

4/10/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
) Docket No. TSCA-III-451
 EXETER PROPERTIES, INC.,)
 (HOPEWELL, VIRGINIA FACILITY),)

Toxic Substances Control Act. Where Respondent failed to comply with order of Administrative Law Judge requiring the exchange of prehearing information, Respondent was found to be in default pursuant to 40 C.F.R. § 22.17, to have admitted violation charged, and assessed full amount of penalty proposed in complaint.

ORDER ON DEFAULT

By: Frank W. Vanderheyden
 Administrative Law Judge

Dated: April 10, 1991

APPEARANCES:

For Complainant: Charles McPhedran
 Assistant Regional Counsel
 U.S. Environmental Protection Agency
 Region III
 841 Chestnut Building
 Philadelphia, PA 19104

For Respondent: Robert G. Varnon, President
 Exeter Properties, Inc.
 785 Airpark Drive, Suite 212
 Gaithersburg, MD 20879

INTRODUCTION

The United States Environmental Protection Agency (sometimes Complainant) initiated this proceeding under Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615, by issuing a complaint on July 6, 1989 charging Exeter Properties, Inc. (Respondent) with violations of TSCA and its accompanying regulations. Respondent answered by letter dated August 2, 1989, indicating that the facility had not been in use since 1983, that Respondent had been trying to sell the facility, and that Respondent intended to clean up the property at the time of its sale. The complaint charged Respondent with several violations of the regulations regarding PCBs, including improper storage of PCBs and PCB Items designated for disposal, failure to register PCB transformers with fire response personnel, failure to prepare and maintain annual PCB documents for 1985 and 1986, and improper disposal of PCB fluid. For these violations, Complainant sought a civil penalty of \$44,000.

FINDINGS OF FACT

On May 23, 1988, George H. Houghton and Charles T. Hufnagel of EPA conducted an inspection at Respondent's facility located at the end of South Main Street in Hopewell, Virginia. Exeter Properties had purchased the site, a former Firestone, Inc. manufacturing facility, in 1985 from Perry Realty Investment. At the time of the inspection, eleven PCB transformers and 164 capacitors, none of which were energized at the time of the inspection, were located on the property.

The inspectors observed several violations of the PCB regulations, 40 C.F.R. § 761, and documented these violations in their inspection report (attached to EPA's prehearing exchange as Exhibit 1). The inspectors reported that eleven transformers, no longer in use, were stored out-of-doors without any roof, floor, or curbing, a violation of 40 C.F.R. § 761.65(b)(1), and that one of the PCB transformers was leaking fluid, a disposal violation under 40 C.F.R. 761.60(a). The inspectors also reported that Respondent failed to prepare annual documents regarding PCB transformers since acquiring the property, including the years 1985 and 1986, in violation of 40 C.F.R. § 761.180(a), and that Respondent had failed to register its PCB transformers with fire response personnel with primary jurisdiction, in violation of 40 C.F.R. § 761.30(a)(1)(vi).

In response to these violations, EPA issued a complaint to Respondent on July 6, 1989. Respondent answered by letter, dated August 2, 1989, requesting an "informal hearing," attaching a "PCB Annual Report, 1988," and requesting "permission or an extension to leave the transformers where they are, as is, until the property is sold." The matter was assigned to the below Administrative Law Judge (ALJ) on August 24, 1989. By order dated August 25, 1989, the parties, failing settlement, were directed to exchange information regarding the anticipated hearing, including witness lists and copies of documentary evidence to be introduced. Complainant was also directed to submit a copy of the inspection report, show the rationale for

the proposed civil penalty, and describe the gravity of the alleged violations; Respondent was further directed to state whether or not Respondent contested the civil penalty proposed and to submit financial data to support any inability to pay claim.

Following two changes of counsel for Complainant and several extensions of time, Complainant made a timely submission of its prehearing exchange on October 17, 1990. Complainant's prehearing exchange listed as witnesses the two inspectors who visited Respondent's facility and a further witness to explain the calculation of the penalty; attached exhibits included the inspection report documenting the violations at issue and EPA's PCB penalty policy. Respondent did not submit its prehearing exchange nor request an additional extension of time, and the ALJ on January 10, 1991, issued an Order to Show Cause why an order on default should not be taken against Respondent for failure to submit its prehearing exchange. Respondent's only response to the Order to Show Cause was a brief letter indicating the City of Hopewell had "taken over" the facility where the violations took place due to nonpayment of taxes. On February 27, 1991, the ALJ issued an Order directing the Complainant to draft a proposed order on default against Respondent and submit it to the ALJ for review, possible revision, and signature. (On February 28, 1991, prior to receipt of this Order, Complainant moved for a default order against Respondent.) Complainant submitted the proposed order on default on April 1, 1991. Under 40 C.F.R. § 22.17,

Respondent had 20 days to reply to the Order of February 27, 1991, but failed to do so.

