UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	Docket No. TSCA VII-83-T-191
	)	
T H Agriculture and Nutrition	)	
Company,	)	
	)	
Respondent	)	

1. Toxic Substances Control Act - Disposal of Hazardous Waste - 40 CFR, Part 775, promulgated pursuant to Section 6 of TSCA, requires persons who dispose of wastes containing TCDD to notify the Administrator sixty days before disposal. Respondent's failure to comply with said regulation is unlawful under the express provision of Section 15 of TSCA, 15 U.S.C. 2614, and subjected it to a civil penalty pursuant to Section 16 of TSCA, 15 U.S.C. 2615.

2. Toxic Substances Control Act - Disposal of Hazardous Waste - Absent a showing that the receiving facility, to which Respondent twice transported waste containing TCDD, was a facility "permitted for disposal of TCDD" under Section 3005(c) of the Resource Conservation and Recovery Act, Respondent does not qualify for the exclusion provided by 40 CFR 775.197 and is subject to the prohibitions and requirements provided by 40 CFR Part 775.

3. Administrative Law - Regulations - Regulations issued under a claimed authority and pursuant to law carry a strong presumption of validity; any attack on Administrative Agency regulations must be made at the rule-making stage and has no place in an administrative hearing.

4. Administrative Law - Regulations - Where the construction of Administrative regulations is at issue, deference to the Agency interpretation is clearly in order. The interpretation need not be the only interpretation but simply a reasonable one.

5. Administrative Law - U.S. Constitution - Administrative Agencies and Administrative Law Judges cannot be expected to entertain Constitutional issues.

6. Administrative Law - Public Policy - In regulatory offenses the public interest outweighs the individual interest. Thus, for sake of adequate public protection it is necessary that Respondent conform to a standard of conduct which will insure the result intended by Congress.

7. Resource Conservation and Recovery Act - State Authority - Authority granted to a state to issue permits under its hazardous waste program contemplates that such state program will be equivalent to, consistent with and no less stringent than the Federal program; 42 U.S.C. Sections 6926, 6929.

8. Administrative Law - Toxic Substances Control Act - Intent - Intent is not an element of the offense charged and for which a civil penalty is assessed under Section 16(a) of TSCA. Appearance of the subject rules and regulations in the Federal Register gave Respondent legal notice of their contents.

9. Toxic Substances Control Act - Civil Penalty - Where a violation is shown, a civil penalty should be assessed after consideration of the factors set forth in Section 16(a)(2)(B) of TSCA and the guidelines issued for the assessment of civil penalties relating to toxic substances.

Appearances

For Respondent:

Donald F. Martin, Esquire
Blackwell Sanders Matheny
Weary & Lombardi
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108

For Complainant:

Henry F. Rompage, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION
Marvin E. Jones
Administrative Law Judge

By Complaint filed August 12, 1983, Respondent, T H Agriculture and Nutrition Company, Kansas City, Kansas (hereinafter "Respondent"), is charged with two violations of the regulation 40 CFR 775.190(b). Said Complaint alleges, in Counts I and II, respectively:

1. That Respondent, on September 11, 1981, shipped for disposal "at least 20 cubic yards of waste material contaminated with tetrachlorodibenzo-p-dioxin" (hereinafter "TCDD") "from the the manufacture of 2,4,5-TCP or its pesticide derivatives" without giving a 60-day notice to United States Environmental Protection Agency (hereinafter "EPA", "Complainant" or the "Agency") of said intended disposal, as by said regulation required; and

2. That Respondent, on September 25, 1981, shipped for disposal "at least 20 cubic yards of waste material contaminated with TCDD from the manufacture of 2,4,5-TCP or its pesticide derivatives" without giving a 60-day notice to Complainant of said intended disposal, as by said regulation required.

On each count, Complainant proposes the assessment of a civil penalty in the amount of $25,000 because of Respondent's alleged failure to notify EPA of said intended disposal 60 days prior thereto.

Said regulation, 40 CFR 775.190(b), provides, in pertinent part, as follows:

> (b) Disposal notification. Any person who disposes of chemical substances or mixtures for commercial purposes who wishes to dispose of wastes containing TCDD shall notify the Assistant Administrator sixty (60) days prior to their intended disposal of such wastes. (Emphasis supplied.)

