10/31/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Plaza Land Associates, Ltd. Partnership; and Twitchell Wrecking Co.; and DML Corp.,	)	Docket No. TSCA-III-483
	)	
	)	
Respondents	)	

Toxic Substances and Control Act -- Motions to Strike Defenses, and for Accelerated Decision -- Complainant's motion to strike Respondent's defense that the complaint fails to state a valid claim was granted, because the complaint contained all the elements required by the governing procedural rules and it charged Respondent with acts that would constitute the alleged violations; Complainant's motion to strike Respondent's defense that the proposed civil penalty was illegal and excessive was granted as to the asserted illegality, because the proposed amount was within the statutory maximum and no other ground for illegality was shown, but denied as to the asserted excessiveness, because the appropriate amount can be determined only after it has been decided whether and how Respondent committed the alleged violations; Complainant's motion for accelerated decision was denied to give Respondent a further chance to file a submission documenting the existence of a "genuine issue of material fact," because it is desirable whenever reasonably possible to decide a case on the merits.

RULING GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO STRIKE DEFENSES, AND DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

This Ruling addresses motions to strike defenses and for accelerated decision filed by Complainant--Region III, U.S. Environmental Protection Agency--against Respondent DML Corporation. The underlying case has been brought under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2615 et seq., and regulations promulgated pursuant to TSCA at 40 C.F.R. § 761 (the "PCB Rule").

The 1991 complaint in this case charged Respondent, a Baltimore, Maryland firm, and two other parties with violations of the PCB Rule in connection with the removal of PCB transformers from a Baltimore facility. One of the other parties charged--Plaza Land Associates, Ltd. Partnership ("Plaza")--was the owner of the

facility, and has settled this case as concerns it.[1] According to the complaint, Respondent and the other party charged--Twitchell Wrecking Company ("Twitchell")--were hired by Plaza to remove the PCB transformers. Twitchell has never been served.

The complaint alleged that in 1989 at Plaza's Baltimore facility, Respondent, together with Plaza and Twitchell, improperly stored PCBs in two open-topped 55 gallon drums, improperly disposed of about 80 gallons of PCBs from these drums, and failed properly to mark these drums, all in violation of TSCA. The civil penalty sought from Respondent was $31,000. Other allegations in the complaint concerned only Plaza.

Motion to Strike Defenses

Respondent answered the complaint by denying the charges against it and asserting, as defenses, that "the Complaint fails to state a claim against this Respondent upon which relief can be granted," and that "the monetary amount of the civil penalties ... [sought is] excessive and illegal."[2] After the parties engaged in a prehearing exchange, Complainant moved to strike both these defenses.

In the order directing the prehearing exchange, Respondent was instructed to state "the factual and legal justification" for its defenses.[3] Respondent in its prehearing exchange replied for both defenses. As to the complaint's alleged failure to state a valid claim, Respondent asserted that "it demands strict proof of the claim as filed against it, that the allegations as outlined in the Complaint are insufficient, both factually and legally, to warrant, justify or in any way support the relief which it seeks."[4]

Complainant in its motion to strike cited the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22, which govern the procedure for this case. Section 22.14(a) of the Consolidated Rules specifies items that must be included in a complaint. Complainant contended that its complaint contained each of these items: a statement of the statutory section authorizing the complaint, a reference to each statutory and regulatory section alleged to have been violated, a concise statement of each allegation's factual basis, a proposed civil penalty, an explanation of the reasoning behind the penalty, a notice of the right to a hearing, and a copy of the Consolidated Rules.

As for Respondent's defense that the proposed civil penalty

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[1] Consent Agreement and Consent Order (March 4, 1992).

[2] Respondent's Answer to Complaint, at 1 (March 21, 1991).

[3] Notice and Order, at 3 (April 30, 1991).

[4] Respondent's Prehearing Exchange, at 7 (December 12, 1991).

was "excessive and illegal," in its prehearing exchange it asserted "that the proposed penalties ... notwithstanding agency approval, ratification and authorization, are clearly in violation of Constitutional provisions regarding excessive fines, and further are contrary to the policy as outlined by the EPA in its Polychlorinated Biphenyls Penalty Policy dated April 9, 1990."[5] In addition, Respondent for the first time claimed an inability to pay the proposed penalty.

