UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
LAWRENCE COUNTY	)	**DOCKET NO. TSCA-5-98-090**
AGRICULTURAL SOCIETY,	)	
	)	
RESPONDENT	)	

DEFAULT JUDGMENT

Toxic Substances Control Act ("TSCA"): Pursuant to 40 C.F.R. § 22.17(a), Respondent, Lawrence County Agricultural Society, is found to be in default because of its failure to comply with the Administrative Law Judge's Prehearing Order without good cause, and such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent violated the Polychlorinated Biphenyls regulations concerning certain recordkeeping and use requirements, 40 C.F.R. Part 761, and thereby violated Section 15 of TSCA, 15 U.S.C. § 2614.

Issued: September 14, 2000

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Randall L. Lambert, Esquire
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For Complainant: Jeffery M. Trevino, Esquire
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INTRODUCTION

This civil administrative penalty proceeding arises under Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615 (a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. [1/]

The United States Environmental Protection Agency (the "EPA" or "Complainant") initiated this proceeding by filing with the Regional Hearing Clerk a Complaint against Lawrence County Agricultural Society, Respondent ("Respondent"), on September 25, 1998.[2/] The Complaint charges Respondent with four (4) violations of TSCA and the Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions regulations ("PCB regulations") promulgated thereunder. More specifically, the EPA charged that Respondent violated Section 15 of TSCA and the PCB regulations at 40 C.F.R. Part 761 by failing to comply with certain recordkeeping and use requirements of the PCB regulations. In the Complaint, the EPA seeks a civil administrative penalty of $7,000 for these alleged violations.

Complainant filed a Motion for Default Judgment Against Respondent on August 7, 2000. Respondent submitted an untimely response to the motion for default on September 7, 2000.

As discussed below, Respondent is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), because Respondent failed to comply with the Administrative Law Judge's Prehearing Order issued on April 4, 2000, without good cause. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). The factual allegations contained in the Complaint, deemed to be admitted, establish that Respondent violated the PCB regulations at 40 C.F.R. Part 761 and Section 15 of TSCA as charged in the Complaint.

[1/] The Rules of Practice were revised effective August 23, 1999. Proceedings commenced before August 23, 1999, are subject to the revised Rules of Practice unless to do so would result in substantial injustice. The instant proceeding is subject to the revised Rules of Practice as there is no indication that doing so results in substantial injustice.

[2/] The Complaint mailed to Respondent on September 25, 1998, was returned as undeliverable mail. The Complaint was sent to Respondent by certified mail, return receipt requested, on October 21, 1998, and a copy was sent to Respondent's counsel by first class mail.

FINDINGS OF FACT

1. The EPA initiated this matter against Respondent by issuing a Complaint and Notice of Opportunity For Hearing pursuant to Section 16 (a) of TSCA. In the Complaint, the EPA charged that Respondent violated Section 15 of TSCA and the PCB regulations at 40 C.F.R. Part 761 by failing to comply with certain recordkeeping and use requirements of the PCB regulations. Specifically, the Complaint charges that Respondent violated Section 15 of TSCA, 15 U.S.C. § 2614, and 40 C.F.R. §§ 761.65(b)(1), 761.65(c)(8), 761.65(a), 761.205(a)(2), respectively, for failing to store a transformer, which is a PCB Article and Item as defined at 40 C.F.R. § 761.3, in a proper storage facility, failing to mark the transformer with the date it was placed in storage, failing to dispose of the transformer within one year from the date when it was placed in storage for disposal, and failing to notify the U.S. EPA of its PCB waste activities. The EPA proposed a civil administrative penalty of $7,000 for these alleged violations.

2. The Complaint was filed with the Regional Hearing Clerk on September 25, 1998, and a copy was sent to Respondent by mail. The copy of the Complaint sent to Respondent was returned to Complainant as undeliverable mail. On October 21, 1998, a copy of the Complaint was sent to Respondent by certified mail, return receipt requested, and another copy was sent to Respondent's counsel by first class mail. The Complaint advised Respondent that the Consolidated Rules of Practice, 40 C.F.R. Part 22, govern these proceedings, and a copy of the Rules was sent to Respondent with the Complaint.

3. On November 12, 1998, Respondent, filed with the Chief of the Pesticides and Toxics Branch for Region 5 of the EPA an Answer to the Complaint and a request for hearing. Counsel for Respondent entered an appearance on behalf of Respondent.[3/] Respondent failed to file its Answer with the Regional Clerk. The Answer was forwarded to the Regional Hearing Clerk for filing by the EPA on February 22, 2000.

