UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ARMOUR AND COMPANY,	)	Docket No. TSCA-VII-89-T-229
	)	
Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART

COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

The United States Environmental Protection Agency (sometimes complainant or EPA) issued a complaint on August 29, 1989, charging Armour and Company (respondent) with violations of the Toxic Substances Control Act (TSCA). Specifically, respondent has been charged with violations of regulations of TSCA that concern Polychlorinated Biphenyls (PCBs). Three counts were set forth in the complaint. Count I alleges the failure to properly register two PCB transformers with the local fire department personnel. Count II deals with the failure to develop and maintain annual records on the disposition of PCBs and PCB items for the years 1978-1987. Count III addresses the failure to properly mark the means of access to two PCB transformers with the ML warning mark. Respondent's answer was served September 3, 1989, in which it denied generally the allegations and pleaded affirmative defenses to all three counts. Thereafter, the parties filed their prehearing exchange.

Complainant filed a motion for a partial accelerated decision (motion) on February 16, 1990, with regard to respondent's liability concerning all three counts of the complaint. The motion relates that no material issue of fact exists with respect to any of the three counts that should preclude a decision concerning liability from being rendered without a hearing. Respondent served its opposition to the motion (response) on March 8, 1990.

The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), states that the Presiding Officer (hereinafter Administrative Law Judge or ALJ) may grant an accelerated decision at any time,

> without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

Respondent argues that complainant has offered no additional evidence to support its motion and it must be denied. (Response at 1). In an administrative proceeding, however, prehearing exchange documents[1] constitute evidence which the ALJ shall admit if "not irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value." 40 C.F.R. § 22.22(a). The prehearing exchange was ordered on October 3, 1989, and the

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[1] Section 22.19(b) provides, in part, that "[u]nless otherwise ordered by the ALJ, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence." (emphasis added.)

documents submitted by the parties constitute adequate evidence for rendering a decision on the motion.

Respondent also argues that a general denial of all allegations set forth in the complaint, as well as certain affirmative defenses set forth in the response provide adequate cause for a denial of the motion. The responding party, however, cannot rely upon unsupported legal conclusions, allegations or denials to preclude summary judgment, or an accelerated decision, but must come forward with documented, specific facts that create issues of material fact. Securities and Exchange Commission v. Bonastia, 614 F.2d 908, 914 (3d Cir. 1980). Respondent's general denials do not create the required issues of material fact.

Respondent is a processor and distributor of meat products, incorporated in the State of Arizona and registered to do business in the State of Missouri. In May 1989, authorized representatives of EPA conducted an inspection of the respondent's facility in Kansas City, Missouri, pursuant to Section 11 of TSCA, 15 U.S.C. § 2610. During the inspection, records were obtained concerning the two PCB transformers, as defined at 40 C.F.R. § 761.3, that have been in use at respondent's facility since 1983. The EPA inspector found no evidence that respondent had registered the two PCB transformers with the fire department by December 1, 1985, as is required by 40 C.F.R. § 761.30(a)(1)(vi). Also missing were records of annual documents for the years 1978-1982 and 1984-1987. The regulations, 40 C.F.R. § 761.180(a), require that beginning July 2, 1978, each owner or operator of a facility using or storing

at one time at least 45 kilograms (kg) of PCB contained in one or more PCB transformers, or 50 or more PCB Large High or Low Voltage Capacitors, shall develop and maintain records of the disposition of PCB items. The EPA inspector did find a Spill Prevention Control and Countermeasure Plan (SPCCP) for the year 1983 that respondent had prepared. This plan appeared to the inspector to contain the information required by 40 C.F.R. § 761.180(a). (Exhibit 1 of Complainant's Prehearing Exchange[2], Inspection Report at 3.)

The inspector took photographs of the PCB transformers and of two access doors which lead to them. Complainant submitted in its prehearing exchange these photographs (Exhibits 7 and 9) which show the access doors to the transformers without the ML marks which are required by 40 C.F.R. § 761.40(j). Respondent in its prehearing exchange submitted photographs of four access doors (Exhibits 2,3,4,5 and 6). These photographs showed the doors with the required warning signs on them.

DISCUSSION

Count I

Complainant charges that respondent violated 40 C.F.R. § 761.30(a)(1)(vi) by failing to register its PCB transformers with the local fire department by December 1, 1985. In pertinent part, this section of the regulations provides:

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[2] References to exhibits refer to exhibits contained in the parties' prehearing exchanges.