Complainant in its motion to strike argued that Section 16 of TSCA, 15 U.S.C. § 2615, authorizes a maximum penalty of $25,000 for each violation. Thus, contended Complainant, the $31,000 proposed here--comprising assessments for each of the three violations of $3,000, $25,000, and $3,000 respectively--is well within the statutory maximum. Complainant argued further that the $31,000 represented an accurate application of the EPA Penalty Policy cited by Respondent.

Ruling

Complainant's motion to strike Respondent's first defense--that the complaint fails to state a valid claim--is granted. Complainant's motion adequately demonstrated that the complaint complied with the pertinent section of the Consolidated Rules regarding complaints. Moreover, for each of the three violations charged to Respondent--improper storage of PCBs, improper disposal of PCBs, and failure to mark PCB containers properly--the facts set forth in the complaint would, if proven, constitute the alleged violation.

For the improper storage, count XIV of the complaint alleged that there were identified on Plaza's Baltimore facility two open-topped 55 gallon drums containing about 80 gallons of PCB fluid. Accordingly Respondent was charged with a violation of 40 C.F.R. § 761.65(c)(6) and Section 15(1)(C) of TSCA, because that regulatory section requires containers storing liquid PCBs to comply with the provisions of 49 C.F.R. § 178.80, which mandates for such containers a closure adequate to prevent leaks.

For the improper disposal, count XV of the complaint alleged that the two drums had tipped over and spilled their contents onto the floor. Accordingly Respondent was charged with a violation of 40 C.F.R. § 761.60(a) and Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). That regulatory section characterizes such spillage as a disposal, and mandates that any disposal comply with 40 C.F.R. § 761.60, which requires that disposal of PCBs at the concentration found in these drums be done in an incinerator.

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[5] Id.

For the failure of proper marking, count XVI of the complaint alleged that the two drums lacked a certain marking that is required by 40 C.F.R. § 761.40(a)(1) and illustrated in 40 C.F.R. § 761.45(a). Accordingly Respondent was charged with a violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

In sum, Complainant's motion to strike Respondent's first defense--failure of the complaint to state a valid claim--is granted. The complaint contains all the elements required by the Consolidated Rules and alleges acts sufficient to constitute the violations charged.

Complainant's motion to strike Respondent's second defense--that the proposed civil penalty is illegal and excessive--is granted as to illegality, and denied as to excessiveness. With respect to illegality, Respondent asserted unconstitutionality and inconsistency with EPA's Penalty Policy, but supplied nothing to support either assertion. The amount of the proposed civil penalty is clearly within the TSCA maximum. No basis of illegality has been shown, and Respondent's defense claiming illegality will accordingly be stricken.

Excessiveness is a different matter. Whether $31,000 is appropriate for Respondent's alleged violations can be determined only after it has been decided if Respondent actually committed them and what were the nature and circumstances of any such commission. Hence Complainant's motion to strike the defense of excessiveness will be denied.

One element in determining the amount of any civil penalty to be imposed will be Respondent's ability to pay. To date, Respondent has just claimed an inability, but provided no supporting information. So that Respondent's claim may be reasonably considered, Respondent will be directed to supply such information by November 15, 1995.[6]

Motion for Accelerated Decision

Complainant's motion for accelerated decision stressed the nonfactual generality of Respondent's replies to the three charges that were stated specifically in the complaint and then supported with factual detail in Complainant's prehearing exchange. Section 22.20(a) of the Consolidated Rules provides that an accelerated decision may be granted if "a party is entitled to judgment as a matter of law" and "no genuine issue of material fact exists."

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[6] For an indication of what information would be appropriate, Respondent is referred to Complainant's: Reply to Prehearing Exchange of DML Corp., at 3 (December 20, 1991); Memorandum in Support of Motion to Strike, at 4 (May 30, 1992); Motion for Accelerated Decision, at 9-10 (November 2, 1992).

For the first alleged violation--improper storage of PCBs--Complainant cited a report, included in its prehearing exchange, of a 1989 Agency inspection of the Baltimore facility where Respondent had been hired to remove PCB transformers.[7] According to the report, the inspector identified two open-topped 55 gallon drums containing about 80 gallons of PCB fluid, in violation of the requirement that containers of liquid PCBs have a specified closure to prevent leaks.[8]

Respondent's replied "that any such storage of PCB fluid was not in 'open topped 55 gallon drum containers', and that, in fact, any such PCB fluid was stored in containers that did meet the [regulatory and statutory] standards."[9] Complainant argued that Respondent's reply was so conclusory and so lacking in evidence that Complainant's factual assertions remain unchallenged, thus eliminating any "genuine issue of material fact."