In pertinent part, 40 CFR 775.180 states:

> ... In addition, this subpart requires persons who dispose of wastes containing TCDD to notify the Administrator sixty days before disposal.

Said regulations were promulgated pursuant to Section 6, Toxic Substances Control Act (hereinafter "TSCA"), 15 USC 2605, which provides as follows:

> Regulation of hazardous chemical substances and mixtures
>
> (a) Scope of regulation. - If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:
>
> > (1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.
> >
> > * * *
> >
> > (6)(A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.

At a prehearing conference held in Room 101, 324 East 11th Street, Kansas City, Missouri, on October 18, 1983, beginning at 9:30 a.m., and at the adjudicatory hearing held in Room 415B, at the aforesaid address, on October 27, 1983, at 9:30 a.m., Respondent admits that no notice was given respecting said shipments (TR. 3) and that said shipments

were made (Respondent's letter, dated September 6, 1983), to Texas Ecologists, Inc., waste disposal facility, in Robstown, Texas, and that the carrier used to transport said hazardous waste was Materials Recovery Enterprises, Incorporated (TR. 23). However, Respondent denies that a violation occurred, relying on 40 CFR 775.197(a), to wit:

> Exclusions.
>
> (a) This subpart does not apply to persons disposing of wastes containing TCDD <u>at facilities permitted for disposal of TCDD</u> under <u>section 3005(c)</u> of the Resource Conservation and Recovery Act, 42 U.S.C. 6925(c). (Emphasis supplied.)

Said section 3005(c), 42 U.S.C. §6925(c), provides, in pertinent part:

> (c) Permit issuance
>
> Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. . .

Section 6924 sets down standards applicable to owners and operators of such facilities, including (subsection 7) compliance with the requirements of said Section 6925. Section 6925, Subsection (b) - Requirements of Permit application - provides that applications for a permit "shall contain such information as may be required under regulations promulgated", including the composition, quantities and concentrations of any hazardous waste <u>identified or listed</u>,

or combinations of such hazardous waste and other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency or rate of such handling as well as the site thereof.

Respondent contends in its Answer, dated August 30, 1983, and its letter, dated September 6, 1983, that, by virtue of the Interim Status of Texas Ecologists, Inc., pursuant to 42 U.S.C. 6925(e), and the State Hazardous Waste Program of Texas, authorized by EPA (pursuant to 42 U.S.C 6926), and "the decisions and permits made and issued by the State of Texas under said program, making the subject facility authorized and permitted to receive and dispose of the materials shipped", that the aforesaid shipments were excluded from the 60-day notification requirements. 1/ It is further there contended that EPA's position that the 60-day notification is required by the regulations despite the "Interim Status" and authorized state program and the permits and authority granted Texas Ecologists, Inc., denies Respondent due process (under the 14th Amendment of the U.S. Constitution) because said requirements and regulations are indefinite, vague and ambiguous "in not conveying the proscribed conduct when measured by common understanding and practices" (page 2, Respondent's letter, dated September 6, 1983).

1/ Respondent apparently refers to 40 CFR 775.197 set out hereinabove In this regard, 42 U.S.C. 6929 modifies 42 U.S.C. Section 6926(d). While the latter section provides that state action under a hazardous waste program shall have the same force as action by the Agency, Section 6929 provides that a state may not impose provisions less stringent than provided by the Act.

Further, Respondent does not admit that it comes within the definition (40 CFR 775.183[c]) of "disposes of...[chemical substances or mixtures] for commercial purposes." There is no question that "persons who use chemicals in their commercial enterprise also are considered to dispose of their waste chemicals for commercial purposes." In the Preamble to 40 CFR Part 775, contained in 45 FR at page 15598 (March 11, 1980), it is stated:

> For example, while a manufacturer of the pesticide 2,4,5-T may be subject to the jurisdiction of FIFRA with regard to the registration of the pesticide, he is subject to TSCA jurisdiction for regulation of the TCDD waste disposal incidental to that production. EPA considers any waste disposal (or actions incidental thereto) by Vertac, for example, to be disposal for commercial purposes because Vertac is engaged in the commercial manufacture of pesticides."

The remaining contentions of Respondent were also addressed in said Preamble, _supra_, page 15598, column 2, where it states, in summary:

> Persons shall not be allowed to dispose of TCDD wastes in facilities covered only by intermin status under section 3005(e) of RCRA without prior notification.

