

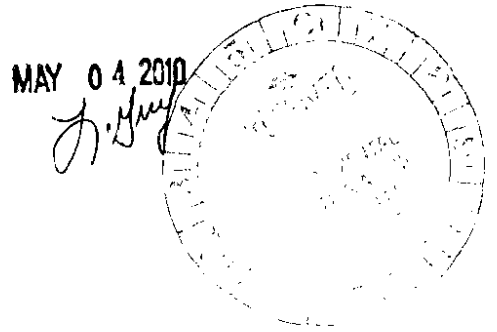
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May 3, 2010

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S.E.P.A. Region III
1650 Arch St.
Philadelphia, PA 19103-2029




In the Matter of Cycle Chem, Inc.
Us EPA Docket No.: TSCA-03-2009-0209

Dear Ms. Guy:

I am counsel for the respondent in the above-entitled matter. I enclose for filing an original and one copy of Respondent's Prehearing Exchange with proof of service.

Thank you.

Very truly yours,


James M. Hazen

JMH:kr
Encl.
cc w/ encl.:
Judge William B. Moran
A.J. D'Angelo, Esq.

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY REGION III

In the Matter of:

U.S.EPA Docket No.
TSCA-03-2009-0209

Cycle Chem, Inc.
201 S. First Street
Elizabeth, New Jersey
07206

PREHEARING EXCHANGE

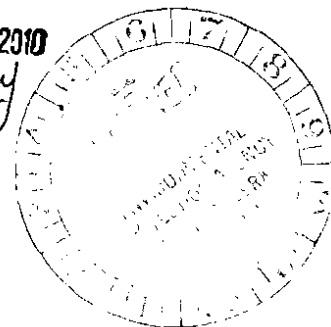
Respondent.

Cycle Chem, Inc.
550 Industrial Drive
Lewisberry, Pennsylvania 17339

Facility.

MAY 04 2010

J. Gray



Respondent, by its attorney, James M. Hazen, Esq., as and for its
Prehearing Exchange, states as follows:

1. List of all expert and other witnesses attached, with a brief,
narrative summary of their expected testimony.

Copies of all documents and exhibits it intends to introduce into
evidence, including a resume for each proposed expert witness,

attached, except for those documents not in its possession to be subpoenaed.

2.-3. Not applicable to Respondent.

4. We prefer Philadelphia for the place of the hearing, where the EPA office involved is located. We would be available for the hearing June 16-18, July 12-14, 26-30 (except for one-half day for appellate argument in Philadelphia not yet scheduled by the Third Circuit), August 9-13, 23-27, September 7-10 and 20-24, October 5-8 and 18-22. Beyond the next six months, we find it difficult to predict availability. We expect that our case will take two days to present.

Dated:

May 3, 2010

A handwritten signature in cursive script, appearing to read "J. M. Hazen", written over a horizontal line.

James M. Hazen

Respondent's Document Exchange

RCRA Permit

RCRA Permit Modification

September 25, 2003 Inspection Report

January 5, 2006 letter Ventura to Shaner

February 6, 2006 letter Shaner to Ventura

June 25, 2007 Inspection Report

January 15, 2009 letter Miller to Yussen

2004 PCB logs

2005 PCB logs

2006 PCB logs

2007 PCB logs

(All including manifests for each shipment entered in PCB logs and
Certificates of Disposal for each shipment entered in PCB logs)

Pumpsheet ID 3272

August 13, 2007 Inventory Search Results

March 31, 1991 Closure plan

April 1, 1999 Request for Transfer of permit with accompanying information,
including new PCB Notification Form

September 19, 2009 Request for Authorization

EPA Region II Instructions re PCB waste reporting

Resume of Gary Hoadley

Resume of James Butler

Resume of Ryan Miller

2004-2007 marked up PCB logs with household waste and Cycle Chem drums removed

Sample Discrepancy Letters

Sample kiln records

Matthew Marowski is a fact witness on documents and practice and procedure. He is expected to testify that he is Approvals Manager of Cycle Chem Lewisberry. Previously, and during the time in question, he was Inventory Manager and Compliance Specialist. As such, he assisted Ryan Miller approximately 30% regarding compliance, 70% regarding approvals. He will identify and explain the contents of documents, including those entitled "refined logs", which removed household waste and Cycle Chem waste from the PCB logs. Based upon his calculations, there were

