**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the matter of** | **)** | |
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| **Environmental Protection Services, Inc.,** | **)** | **Docket No. TSCA-03-2001-0331** |
| | **)** | |
| **Respondent** | **)** | |

## ORDER ON EPA'S MOTION FOR SANCTIONS

Complainant U.S. Environmental Protection Agency ("EPA") moves for sanctions against respondent Environmental Protection Services, Inc. ("EPS"), for respondent's alleged non-compliance with a discovery order issued by this tribunal. Alternatively, EPA requests the issuance of an order compelling compliance by respondent. EPS opposes this motion. For the reasons that follow, EPA's motion for sanctions is *granted in part* and *denied in part.*

## I. The Complaint

EPA issued an administrative complaint against EPS charging respondent with three violations of the Toxic Substances Control Act ("TSCA"). 15 U.S.C. § 2601 *et seq.* In the complaint, EPA asserts that respondent is a "commercial storer of PCB waste" as that term is defined at 40 C.F.R. Section 761.3. Compl. ¶ 6. EPA also asserts that "respondent stores, recycles and/or disposes, and at the time of the violations alleged in this Complaint, stored, recycled and/or disposed of electrical transformers, dielectric oil contaminated with polychlorinated biphenyls ('PCBs'), and PCB-contaminated scrap material at the EPS facility in Wheeling, West Virginia." *Id.*, ¶4.

As a result of two inspections of respondent's facility, EPA alleges the three TSCA violations which are at issue in this case. Count I involves the storage of PCB transformers allegedly in excess of an EPA-approved maximum storage capacity. In that regard, EPA charges that on July 15, 1999, EPS was storing at its facility 32 PCB transformers which had a total weight of 10,898 pounds and that on November 2, 1999, it was storing 16 PCB transformers which had a total weight of 15,360 pounds. Compl. ¶¶ 18 & 19. Accordingly, complainant alleges, "Respondent violated Condition B.1. of its EPA Approval to Commercially Store PCBs, required by 40 C.F.R. Section 761.65(d), by storing, on each of two separate occasions, PCB transformers in excess of Respondent's maximum storage capacity, and thereby committed a prohibited and unlawful act under TSCA Section 15(1)(C), 15 U.S..C. Section 2614(1)(C)." *Id.*, ¶20.

Count II involves the storage of capacitors allegedly in excess of the EPA-approved maximum storage capacity. EPA states that on July 9, 1999, EPS was storing at its facility 26,367 pounds of PCB capacitors. Compl. ¶ 22. EPA asserts that "Respondent violated

Condition B.1. of its EPA Approval to Commercially Store PCBs, required by 40 C.F.R. Section 761.65(d), by storing PCB capacitors in excess of Respondent's maximum storage capacity, and thereby committed a prohibited and unlawful act under TSCA Section 15(1)(C), 15 U.S.C. Section 2614(1)(C)." *Id*., ¶ 23.

Finally, Count III involves EPS's alleged failure to comply with PCB scrap metal recovery oven operation requirements. There, EPA submits that pursuant to 40 C.F.R. 761.72(a)(3), "any person may dispose of residual PCBs associated with PCB-contaminated articles regulated for disposal under Section 761.60(b), metal surfaces in PCB remediation waste regulated under Section 761.61, or metal surfaces in PCB bulk product waste regulated under Sections 761.62(a)(6) and 761.79(c)(6), from which all free-flowing liquids have been removed in a scrap metal recovery oven." Compl. ¶ 25. EPA further submits, "pursuant to 40 C.F.R. Section 761.72(a)(3), the primary chamber of such oven shall operate at a temperature between 537 degrees C (999 degrees F) and 650 degrees C (1,202 [degrees] F) for a minimum of two and a half hours and reach a minimum temperature of 650 degrees C (1,202 degrees F) once during each heating cycle or batch treatment of unheated, liquid-free equipment." *Id.* EPA charges that EPS violated 40 C.F.R. 761.72(a)(3), and thus Section 15(1)(C) of TSCA, 15 U.S.C. Section 2614(1)(C), by failing to operate the primary chamber of its scrap metal recovery oven in accordance with Section 761.72(a)(3) on twelve days during March, September, and October of 1999. *Id.* ¶¶ 26-28.

