

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

11/26/91

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In Re: )  
MPD, INC., ) TSCA-IV-89-P0152  
Respondent. )

Toxic Substances Control Act  
Rules of Practice - Default - Determination of Penalty

If a motion for additional time is not filed prior to the date upon which the pleadings in question are due the movant will be found in default unless the movant can demonstrate excusable neglect.

Appearance for Complainant: Lynda Carney Crum  
Assistant Regional Counsel  
U.S. EPA, Region IV  
Atlanta, Georgia 30365

Appearance for Respondent: E. Davis Coots, Esq.  
Coots, Henke & Wheeler  
255 East Carmel Drive  
Carmel, Indiana 46032

DEFAULT ORDER

This administrative proceeding for the assessment of a civil penalty was initiated pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a), as amended. The action was instituted by a Complaint and Notice of Opportunity for Hearing which was served by certified mail upon MPD, Inc., hereinafter referred to as Respondent, on or about May 1, 1990. The Complaint charged Respondent with violations of regulations governing the manufacture, processing, distribution in commerce, use, disposal, storage and marking of polychlorinated biphenyls (PCBs), promulgated at 40 C.F.R.

Part 761, pursuant to Section 6(e) of TSCA, 15 U.S.C. §2605(e). Respondent filed an Answer on or about June 22, 1990. The matter was referred to the undersigned by Order dated June 29, 1990.

On September 24, 1991, Complainant reported in its Status Report that settlement negotiations had broken down. I therefore issued an Order on September 26, 1991, requiring the parties to file an initial prehearing exchange no later than October 17, 1991. Complainant timely filed its initial prehearing exchange on October 17, 1991. Instead of filing its initial prehearing exchange on or before October 17, 1991, as directed by my Order, Respondent filed a "Request for Enlargement of Time" on October 31, 1991. Complainant opposed this Request, and on November 15, 1991, I issued an Order denying Respondent's request for an extension of time to file its initial prehearing exchange and deemed Respondent to be default of my September 26, 1991 Order.

The Consolidated Rules of Practice, 40 C.F.R. §22.07(b), require that a motion for additional time be filed prior to the date upon which the pleadings in question are due, unless the movant can demonstrate excusable neglect. In this case the due date was October 17, 1991, and the Respondent made no showing at all as to why its motion was not timely filed. This failure constitutes a default within the meaning of the Consolidated Rules of Practice, 40 C.F.R. §22.17(a) which state that default by Respondent constitutes, for the 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. In addition, and in accordance with 40 C.F.R.

§22.17(a), the penalty proposed in the Complaint shall become due and payable by Respondent without further proceedings.

Based on the allegations in the Complaint and the exhibits submitted in Complainant's prehearing exchange, I make the following findings:

FINDINGS OF FACT

1. Respondent owns and operates a communication products manufacturing facility in Ownesboro, Kentucky.
2. Respondent is included in the word "person" as defined in 40 C.F.R. §761.3, as such is subject to TSCA, 15 U.S.C. §2601 et seq., and the regulations promulgated thereunder.
3. On or about August 16, 1989, an inspection of Respondent's facility was performed by the Commonwealth of Kentucky, Division of Waste Management, acting as an authorized agent of Complainant pursuant to Section 11 of TSCA, 15 U.S.C. §2610.
4. At the time of the inspection, Respondent had failed to conduct quarterly inspections, maintain quarterly records of inspection and maintenance history, and label the means of access to one (1) General Electric 750 KVA, 375 gallon Pyranol PCB Transformer, Serial Number C-502596, located at the north end of Respondent's Building Number 9. Pyranol is a trade name for PCB liquid containing PCBs at concentrations greater than 500 ppm.
5. Also, at the time of the inspection, Respondent had failed to maintain quarterly records of inspection and maintenance history for six (6) additional PCB Transformers prior to placing them in storage for disposal. Four (4) of the six (6) transformers were missing manufacturer's name plates, but all six (6) were labelled with the PCB M<sub>r</sub> label.