> As of December 1, 1985, all PCB transformers . . . must be registered with fire response personnel with primary jurisdiction . . . Information required to be provided to fire response personnel includes: (A) the location of the PCB Transformer(s) (the address(es) of the building(s) and the physical location of the PCB Transformer(s) on the building site(s) and for outdoor PCB Transformers, the location of the outdoor substation). (B) The principal constituent of the dielectric fluid in the transformer(s) (e.g., PCBs, mineral oil, or silicone oil). (C) The name and telephone number of the person to contact in the event of a fire involving the equipment.

The answer denies a violation of 40 C.F.R. § 761.30(a)(1)(vi) and affirmatively states that it provided the fire response personnel with the required information. (at 2). Respondent states that fire response personnel received guided tours through the facility during which time the PCB transformers were identified, and that the fire response personnel received notification through compliance with the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022, that PCB materials were located at the plant. Respondent, however, makes no claims that this walking tour of the facility by fire department personnel occurred before the 1985 deadline for registration. Respondent's assertion of compliance with EPCRA also fails as a valid defense in that this statute did not go into effect until 1986, a year after registration of PCB transformers was required under federal regulations.

The question of compliance with the registration requirement of TSCA presents no issues of material fact. Registration must occur by December 1, 1985. There is no evidence presented that

this occurred nor are any claims made by the respondent that this occurred before the deadline. In its prehearing exchange, respondent included a letter dated October 11, 1989, from Logan Grote, a representative of the fire department, to the plant personnel. (Exhibit 9). The letter states that the fire department's computer shows an entry date of March 16, 1987, but that the fire department was unable to find any form of paperwork that shows what information was provided at that time. Respondent has provided no evidence that fire personnel were informed of the PCB transformers by the 1985 deadline. Respondent merely provides the following series of questions:

> What if the fire department is one or two years late on entering data into its computer so that the date of March 16, 1987 is irrelevant; what if the fire department obtained a new computer system and reentered data on March 16, 1987; what if respondent had provided each and every document required of it and all such documentation was entered on March 16, 1987 - is respondent charged with or responsible for the documents the fire department loses; what if . . . ? (Response at 7.)

Respondent's conjecturing is not supported by any evidence in the record, and does not rise to the level of disputing a material fact. A litigant opposing an accelerated decision or summary judgment must bring to the court's attention some affirmative indication that his version of the relevant facts is not mere speculation. Connecticut Fund for the Environment v. Job Plating Company, Inc., 623 F. Supp. 207, 218, n. 12 (D. Conn. 1985). That court held that a bald assertion by a defendant that certain

monitoring reports could not be used as a basis for liability, because they were inaccurate due to laboratory error, did not present disputed issue of material fact required to avoid summary judgment. Respondent has provided no affirmative evidence that the local fire department was properly notified of the two PCB transformers by the December 1, 1985 deadline and has failed to establish that any issue of material fact exists as to its liability under Count I of the complaint.

It is not necessary to decide here whether a walking tour of the plant's facilities constitutes adequate registration with the local fire department.[3]

The objective of 40 C.F.R. § 761.30(a)(1)(vi) is to notify the local fire department of the existence and location of the PCB transformers in case of an emergency. PCB transformers can pose a serious threat and fires involving them present special problems. (50 Fed. Reg. 29170, July, 1985). It is important that respondent inform the appropriate fire response personnel of the existence and location of all its PCB transformers and this was not accomplished by the 1985 deadline.

Count II

Count II involves the issue of whether the respondent has

[3] In Tulkhoff's Horseradish Products Co., Inc., Docket No. TSCA-III-403 (Initial Decision November 30, 1989), it was held that under the circumstances of that case, a walking tour by a fire department lieutenant of a facility containing a PCB transformer did not constitute "registration" under 40 C.F.R. § 761.30(a)(1)(vi).

complied with 40 C.F.R § 761.180(a) which, in pertinent part, states:

> (a) PCBs and PCB Items in service or projected for disposal. Beginning July 2, 1978, each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB container(s) or one or more PCB transformers, or 50 or more PCB large High or Low Voltage Capacitors shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year.

The regulation then lists specific information that must be included in the annual reports. On the question of proper documentation of records by the respondent for the years 1978-1982 and years 1984-1987, there is no question of material fact. The EPA inspector found no annual documents for these years and respondent makes no claim that the proper documentation was kept for any year other than 1983.