EPS filed an answer denying these charges.

## II. EPA's Discovery Request

Thereafter, EPA initiated discovery. Among complainant's discovery requests was the demand that respondent produce certain documents. On March 5, 2003, a discovery order was issued *granting in part* and *denying in part* EPA's request. EPA alleges non-compliance by EPS with this order.

## III. Evaluation of EPS's Alleged Non-Compliance With the Discovery Order

Request 1(a)

EPS was ordered to "[p]rovide the generator's name, the manufacturer, the serial number, the type of dielectric fluid shown on the name plate, the date each item was received, the size of each item, and the corresponding PCB concentration claimed by the generator and/or determined through direct analysis of the dielectric fluid." Order at 1-2.

In its motion for sanctions, EPA asserts that as ordered pursuant to Request 1(a), respondent failed to provide generator names, legible serial numbers, name plate information, PCB concentrations analysis data, the size of each item, the type of dielectric fluid, and the date of receipt. Mot. at 4. In response, EPS argues that it has fully complied with the discovery order.

On balance, it appears that EPS has complied with some, but not all, of the March 5 discovery order. Insofar as respondent is required to provide the "generator's name" and "serial number," Exhibits 4 and 5 which are attached to EPA's Motion for Sanctions, and Exhibits 2 and 3 which are attached to complainant's reply, show that in response to the discovery order EPS has provided material that is not completely legible. These attachments contain data which is not readable because it is covered by black markings. This response does not satisfy the ordered discovery. To the extent that respondent argues that it is in compliance here because such redacted versions had been provided to EPA in the past, apparently without objection, this argument is rejected. Simply put, the "blacked out" versions supplied to EPA in this instance do not satisfy the March 5 discovery order. Moreover, respondent's argument that it alone is the "generator" of the PCB waste, and thus it need not identify any other entity, is rejected as clearly being inconsistent with the spirit and letter of the discovery order as it relates to the "generator's name." *See* Resp. Reply at 4-5.

With respect to the "name plate information," EPS submits that while there is no requirement in 40 C.F.R. Part 761 that it maintain such data, it nonetheless already has provided this material to EPA.[1] EPS states that the name plate information is contained on the bar code sheets given to complainant. Resp. Reply at 6. EPA offers no specific rebuttal of respondent's explanation, except to argue that EPS did not provide the requested name plate information. Compl. Reply at 5-6.

In this regard, the parties' argument over the name plate information seems to be beside the point. As noted below (fn. 1), consistent with EPA's discovery motion, the name plate information ordered to be turned over involved the "type of dielectric fluid." As to this point, in its response, EPS states that it has previously advised EPA that all 1,287 units at issue used mineral oil, and not dielectric fluid. Aff. of Keith Reed (May 1, 2003), ¶ 60. Given this representation, it would appear that respondent is in compliance with the discovery order.

Next, EPA complains that EPS provided no information regarding the PCB concentrations analysis data. In response, EPS in part states, "[d]uring the settlement discussions and for a period of over 12 weeks, EPS provided all PCB levels on the units in question." Resp. Reply at 6. Accordingly, it is established that this information exists. Also, it has been determined this information is discoverable. Thus, respondent is directed to either provide "the PCB concentration claimed by the generator and/or determined through direct analysis of the dielectric fluid" to EPA no later than June 6, 2003, or to advise complainant as to where it might find this data in the material already provided.

Regarding the "size of each item," EPS asserts that it is in compliance. It states that the bar code sheets provided to EPA contain "the KVA rating of the unit, which is the size of the

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[1] The March 5, 2003, discovery order actually references, "the type of dielectric fluid shown on the name plate."

unit number." Resp. Reply at 6. EPA offers no argument to the contrary. Thus, it is held that respondent has complied with the ordered discovery as it relates to the size of each item.

