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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Lefton Iron & Metal Company	:	
	:	Docket No. TSCA-V-C-55-1991
Respondent	:	Judge Greene

ORDERS
UPON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter arises under Sections 11(a) and 15(4) of the Toxic Substances Control Act, 15 U.S.C. §§ 2610(a) and 2614(4) ("TSCA" or "the Act") and regulations promulgated pursuant to authority contained therein.

The complaint charges that Respondent prevented a U. S. Environmental Protection Agency [EPA] representative from taking soil samples to determine compliance with requirements of federal regulations relating to polychlorinated biphenyls [PCBs], in violation of Section 15 (4) of the Act, 15 U.S.C. 2614(4). A civil penalty of $25,000 is proposed for the alleged violation.

In its answer, Respondent denied that it is subject to such

regulations, that it had "ever prevented" EPA's representative from taking samples at its facility, that the EPA representative had "attempted to inspect" the facility, that EPA has authority to conduct an inspection pursuant to Section 11(a) of the Act, and that the purpose of the proposed inspection was proper pursuant to Section 11(a). Respondent answered further that the proposed inspection was intended solely to harass. In addition, affirmative defenses of laches and "unclean hands" were asserted.[1]

The parties filed cross-motions for summary judgment. Complainant's motion goes only to liability.

Section 11(a) and (b) of TSCA, 15 U. S. C. § 2610 (a)-(b).

The Act provides specifically that EPA "may inspect any establishment, facility, or other premises in which chemical substances or mixtures are . . . processed, stored, or held before or after their distribution in commerce."[2]

Section 11 (a) states, *inter alia*, that:

> . . . . an inspection conducted . . . ***shall extend to all things within the premises*** . . . (including records, files, papers, processes, controls, and facilities) ***bearing on whether the requirements of this chapter*** applicable to the chemical substances or mixtures within such premises . . . ***have been complied with.*** [Emphasis added]

The statute does exclude from inspection data relating to finances,

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[1] Answer to the complaint, at 2, 4, 5-7.

[2] TSCA § 11(a), 15 U.S.C. § 2610(a).

sales (other than shipments), pricing, personnel, and research -- but only if the nature and extent of such data have not been described with "reasonable specificity" in the required written inspection notice. In addition, Section 15 (4) of the Act, 15 U.S.C. § 2614 (4), provides that "[I]t shall be unlawful for any person to . . . fail or refuse to permit entry or inspection as required by section 2610 of this title."

EPA has broad authority pursuant to Section 11 (a) of the Act, 15 U.S.C. § 2610 (a), to conduct inspections for the purpose and within the scope set forth at subsections (a) and (b) thereof. If the proposed investigation is within such scope, and if the other requirements of subsection (a) have been met, members of the regulated community are not at liberty to delay, prevent, or refuse an inspection without risking the commission of an unlawful act.

It is also clear that the taking of soil samples falls well within the scope of an inspection for compliance with PCB regulations. "When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing its statutory mission." Dow Chemical Co. v. U. S., 476 U.S. 227, 233 (1986). In the case of PCBs, a chemical compound[3]

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[3] 15 U.S.C. § 2602(2)(A) provides that the term "chemical substance" means "any organic or inorganic substance of a particular molecular identity including -- (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and (ii) any element or uncombined radical." 40 C.F.R. § 761.3 is virtually identical. See also the definition of "PCBs," at 40 C.F.R. § 761.3.

that Congress has specifically found to be a danger to public health and the environment, and has "singled out for special treatment"[4] at Section 6 of the Act, 15 U.S.C. § 2605, a holding that excluded the taking of soil samples for PCB analysis would lead to an absurd and contradictory result: even in cases where PCBs are almost certainly known to be present in the soil, no confirmation or proof would be obtainable. "Common sense and ordinary human experience"[5] suggest that the taking of soil samples for PCB analysis is not only a reasonable method for determining compliance with TSCA-PCB regulations, it is a necessary method included by inference within the scope of Section 11 (a)-(b). As the Supreme Court said in Dow Chemical, supra,

> Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. Environmental standards such as clean air and water cannot be enforced only in libraries and laboratories, helpful as those institutions may be.