For the second alleged violation--improper disposal of PCBs--Complainant cited the same EPA inspection report to the effect that the two drums had been tipped over and their contents spilled onto the floor. Such spillage, according to Complainant, constituted an improper disposition of PCBs.[10] Respondent's reply was that "any release of PCB fluid resulting from the spill of PCB's from the aforemention [sic] storage containers was, in fact, authorized by the Complainant, it [sic] representative agents and employees at the time of the incident."[11] Complainant again rejoined that the generality of Respondent's position left Complainant's factual allegations unrebutted, again removing any "genuine issue of material fact."

For the third violation--failure to mark the drums properly--Complainant cited the EPA inspection report to the effect that the

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[7] Complainant's Prehearing Exchange (December 12, 1991), Exhibit 1, Inspection Report No. MD-89-032 (July 5, 1989).

[8] Under 40 C.F.R.§ 761.65(c)(6), according to Complainant, any container storing liquid PCBs must comply with the Transportation Department's Shipping Container Specification, 40 C.F.R. § 178.80, which in 1989 required such containers to have a specified closure to prevent leaks.

[9] Respondent's Prehearing Exchange at 6 (December 12, 1991).

[10] Complainant charged that such spillage violated 40 C.F.R. § 761.60(a) and Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

[11] Respondent's Prehearing Exchange, at 6 (December 12, 1991).

drums lacked a required mark for PCB containers.[12] In reply, Respondent asserted "that DML Corporation did, in fact, properly mark the two PCB containers with the required labels and that, at all operative time, the containers were properly marked."[13] The essence of Complainant's argument regarding this violation was the same as regarding the first two.

Ruling

The thrust of Complainant's argument is correct--Respondent's submissions have been too conclusory and unspecific to demonstrate the existence of a "genuine issue of material fact." Nevertheless, it is desirable whenever reasonably possible to decide a case on its merits.[14] Therefore, Respondent will be given a further chance to supplement its submissions, as directed below, to try to establish that a "genuine issue of material fact exists." After the due date prescribed below for Respondent's further submission, Complainant may at its discretion refile its motion for accelerated decision.

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[12] According to Complainant, pursuant to 40 C.F.R. § 761.40(a)(1), PCB containers were required to have a certain mark, as illustrated in 40 C.F.R. § 761.45(a), and failure to have that mark violated 40 C.F.R. § 761.60(a) and Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

[13] Id.

[14] Cf. In The Matter of James Cuthbertson, Floyd Richardson & Popile, Inc., RCRA Docket No. RCRA-IV-832-H, (May 29, 1991).

Order

Complainant's motion to strike defenses is granted as to Respondent's defenses "that the Complaint fails to state a claim ...upon which relief can be granted" and "that the monetary amount of the civil penalty ... [sought is] illegal." Complainant's motion is denied as to the defense "that the monetary amount of the civil penalty ... [sought is] excessive."

Complainant's motion for accelerated decision is denied.

Respondent is directed to file by November 15, 1995:

(1) evidence of its claimed inability to pay the civil penalty proposed in the complaint; and

(2) a presentation of the factual evidence supporting its denials of the violations charged to it in the complaint; such presentation shall include--
   (a) copies of any documents;
   (b) the names of any witnesses, together with a detailed summary of the proposed testimony of each;

this presentation shall set forth a detailed exposition of Respondent's position that the drums at issue containing PCBs did comply with regulatory and statutory standards, that any spillage from them of PCBs was authorized by the Agency, and that the drums were marked in compliance with regulatory and statutory requirements.

Thomas W. Hoya
Administrative Law Judge

Dated: October 31, 1995

In the Matter of Plaza Land Associates, Ltd. Partnership; & Twitchell Wrecking Company; and DML Corporation, Respondent
Docket No. TSCA-III-483

Certificate of Service

I certify that the foregoing **Summary of Telephone Conference and Ruling Granting in Part and Denying in Part Complainant's Motion to Strike Defenses, and Denying Complainant's Motion for Accelerated Decision**, dated October 31, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, PA 19107

Copy by Regular Mail to:

Attorney for Complainant:

Catherine King, Paralegal
Office of Regional Counsel
U.S. EPA
841 Chestnut Building
Philadelphia, PA 19107

Attorney for Respondent:

Michael T. Wyatt, Esquire
Law Offices of
William F.C. Marlow, Jr.
404 Allegheny Avenue
Towson, Maryland 21204

Maria Whiting
Legal Staff Assistant

Dated: October 31, 1995