing not later than January 18, 1994, TSS submitted an answer by facsimile on February 1, 1994, and the hard copy on March 15, 1994 (Motion for Default, Proposed Findings of Fact, ¶¶ 9.10, and 11). Complainant has not challenged consideration of the answer, however, and the answer is accepted.

3. "A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer." Rule 22.15(c).

4. The inspection report contains a statement that "EPA arrived on site on February 17, 1993." (Id. 1). It is concluded that this date is a typographical error.

5. The 1980 § 16 "penalty guidelines" contained a chapter entitled "PCB Penalty Policy" (45 Fed. Reg. 59776 et seq.).

6. In accordance with Rule 22.17(b) (40 CFR Part 22), this order constitutes an initial decision, which unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 or unless the EAB elects to review the same sua sponte as therein provided, will become the final decision of the EAB and of the Agency in accordance with Rule 22.27(c).