



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

September 28, 2007

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable Mayor Warren D. Ludeman
City of Flandreau
1005 W. Elm Avenue
P.O. Box 343
Flandreau, SD 57028-0343

Re: In the Matter of City of Flandreau
Docket No. TSCA-08-2007-0016
Administrative Complaint and Notice of Opportunity for Hearing

Dear Mayor Ludeman:

Enclosed is an Administrative Complaint and Notice of Opportunity for Hearing (Complaint) filed by the U.S. Environmental Protection Agency (EPA) against the City of Flandreau, SD (City) pursuant to its authority under section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615. EPA alleges in the Complaint that the City of Flandreau's facility in Flandreau, South Dakota violated the polychlorinated biphenyls (PCB) requirements set forth at 40 C.F.R. part 761.

Specifically, the Complaint alleges that the City of Flandreau violated TSCA section 15, 15 U.S.C. §2614, and the regulations at 40 C.F.R. §§761.60(a), 761.65(b), 761.65(c)(5), and 761.180(a) requiring: the proper disposal of PCBs; the proper storage of PCB containers; 30 day inspections of PCB containers in storage for disposal, the immediate cleanup of PCB leaks and spills, the transfer of PCBs in leaking containers into non-leaking containers; and, the keeping of annual records and an annual log. These violations were discovered during an inspection of the City's facility on August 8, 2006. The Complaint proposes a total penalty of \$34,500 for the alleged violations.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an answer set forth in 40 C.F.R. §§22.15 and 22.38. If you wish to contest the allegations in the

Complaint or the penalty proposed in the Complaint, you must file a written answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129


If you fail to request a hearing, you will waive your right to formally contest any of the allegations set forth in the Complaint. If you fail to file a written answer or pay the proposed penalty within the time limits, a default judgment may be entered pursuant to 40 C.F.R. §22.17. This judgment may impose the penalty proposed in the Complaint.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people at EPA regarding this matter are Richard H. Baird and Kim Le. Mr. Baird is in our Legal Enforcement Program and can be reached at (303) 312-6642. Kim Le is in our TSCA Enforcement Program and can be reached at (303) 312-6973.

We urge your prompt attention to this matter.

Sincerely,



Martin Hestmark, Director
Air & Toxics Technical Enforcement Program
Office of Enforcement, Compliance and
Environmental Justice

Enclosures: Complaint and Notice of Opportunity for Hearing

cc: Chuck Jones, City Administrator
William J. Ellingson, Esq.
Richard H. Baird, Esq., 8ENF-L
Kim Le, 8ENF-AT
Brenda Cazier, 8ENF-PT



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2007 SEP 28 AM 10:46

EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
City of Flandreau)
1005 W. Elm Avenue)
Flandreau, SD 57028-0343)
)
)
Respondent.)
)
_____)

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

Docket No. **TSCA-08-2007-0016**

COMPLAINT

This is a civil administrative action (Complaint) commenced and concluded under the authority granted to the Administrator of the United States Environmental Protection Agency (EPA) by section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615, as properly delegated to the undersigned EPA officials. This proceeding is subject to EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Rules of Practice)," 40 C.F.R. Part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

The following general allegations apply to each count below.

1. Respondent, City of Flandreau, South Dakota, is a "person" within the meaning of 40 C.F.R. §761.3 and is thus subject to regulation.
2. Respondent was at all times relevant to this action, the owner or operator of a facility located at 1005 West Elm Avenue, Flandreau, South Dakota 57028-0343 (Facility).
3. On or about August 8, 2006, Ms. Kim P. Le, an authorized EPA inspector, conducted an inspection of the Facility, with the consent of Respondent, to determine compliance with TSCA and EPA regulations relating to polychlorinated biphenyls (PCBs), 40 C.F.R. part 761. Notices of inspection and confidentiality for the inspection were issued to and signed by Donald W. Johnston, a representative of Respondent.

4. The PCB regulations define "disposal" of PCBs to include "spills, leaks, and other uncontrolled discharges of PCBs...." 40 C.F.R. §761.3.
5. The PCB regulations require that PCBs, as defined at 40 C.F.R. §761.3, be disposed of by the incineration or burial methods specified in the regulations. 40 C.F.R. §761.60.
6. The PCB regulations define the term "leak or leaking" to mean any instance in which a PCB Article, PCB Container, or PCB Equipment has PCBs on any portion of its external surface. 40 C.F.R. §761.3.
7. The PCB regulations define the term "PCB Contaminated Electrical Equipment" as "any electrical equipment including, but not limited to, transformers . . . that contain[s] PCBs at concentrations of ≥ 50 ppm and < 500 ppm in the contaminating fluid . . ." 40 C.F.R. § 761.3.
8. The PCB regulations define the term "PCB Container" to mean any package. . . barrel, drum, tank or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs." 40 C.F.R. §761.3.
9. The PCB regulations define the term "PCB Item" to mean "any PCB Article, PCB Article Container, PCB Container, PCB Equipment, or anything that deliberately or unintentionally contains or has as a part of it any PCB or PCBs. 40 C.F.R. §761.3.
10. The PCB regulations define the term "PCB Transformer" to mean "any transformer that contains ≥ 500 ppm PCBs.