6. Also, at the time of the inspection, Respondent had failed to date the six (6) PCB Transformers to indicate when they were placed in storage for disposal. Respondent stated they had been removed from service in February 1989.

7. Also, at the time of the inspection, Respondent had improperly stored for disposal the six (6) PCB Transformers by failing to store them in a storage area meeting the required criteria. The transformers were located on pallets in the middle of the floor in Respondent's Building Number 7. There was a floor drain approximately fifty (50) feet from the perimeter of the storage area and there was no six inch high curbing in the storage room.

8. At the time of inspection, Respondent had failed to develop and maintain annual records on the disposition of PCBs and PCB Items.

9. On a follow-up inspection, February 28, 1990, copies of a manifest, certificate of destruction, and Unison PCB Tracking Document were obtained from Respondent to document the destruction of the PCB Transformers. These PCB Transformers were shipped for disposal August 23, 1989, and incinerated December 10, 1989.

#### CONCLUSIONS

1. Respondent violated 40 C.F.R. §761.30(a)(1)(ix) by failing to conduct quarterly inspections of the PCB Transformer, Serial Number C-502596.

2. Respondent violated 40 C.F.R. §761.30(a)(1)(xii) by failing to maintain records of quarterly inspections and maintenance history for the PCB Transformer, Serial Number

C-502596 for at least three (3) years after disposing of the PCB Transformer.

3. Respondent violated 40 C.F.R. §761.40(j)(1) by failing to mark the means of access to one (1) PCB Transformer, Serial Number C-502596, with the required PCB M<sub>t</sub> label.

4. Respondent violated 40 C.F.R. §761.30(a)(1)(xii) by failing to maintain records of quarterly inspections and maintenance history for the six (6) PCB Transformers, located in Respondent's Building Number 7 which were in use or stored for reuse, for at least three (3) years after disposing of the PCB Transformers. 5. Respondent violated 40 C.F.R. §761.65(c)(8) by failing to date PCB Articles and PCB Containers to indicate when they were placed in storage for disposal.

6. Respondent violated 40 C.F.R. §761.65(b) by failing to store PCBs and PCB Items designated for disposal in a facility meeting the required criteria.

7. Respondent violated 40 C.F.R. §761.180(a) by failing to develop and maintain annual records on the disposition of PCBs and PCB Items for each facility by July 1 covering the previous calendar year and by failing to maintain the records for at least five (5) years after the facility ceased using or storing the PCBs and PCB Items.

#### DISCUSSION

The Consolidated Rules of Practice at 40 C.F.R. §22.07(b) require that a motion for additional time be filed prior to the date upon which the pleadings in question are due, unless the movant can demonstrate excusable neglect. In this case the due date set forth in my Order of September 26, 1991 required the

Parties to submit their initial prehearing exchange by October 17, 1991. By motion dated October 31, 1991, the Respondent sought leave for additional time to file its initial prehearing exchange. In support thereof, counsel made some vague statements to the effect that is needed more time. The Complaint was filed in May of 1990 and yet about one and one-half years later, Respondent said it needed more time to prepare its prehearing exchange. Such a statement borders on the outrageous. Respondent made no showing at all as to why its motion was not timely filed. Thus, Respondent's motion is denied and Respondent is deemed to be in default of my Order.

The Consolidated Rules of Practice at 40 C.F.R. §22.17(a), provide that default by Respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the Complaint, a waiver of Respondent's right to a hearing on such factual allegations. In addition, 40 C.F.R. §22.17(a) provides for an assessment of the penalty proposed in the Complaint without further proceedings.