32 shipments of household waste and 6 shipments of Cycle Chem's own material in 2004

27 shipments of household waste and 4 shipments of Cycle Chem's own material in 2005

31 shipments of household waste and 3 shipments of Cycle Chem's own material in 2006

25 shipments of household waste and 3 shipments of Cycle Chem's own material in 2007

The Annual PCB Logs show 132 shipments of PCBs in 2004, 69 in 2005, 55 in 2006 and 119 in 2007.

Also, the records show Cycle Chem received four shipments of paint in 2004, two from Lancaster County, seven shipments of paint chips in 2005, three from Lancaster County, eleven shipments of paint chips in 2006, seven from Lancaster County, six shipments of paint chips in 2007, two from Lancaster County, in total 28 additional shipments of Household Waste.

PCB logs further indicate that in 2004 two shipments remained on site for less than 30 days, nine in 2005, 13 in 2006 and 38 in 2007.

PCB logs also show five shipments of paint chips in 31 drums in 2004, four shipments of paint chips in 16 drums in 2005, two shipments of paint chips in five drums in 2006, and four shipments of paint chips in 17 drums in 2007.

Next, he will testify that the PCB logs show for 2004, fluorescent light bulb ballast– 2 shipments, 2 drums total, for 2005 – 1 shipment, 1 drum total, for 2006 – 1 shipment, 1 drum total, and for 2007 – 2 shipments, 2 drums total.

Any claim that “most of the drums [containing PCBs] were full” is speculative. The ratio of 55 gallons to 228 kilograms is also speculative. I have opened thousands of drums at the Lewisberry facility to take samples for their lab testing, and I have observed no discernable pattern as to the volume of their contents, but most of them did not appear to be full.

Gary Hoadley is expected to testify on the subjects of the facility and Cycle Chem practice and procedure. He is expected to testify as follows: He will identify his resume submitted with the first initial document exchange and state that he has been General Manager at Lewisberry since August 19, 1999.

Cycle Chem is a licensed RCRA hazardous waste TSD. It is licensed by the State of Pennsylvania to receive non-hazardous industrial waste. Cycle Chem acquired its facility in 1999 from Remtech. In addition to RCRA and state solid waste permits, Remtech held a TSCA commercial storage approval. The Pennsylvania DEP approved the transfer of the RCRA and non-hazardous solid waste permits to Cycle Chem.

Cycle Chem applied for approval of the transfer of a TSCA storage approval as indicated in the documents exchanged, which he will identify. Last year, it reapplied for approval as indicated in the documents exchanged, which he will identify.

No operating procedure was to be changed; the closure cost estimate was the same; the only change was a new owner. Cycle Chem has owned and operated a RCRA TSD in New Jersey since 1986, and has been vetted by the New Jersey DEP and the New Jersey State police. Cycle Chem holds a TSCA commercial storage approval for its New Jersey TSD, which has been renewed every five years. Thus, Cycle Chem's qualifications are satisfactory to hold a TSCA approval. EPA never acted on Cycle Chem's application to transfer the Lewisberry, PA TSCA commercial storage approval to my knowledge. On September 17, 2009, Cycle Chem submitted another Request for approval, which he will identify, and which again has never been acted upon.

The facility employs a waste tracking system and extensive Quality Assurance/Quality Control procedures to track the length of time that unknown PCB material remains on-site after arrival.

PCB's exist throughout the county and appear in general waste streams periodically. All of Cycle Chem's customers certify that their waste is free of PCB's. The failure to grant the Application for Commercial Transfer of TSCA storage approval left Cycle Chem with a Hobson's choice. If PCBs were discovered, contrary to the customers' certification, Cycle Chem could legally return the waste to the customer, or dispose of it within 30 days. Disposal, however, under both TSCA and RCRA could only be done pursuant to the customers' instructions. Cycle Chem's choice was to either comply with the law and risk damage to the environment or was not to ship the material back to the

customer, and, from time to time, risk a violation when it failed to dispose of the PCBs within 30 days of receipt.