COUNT 1
(Improper Disposal of PCBs)

11. The PCB regulations require mineral oil dielectric fluid with concentrations ≥ 50 ppm PCBs and < 500 ppm PCBs to be disposed of in an incinerator or a high efficiency boiler. 40 C.F.R. §761.60(a)(1).
12. On or about August 8, 2006, Respondent's Facility contained two General Electric (GE) transformers identified with serial numbers B460811 and 9385213 which were marked as "PCB Contaminated" and stored in a field behind the Facility.
13. On or about August 8, 2006, EPA's inspector observed that the two transformers identified in paragraph 12 above were leaking PCBs; with GE transformer serial number B460811 showing a leak of PCBs from its top seal that had spread on the outside of the transformer in an area approximately 18 inches by 5 inches, and with GE transformer serial number 9385213 showing a leak of PCBs from its valve that had spread approximately 4 inches by 5 inches.

14. Respondent's above-described conduct, resulting in a leak of PCBs from a PCB Container, as prohibited by 40 C.F.R. §761.60(a), constitutes a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT 2

(Failure to Keep Annual Records and Log)

15. The PCB regulations require that the owner or operator of a facility using or storing at any one time at least 44 kilograms or 99.4 pounds of PCBs contained in PCB Containers, or one or more PCB Transformers must maintain annual records and an annual document log that is available for inspection by EPA. 40 C.F.R. §761.180(a).
16. On or about August 8, 2006, Respondent was storing at the Facility at least one PCB Transformer, identified as a GE transformer serial number 6958283, and was storing more than 99.4 pounds of PCBs in thirteen (13) PCB transformers marked as PCB Contaminated.
17. On or about August 8, 2006, EPA's inspector requested to see Respondent's annual records and annual document log. Respondent was only able to produce a transformer oil test performed on some of Respondent's transformers and not the annual records or the annual document log.
18. Respondent's failure to maintain the annual records and the annual log is a violation of 40 C.F.R. §761.180(a).

COUNT 3

(Failure to Properly Store PCB Items)

19. The PCB regulations require that owners or operators of facilities used for the storage of PCBs and PCB Items designated for disposal shall have storage units with, including but not limited to, adequate roof and walls to prevent rain water from reaching the stored PCBs and PCB Items and adequate floors. 40 C.F.R. §761.65(b).
20. On or about August 8, 2006 Respondent was storing PCB Items, including fourteen PCB Contaminated transformers, at the Facility in the outdoors in a location that had no roof, no walls and no floor.
21. Respondent's representative, Donald W. Johnston, Utilities & Public Works Superintendent, provided a signed and written statement that the PCB Contaminated transformers stored "at the open air City lot" were being stored "for disposal".

22. Respondent's failure to properly store PCB Items at the Facility is a violation of 40 C.F.R. §761.65(b).

COUNT 4
(Failure to Conduct 30 Day Inspections)

23. The PCB regulations require that PCB Items in storage for disposal be checked for leaks at least once every 30 days and that any leaking PCB Items and their contents shall be transferred immediately to properly marked non-leaking containers, that any spilled or leaked material shall be immediately cleaned up and that records of the inspections, maintenance and cleanup be maintained. 40 C.F.R. §761.65(c)(5).
24. On or about August 8, 2006, Respondent had PCB Items in storage for disposal at the Facility.
25. On or about August 8, 2006 EPA's Inspector asked to see Respondent's records of its 30 day inspections and Respondent was unable to produce any such records.
26. On or about August 8, 2006 Respondent had two PCB Items in storage for disposal at the Facility that were leaking where the leaks had not been cleaned up and the contents of the leaking PCB Items had not been transferred to properly marked non-leaking containers.
27. Respondent's failure to conduct 30 day inspections on PCB Items in storage for disposal, failure to immediately cleanup leaking PCB Items and failure to transfer the contents of the leaking PCB Items to properly marked non-leaking containers is a violation of 40 C.F.R. §761.65(c)(5).

PROPOSED TSCA PENALTY

Section 16 of TSCA, 15 U.S.C. § 2615, and the regulations promulgated under section 6 of TSCA, 15 U.S.C. §2605, authorize the assessment of a civil penalty of up to \$32,500 per day of violation for each violation of TSCA. EPA's actions with respect to the assessment of civil penalties are guided by its Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990, which provides a rational and consistent method for applying the TSCA statutory factors to the circumstances of a specific case, a copy of which is enclosed.