Discussion and Conclusions

On consideration of the entire record and the briefs submitted by the parties, I find that a civil penalty should be assessed. All proposed findings inconsistent herewith are rejected.

Under the pertinent.regulations cited hereinabove, Respondent clearly violated 40 CFR 775.190(b) in failing, on September 11, 1981, and again on September 25, 1981, to give the 60-day

notice to EPA of its intended disposal of TCDD as by said regulation required. I further find that Respondent does not come within the exclusion provided in Section 775.197(a) of 40 CFR for the reason that the facility to which Respondent's TCDD waste was shipped was not, on this record (TR. 5), "permitted for disposal of TCDD." In so finding, I have given "weight and considerable respect" to the Preamble to 40 CFR Part 775 (45 FR, page 15598, March 11, 1980), supra, (see Withers v. USPS, 417 FS 1 [1976]; Black Hills Video Corporation v. FCC, 399 F.2d 65 [1968]). Regulations issued under a claimed authority and pursuant to law carry a strong presumption of validity (Edwards v. Owens, 137 FS 63 [1956]; Foremost-McKesson, Inc. v. Davis, 488 SW 2d 193 [MO]). Further, it is well settled that the statutory interpretation of an agency which is charged with the administration of a particular act will not be overturned, unless it is patently unreasonable. When, as here, the construction of an administrative regulation (rather than a statute) is an issue, deference to the Agency interpretation is even more clearly in order. The interpretation need not be the only interpretation but simply a reasonable one (see Train v. NRDC, 421 U.S. 60, l.c. 87 [1975]; Udall v. Tallman, 380 U.S. 1, 16-18 [1965]; McLaren v. Fleischer, 256 U.S. 477, 480 [1921]).

Respondent's claim of "denial of due process" and its attack on the regulation are both misplaced. I am precluded

from passing on the constitutionality of procedures which I am called upon to administer, Frost v. Weinberger (NY 1974) 375 FS 1312, 1313(11), 515 F2d 57; see also City of Joplin v. Industrial Commission of MO (MO 1960), 329 SW 2d 687. In Public Utilities Commission v. U.S., 355 U.S. 534, l.c. 539, 78 S.Ct. 446, l.c. 453, the Supreme Court observed (with reference to an administrative proceeding): "The issue is a Constitutional one that the Commission can hardly be expected to entertain", confirming FPC v. Texaco, 377 U.S. 33 (1964). In Storer Broadcasting Co. v. U.S., 351 U.S. 192, l.c. 205, 76 S.Ct. 763, l.c. 771 (1950), the Court held that an attack on the Rules and Regulations of an Administrative Agency must be made in the "rule making proceeding" and has no place in an administrative hearing. See further Weinberger v. Salfi, 422 U.S. 749, l.c. 765 (1975).

The underlying logic for such holdings is apparent. Using the language of Belsinger v. D.C. (DCDC 1969), 295 FS 159, 436 F. 2d 214, "the offense is not a criminal offense but a regulatory one. In regulatory offenses the public interest outweighs the individual interest." Thus, for sake of adequate public protection, it is necessary to hold Respondent to that standard of conduct which will insure the result intended by Congress. On this record, TCDD is not now and was not, in September, 1981, a "listed waste" under the Resource Conservation and Recovery Act (RCRA) (TR. 6).

Further, it was "not possible for a landfill to be fully permitted for disposal of TCDD" under RCRA Section 3005(c) in September, 1981 (TR. 5). On this record, the Part A Application of Texas Ecologists (to whom said shipments by Respondents were made) did not list TCDD as a hazardous waste which it would receive (TR. 44), though said Part A Application did, in fact, list over 400 RCRA "listed wastes" (Respondent ["R"] Exhibit ["Ex."] 1. Respondent's only witness, Willis H. Hart (TR. 22), Thompson-Hayward Chemical Company Vice President for Engineering and Environment, who has the responsibility to see that Respondent is in compliance with regulations concerning the environment (TR. 47), testified that he found that the receiving landfill, Texas Ecologists, at Robstown, Texas, had an EPA identification number which signified, to him, that "they had filed a notification with (EPA) and had submitted a Part A application, as a minimum" (TR. 24). He made a telephone call to them and confirmed "they were a hazardous waste disposal facility, the types of materials in general they could take" and that they had a state permit (TR. 25). Mr. Hart was familiar with the regulations in 40 CFR Part 775 (TR. 26), and with the requirements of Sections 3005 and 3010 of the Act (TR. 31). He did not determine that TCDD was listed on the Part A Application of Texas Ecologists (TR. 44); he did not contact EPA or any Texas state agency to determine if the state agency had authority under RCRA to permit landfills to take TCDD (TR. 46); nor did he determine if Texas Ecologists had been,