4. The case was forwarded to the Chief Administrative Law Judge on February 23, 2000. On February 28, 2000, the Office of Administrative Law Judges advised the parties of the availability of participating in the process of Alternative Dispute Resolution (ADR) to facilitate settlement. Respondent agreed to participate in ADR but Complainant failed to respond to the inquiry which was deemed to be a declination of its participation in ADR.

5. On April 4, 2000, the undersigned entered a Prehearing Order directing the parties to hold a settlement conference on or before May 5, 2000, in an attempt to reach an amicable resolution of this matter and requiring Complainant to file a status report on the progress of settlement by May 19, 2000. If there was no settlement, the parties were directed to submit their prehearing exchange; the EPA's prehearing exchange was due by June 28, 2000, and

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[3/] Hereinafter, all references to the service of documents on Respondent refers to service on its attorney of record.

Respondent's prehearing exchange information was due by July 28, 2000. [4/] The parties were advised that failure to comply with the Order could result in the entry of a default judgment against the defaulting party. The April 4, 2000, Prehearing Order was sent to Respondent by certified mail, return receipt requested.

6. On May 19, 2000, Complainant filed a status report stating that the parties had engaged in a settlement conference. The status report indicated that the parties were unable to resolve the matter.

7. On June 26, 2000, Complainant filed its prehearing exchange as directed. Complainant's prehearing exchange was sent to Respondent by first class mail. Respondent has not filed its prehearing exchange information.

8. Complainant filed a Motion for Default Judgment against Respondent on August 7, 2000, and a copy of the motion was sent to Respondent by first class mail.

9. Respondent submitted a Motion for Extension of Time to File Prehearing Exchange and Respondent's Memorandum Contra to Complainant's Motion for Default Against Respondent dated September 7, 2000. Respondent stated that it did not file its prehearing exchange on July 28, 2000, because it inadvertently missed that date and because it never received Complainant's prehearing exchange. Respondent requested an extension of time to file its prehearing exchange.

10. Respondent's stated reasons for failing to comply with the Administrative Law Judge's Prehearing Order dated April 4, 2000, do not constitute good cause. Respondent's response to Complainant's Motion for Default Judgment Against Respondent was untimely filed.

11. Respondent is Lawrence County Agricultural Society, a non-profit corporation operating under the laws of the State of Ohio, with a place of business at the Lawrence County fairgrounds.

12. Respondent is a "person" as defined at 40 C.F.R. § 761.3.

13. Respondent operates the Lawrence County Fairgrounds facility ("Facility") located on State Road 7, Proctorville, Ohio.

14. The EPA inspected Respondent's Facility on July 10, 1997, to determine its compliance with the PCB regulations at 40 C.F.R. Part 761, which were promulgated pursuant to Section 6 of TSCA, 15 U.S.C. § 2605.

[4/] The April 4, 2000, Prehearing Order directed Respondent to file a statement of election to only conduct cross-examination of Complainant's witnesses as its manner of defense if it chose to forgo the presentation of direct and/or rebuttal evidence.

15. At the time of the EPA's inspection at the Facility on July 10, 1997, Respondent had four oil filled electrical transformers of which two were out of service. The two out of service transformers were located in a storage area outside and had been in storage for more than one year. On September 12, 1997, the EPA took oil samples from the two out of service transformers and an oil sample from one of the transformers, a General Electric Spirakore transformer (Serial Number B393305), was found to contain 88 parts per million PCBs.

16. Respondent's General Electric Spirakore transformer is a PCB Article as defined at 40 C.F.R. § 761.3, and is a PCB Item as defined at 40 C.F.R. § 761.3.

17. At the time of the EPA inspection on July 10, 1997, the General Electric Spirakore transformer was stored in a storage area without adequate roof, walls, continuous curbing of a minimum of six (6) inches of curb height, and floor and curbing constructed from continuous smooth and impervious materials.

18. On July 10, 1997, the General Electric Spirakore transformer, which was in storage for disposal at the Facility, was not marked with the date that it was placed in storage.

19. The General Electric Spirakore transformer was placed in storage for disposal at the Facility prior to July 10, 1996.