In arriving at a penalty for this matter, EPA took into consideration those factors required by section 16(a)(2)(B) of TSCA, 15 U.S.C. §2615(a)(2)(b), which include: the nature, circumstances, extent, and gravity of the violation, and, with respect to respondent, the ability to pay, effect on ability to continue to do business, any history of prior violations, degree of culpability, and other matters as justice may require. Based on the nature of these violations, including the actual or potential introduction of PCBs into

the environment and/or exposure to humans, EPA proposes a penalty for the violations alleged in this Complaint of \$34,500, as shown below:

<u>COUNT</u>	<u>VIOLATION</u>	<u>PENALTY</u>
1	Improper Disposal of PCBs	\$ 1,500
2	Failure to Keep Annual Records and Log	\$10,000
3.	Failure to Properly Store PCB Items	\$13,000
4.	Failure to Conduct 30 Day Inspections	\$10,000
TOTAL PROPOSED PENALTY		\$34,500

NOTICE OF OPPORTUNITY FOR A HEARING

Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

To disagree with the Complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk, U. S. EPA, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, within 30 days of receiving this Complaint. The answer must clearly admit, deny or explain the factual allegations of the Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

Respondent may resolve this proceeding at any time by paying the specific penalty proposed in the Complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this Complaint, payment must be made, within thirty (30) calendar days of receipt of this Complaint, by sending a certified or cashier's check payable to "Treasurer, United States

of America," by one of the following methods and referencing EPA Region 8 and the Docket No. of this matter:

By U.S. Mail

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

By Wire Transfer

Wire transfers should be directed to the Federal Reserve
Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

By Overnight Mail

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

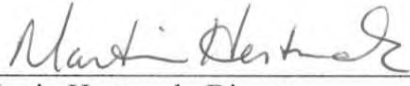
A copy of the check must be mailed simultaneously to Richard H. Baird, at the address listed below.

SETTLEMENT NEGOTIATIONS

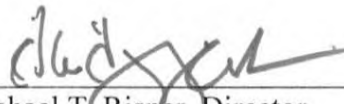
EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Mr. Richard H. Baird at (303)312-6642, or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

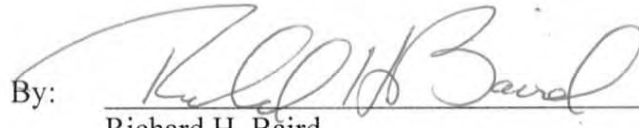
Date: 9/28/07

By: 
Martin Hestmark, Director
Technical Enforcement Program

Date: 9.27.07

By: 
Michael T. Risner, Director
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program
303-312-6917
Janik.David@epa.gov

Date: 9/28/07

By: 
Richard H. Baird
Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street, 8ENF-L
Denver, Colorado 80202-1129
Colorado Bar # 29718
Phone: (303)-312-6642
FAX: (303) 312-7202
Baird.Richard@epa.gov

ATTACHMENTS

Consolidated Rules of Practice, 40 C.F.R. Part 22
EPA PCB Penalty Policy dated April 9, 1990

IN THE MATTER OF: City of Flandreau
EPA Docket No. TSCA-08-2007-0016

CERTIFICATE OF SERVICE

I hereby certify that the attached COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING dated was served as follows:

The original and one copy was hand carried to:

Regional Hearing Clerk
U.S. EPA, Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

A copy was sent via CERTIFIED MAIL, RETURN RECEIPT REQUESTED, postage prepaid, to:

Honorable Mayor Warren D. Ludeman
City of Flandreau
1005 W. Elm Avenue
P.O. Box 343
Flandreau, SD 57028-0343

Chuck Jones, City Administrator
City of Flandreau
1005 W. Elm Avenue
P.O. Box 343
Flandreau, SD 57028-0343

William J. Ellingson, Esq.,
P.O. Box 324
Flandreau, SD 57028

9/28/07
Date

Ms. Judith McTernan
Ms. Judith McTernan

1st Page Only

POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

United States Environmental Protection Agency

April 9, 1990

Environmental Protection Agency

Pt. 22

will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec.
- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
- 22.8 *Ex parte* discussion of proceeding.
- 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

- 22.29 Appeal from or review of interlocutory orders or rulings.
- 22.30 Appeal from or review of initial decision.

Subpart G—Final Order

- 22.31 Final order.
- 22.32 Motion to reconsider a final order.

Subpart H—Supplemental Rules

- 22.33 [Reserved]
- 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.
- 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.
- 22.36 [Reserved]
- 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.
- 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.
- 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
- 22.40 [Reserved]
- 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).
- 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public