PCBs are present in small quantities throughout the country. Thus possession and sale of pre-existing PCBs was not prohibited by TSCA. PCBs however must be enclosed. Cycle Chem does not even know if has received PCBs. Its process consists of testing batches of drums and then testing individual drums. Once the testing process is complete, Cycle Chem by law must contact the generator to obtain approval to arrange for transportation to an approved disposal facility. The PCBs are moved to a separate storage area, and then transportation arrangements are made and after receiving the approval of its customer, Cycle Chem loads the PCB waste onto a licensed transporter. Every action Cycle Chem takes is to facilitate the transportation of the material to a licensed storer or disposer.

Cycle Chem, in reality, is no more than a lab which takes possession of the drum of waste itself, and then, consonant with EPA's system for regulating waste, takes steps to transport and dispose of the waste.

Cycle Chem, Inc. tested and found the PCBs which then became subject to the disposal requirements. Generally speaking, until Cycle Chem discovered PCBs no one could decide to dispose of PCBs.

The factual setting concerning the major waste stream involved herein, paints poured off at Household Hazardous Days by Cycle Chem, or its 100% affiliated sister company, Clean Venture, Inc., makes the generator status of Cycle Chem, Inc clear.

At the subject Lewisberry facility Cycle Chem conducts a fuel blending program. Solvent is a hazardous material because it is flammable. Some solvent is chlorinated, some not. Cycle Chem blends fuels to achieve a supplemental-fuel grade product. Supplemental fuels must have a minimum BTU content of 5,000, with chlorine in limited amounts and a limited amount of suspended solids. Paints have a high BTU content because solvent is a prime constitute of paint. Paint also contains a high level of suspended solids. PCBs are also sometimes found in bulking used motor or other oils. After blending, the solvents remain in commerce. There is a market with kiln facilities burning the solvent. We usually pay the kiln to burn the solvent. As the price of oil increases, the cost to burn decreases, theoretically to zero.

Household hazardous waste ("HHW") constitutes an important source of supplemental fuel. Cycle Chem conducts HHW events by contract with

governmental entities. By contract Cycle Chem assumes title, control and responsibilities for the materials collected from the public at the moment of delivery from the homeowner.

Most HHW events have a paint collection point. Members of the public deliver paint cans to Cycle Chem personnel. The Cycle Chem personnel then open the cans, and pour off all viscous material into a drum. The paint is removed and the empty can thrown away.

Paint becomes the property of Cycle Chem or its 100% affiliated sister company Clean Venture Inc. upon delivery from the homeowner. Cycle Chem or Clean Venture has possession and control. The paint is a RCRA hazardous waste. Cycle Chem or Clean Venture signs the RCRA manifest as generator, Clean Venture as transporter and Cycle Chem as disposal facility.

The paint drums are transferred to Cycle Chem and enter the Cycle Chem inventory, with a bar code attached to the drum. Cycle Chem then tests the paint. A sample is amalgamated from 5-10 drums and sent to the lab. If PCBs are detected, each individual drum is tested to isolate the drum or drums which contain PCBs.

In HHW events managed by Cycle Chem however, it is clear that Cycle Chem received the exempt gallon cans, and it is Cycle Chem's act of pouring the paint into a drum which first causes the PCB to become subject to the disposal requirements of TSCA. The act of pouring the contents of the cans together makes the paint "comingled liquid", and it is thus transformed and loses its blanket exemption.

But, in each case involving HHW events run by Cycle Chem, or its 100% affiliate Clean Venture, Cycle Chem or its affiliate is the generator of the PCB waste and a generator may store its and its affiliate's PCB's for one year, and is not engaged in commercial storage. PCB waste generated by Clean Venture may be stored by Cycle Chem without TSCA storage approval.

