UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Watervliet Paper Company, Inc.,	)	Docket No. TSCA-V-C-098-88
	)	
Respondent	)	

ORDER ON DEFAULT

This is a proceeding under the Toxic Substances Control Act Section 2615(a) for the assessment of civil penalties for violations of the EPA's regulations governing the manufacturing, processing, distribution and use of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761. [1] The EPA, Region V, instituted the proceeding by filing a complaint on August 2, 1988, charging Respondent Watervliet Paper Company, Inc. with the failure to develop and maintain PCB records, to register PCB transformers with local fire response personnel, to remove combustible materials from

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[1] TSCA, section 16(a) of the Act, provides as follows:

(1) Civil. (1) Any person who violates a provision of section 2614 . . . shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title.

Section 15 of the Act, 15 U.S.C. 2614, provides in pertinent part that "It shall be unlawful for any person to . . . (1) fail or refuse to comply with . . . (C) any rule promulgated or order issued under section 2604 or 2605 of this title . . . ." The PCB Ban Rule was issued under section 6(e) of the Act, 15 U.S.C. 2605(e).

within 5 meters of PCB transformers, and to mark the means of access to its PCB transformers. A penalty of $29,000 was requested. Respondent answered, admitting that the PCB records were incomplete and that Respondent had failed to formally notify the local fire department. Respondent denied storage of combustibles within five meters of its PCB transformers. Respondent admitted that the means of access to PCB transformers was not properly marked. Respondent contended that the proposed penalty was unreasonably large, and stated that it corrected some of the violations upon receipt of the EPA's complaint. The matter is before me on the question of whether to issue a default order as authorized by 40 C.F.R. section 22.17.

Respondent did not request a hearing, but asserted in its answer its belief that it is in full compliance with EPA regulations as of the date of filing its answer, that as a first offense it should not be fined, and that the matter should be considered settled. I was designated by my Order dated September 19, 1988 to preside in this proceeding. On October 5, 1988, I wrote the parties directing the filing of a prehearing exchange by December 6, 1988, unless the case were settled. Complainant filed its prehearing exchange on December 6, 1988. On December 20, 1988, the parties were advised that Respondent was provided until January 3, 1989 to file its prehearing exchange. Upon notification that Respondent retained an attorney, Complainant requested an extension of time for Respondent's prehearing exchange, which was granted to March 20, 1989, by my Order dated January 25, 1989.

Complainant warned Respondent's attorney by letter dated January 19, 1989 that if Respondent does not file "a Pre-Hearing Exchange or a statement that Watervliet Paper Company, Inc., is financially unable to pay the proposed penalty within sixty days," Complainant would be compelled to file a Motion for Default. On March 14, 1989, Respondent filed a Statement of Financial Inability to Pay Penalties, requesting dismissal of the complaint, and enclosing a copy of a petition in bankruptcy under Chapter XI of the Bankruptcy Code. By my Order of May 25, 1989, Respondent's request for dismissal of the proceedings was denied. Complainant filed a Motion for Default Order on June 23, 1989, to which no opposition has been filed. Assuming that Respondent's filings could be interpreted as Respondent seeking dismissal solely on grounds of the bankruptcy proceedings, the EPA would still be entitled to an order, albeit the matter is really one for accelerated decision, for the reasons hereinafter stated.

The issue is whether this proceeding is subject to the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362. Because this is a proceeding to assess a civil penalty for failure to comply with the environmental laws, this proceeding is excluded from the stay provisions by 11 U.S.C. 362(b)(4) and (b)(5).

The legislative history of 11 U.S.C. section 362(b)(4) states that: "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting

to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H. Rep. No. 595, 95th Cong., 2nd Sess. 343, reprinted in 1978 U.S. Code Cong. & Adm. News 5787, 5963, 6299 (emphasis added). The legislative history of 11 U.S.C. section 362(b)(5) states that "the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment." S. Rep. No. 989, 95th Cong, 2nd Sess. 52, reprinted in U.S. Code Cong. & Adm. News 5787, 5838 (emphasis added).

