

2-13/94

1994 FEB -3 11:55

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
GUNLOCKE CO., INC. (THE),) Docket No. II TSCA-PCB-92-0228
)
Respondent)

Toxic Substances Control Act. Where respondent failed to comply with two orders of the Administrative Law Judge requiring respondent to (1) show cause why it had not provided complainant with a counter offer and with information regarding proposed supplemental environmental projects as alleged in the status report and to (2) show cause why an order on default should not be taken against it for failure to respond to the first order, respondent was found to be in default pursuant to 40 C.F.R. § 22.17 to have admitted the violations charged, and assessed the full amount of penalty proposed in the complaint.

ORDER ON DEFAULT

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: February 3, 1994

APPEARANCES:

For Complainant:

Richard J. Weisberg, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region II
26 Federal Plaza
New York, New York 10278

For Respondent:

Lynne A. Monaco, Esquire
Nixon, Hargrave, Devans & Doyle
Clinton Square
P.O. Box 1051
Rochester, New York 14603

INTRODUCTION

This proceeding was initiated under section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), by issuance of a complaint on December 20, 1991, charging respondent, The Gunlocke Company, Inc. (respondent), with violations of TSCA and regulations promulgated thereunder. An answer to the complaint was served on February 7, 1992. The answer, in paragraph 24, included a purported motion to dismiss Count 2 of the complaint. The motion to dismiss Count 2 was denied on March 19, 1992. Complainant and respondent each served a prehearing exchange on August 3, 1992.

Respondent's answer and prehearing exchange contested the amount of penalty sought and requested a hearing. The answer admitted in paragraph 12 that respondent had transformers at its facility during 1978-1988 that may have contained PCBs. The answer also admitted in paragraph 15 that respondent cannot locate records of inspection for its transformers for the time period of April 1983 through September 1984. The answer otherwise specifically denied many of the allegations in the complaint.

Count 1 of the complaint charged respondent with failure to maintain records of quarterly inspections and maintenance history for two PCB transformers, in violation of 40 C.F.R. § 761.30(a)(1)(xii). Count 2 of the complaint charged respondent with failure to compile and maintain annual documents on the disposition of its PCBs and PCB Items, in violation of 40 C.F.R. § 761.180(a). A civil penalty in the amount of \$54,600 was sought by complainant.

FINDINGS OF FACT

Respondent owns and operates a facility located at One Gunlocke Drive, Wayland, New York 14572. Respondent is a "person" as that term is defined in 40 C.F.R. § 761.3.

Following the issuance of the complaint, the matter was assigned to the below Administrative Law Judge (ALJ) on March 11, 1992. By order dated March 19, 1992, the parties, failing settlement, were directed to exchange certain prehearing information consisting of witness lists, documentary evidence and arguments supporting their respective cases no later than May 19, 1992. By oral motion, complainant sought and received from the ALJ extension of the prehearing exchange deadline until August 3, 1992. Complainant and respondent then filed their prehearing exchanges on August 3, 1992.

Settlement negotiations ensued. According to complainant's status report of November 3, 1992, respondent agreed during the settlement discussion to soon provide complainant with a counter offer and with additional detailed information, including summaries, of proposed supplemental environmental projects, which information was not forthcoming. On November 27, 1992, respondent was ordered to show cause why it had not provided complainant with the promised counter offer and information regarding proposed supplemental environmental projects. Respondent never replied to the order. On January 11, 1993, respondent was ordered to show cause why an order on default should not be issued against it for failure to respond to the order served on November 27, 1992. This

was sent by certified mail, with a return receipt shown in the file. Respondent failed to respond to the order of January 11, 1993. On March 4, 1993, an order was issued directing complainant to submit, within 35 days, a draft of a proposed order on default against respondent for review, possible revision and signature by the ALJ. A copy of this order was sent to respondent by certified mail, with a return receipt shown in the file.

On April 27, 1993, complainant notified the ALJ and respondent that the Environmental Protection Agency (EPA) was reviewing this matter to determine where there have been lapses or other problems in certain information collection request approvals granted by the Office of Management and Budget under the Paperwork Reduction Act (PRA). In a status report dated August 19, 1993, EPA determined that the violations alleged in the complaint were not impacted by the PRA.

CONCLUSIONS OF LAW

Pursuant to section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), complainant has the authority to institute enforcement proceedings concerning violations of regulations promulgated pursuant to section 6(e) of TSCA, 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. Part 761. Respondent's answer to the complaint does not raise any questions which could support a decision that complainant has failed to establish a prima facie case, or justify the dismissal of the complaint.

An examination of the prehearing exchange documents submitted by complainant buttresses the allegations in the complaint that

respondent (1) failed to maintain records of quarterly inspections and maintenance history for two PCB transformers and (2) failed to compile and maintain annual documents on the disposition of its PCBs and PCB Items. Complainant has established a prima facie case to support the allegations in the complaint that respondent has violated 40 C.F.R. § 761.30(a)(1)(xii) and 40 C.F.R. § 761.180(a). Respondent's failure to comply with the order of November 27, 1992 and its failure to show good cause amounts to a default and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations. 40 C.F.R. § 22.17(a).

ULTIMATE CONCLUSION

TSCA specifies that in assessing a penalty the Administrator shall take into account the nature, circumstances, extent and gravity of the 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. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B). Respondent by its default, however, has waived the right to contest the penalty which shall become due and payable without further proceedings.

The penalty proposed in the complaint is \$54,600, comprising \$52,000 for Count 1 and \$2,600 for Count 2. This penalty amount is consistent with the provisions of 15 U.S. C. § 2615(a) and the Polychlorinated Biphenyls (PCB) Penalty Policy of April 9, 1990.