The penalty proposed in the Complaint for the violations alleged was \$45,000. The penalty amount was determined in accordance with the U.S. Environmental Protection Agency's "Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy" ("PCB Penalty Policy"), 45 Fed. Reg. 59770 (1980), as amended on April 9, 1990. In arriving at the penalty assessed in the Complaint, the gravity based penalty was calculated, then adjustments were considered and made where appropriate. To determine the gravity based penalty, the nature of the violation, extent of potential or actual environmental

harm from a given violation, and the circumstances of the violation were taken into consideration. The \$45,000 penalty is appropriate given the nature, extent and circumstances of the violations of Respondent. Both prior to the issuance of the Complaint and in discussion with Respondent following issuance of the Complaint, Complainant considered adjustments to the gravity based penalty, including Respondent's culpability, history of such violations, ability to pay, ability to continue in business, and other matters as justice may require, such as environmentally beneficial expenditures. Respondent furnished no information regarding the effect of the proposed penalty. Under these circumstances, no further discussion of an adjustment to the proposed penalty is warranted and the proposed, unadjusted \$45,000 penalty is determined to be appropriate and will be assessed in full against Respondent.

ORDER

I hereby Order that a penalty of \$45,000 is assessed against Respondent MPD, Inc. in accordance with the procedures set forth in the Consolidated Rules of Practice, 40 C.F.R. §22.17 and the provisions of Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a), as amended, for violations of TSCA as charged in the Complaint.

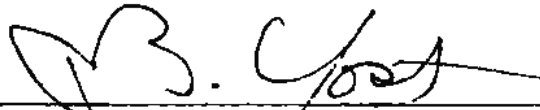
Respondent shall make payment of the full amount of the penalty by submitting a cashier's or certified check payable to

the Treasurer of the United States within 60 days of receipt of this Order<sup>1</sup> to the following address:

Regional Hearing Clerk  
U.S. EPA, Region IV  
P.O. Box 100142  
Atlanta, Georgia 30384

Respondent shall state the Docket Number of this action on the face of such check.

Dated this 26<sup>th</sup> day of NOV., 1991.



Thomas B. Yost  
Administrative Law Judge

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<sup>1</sup>In accordance with 40 C.F.R. §22.17(b), this Default Order constitutes an Initial Decision, which, unless appealed in accordance with 40 C.F.R. §22.30, shall become the final order of the Administrator within forty-five (45) days after service upon the parties and without further proceedings.



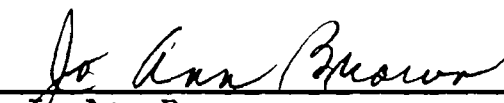
CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing ORDER ON DEFAULT of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Julia P. Mooney, Regional Hearing Clerk, United States Environmental Protection Agency, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia 30365, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said ORDER ON DEFAULT to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)  
EPA Headquarters  
Washington, D.C. 20460

who shall forward a copy of said ORDER ON DEFAULT to the Administrator.

Dated: 11/26/91

  
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Jo Ann Brown  
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing ORDER ON DEFAULT in the matter of MPD, INC., Docket No. TSCA-IV-89-P0152, on each of the parties listed below in the manner indicated:

E. Davis Coots, Esquire (via Certified Mail - Return Receipt  
Coots, Henke & Wheeler Requested)  
255 East Carmel Drive  
Carmel, Indiana 46032

Lynda Carney Crum, Esquire (via Hand-Delivery)  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency, Region IV  
345 Courtland Street, N.E.  
Atlanta, Georgia 30365

I hereby further certify that I have this day caused the original of the foregoing ORDER ON DEFAULT together with the record of the proceeding in the matter of MPD, INC., Docket No. TSCA-IV-89-P0152, to be delivered to the Headquarters Hearing Clerk addressed as follows:

Bessie L. Hammiel (via inter-agency pouch mail)  
Headquarters Hearing Clerk  
U.S. Environmental Protection  
Agency (Mail Code A-110)  
401 M Street, S.W.  
Washington, D. C. 20460

Date: 11/29/91

Julia P. Mooney  
Julia P. Mooney  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region IV  
345 Courtland Street, N.E.  
Atlanta, Georgia 30365  
(404) 347-1565  
FTS 257-1565