in fact, "permitted for disposal of TCDD". (TR. 46). Mr. Hart did determine, however, in contacting the Texas state agency administering the state's waste disposal program, that the 1972 permit issued to said Texas Ecologists (R Ex. 7) was still in force and effect (TR. 64). Since he was familiar with the provisions of 40 CFR Part 775, and made contact with the state agency and said receiving facility, the question remains why he did not inquire specifically whether said Texas Ecologist was a facility "permitted for disposal of TCDD". This inquiry could easily have been made to the EPA Regional Office in Kansas City, Missouri, but was not. Such inquiry likely would have revealed that no landfills were anywhere "permitted for disposal of TCDD" (TR. 5).

Contrary to Respondent's argument, the violations with which Respondent is charged were explicitly proscribed by the language of Sections 775.190(b) and 775.180 of 40 CFR, and Respondent does not come within the exclusion provision of 40 CFR 775.197(a). Respondent's failure to make the essential factual determination that the subject receiving facility was <u>not</u> a facility "permitted to receive TCDD" was not due to its being unaware of "a requirement prohibiting...(said) disposal"; but rather to its indifference to, or a reluctance to recognize, the literal wording of the rules and regulations governing said shipments. This is not to say that it is a defense to the charge if Respondent claims it did not know of the prohibition

contained in the rule cited hereinabove. Publication of the rules in the Federal Register imparted notice to Respondent of said provisions and, legally, is the notice to which it was entitled. 2/

Civil Penalty

The statutory criteria for assessing penalties under TSCA, Section 16(a), are listed in Section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B), which provides as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

To provide guidance to the assessment of penalties under Section 16, the EPA enforcement staff has issued guidelines setting forth the general policies it will follow and has supplemented these guidelines with a specific policy for assessing penalties for violations relating to polychlorinated biphenols ("PCBs") and other toxic substances. 3/

2/ See In the Matter of Ridco Casting Co., Docket No. TSCA-82-1089 (1983), citing Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947), where the Supreme Court stated, "[J]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."

3/ See 45 Federal Register 59770-59783 (September 10, 1980), referred to herein as the PCB penalty policy.

The procedural rules for these proceedings require that I consider the guidelines and PCB penalty policy in determining the appropriate penalty, and that if I assess a penalty different in amount from that proposed in the Complaint, I must give my reasons therefore. 4/

The PCB penalty policy uses a matrix to establish an initial penalty based upon the nature, extent, circumstances and gravity of the violation. The initial penalty can then be adjusted upwards or downwards depending upon consideration of the other statutory factors, i.e., culpability, history of such violations, ability to pay, ability to continue in business and such other matters as justice may require. 5/

The regulation here twice violated is a "chemical control" regulation which places constraints on how TCDD is handled in an effort to minimize the risk presented by this very toxic substance. 6/ I have concluded that said transportation and handling on both of the occasions here considered presented a "significant chance" to cause damage to public health and the environment, i.e., the likelihood of damage was lessened by the use of an experienced means of transport. It is the "probability of harm" or potential for harm and the risk inherent in the violation as it was committed that is properly considered rather than any actual harm that resulted from subject violation. 7/

4/ 40 CFR 22.27(b).

5/ 45 Federal Register 59777 (September 10, 1980).

6/ Ibid. 59771.

7/ Ibid. 59772.

The circumstances (probability of damages), indicated on this record, are at "mid-range level 3" on the horizontal axis of the matrix (45 FR at 59771). The "extent of potential damage" on the vertical axis of the matrix is "major."

In the premises, upon consideration of the statute and the guidelines for the assessment of penalties relating to toxic substances, and all of the factors herein set forth, I find that a civil penalty of $15,000 should be assessed for each of said violations by Respondent, for a total penalty of $30,000.