CONCLUSIONS OF LAW

Pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, Complainant has the authority to institute enforcement proceedings concerning violations of federal PCB regulations. 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.

Complainant's prehearing exchange submission supports the allegations in the complaint that Respondent has violated federal regulations regarding PCBs. Complainant has established a prima facie case to support the allegations in the complaint that Respondent has violated Section 15 of TSCA, 15 U.S.C. § 2614. Respondent's failure to comply with the prehearing order and its failure to show good cause amount to a default and constitute 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

It is concluded that Respondent violated of Section 15 of TSCA, 15 U.S.C. § 2614(1)(C).

THE PENALTY

The penalty imposed on Respondent was calculated in accordance with "Environmental Protection Agency Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic

Substances Control Act and EPA Policy for Determining Penalties for Violations of the Polychlorinated Biphenyl Regulations" and "Environmental Protection Agency Policy for Determining Penalties for Violation of the Polychlorinated Biphenyl Regulations," 45 Fed. Reg. 59770 ("Penalty Policy").

Count I imposes a penalty of \$15,000 for failure to maintain an adequate facility for the storage of PCBs and PCB items designated for disposal. This major storage violation is a Level III violation to a major extent (based on volume of PCBs) involving storage violations where a significant portion of spilled PCB material would not be contained. In this case, 11 PCB transformers containing 4,197 gallons of PCB dielectric fluid were left outdoors, exposed to the elements without any roof, floor, or curbing.

Count II imposes a penalty of \$20,000 for failure to register PCB transformers with fire response personnel. This is a Level II violation--use of PCBs in violation of a condition of authorization--to a major extent, again based on the volume of PCBs at the facility.

Counts III and IV impose penalties of \$2,000 each for failure to prepare and maintain annual PCB documents for 1985 and 1986. This record-keeping violation is Level VI (since annual documents could be prepared from Respondent's other records regarding its transformers) to a major extent, again based on the amount of PCBs.

Count V imposes a penalty for improper disposal of PCB fluid, a Level I violation, to a minor extent, based on the amount of PCBs spilled or leaked.

EPA considers several other factors set forth in 15 U.S.C. § 2615(2)(B) in determining the appropriate penalty for violations of TSCA. In this case, the Respondent had no history of violations, no adjustment for culpability was appropriate, and no other "matters as justice may require" required an adjustment to the penalty assessed. Respondent was notified in the complaint that the penalty amount would be based on Respondent's ability to pay and ability to continue in business and also, by Order of the below ALJ dated August 25, 1989, directed to "furnish financial data or other acceptable documentation" as part of its prehearing exchange if Respondent wished to claim inability to pay the proposed penalty. However, Respondent made no showing in the settlement process nor in the prehearing exchange (which Respondent failed to submit) sufficient to warrant an adjustment in the penalty.

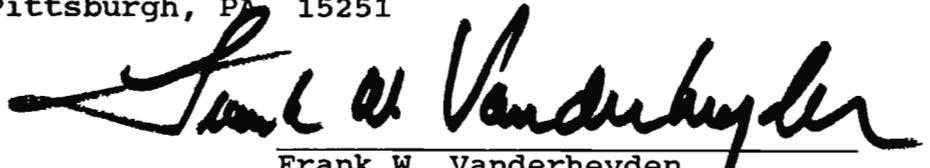
ORDER¹

IT IS ORDERED, pursuant to Section 16(a)(1) of TSCA, 15 U.S.C. 2615(a)(1), that Respondent, Exeter Properties, Inc., be assessed a civil penalty of \$44,000.

¹ 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 his own motion, this decision shall become the Final Order of the Administrator. 40 C.F.R. § 22.27(c).

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 III
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251



Frank W. Vanderheyden
Administrative Law Judge

Dated this 10th day of April 1991.
Washington, DC