20. Respondent never notified the EPA of its PCB waste activity at the Facility.

DISCUSSION

The issue before me is whether a default order should be entered against Respondent pursuant to Complainant's Motion for Default Judgment Against Respondent filed on August 7, 2000. The federal regulations governing default in administrative proceedings before the EPA are found at Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), concerning default states, in pertinent part:

> A party may be found to be in default ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer[5/]... Default by respondent constitutes, for purposes of the pending

5/ The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

> proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.[6/]

40 C.F.R. § 22.17(a).

Section 22.17(b) of the Rules of Practice concerning motions for default states, in pertinent part:

> A motion for default may seek resolution of all or part of the proceeding. Where the motion requests assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

40 C.F.R. § 22.17(b).

Section 22.17(c) of the Rules of Practice concerning default orders states, in pertinent part:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

Complainant's Motion for Default Judgment Against Respondent only requests me to determine whether a default has occurred, without arguing what penalty should be assessed against Respondent. Although such limited pleading is permitted under the regulation cited above, it is not viewed favorably in this administrative forum unless prompt action is taken to

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6/ Section 22.17(a) of the Rules of Practice in effect prior to August 23, 1999, provided:

> A party may be found to be in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer... Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

resolve all parts of the proceeding. *See* Sections 40 C.F.R. § 22.17(b),(c).[7/] In the event that it is found that default has occurred and that a respondent is liable for the violations charged, complainant must then file a second motion for the assessment of a penalty against the defaulting party or there must be the filing of a Consent Agreement and Final Order between the parties.[8/] *See* Sections 22.17(b), (c), 22.18(b). Otherwise, there is no resolution of all parts of the proceeding and the matter could languish indefinitely.

In the instant proceeding, the file reflects that this matter was initiated by the filing of a Complaint against Respondent on September 25, 1998. The parties were directed to file their prehearing exchange information by the Administrative Law Judge's Prehearing Order entered on April 4, 2000. The Prehearing Order was sent to Respondent by certified mail, return receipt requested. The EPA timely filed its prehearing exchange but no prehearing exchange information has been filed by Respondent. Complainant then filed a Motion for Default Judgment Against Respondent on August 7, 2000.

On September 7, 2000, Respondent mailed a Motion for Extension of Time to File Prehearing Exchange and Respondent's Memorandum Contra to Complainant's Motion for Default Against Respondent. Respondent states that it did not file its prehearing exchange on July 28, 2000, because it inadvertently missed that date and because it never received Complainant's prehearing exchange. Respondent requests an extension of time to file its prehearing exchange.[9/]

A party's failure to comply with the information exchange requirements of Section 22.19(a) of the Rules of Practice or an order of the Administrative Law Judge, subjects the defaulting party to a default order under Section 22.17(a) of the Rules of Practice. 40 C.F.R. § 22.17(a). Although the Administrative Law Judge is accorded some discretion in making the default determination under Section 22.19 of the Rules of Practice, such discretion is usually reserved for minor violative conduct or when the record shows "good cause" why a default order should not be issued.[10/]

[7/] The preamble to the regulations specifically discusses this limited form of pleading. 64 Fed. Reg. 40,154-155 (1999).

[8/] In addition, a respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. Upon receipt of payment in full, the Regional Administrator shall issue a final order. 40 C.F.R. § 22.18(a).

[9/] Respondent also states that only the amount of the penalty is at issue.

[10/] The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that "a party may be found to be in default... upon

(continued...)

In the instant matter, Respondent's stated reasons for failing to comply with the Administrative Law Judge's April 4, 2000, Prehearing Order do not constitute good cause for why a default order should not be issued. The Prehearing Order advised both parties that their failure to comply with the Prehearing Order could result in the entry of a default judgment against the defaulting party. Although Respondent acknowledges that it inadvertently missed the prehearing exchange filing date, I note that it has not yet filed its prehearing exchange. Second, assuming the truth of Respondent's allegation that it did not receive Complainant's prehearing exchange, I note that Respondent did not file a motion for extension of time to file its prehearing exchange until one month after the filing of the Motion for Default. Although failure to receive Complainant's prehearing exchange would be a valid reason to grant Respondent an extension of time for filing its prehearing exchange, it still was incumbent upon Respondent to obtain this extension. Respondent cannot rely on the alleged nonreceipt of Complainant's prehearing exchange to excuse its failure to act.