In In re Commonwealth Oil Refining Co., 805 F.2d 1175 (5th Cir. 1986), cert. denied, _____ U.S. _____, 107 S.Ct. 3228, 97 L.Ed 2d 734 (1987), the court held that EPA was entitled to enforce its order requiring compliance by a debtor with the provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. sections 6901-6991. The court noted that "the police and regulatory exceptions [to the automatic stay] do not depend on a showing of imminent and identifiable harm or urgent public necessity" in response to the company's contention that the EPA's action was merely one to correct "technical violations," Id. at 1182, 1184. See also, United States v. Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986)(proceeding under the Clean Air Act and Clean Water Act was held exempt from the automatic stay provision); U.S. v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 (3rd Cir. 1987) (Chapter XI petition and economic infeasibility held not to relieve company of compliance schedule mandated by consent decree under

Clean Air Act). See also, Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267 (3d Cir. 1984)(state proceeding to compel debtor to correct environmental damage not automatically stayed); NLRB v. Evans Publishing Co., 639 F.2d 291 (5th Cir. 1981) and Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23 (1st Cir. 1983)(unfair labor practice proceedings before NLRB against debtor for reinstatement of employees and for back pay not automatically stayed); In re: Tauscher, 7 Bankr. 918 (E.D. Wisc. 1981)(proceeding to assess civil penalties against debtor for violation of Fair Labor Standards Acts not automatically stayed); Kovacs v. Ohio, 717 F.2d 984, 988 (6th Cir. 1983), aff'd., 469 U.S. 274 (1985)("a money penalty assessed . . . for the environmental damage . . . caused . . . would not have been subject to the automatic stay of [11 U.S.C] Section 362, although enforcement of the assessment would have been stayed."). See also, Order on Default, In the Matter of Electric Utilities Company, Docket No. TSCA-V-C-011, dated February 13, 1985.

Respondent has asserted in its letter dated March 14, 1989 to Complainant that Respondent is unable to make any payments on the proposed penalty due to the filing of the bankruptcy petition on October 13, 1988. [2] Arguably, this proceeding could be dismissed as moot; however, it is not moot for several reasons, as also

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[2] See Complainant's Motion for a Default Order, Exhibit 7. Respondent's Order for Relief under Chapter 11 of the Bankruptcy Code was granted on December 23, 1988.

stated in my Order on Default, In the Matter of Electric Utilities Company, supra.

First, the assessment of a civil penalty reduces the claim to a fixed amount against Respondent for purposes of determining its treatment in the plan of reorganization. It is then for the Bankruptcy Court to decide how to treat the claim under the Chapter XI plan.

Second, the EPA is entitled to a resolution of the merits of its charges. [3] A Chapter XI proceeding contemplates Respondent's continued operation in some reorganized form; therefore, the resolution of this matter is significant in order to carry out the purposes of TSCA.

Finally, this proceeding may be relevant in the event that the reorganized company is cited again for a violation of TSCA, since account must be taken of a respondent's prior history of violations in the process of assessing a civil penalty. [4]

As to whether Complainant has presented sufficient evidence to establish a prima facie case against Respondent, [5] Complainant has supplied a PCB Compliance Inspection Report which summarizes

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[3] See Ahrens Aircraft v. NLRB, 703 F.2d at 23, and NLRB v. Autotronics, Inc., 434 F.2d 651 (8th Cir. 1979). (The fact that the company had undergone Chapter XI proceedings "does not alter [the Eighth Circuit] court's jurisdiction to review the merits of the Board's order or to consider enforcement of it.")

[4] TSCA, section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B).