I do not find that any adjustment is warranted because of Respondent's "ability to pay." No claim of inability to pay is made on this record nor it is claimed or shown whether Respondent's ability to continue in business will be affected by assessment of the penalties proposed. Further, there is no evidence in this record that Respondent's history of compliance is unfavorable.

It should be pointed out that intent to violate is not a factor to be considered; 8/ however, "culpability" of the violator should be and has been considered in determining if an adjustment to the penalty amount is warranted. No adjustment to the penalty for this cause is appropriate.

8/ Cf. 15 U.S.C. 2615(a) with 2615(b). (See 16[a] and [b].) The words "knowingly or willingly" which appear in Section 16(b) do not appear in Section 16(a). Thus, while intent is an element of the offense for which a criminal penalty may be assessed, it is not an element of offenses for which civil penalties are assessed.

ORDER 9/

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615[a]), a civil penalty of $30,000 is hereby assessed against Respondent T H Agriculture and Nutrition Company for the violations of the Act found herein.

Payment of the full amount of the civil penalty shall be made within 60 days of the Service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, U.S. EPA, Region VII, a cashier's check or certified check payable to the Treasurer, United States of America.

DATED: January 10, 1984

Marvin E. Jones
Administrative Law Judge

9/ Unless an Appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review the Decision on his own Motion, this Initial Decision shall become the Final Order of the Administrator (40 CFR 22.27[c]).

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the above and foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of said Initial Decision to the Administrator.

DATED: January 10, 1984

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
324 EAST ELEVENTH STREET
KANSAS CITY, MISSOURI - 64106

IN THE MATTER OF)
)
T H Agriculture and Nutrition) Docket No. TSCA VII-
Company) 83-T-191
)
) CERTIFICATION OF SERVICE
)
Respondent)

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Marvin E. Jones, along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Henry F. Rompage, Office of Regional Counsel, Environmental Protection Agency, Region 7, 324 E. 11th Street, Kansas City, Missouri; that a copy was served by certified mail, return receipt requested on Respondent's attorney Donald F. Martin, Blackwell, Sanders, Matheny, Weary & Lombardi; Five Crown Center, 2480 Pershing Road, Kansas City, MO 64108.

If no appeals are made (within 20 days after service of this Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Missouri this 10th day of January 1984.

Rita Ricks
Regional Hearing Clerk

cc: Honorable Marvin E. Jones
Administrative Law Judge

Attachment C

RECUSAL FORM

This form must be included with all documents requiring review by the Administrator, Mr. William D. Ruckelshaus.

|__| 1. It appears that the financial interest of an entity listed on Attachment A, or the industry of which it is a member, is distinctively affected or involved in this particular matter.

Name of entity and/or industry: ______________________

____

Nature of entity's interest: ______________________

____

____

|__| 2. It appears that (1) this is a particular regulatory or adjudicatory matter in which an entity listed on Attachment A or Attachment B is a party-in-interest and (2) the matter (a) was pending before EPA at the time Mr. Ruckelshaus was affiliated with that entity, or (b) was one in which he was directly and substantially involved while affiliated with that entity.

Name of entity: ______________________

____

____

Nature of entity's participation: ______________________

____

|__| 3. It appears that the entity listed below has an interest in this matter and that Mr. Ruckelshaus had a prior affiliation with such entity. (Do not check this box if No. 1 or No. 2 above applies.)

Name of entity: ______________________

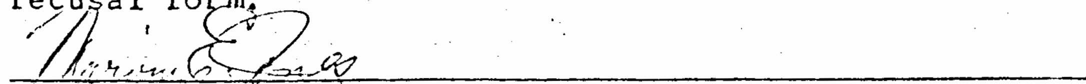
Nature of entity's interest: ______________________

____

____

| X | 4. There is no potential recusal issue apparent to the office originating this matter.

Names and signature of official(s) filing recusal form.



Marvin E. Jones

Administrative Law Judge

Date: January 10, 1984

Concur ____________ Non-concur ____________

Comments: ____________

____
General Counsel

Note: The concurrence of the General Counsel is not required if Box 4 is checked.

I recuse myself from decision-making in this matter.

Date: ____________ ____________
Administrator

I do not recuse myself from decision-making in this matter.

Date: ____________ ____________
Administrator