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[4] See Dr. David G. Walker v. EPA, 802 F. Supp. 1568, 1571 (S. D. Tex. 1992); and Environmental Defense Fund, Inc. v. EPA, 636 F. 2d 1267, (D. C. Cir. 1980), at 1271:

> No other section of the Act addresses the regulation of a single class of chemicals.
>
> The special attention accorded to PCBs in [the Act] resulted from the recognized seriousness of the threat that PCBs pose to the environment and human health . . . .

[5] Dow Chemical 476 U.S., at 233.

There is no reason to suppose that TSCA authority to enforce does not carry with it "all the modes of inquiry . . . useful to execute the authority granted."

Application of TSCA and PCB Regulations.

Respondent's denial that the regulations apply to its facility is based upon assertions that it does not manufacture, process, store, *or hold* the chemical substances or mixtures referred to in Section 11 (a) of the Act.[6] It is Respondent's position that, even where PCBs are known or believed to be present, or known to have been present at one time,[7] EPA has no authority to inspect because (1) -- taking Respondent's word for it -- no PCBs are manufactured, processed, stored, or held at the facility; (2) EPA has made no showing that Respondent engages in any of the activities set forth at Section 11 (a). Respondent further asserts that if PCBs should happen to be present at its facility, it is because they were tracked in, washed in by storm water run-off, or arrived as the result of an explosion.[8]

The definition of the word "hold" is therefore at issue since Section 11 (a) applies not only where chemicals are being manu-

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[6] Answer to the complaint, at 3.

[7] Complainant's motion, attachments A and C; Respondent's Memorandum in Opposition to Complainant's motion and in Support of Respondent's Motion [Respondent's Memorandum] at 4.

[8] It appears that Respondent's facility is surrounded by operations that do manufacture, process, store, or hold PCBs. See Respondent's Memorandum at 4.

factured, processed, or stored, but also where they are "held" at "any facility, establishment, or other premises."[9]

In the absence of a statutory or regulatory definition, "hold" must be interpreted in the light of common usage. Usages are recorded in dictionaries of the English language. "Hold," a common word used broadly and in numerous ways, is defined first to include the following: "keep possession of; retain; keep; possess; . . . to cling; to adhere;"[10] "to maintain possession of; . . . to keep control of or authority over; . . . to have or keep in the grasp."[11],[12] Thus, common usage of the word "hold" does embrace the concept of presence -- without more -- of PCBs at Respondent's facility, since "hold" can be neutral as to knowledge, intent, or deliberateness.

In this case, matters such as whether Respondent knew of or intended such presence, and whether the quantity was large or just 50 parts per million[13] do not lead to material facts that are in dispute. In addition, such matters are not material to a determination as to whether Complainant is entitled to judgment as a

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[9] Section 11 (a) of the Act, 15 U.S.C. § 2610 (a).

[10] Winston Senior Dictionary 461 (27th ed. 1957).

[11] Webster's New Collegiate Dictionary 540 (8th ed. 1979).

[12] Presumably those definitions of "hold" which are most similar to "store" may be eliminated, since "store" is specifically covered by Section 11 (a).

[13] See 40 C.F.R. § 761.3.

matter of law in connection with an attempted Section 11 (a) inspection.

Complainant's evidence that PCBs were found at Respondent's facility before as well as after September 21, 1990, is amply supported[14] and, in any case, is not denied. Viewing the record in the light most advantageous to Respondent's case, there is nothing remotely approaching a disputed issue of material fact as to whether EPA had reason to believe PCBs were present at Respondent's premises. Neither can there be doubt, in view of the broad policy statements and findings set out by the Congress[15] in the first section of the Act [Section 2601 (a)-(b)] that PCBs in the soil at a scrap yard facility -- even assuming the facility is unaware

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[14] See attachments Exhibits A-C to Complainant's motion.