Cycle Chem also receives HHW from municipalities which conduct HHW days directly. Cycle Chem has a contract to receive HHW from the Lancaster County Solid Waste Management Authority ("LCSWMA"). LCSWMA is a municipal collection program that operates under the PCB household waste exemption. As envisioned in the TSCA Rule making preamble, it forwards the paints to a "waste, handling facility where they are tested", which is Cycle Chem.

In January of 2006, nearly two and a half years after a TSCA inspection, EPA Inspector Dominic Ventura advised Cycle Chem that it was engaged in the commercial storage of PCB's and therefore needed to compile annual PCB reports and provide unmanifested waste reports. Further, Inspector Ventura stated that Cycle Chem should not return HHW drums back to the municipality and need not get a PCB manifest from the municipality, but that Cycle Chem should file unmanifested waste report to EPA. There was no citation for failure to obtain commercial storage approval.

CCI is a generator of PCB waste not only at a HHW but at our facility. A large part of our business is lab packs. This is where a customer sends in small bottles/cans of chemicals and we bulk them up to 55 gallon drum size for disposal. This can include chemicals, paints, oils, almost any solid/liquid. After a drum is bulked it is sampled and tested for everything including PCBs. A good portion of the PCB drums in the PCB log is from this activity. This also includes paint cans from HHW coming to our facility and bulked- not at the HHW.

In February of 2006, Cycle Chem's Ken Shaner wrote back to Inspector Ventura, and stated that Cycle Chem was not a commercial storer due to the exception of 40 CFR §761 (c)(5), which allows 30 day storage of PCBs in approved hazardous waste containers. Mr. Shaner also stated that Cycle Chem could not accept PCBs and Cycle Chem's RCRA permit required that it reject the unacceptable waste within 30 days. Often, the shipment was rejected to a disposer or rejected back to the customer right on the original manifest, in which case there would be no separate manifest discrepancy letter.

Mr. Shaner reasoned that since Cycle Chem was not commercial storer, Cycle Chem was not subject to the regulations applicable to commercial storers and therefore need not prepare annual PCB only logs and need not provide unmanifested waste reports.

There are two kinds of storers, commercial, and, for want of a better name, non-commercial. All PCB materials have to be stored in an appropriate manner; indeed, a non-commercial storer must store the PCBs in the same manner as a commercial storer. The principal difference is that commercial storers are subject to record keeping and notice requirements.

As previously stated, a number of its shipments are exempt from commercial storage requirements. A separate exemption exists for small quantity storage of up to 500 gallons at any one time. How is the small quantity exemption applied to an entity which stores exempt and non-exempt material? Does the 500 gallon figure mean 500 gallons of non-exempt PCB? The Region has advised Cycle Chem it

does not know. However, the answer must be that the small quantity exception covers 500 gallons of non-exempt material plus exempt material; otherwise one who stores 600 gallons of exempt material would lose the exemption.

The Region has calculated 85 or 86 instances in 2006 and 2007 where Cycle Chem received waste which it calls "unmanifested waste" while Cycle Chem was a commercial storer. However, the Region has not considered any exemptions, and has ignored the fact that transportation by a generator to its own facility does not require a manifest.

Each shipment of waste received by Cycle Chem was accompanied by a RCRA manifest. The regulations require the receiver to contact the generator and work the discrepancy out within 15 days. In each case involving Cycle Chem, the generator agreed within 15 days with Cycle Chem's results and did not dispute the discrepancy, and therefore no report was required. Our February 6, 2006 letter disputing the Notice of Non-Compliance of January 5, 2006 generated no response. Indeed, the position concerning the 30 day exemption expressed by Cycle Chem is unremarkable, and Cycle Chem fairly inferred agreement.

Paint chips are defined as PCB bulk product waste, and may be disposed of at a waste handling facility licensed by a state to receive industrial waste. Cycle Chem can therefore dispose of paint chips. A person sending PCB bulk product waste to a waste management facility not having a commercial PCB sampling disposal or storage approval must provide written notice to the facility a minimum of 15 days in advance. Fluorescent light bulb ballast is similarly treated. Cycle Chem had quantities of each item on hand from 2004-2007, which Matthew Marowski has quantified at my request with his other tabulations upon which I am relying.