For the year 1983, respondent claims that the SPCCP compiled by respondent supplies all of the necessary information required in the regulation. Respondent supports this claim with the statement in the EPA inspector's report of May 4, 1989 (Complainant's Exhibit 1). Under "Summary of Observations," at paragraph "1" it states that "[N]o annual documents were available from 1978 to 1982, or from 1984 to 1987." Page 3 of the report mentions the SPCCP with the assumption by the investigator that it could be counted as an annual document since all the information was there. However, the record as a whole does not make clear whether all the necessary information with regard to the 1983

annual document was provided in the SPCCP. Complainant states that not all of the necessary information was included in the SPCCP. For example, it states that the SPCCP does not identify the dates when PCBs and PCB Items were removed from service, placed into storage for disposal, and placed into transport for disposal, as required by the regulation. (Motion at 10).

The SPCCP only presents an issue of material fact with respect to liability for the year 1983. Respondent had not prepared annual documents for the other years in question at the time of the EPA inspection of the facility on May 4, 1989, and such records still had not been prepared at the time of respondent's prehearing exchange in December, 1989. Respondent's failure to prepare and maintain annual documents for its facility for the years 1978-1982 and 1984-1987 is a violation of 40 C.F.R. § 761.180(a), and transgresses Section 15 of TSCA, 15 U.S.C. § 2614.

Count III

Count III charges that respondent failed to adequately mark the access doors to the two PCB transformers with the required warning as is required by 40 C.F.R. § 761.40(j). Complainant submitted two photographs of the doors allegedly taken at the time of the EPA inspection of respondent's facility. These photographs are alleged to depict the generator room door and the outside door leading to the PCB transformers. Both of these photographs show the doors without the required warning marks on them.

Respondent denies this, stating that all PCB transformers were marked, and provides photographs of four access doors with the required warnings on them. These photographs are labeled east, south, southwest and northwest engine room doors. All doors in the exhibits are shown both open and closed and have proper warning markers on both sides of the doors. (Exhibits 1-6). However, respondent makes no claims concerning when these photographs were taken. Guidance from the federal courts provides that in determining whether there is a genuine issue of fact, the forum "is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts." Bank v. Fleisher, 419 F. Supp. 1243, 1247 (D. Neb. 1976). These two sets of photographs submitted by each party present a material issue of fact as to whether respondent has violated 40 C.F.R. § 761.40(j).

Statute of Limitations

A final defense raised by respondent is that the statute of limitations set forth in 28 U.S.C. § 2462 bars the present enforcement action with respect to allegations in Counts I, II and III of the complaint, because the complaint was filed more than five years after those alleged violations took place. This statute provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not

> be entertained unless commenced within five years from the date when the claim first accrued . . . .

This statute of limitations has been held not to apply to civil administrative enforcement actions under TSCA. In re Tremco, Inc., Docket No. TSCA-88-H-05 (Accelerated Decision, April 7, 1989); In re 3M Company (Minnesota Mining and Manufacturing), Docket No. TSCA-88-H-06 (Interlocutory Order Granting Complainant's Motion for Accelerated Decision, August 7, 1989). It is concluded that a statute of limitations is not applicable in the subject proceeding.

ORDER

IT IS ORDERED that the motion for partial accelerated decision be:

1. **GRANTED** with respect to Count I.

2. **GRANTED** with respect to Count II concerning the annual documents for the years 1978-1982 and 1984-1987; and **DENIED** with regard to the annual documents for the year 1983.

3. **DENIED** with respect to Count III.

IT IS FURTHER ORDERED that the following issues are reserved for further proceedings:

1. That of liability with regard to Count II for year 1983.

2. That of liability concerning Count III.

3. The penalty question.

IT IS FURTHER ORDERED, within 15 days of the service date of this order, that complainant get in touch with the office of the ALJ in order to arrange a telephone prehearing conference (PHC) that is mutually convenient to the parties and the ALJ. The purpose of the PHC will be, in part, to arrange a hearing date in this matter.

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 11, 1990

IN THE MATTER OF ARMOUR AND COMPANY, Respondent,
Docket No. TSCA-VII-89-T-229

Certificate of Service

I certify that the foregoing Order, dated 9-11-90, was sent this day in the following manner to the below addressees:

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Secretary

Dated: Sept. 11, 1990