[15] At 15 U.S.C. § 2601(a) and (b), Congress found that

> human beings and the environment are being exposed each year to a large number of chemical substances . . .
> among the many chemical substances and mixtures which are constantly being developed and produced, there are some whose . . . distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment. . . .
>
> . . . It is the policy of the United States that --
> . . .
> (2) adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards . . . .

of their presence -- are an appropriate subject of inspection.[16] Accordingly, it is found that the Act and the PCB regulations issued pursuant to authority of Section 6 [15 U.S.C. § 2605] are applicable in circumstances where a facility denies that it manufactures, processes, stores, or holds PCBs, but where there is reason to believe that PCBs may be found.

Inspection and Sampling.

Turning to the factual aspects of the charge that Respondent prevented the taking of samples on the occasion in question, the record discloses the following: a duly authorized EPA official, accompanied by a representative of the Illinois Environmental Protection Agency, made an unannounced visit to Respondent's facility on September 21, 1990, at about 10:40 a.m., for the purpose of inspecting the facility pursuant to Section 11 (a) - (b) of the Act. The official presented EPA credentials and a notice inspection[17] as required by Section 11 (a). He explained the scope of the inspection to Respondent's President and, later, to its Board Chairman. The EPA official explained that "samples," i. e. soil samples to be analyzed for the presence of PCBs, "may be

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[16] Complainant's documents indicate that Respondent operates a salvage yard; activities at the salvage yard include receipt of and salvaging of scrap iron. See Attachment 1 to Exhibit A to Complainant's motion, In the Matter of Lefton Iron & Metal Company, Notice Pursuant to Section 4(g) of the Environmental Protection Act, issued by the Illinois Environmental Protection Agency, at 2-3, dated December 8, 1988. The document is signed by Bernard P. Killian, Director.

[17] First Set of Joint Stipulations of Law and Fact, at 3, #9.

taken."[18] Respondent's President consulted an attorney, with whom the EPA representative then spoke. The attorney said he would advise Respondent to cooperate with the inspection. Respondent's President then agreed to cooperate. The EPA representative did not object to the splitting of soil samples and giving Respondent copies of any photographs taken.[19]

Respondent's Board Chairman arrived, and, after explanation by EPA's representative and some discussion, said either that he would not "allow" or that he had not decided "whether to allow" the taking of soil samples -- even split samples -- unless a particular sampling contractor was present for the soil sampling.[20] It was then determined that the contractor could not be present that day. The EPA and IEPA representatives left Respondent's premises at about 1:26 p.m.[21] Three or four days later, Respondent's attorney or another of Respondent's representatives telephoned and offered to reschedule the inspection.[22] There is substantial agreement between the parties with respect to the foregoing material facts

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[18] Exhibit A to Complainant's motion, document signed by Scott Cooper; see also affidavit of Scott Cooper, Exhibit B to Complainant's motion, dated March 5, 1993, in which the statements made in Exhibit A are certified to be true and accurate.

[19] Complainant's brief states that the EPA representative "agreed" to split the soil samples with respondent.

[20] Affidavit of Norman Lefton, at 3.

[21] Affidavit of Scott Cooper, Exhibit B to complainant's motion; First Set of Joint Stipulations of Fact and Law, # 11 at 3.

[22] Affidavit of Scott Cooper, Exhibit B to complainant's motion. See also Answer to the complaint at 3, ¶ 12.

relating to the inspection.[23]

Section 11 (a) provides that:

> Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection ***shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner***. [Emphasis added]

Clearly, then, inspections must be "reasonable" as to time, limits, and manner; and they must be commenced and completed with "reasonable promptness."

Respondent urges that the presence of some rain on the date in question makes the inspection unreasonable. Even if it were to be shown reliably rather than merely raised as a possibility[24] that the presence of rain during the taking of soil samples could affect PCB readings,[25] this would not constitute a disputed issue of material fact as to whether the inspection was "reasonable" as to time. Neither would the presence of rain cause the inspection to

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[23] Respondent's official said either that he would not allow the samples to be taken in the absence of his sampling contractor, or that he had not decided whether to allow such sampling in the absence of the contractor. It is not disputed that the EPA official presented U. S. EPA Region V credentials to Respondent's President and Board Chairman [Answer to the complaint at 3].

[24] Respondent's Notice of Compliance with Pretrial Exchange Order, at 1.