Finally, with respect to Request 1(a), EPA argues that respondent provided no information regarding the date on which each item was received. Mot. at 4. EPS does not address this argument. Accordingly, it is found that EPS is in non-compliance with this portion of the discovery order.

Request 1(b)

Here, respondent was directed to "[p]rovide manifests for all items sent to EPS which were decontaminated by EPS in calendar year 1999." EPA submits that no manifests were provided in response to this order. Mot. at 4. Essentially, EPS's response is that because the units came in untested for disposal "**manifests were not required.**" Resp. Reply at 9 (emphasis in original). Regardless as to whether there is a legal requirement to maintain such manifests, EPS was ordered to provide EPA with the manifests that it did have. Accordingly, to the extent that respondent has this information it is to be furnished to EPA no later than June 6, 2003.

Request 1(c)

This discovery item requires respondent to "[p]rovide the date, location and method of disposal for each bar code item." In response, EPS submits that in its prehearing exchange "Complainant included all of the furnace records, which included the time and dates of each burn cycle." Aff. of Keith Reed (April 30, 2003), ¶ 64. EPA does not dispute this assertion. Thus, it appears that EPS has indeed complied with discovery Request 1(c).

Request 1(d)

EPA maintains that EPS did not provide "the certificates of disposal" as referred to in Request 1(d). EPS's only response is that as a result of EPA's Second Amendment of the Complaint, this information no longer is relevant. Resp. Reply at 11. Despite the fact that EPA does not address this argument, respondent's argument lacks merit. The manner in which EPA amended the complaint does not relieve EPS from complying with this discovery request as ordered.

Request 2

In the March 5, 2003, discovery order, EPS was directed to provide "documents which list each source, PCB concentration, and volume of dielectric fluid which were commingled and sampled in March, September, and October, 1999, and which are represented by the batch testing sampling results submitted to complainant as an attachment to respondent's Motion to Dismiss." Order at 2. EPA now argues that respondent failed to provide any documents for the months of March and September, 1999, and, without explanation, states that the documents which EPS provided for October of 1999, were either incomplete or non-responsive. Mot. at 5.

In response, citing to Section 22 of Keith Reed's affidavit, EPS apparently states that it has provided the requested information to EPA. EPS also states that it "does not have the volume of fluid." Resp. Reply at 12-13. Despite the lack of clarity of EPS's response, EPA fails to take issue with any of the representations made by respondent. Accordingly, there is insufficient information upon which to base a determination that EPS failed to comply with Request 2 of the discovery order.

Request 3(a)

EPS was ordered to "[p]rovide the written record of the documentation procedures used to decontaminate PCB transformers or PCB-contaminated transformers received by EPS for calendar year 1999, including photographs and videotapes." Order at 2. EPA takes issue with an undated document provided by respondent. Mot. at 5. EPS, in turn, represents that the document provided to EPA is the only document which it has that is relevant to this request. Resp. Reply
at 14. Apparently accepting this representation, EPA offers no reply. Accordingly, it is found that respondent has complied with Request 3(a).

Requests 3(b), (c), & (d)

In Request 3(b), EPS was ordered to provide "manifests for all items sent to EPS which were decontaminated by EPS in calendar year 1999;" in Request 3(c), respondent was ordered to provide "certificates of disposal for all items decontaminated by EPS in 1999;" and in request 3(d), it was ordered to provide "the identifying bar codes for each transformer that respondent claims was not subject to the EPA Approval to Commercially Store PCB Waste because it had been decontaminated in accordance with 40 C.F.R. 761.79." Order at 2. EPA alleges non-compliance with Requests 3(b), (c), and (d). Mot. at 5-6.

