

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
General Electric Co., ) Docket Nos.  
 ) TSCA-III-520  
 ) TSCA-V-C-93-90, 94-90 & 95-90  
 ) TSCA-VI-477C  
 ) TSCA-1090-02-14-2615  
 )  
Respondent )

ORDER GRANTING MOTIONS FOR PARTIAL ACCELERATED DECISION,  
DISMISSING IN PART WITH PREJUDICE AND  
ORDER ON MOTION TO COMPEL

By an order, dated December 8, 1993, Complainant's motion for an accelerated decision as to liability on the "disposal counts" of the previously consolidated Region V proceedings (Docket Nos. TSCA-V-C-93-90, 94-90 & 95-90) was granted. By an order, dated March 15, 1994, Complainant's motion for an accelerated decision as to liability for the "disposal count" in the Region X proceeding (TSCA-1090-02-14-2615) was granted, and, inter alia, a sua sponte order finding liability for the "disposal counts" in the Region III and Region VI proceedings (Docket Nos. TSCA-III-520 and TSCA-VI-477C, respectively) was entered.

The latter order is in need of clarification, because the "disposal counts" in the Region III docket included Count II, which alleged a spill of from 50-to-75 gallons of PCBs on October 17, 1987, and because the order should not have been entered "sua sponte." The fact is that on January 12, 1994,

Complainant in Docket No. III-520 filed a motion for an accelerated decision as to liability on all counts of the complaint. Count I alleged improper recordkeeping in violation of 40 CFR § 761.180(a), Count II alleged improper disposal due to the mentioned spill in violation of 40 CFR § 761.60(a)(1) and Counts III through XXXIV alleged improper disposal of PCBs through the operation of GE's freon-flush system. By a motion, dated March 28, 1994, Complainant requested withdrawal of Count I with prejudice,<sup>1/</sup> GE's liability for Counts III through XXXIV is established by In Re General Electric Company, TSCA Appeal No. 92-2a (EAB, November 1, 1993) and it is only necessary to discuss the motion insofar as applicable to Count II.

GE has admitted the spill referred to in Count II in its answer and avers that it reported the spill to EPA. Responding to the motion, GE asserts: (1) that the accidental spill was contained within a PCB storage area which complied with 40 CFR § 761.65(b); (2) the storage area had a floor and curbing designed to contain leaks and spills; (3) the spill was contained completely within this diked storage area; and (4) the spill was immediately cleaned up and disposed of in accordance with 40 CFR § 761.60 (Response of GE, dated January 24, 1994, at 2). Therefore, GE argues that there are factual issues to be

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<sup>1/</sup> The withdrawal had the effect of eliminating from the proceeding issues relating to the Agency's failure to fully comply with the Paperwork Reduction Act (44 U.S.C. §§ 3501 et seq.).

resolved and that Complainant's motion as to Count II should be denied.

Assertions (1), (2), and (3) above relate to mitigation of the proposed penalty rather than whether there was a violation. As to (4), GE has not specifically alleged that it complied with the PCB Spill Cleanup Policy (40 CFR Part 761, Subpart G), which applies to spills occurring after May 4, 1987. Compliance with the cleanup policy, however, would create a presumption against both enforcement action for penalties and the need for further cleanup (§ 761.135), but would not mean that the Act and regulation had not been violated. Complainant's motion for an accelerated decision as to liability on Count II will be granted.

On February 1, 1994, Complainant in Docket No. VI-477C filed a motion for accelerated decision as to liability on Counts I, III and Violation I of Count IV, alleging that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Count I alleges that PCB transformers, which GE had in service in 1985 were required by 40 CFR § 761.30(a)(1)(vi) to be registered with fire response personnel by December 1, 1985, but that such registration was not in fact accomplished until January 15, 1986. Count II involved alleged improper use of presumptively PCB contaminated solvent, which had previously been used to flush PCB

transformers.<sup>2/</sup> Count III alleges improper disposal of PCBs and Count IV--Violations One through Five--alleges inaccurate maintenance of annual documents for the calendar years 1987 and 1988 in violation of 40 CFR § 761.180(a). Simultaneously with the motion for an accelerated decision, Complainant filed a motion to dismiss Violations Two through Five of Count IV. By a notice, dated April 1, 1994, Complainant withdrew Violation One of Count IV. Count IV will be dismissed with prejudice.

In its answer, GE admitted that it first registered the four PCB transformers referred to in Count I [with appropriate fire response personnel] by letter, dated January 15, 1986. Complainant's motion for an accelerated decision as to liability on Count I will be granted. GE's liability for the improper disposal alleged in Count III is governed by the EAB's decision in General Electric Company, supra, and the motion for an accelerated decision as to liability for this count will be granted.

#### GE's Motion To Compel

Under date of April 12, 1994, GE, noting that all regions except Region V have identified in their pre-hearing exchanges witnesses who are expected to testify as to the basis for the proposed penalties, submitted a motion to compel Complainant in

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<sup>2/</sup> This is the freon involved in Count III, which alleges improper disposal of PCBs. This count is foreclosed by General Electric Company, supra, which held that "use" and "disposal" provisions of the regulations are mutually exclusive.

the Region V proceedings to identify witnesses it intended to call to support the penalties claimed. If Complainant did not intend to call any such witnesses, GE moved that Complainant be compelled to identify the individual or individuals who calculated the currently proposed penalties in order that the testimony of such individuals may be compelled by the issuance of a subpoena.