[25] It is Respondent's position that there were no PCBs on its property as a result of its own business activities.

be unreasonable with respect to time, limits, or manner as a matter of law.[26]

Respondent urges that September 21, 1990, was a religious holiday, and that an inspection on such a holiday is unreasonable. The record does not show that Respondent raised this when the EPA representative arrived. There is no evidence that the facility was not open for business during regular business hours. Respondent's President was present at the facility when the EPA representative arrived. As has been noted in the record, Respondent's Board Chairman was also present, and at one point left the facility on a "business errand."[27] In short, there is no evidence that Respondent's chief officials were observing a religious holiday in a manner such as would cause the inspection to be unreasonable in Section 11 (a) terms.

Respondent states, without elaboration, that the presence of the representative of the Illinois Environmental Protection Agency caused the inspection to be unreasonable because that individual was not an EPA representative. It is difficult to understand why

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[26] Whether the taking of soil samples in the presence of rain is *ill-advised* is another matter, but this interesting question goes not to a material fact remaining at issue with respect to EPA's compliance with Section 11 (a), but to the accuracy of the PCB analysis. It must be remembered that the charge here relates to prevention of a lawful inspection -- not illegal disposal of PCBs. Accordingly, the question of rain and soil samples need not be addressed here.

[27] Affidavit of Chairman of the Board Mr. Norman Lefton, at 2, 3; see also Respondent's motion in opposition to Complainant's motion.

this would be so. No reasons come to mind, and none have been offered. Section 11 (a) requires only the showing of "appropriate credentials" on the part of inspecting officials.

No material question of fact remains to be determined as to whether the inspection was reasonable as to time, limits, and manner, or with respect to whether respondent prevented EPA from carrying out its intended Section 11 (a) inspection. The EPA representative (1) arrived at a reasonable time, (2) announced his purpose, showed appropriate credentials, and provided written notice to respondent's officials. He advised them that he might take soil samples. Respondent's Board Chairman said that he would not "allow," or had not decided "whether to "allow," soil samples. At 1:26 p.m. either (1) the matter had been resolved by Respondent's Board Chairman against allowing soil samples,[28] or (2) Respondent's officials had not yet decided "whether to allow soil sampling".[29] As a matter of law, Respondent's actions in refusing to "allow" -- or in having not decided, two and a half hours after EPA's arrival, *"whether to allow"* -- soil samples to be taken in the absence of a particular contractor who was not available that day constitutes failure or refusal to permit inspection pursuant to Section 11 (a) of the Act. A facility operator cannot fail to allow, without risk of penalty, a lawful inspection. Especially in circumstances where enforcment officials have received reports that

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[28] Complainant's motion, Attachment B.

[29] Affidavit of Mr. Norman Lefton, at 3.

PCB-contaminated soil may have been removed subsequent to an earlier inspection notice directed to Respondent's facility, but before the date scheduled for such inspection,[30] the importance of consummating an unannounced inspection (including the taking of soil samples, if appropriate) is obvious.[31] EPA is not required to accomodate the sort of scheduling contended for here by Respondent. Neither is EPA required to reschedule an inspection at Respondent's convenience on penalty of being guilty of laches or "unclean hands." Finally, Section 11 (a) does not require EPA officials to argue, engage in extensive negotiations, wait for indefinite periods, or possibly endanger themselves by doing something that a facility operator has said he will not "allow," or has not decided "whether to allow," in order to inspect a facility. Indeed, it is just such difficulties which the clarity of Section 11 (a) should obviate. Both EPA's authority and the limitations on that authority are clearly spelled out.

Since Respondent has pointed to no material facts in dispute which suggest that EPA failed to comply with any Section 11 (a) - (b) requirements, the questions of law as to whether EPA complied

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[30] Exhibit A to plaintiff's motion, document entitled "Notice Pursuant to Section 4(g) of the Environmental Protection Act," at 3.