Cycle Chem refuses to receive any waste containing regulated levels of PCB. Therefore, if such a notice were given, the waste would be refused. However, the customer did not know that the waste had PCB contamination, and no notice was given. All of these shipments came to Cycle Chem because the paints contained lead and were therefore hazardous. The government agencies were conducting lead paint abatement projects. There was no suspicion concerning PCBs; and there is no requirement that paint chips be tested for PCBs. Testing is very expensive. The regulated waste business requires only that the producer of the waste make a reasonable investigation as to its characteristics. The regulatory scheme relies upon testing at the waste handling facility, which is precisely what happened here.

Here, the drums containing PCBs were merely assumed to be full when it was known that many were not full. While Ryan Miller sent an e-mail stating that "most" of the drums were full, that is a vague statement of a range from 51-99%. Indeed, in my experience has been in testing drums in Massachusetts, I found the average volume was 42 gallons out of a 55 gallon capacity and most drums were therefore not full. Thus, there is no factual basis to prove weights, volumes or any violations based upon them.

There was no PCB spill here and never even danger of a spill and respondent at all times refused to accept PCBs. Cycle Chem was the Region's first line of defense, identifying the PCBs here. It employed careful waste handling procedures and saw to it that the PCBs went to EPA approved TSCA disposal sites (usually its affiliate's in Elizabeth, New Jersey).

. There was, in addition, a good faith belief in generator status, relieving Cycle Chem of the need for a permit or to file unmanifested waste reports, making culpability here even less There is no history of prior violations. Two annual logs were produced at the inspection and a third was produced a few days later, rendering any alleged violation extremely minor. Cycle Chem, Inc. reaped no gain and stood to gain nothing from its actions or inactions. Cycle Chem, Inc. was unaware that its conduct was thought by the Region to have violated TSCA until 2006.

Finally, the lack of control Cycle Chem had over the materials coming to it is obvious, as well as Cycle Chem's prudent choice in not shipping the PCB wastes back to the shipper. What is the Philadelphia City Hall going to do with 10 drums of PCB waste? EPA itself recognized the propriety of Cycle Chem's departure from the letter of the law, when it advised Cycle Chem in the 2006 letter from Inspector Ventura not to ship the HHW back to the customer. Return of PCB waste could create danger of release.

James Butler is a fact and expert witness on the subject of regulatory compliance. He is expected to testify that the exhibit submitted is his resume, identify same and note that “advising outside parties in specific rule interpretation and implementation” is part of his job duties, as is “regulatory agency relations relating to permitting, inspections, [and] rule interpretation....”

Also, he worked on Cycle Chem Lewisberry’s Request for Approval Transfer before the facility hired Compliance & Approvals Manager Ryan Miller. Miller therefore had no reason to know about the pendency of the request. Once he was hired, Butler stepped back from the project.

In any event, storage approval was automatic for Lewisberry so long as it was RCRA approved and TSCA compliant. 40 C.F.R. Sec. 760.65(b)(2)(i) provides for such approval when a facility is approved under Section 3004 and spills of PCBs are cleaned up in accordance with TSCA. Section 3004 is 42.U.S.C.A. Sec. 6924, i.e., RCRA.

Furthermore, with respect to unmanifested waste reports, it is the custom and practice in the industry not to send them routinely. When Cycle Chem Elizabeth initially received storage approval from EPA Region II, it received written instructions, submitted as an exhibit, that “All cases where PCB waste is not identified as PCB waste shall be reported. Cycle Chem Elizabeth has uniformly followed this practice and procedure and has not submitted unmanifested waste reports routinely, all with the knowledge and acquiescence of the EPA.

Ryan Miller is expected to testify as a fact witness and expert on the subjects of the facility, its practice and procedure, and regulatory compliance. A summary of his expected testimony is contained in the summaries regarding Hoadley and Butler. He will update his attached resume by adding that he is presently a Special Agent, Hazmat Unit, Federal Bureau of Investigation.