Subsequent to EPA's motion for sanctions for non-compliance with the discovery order, EPS filed a Motion for Clarification of the March 5, 2003, discovery order. With respect to the motion for clarification, respondent stipulated that "no units subject to Count III of the Amended Complaint were decontaminated." Resp. Surreply at 3; *see* Mot. at 1 ("No decontaminated units were included in any of the burns, which are the subject of Count III of the Complaint.")

In light of this stipulation, EPA is willing to withdraw its request for manifests of the items decontaminated by EPS in 1999, as well the identifying bar codes for any decontaminated transformers, "so long as Respondent provides 'certificates of disposal for all items decontaminated by EPS in 1999,' and includes corresponding bar code information for the transformers referenced in those certificates of disposal." Compl. Resp. at 1-2 (fns. omitted). EPS replied to EPA's suggestion and respondent's reference to complainant's "fishing expedition" apparently signals its strong objection. Resp. at 4.

Given the events that have occurred after the issuance of the March 5, 2003, discovery order, it would appear that the only outstanding discovery issue involves the certificates of

disposal and any related bar codes as they embrace Count I. Concerning this issue, respondent represents that it does not maintain copies of certificates of disposal issued to customers. Resp. Reply at 17. The discovery order, however, is not so narrow and it is not limited to disposal certificates issued only to customers. To the extent that EPS maintains disposal records of items decontaminated by respondent in 1999, it is to provide this information to EPA, along with any related bar code information, insofar as such records relate to Count I.

Requests 4(a), (b), and (c)

With respect to Request 4(a), EPS was ordered to "[p]rovide documents or diagrams which depict the exact location of the monitoring point(s) used by respondent to measure the temperature of the primary chamber;" with respect to Request 4(b), to "[p]rovide a dimensioned drawing showing the location of the burner, all air inlets, the exhaust gas outlet, the temperature monitoring device(s) and the approximate location of the scrap being treated;" and with respect to Request 4(c), to "[p]rovide a description of the temperature measurement used, steps taken to ensure that the device accurately portrays the bulk gas temperature, the capacity of all fans (both combustion and exhaust fans and a description of how those flows are regulated)." Order at 2.

EPA argues that EPS provided no documentation in response to Requests 4(a), (b), and (c). Mot. at 6. With respect to 4(a), 4(b), and 4(c), EPS submits that "[n]o documents responsive to this request exist." Resp. Reply at 20-21. EPA does not dispute this representation. In addition, in his affidavit of April 30, 2003, Keith Reed states that no such documents exist. Aff. at ¶ 72. Accordingly, there is no basis to find that EPS did not comply with Requests 4(a), (b), and (c) of the discovery order.

Request 4(d)

As for this item, EPS was ordered to "[p]rovide all data on which respondent bases its assertion that actual temperatures in the primary chamber are 150 degrees higher than measured and reported to EPA." Order at 3. EPA submits that, "[d]espite the fact Respondent provided data to the EPA inspector regarding furnace temperatures with a note that furnace temperatures were actually 150 degrees higher than recorded (See Complainant's Prehearing Exchange Exhibit 19), Respondent now states that no documents exist which support that assertion." Mot. at 6 (emphasis deleted).

In response, EPS reasserts that no documents exist as described in Request 4(d), "and no such document was ever shown to EPA's inspectors." Resp. Reply at 21. This statement is supported by the April 30, 2003, affidavit of Keith Reed. Aff. at ¶ 73. Finally, Complainant's Exhibit 19 is a civil penalty assessment worksheet and this does not support EPA's argument that respondent failed to comply with Request 4(d). Accordingly, EPA has not established non-compliance with the discovery order.

## IV. Order

To the extent that respondent EPS is found not to be in compliance with this tribunal's discovery order of March 5, 2003, as set forth above, the parties will have the opportunity to address the appropriate sanction to be assessed at the start of the hearing on June 17, 2003. Subsequent compliance by the respondent with this discovery order will carry considerable weight.

Carl C. Charneski
Administrative Law Judge

Issued: June 3, 2003
Washington, D.C.