Respondent's reasons for failing to comply with the Prehearing Order are further clouded by its failure to timely respond to Complainant's Motion for Default.[11/] Respondent's response to the Motion for Default was due no later than August 28, 2000, but it was not mailed until September 7, 2000.[12/] Respondent has proffered no reason for its delay in responding to the Motion for Default. A party's failure to respond to a motion within the designated period waives any objection to the granting of the motion under Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b).

In view of the foregoing, I find that the record does not establish good cause for Respondent's failure to comply with the Administrative Law Judge's April 4, 2000, Prehearing Order or why a default order should not be issued, nor is it established that discretion should be

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[10/] (...continued)
failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." The application of the regulation should be made as a general rule in order to effectuate its intent. Thus, when the facts support a finding that there has been a failure to comply with an Administrative Law Judge's order without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions, as appropriate, are available to the Administrative Law Judge for violative conduct that does not reach the level of default. It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

[11/] A party's response to any written motion must be filed within fifteen (15) days after service of such motion. 40 C.F.R. § 22.16(b). Where a document is served by first class mail, five (5) days shall be added to the time allowed by the Rules of Practice for the filing of a responsive document. 40 C.F.R. § 22.7(c).

[12/] A document is filed when it is received by the Regional Hearing Clerk. 40 C.F.R. § 22.5(a).

exercised in favor of Respondent. Thus, Respondent is found to be in default for its failure to comply with the Administrative Law Judge's April 4, 2000, Prehearing Order.

As cited above, Section 22.17(a) of the Rules of Practice further provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." This regulatory provision, couched in mandatory language, requires, upon Respondent's default, that I accept as true all facts alleged in the Complaint. Thus, in the instant proceeding, I must accept as true all facts alleged against Respondent in the Complaint. 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish, by a preponderance of the evidence, the four violations of the PCB regulations at 40 C.F.R. Part 761 and Section 15 of TSCA as charged in the Complaint.

Accordingly, Complainant's Motion for Default Judgment Against Respondent is Granted, and Respondent's Motion for Extension of Time to File Prehearing Exchange is Denied. The granting of Complainant's Motion for Default, however, does not mean that this case will be allowed to languish without further action being taken promptly by the parties. This proceeding has been pending since September 1998. Accordingly, It Is Further Ordered that unless this matter is resolved as to all remaining issues or claims through the filing of a fully executed Consent Agreement and Final Order or Complainant files a motion moving for the assessment of a penalty against the defaulting party on or before October 20, 2000**,** the matter shall be dismissed with prejudice.

CONCLUSIONS OF LAW

1. Respondent is found to be in default because it failed to comply with the Administrative Law Judge's April 4, 2000, Prehearing Order and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. The default by Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of its right to contest such factual allegations. 40 C.F.R. § 22.17(a).

3. Respondent's failure to store its General Electric Spirakore transformer, a PCB Article and Item as defined at 40 C.F.R. § 761.3, in a proper storage facility constitutes a violation of the PCB regulations at 40 C.F.R. § 761.65(b)(1) and Section 15 of TSCA.

4. Respondent's failure to mark its General Electric Spirakore transformer with the date it was placed in storage constitutes a violation of the PCB regulations at 40 C.F.R. § 761.65(c)(8) and Section 15 of TSCA.

5. Respondent's failure to dispose of its General Electric Spirakore transformer within one (1) year from the date when the transformer was placed in storage for disposal constitutes a violation of the PCB regulations at 40 C.F.R. § 761.65(a) and Section 15 of TSCA.

6. Respondent's failure to notify the EPA of its PCB waste activities at the Facility is a violation of the PCB regulations at 40 C.F.R. § 761.205(a)(2) and Section 15 of TSCA.

ORDER

Complainant's Motion for Default Judgment Against Respondent is **Granted.** Respondent's Motion for Extension of Time to File Prehearing Exchange is **Denied**. Respondent is found to be in default for its failure to comply with the April 4, 2000, Prehearing Order and, accordingly, is found to have violated the PCB regulations at 40 C.F.R. Part 761 and Section 15 of TSCA, 15 U.S.C. § 2614, as charged in the Complaint. **It Is Further Ordered** that unless this matter is resolved as to all remaining issues or claims through the filing of a fully executed Consent Agreement and Final Order or unless Complainant files a motion moving for the assessment of a penalty against the defaulting party on or before **October 20, 2000,** the matter shall be dismissed with prejudice.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: September 14, 2000
Washington, DC