[31] Complainant's evidence also suggests that the Illinois Environmental Protection Agency never was able to gain access to certain areas of respondent's facility for purposes of inspection, and on that account assistance was sought from EPA. See Exhibit C to Complainant's motion, document entitled "Site Report," at 1.

with the reasonableness requirements of Section 11 (a) of the Act include whether the time of the inspection, the limits of the inspection, and the manner of the inspection were "reasonable." Because Section 11 (a) requires reasonableness, whether conduct was reasonable becomes a question of law at the point where no material facts remain in dispute.

The requirements of Section 11 (a) were observed. EPA's intended inspection was reasonable as to time, limits, and manner. Therefore, it is held that Respondent's actions constitute failure or refusal to allow an inspection pursuant to Section 11 (a).

Respondent's affirmative defenses of laches and "unclean hands" are, under the circumstances shown here, without merit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The polychlorinated biphenyls ("PCBs") disposal and marking regulations were lawfully promulgated pursuant to Section 6 of TSCA, 15 U.S.C. § 2605, on February 17, 1978 (43 Fed Reg. 7150). The PCBs manufacturing, processing, distribution in commerce and use regulations ("PCB rule") were lawfully promulgated on May 31, 1979 (44 Fed Reg. 31514), and incorporated the disposal and marking regulations. The PCB rule was subsequently amended and rtially recodified at 40 C.F.R. Part 761.

2. Complainant is the Director, Environmental Sciences Division, Region 5, United States Environmental Protection Agency ("U.S. EPA"), by lawful delegation.

3. Respondent, which is and was at all times relevant herein a corporation incorporated under the laws of the State of Missouri, has a place of business at 205 South 17th Street, East St. Louis, Illinois. Respondent is the owner and operator of the facility and is a "person" as defined in 40 C.F.R. Part 761.

4. Respondent's facility at 205 South 17th Street, East St. Louis, Illinois, is an establishment, facility or premises in which chemical substances or mixtures are held before or after their distribution into commerce.

5. EPA is authorized to inspect, pursuant to Section 11 (a) of the Act, a facility where there is reason to believe that PCBs are present or are being held, without establishing in advance that the facility engages in the manufacture, processing, or storage of chemical substances.

6. EPA has broad authority pursuant to Section 11 of the Act, 15 U.S.C. § 2610(a), to conduct inspections for the purpose and within the scope set forth at subsections (a) and (b) thereof. Within such scope, and to the extent that the requirements as to reasonableness of subsection (a) have been observed by EPA, members of the regulated community are not at liberty to refuse an inspection without the risk of committing an unlawful act, as provided by Section 15 (4) of TSCA.

7. On September 21, 1990, a duly designated EPA representative attempted to inspect Respondent's facility at 205 South 17th Street, East St. Louis, Illinois, in order to determine whether the

facility was in compliance with the PCB rule. The EPA representative presented U.S. EPA credentials and a written TSCA notice of inspection to Mr. Benjamin Lefton, Respondent's President.

8. The above attempted inspection was commenced with reasonable promptness and was initiated at a reasonable time; the inspection proposed was within reasonable limits, and initiated in a reasonable manner. The attempted inspection was not unreasonable because the date in question was a religious holiday, if the facility is open for business. The presence of rain on the date in question does not make the attempted inspection unreasonable.

9. Respondent failed to allow EPA's representative to take soil samples to determine whether the requirements of the PCB regulations under TSCA had been complied with. Soil sampling for compliance with such regulations is within EPA's authority under Section 11 (a) of the Act. Respondent's failure to allow the taking of soil samples constituted failure or refusal to permit an inspection, in violation of Section 15 (4), 15 U.S.C. § 2614(4), at Respondent's facility on the date in question. Respondent is subject to the assessment of a civil penalty for this violation.

ORDER

It is hereby ordered that Complainant's motion for partial "accelerated decision" as to liability shall be, and it is hereby, granted. And it is further ordered that Respondent's motion for

"accelerated decision" shall be, and it is hereby, denied.

It is FURTHER ORDERED that the parties shall attempt to settle the remaining issue herein, and shall report upon the status of their effort during the week ending March 29, 1996.

J. F. Greene
Administrative Law Judge

Washington, D. C.
February 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on February 23, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF CASE: Lefton Iron and Metal Company
DOCKET NUMBER: TSCA-V-C-55-91

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