The gravity of the alleged violations of TSCA, including the actual or potential harm to humans and the environment resulting from respondent's purported illegal conduct, is incorporated within the scope of the terms "extent" and "circumstances" as used below. As stated in the Guidelines for the Penalty Policy (guidelines):

'Circumstances' is used in the penalty policy to reflect on the probability of the assigned level of 'extent' of harm actually occurring. In other words, a variety of facts surrounding the violations as it occurred are examined to determine whether the circumstances of the violation are such that there is a high, medium, or low probability that damage will occur

Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59,770, 59,772 (1980) (original emphasis). The guidelines further specify that:

'Gravity' refers to the overall seriousness of the violation. As used in this penalty system, 'gravity' is a dependent variable, i.e., the evaluation of 'nature,' 'extent,' and 'circumstances' will yield a dollar figure on the matrix that determines the gravity based penalty.

Id. at 59,773.

The Guidelines also provide the following means of determining the gravity of illegal conduct:

The probability of harm, as assessed in evaluating circumstances, will always be based on the risk inherent in the violation as it was committed. In other words, a violation which presented a high probability of causing harm when it was committed (and/or was allowed to exist) must be classified as a 'high probability' violation and penalized as such,

even if through some fortuity no actual harm resulted in that particular case. Otherwise some who commit dangerous violations would be absolved. Similarly, when harm has actually resulted from a violation, the 'circumstances' of the violation should be investigated to calculate what the probabilities were for harm occurring at the time of the violation. The theory is that violators should be penalized for the violative conduct, and the 'good' or 'bad' luck of whether or not the proscribed conduct actually caused harm should not be an overriding factor in penalty assessment.

Id. at 59,772 (original emphasis).

Count 1 of the complaint alleges that respondent violated 40 C.F.R. § 761.30(a)(1)(xii) by failing to maintain records of quarterly visual inspections and maintenance history for two PCB transformers, serial numbers 42782 and 42783, for the following time periods.

October 1982 - December 1982
 January 1983 - March 1983
 April 1983 - June 1983
 July 1983 - September 1983
 October 1983 - December 1983
 January 1984 - March 1984
 April 1984 - June 1984
 July 1984 - September 1984
 October 1984 - December 1984

Each time period enumerated above for which there is no record of quarterly visual inspections and maintenance history constitutes a separate violation. Under the limits on multiple violations imposed by the penalty policy, however, complainant assessed penalties based on only four violations under Count 1.

The penalty policy provides that the extent of a non-disposal violation is "significant" where the amount of PCBs involved is at

least 220 gallons but not more than 1,100 gallons. Respondent's two PCB transformers contained a total of about 851 gallons of PCBs.

The penalty policy also provides that the circumstance level of a major use violation is 2. A major use violation is defined in the penalty policy as "[f]ailure to inspect PCB Transformers or to keep records of such inspections."

The circumstance 2 matrix level is based on the probability that respondent's alleged illegal conduct is likely to cause damage. This matrix level also reflects alleged violations which the EPA considers to be the most likely to result in improper disposal. Furthermore, the circumstance 2 matrix level reflects that respondent's alleged violations seriously impair the EPA's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment).

Under the gravity-based penalty matrix, the penalty amount for a violation that is circumstance level 2 and of significant extent is \$13,000. The total assessed penalty for the four violations cited under Count 1 is therefore \$52,000.

Count 2 of the complaint alleges that respondent violated 40 C.F.R. § 761.180(a) by failing to develop and maintain annual documents on the disposition of respondent's PCBs and PCB Items for the period July 2, 1978 through December 31, 1978 and for the years 1979 through 1988.

Each time period enumerated above for which annual documents were not developed and maintained constitutes a separate violation.

Under the limits on multiple violations imposed by the penalty policy, however, complainant assessed penalties based on only two violations under Count 2. These violations are for (1) 1988 and (2) the years 1987 and earlier.

The penalty policy provides that the extent of a non-disposal violation is "significant" where the amount of PCBs involved is at least 220 gallons but not more than 1,100 gallons.

The penalty policy also provides that the circumstance level of a minor recordkeeping and manifesting violation is 6. A minor recordkeeping and manifesting violation is defined in the penalty policy as "the occasional omission of minor data due to clerical error, or partially missing records where the person responsible can substantiate the correct records upon request." Complainant assessed the alleged violations under Count 2 as circumstance level 6, based on respondent having provided complainant with reconstructed annual document logs for the pertinent time periods prior to issuance of the complaint.

The circumstance 6 matrix level is based on the probability that there is a small likelihood that damage will result from respondent's alleged illegal conduct. This matrix level also reflects alleged violations in which the EPA considers the risk to the environment and human health to be minimal. Furthermore, the circumstance 6 matrix level reflects that respondent's alleged violations impair the EPA's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment) in a less than important way.

Under the gravity-based penalty matrix, the penalty amount for a violation that is circumstance level 6 and of significant extent is \$1,300. The total assessed penalty for the two violations under Count 2 is therefore \$2,600.

ORDER

IT IS ORDERED, pursuant to section 16(a) of TSCA, 15 U.S.C. § 2615(a), that respondent, The Gunlocke Company, Inc., be assessed a civil penalty of \$54,600.

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued. 40 C.F.R. § 22.17(a).

EPA - Region II
Regional Hearing Clerk
P.O. Box 360188M
Pittsburgh, PA 15251

Pursuant to 40 C.F.R. § 22.17(b), this order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision on her own motion, this decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).



Frank W. Vanderheyden
Administrative Law Judge

Dated: February 3, 1994