Responding to the motion, counsel for Complainant asserted that he did not intend to call any witnesses to testify as to the penalty calculation it will be proposing at trial (Response to GE's Motion To Compel, dated April 21, 1994). Counsel pointed out that the proposed penalty was set forth in Complainant's pre-hearing exchange in narrative form and showed the numerical calculations.<sup>3/</sup> Counsel further asserted that he calculated the proposed penalties based upon the Agency's penalty policies and the initial and final decisions in In Re General Electric Company, TSCA-IV-89-0016 and TSCA Appeal No. 92-2a, respectively.

In its initial pre-hearing exchange, dated February 1, 1994, Complainant identified two prospective witnesses, Dr. John Smith, an EPA employee, who would testify as to the environmental risk of the violations and William P. Thornton, Jr.,

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<sup>3/</sup> Although this may satisfy Complainant's discovery obligation as to the penalty calculations, counsel is presumably aware that the pre-hearing exchange is not evidence and might ponder how he intends to present a prima facie case that the proposed penalties are appropriate.

Esq., corporate counsel for GE, who would be called as an adverse witness on the issue of GE's alleged culpability. Although Complainant has identified two other potential witnesses in a supplement to its pre-hearing exchange, dated March 28, 1994, no witness is listed as to the penalty calculation.

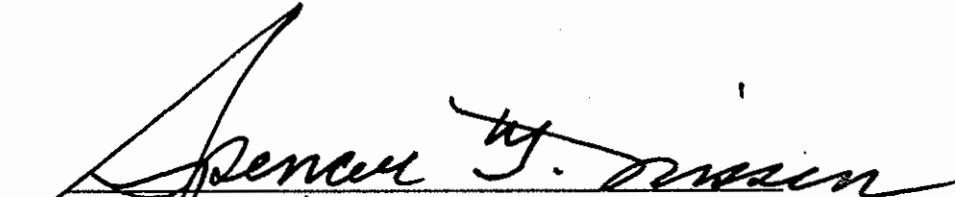
Counsel for Complainant has represented that he calculated the penalties currently proposed and GE has obtained the information sought by the motion to compel. Counsel for Complainant may, however, be called as an adverse witness and examined (cross-examined) on all aspects of the penalty calculations. In such an eventuality, any redirect examination would necessarily be by co-counsel.

#### O R D E R

Complainant's motion for an accelerated decision as to liability for the improper disposal alleged in Count II (Docket No. TSCA-III-520) is granted. The order finding liability for the improper disposal alleged in Counts III through XXXIV of Docket III-520 is affirmed. Complainant's motion to withdraw Count I of Docket III-520 is granted and this count is dismissed with prejudice. Complainant's motion for an accelerated decision as to liability for Count I of Docket No. VI-477C is granted. Count II of Docket No. VI-477C is dismissed and the order finding liability for Count III of this docket is affirmed. Count IV of Docket VI-477C is dismissed with

prejudice. GE has obtained the information sought by its motion to compel and the motion is moot.<sup>4/</sup>

Dated this 3<sup>rd</sup> day of May 1994.

  
Spencer T. Nissen  
Administrative Law Judge

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<sup>4/</sup> In the near future I will be in telephonic contact with counsel for the purpose of setting a date for hearing in Washington, DC.

**CERTIFICATE OF SERVICE**

This is to certify that the original of this **ORDER GRANTING MOTIONS FOR PARTIAL ACCELERATED DECISION, DISMISSING IN PART WITH PREJUDICE AND ORDER ON MOTION TO COMPEL**, dated May 31, 1994, in re: General Electric Company, Dkt. Nos. TSCA-III-520, TSCA-V-C-93-90, 94-90, and 95-90, TSCA-VI-477C, and TSCA-1090-02-14-2615, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Complainants and Regional Hearing Clerks, Regs. V, VI, and X, and Respondent (see list of addressees).



Helen F. Handon  
Legal Staff Assistant

DATE: May 31, 1994

**ADDRESSEES:**

William P. Thornton, Jr., Esq.  
General Electric Co.  
One River Road  
Schenectady, NY 12345

Cara S. Jablon, Esq.  
King & Spalding  
1730 Pennsylvania Avenue, NW  
Washington, DC 20006-4706

Benjamin M. Cohan, Esq.  
Office of Regional Counsel  
U.S. EPA, Region III  
841 Chestnut Building  
Philadelphia, PA 19107

Richard Wagner, Esq.  
Office of Regional Counsel  
U.S. EPA, Region V  
77 West Jackson Boulevard  
Chicago, IL 60604



Richard H. Bartley, Esq.  
Office of Regional Counsel  
U.S. EPA, Region VI  
1445 Ross Avenue  
Dallas, TX 75202-2733

Margaret B. Silver, Esq.  
Office of Regional Counsel  
U.S. EPA, Region X  
1200 Sixth Avenue  
Seattle, WA 98101

Ms. Lydia A. Guy  
Regional Hearing Clerk  
U.S. EPA, Region III  
841 Chestnut Building  
Philadelphia, PA 19107

Ms. A. Marie Hook  
Regional Hearing Clerk  
U.S. EPA, Region V  
77 West Jackson Boulevard  
Chicago, IL 60604

Ms. Lorena Vaughn  
Regional Hearing Clerk  
U.S. EPA, Region VI  
1445 Ross Avenue  
Dallas, TX 75202-2733

Ms. Mary Shillcutt  
Regional Hearing Clerk  
U.S. EPA, Region X  
1200 Sixth Avenue  
Seattle, WA 98101