[5] While Complainant is not required to establish a prima facie case under the Rules of Practice, 40 C.F.R. Section 22.17(a), I address this issue nevertheless since Complainant has produced sufficient information to make this determination.

in detail the TSCA violations listed herein. [6] This Report is based on an inspection performed by the Michigan Department of Natural Resources, Waste Management Division, on February 23, 1988. The results of the inspection as summarized in the Report fully support the allegations made in the complaint. In its answer, Respondent admitted to all of the facts alleged in the complaint. While Respondent maintains in its answer that it "did not and does not store combustible materials within five meters of it's [sic] P.C.B. transformers," [7] Respondent does admit that "at times [employees] may place a piece of cardboard, a rag or a piece of plywood on the floor or a bench on the steel balcony grating for a place to sit down." [8] According to the PCB Compliance Inspection Report, the combustible materials, which included wood wire spools and some old rags, were "stored on the deck with the transformers," within five meters of the transformers. [9] I find that Respondent has not successfully rebutted the allegations made in the complaint; therefore Complainant has established a prima facie case.

Accordingly, Respondent is found in default for failure to make the prehearing exchange directed in my letters of October 5, 1988 and December 20, 1988. While Respondent did make a response

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[6] See supra, p. 1-2, infra, p. 6-7; Complainant's Prehearing Exchange Exhibit 1.

[7] Answer, p. 2.

[8] Id.

[9] Complainant's Prehearing Exchange, Exhibit 1, p. 6.

in submitting its Statement of Financial Inability to Pay Penalties, this submission does not constitute an adequate prehearing exchange as outlined in my letter of October 5, 1988. In the alternative, Complainant is entitled to an accelerated decision against Respondent. The findings of fact as set forth below are based not only on admissions in Respondent's answer but on information contained in Complainant's prehearing exchange, which is incorporated into the record in this proceeding.

Findings of Fact

1. On or about February 23, 1988, Respondent had not developed or maintained complete annual records on the disposition of its two pyranol PCB transformers and 30 PCB large capacitors for calendar years 1978 through 1986, as required by 40 C.F.R. section 761.80.
2. Respondent had not registered its two PCB transformers with local fire response personnel by December 1, 1985 as required by 40 C.F.R. section 761.30(a)(1)(vi).
3. On or about February 23, 1988, combustible materials, including wood wire spools and some old rags, were located within five meters of said transformers, as prohibited by 40 C.F.R. section 761.30(a)(1)(viii).
4. On or about February 23, 1988, the means of access to said transformers, a doorway to the patio substation in which said transformers are stored, was not marked with the PCB label as required by 40 C.F.R. section 761.40(j).

Conclusions of Law

1. Respondent has failed to develop or maintain complete annual records on PCB items in violation of 40 C.F.R. section 761,189(a), and TSCA, section 15, 15 U.S.C. section 2614.
2. Respondent has failed to register its PCB transformers with local fire response personnel in violation of 40 C.F.R. section 761.30(a)(1)(vi) and TSCA, section 15, 15 U.S.C. section 2614.
3. Respondent has failed to remove combustible material from within five meters of PCB transformers in violation of 40 C.F.R. section 761.30a)(1)(viii) and TSCA, section 15, 15 U.S.C. section 2614.
4. Respondent has failed to mark the means of access to its PCB transformers in violation of 40 C.F.R. section 761.40(j), and TSCA, section 15, 15 U.S.C. 2614.

The Penalty

Pursuant to 40 C.F.R. 22.17(a), the penalty proposed in the complaint of $29,000 is the penalty assessed. It is recognized that TSCA specifies that in determining the appropriate penalty, account must be taken of Respondent's ability to pay. [10] The bankruptcy proceeding presents a special case, and the issue of Respondent's ability to pay would seem to be merged into the question before the Bankruptcy Court of how the claim is to be treated under the reorganization plan.

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[10] TSCA, section 16(a)(2)(B).

ORDER [11]

Pursuant to section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of $29,000 is hereby assessed against Respondent, Watervliet Paper Co., Inc., for violations of the Act found herein.

Payment of the full amount of the penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of America and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Gerald Harwood
Chief Administrative Law Judge

DATED: August 21, 1989
Washington, D.C.

[11] Unless an appeal is taken pursuant to 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Default Order shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).