

3/16/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



In the Matter of

NORTEVILLE SQUARE ASSOCIATES
Southfield, Michigan

Respondent

Dkt. No. TSCA-V-C-017-92

**ORDER ON CROSS MOTIONS FOR "ACCELERATED DECISION"
AND ON RESPONDENT'S MOTION IN THE ALTERNATIVE TO DISMISS**

This matter arises under Section 16(a) of the Toxic Substances Control Act ("TSCA," or "the Act"), 15 U.S.C. § 2615(a), which provides for the assessment of civil penalties for violations of Section 15 of TSCA (15 U.S.C. § 2614) and duly promulgated regulations in an amount not to exceed \$25,000 per day for each such violation.¹

¹ Section 16(a) of TSCA, 15 U.S.C. §2615(a), provides that "(A)ny person who violates a provision of section 2614 [section 15] of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title."

Section 15 of TSCA, 15 U.S.C. § 2614, provides that it shall be ". . . . unlawful for any person to . . . fail or refuse to comply with . . . any rule promulgated or order issued under section 2604 (section 6 of TSCA) of this title"

The complaint charges respondent with eight violations of 40 C.F.R. Part 761, which sets forth regulations pertaining to the manufacture, processing, distribution in commerce, use prohibitions, marking, inspection, and recordkeeping in connection with polychlorinated biphenyls ("PCBs"),² based upon an Environmental Protection Agency [EPA] inspection of respondent's facility of October 31, 1990. The inspection allegedly revealed that respondent had violated the inspection and recordkeeping requirements of the PCB regulations with respect to two PCB transformers³ that had been in use at respondent's facility from 1981 to 1990, in that it had failed to conduct quarterly inspections of the transformers and maintain certain records as required by 40 C.F.R. § 761.30(a)(1)(ix), (xi), and had failed to prepare annual reports and other documents as required by 40 C.F.R. § 761.180(a). A civil penalty of \$76,000 for the eight charges has been proposed by complainant. In its answer to the complaint, respondent denied that it had violated the regulations as alleged. In affirmative defense, respondent asserted that it had not known the PCB concentration of the oil in the transformers, and, therefore, until such time as it did know, respondent could assume

² These regulations were promulgated pursuant to section 6 of the Act, 15 U.S.C. § 26005, on February 17, 1978, and May 31, 1979. See 43 Federal Register 7150 and 44 Federal Register 31514.

³ "PCB transformer" is defined at 40 C.F.R. § 761.3 as ". . . any transformer that contains 500 ppm [parts per million] PCB or greater".

the transformers to be "PCB-contaminated."⁴

Respondent specifically denied that it failed to inspect the transformers for the third quarter of 1990 as alleged in Count I of the complaint, but did not deny that a record of the inspection had not been maintained, as also charged in Count I.⁵

The parties have been unable to settle. Pretrial exchange and stipulations were filed according to schedule. Thereafter, complainant moved for partial "accelerated decision," asserting that no genuine issue of material fact exists and that complainant is entitled to judgment as a matter of law. Respondent moved to dismiss and/or for "accelerated decision" as to Counts II - VIII on the ground that the PCB concentration of the dielectric oils in the transformers had not been known to respondent and that the PCB regulations did not apply to respondent before the date upon which it learned of such concentration.⁶ There are no material facts in dispute either with respect to Count I, which is included in complainant's motion, or as to Counts II through VIII, which are

⁴ Answer and Affirmative Defenses of Respondent Northville Square Associates, at 15, ¶ 4.

"PCB contaminated" electrical equipment is defined at 40 C.F.R. § 761.3 as ". . . . any electrical equipment, including but not limited to transformers . . . that contain 50 ppm or greater PCB, but less than 500 ppm PCB." "PCB contaminated" transformers are not subject to the same regulatory requirements as "PCB transformers".

⁵ Answer and Affirmative Defenses of Respondent Northville Square Associates, at 4.

⁶ Motion to Dismiss And/Or For Accelerated Decision in Favor of Respondent, at 1.

the subject of both parties' motions.⁷

The principal question to be determined is whether respondent was required to observe the regulations applicable to PCB transformers before it learned that its transformers were in fact "PCB transformers." For the reasons set out below, it is held that respondent was bound by the regulations pertaining to "PCB transformers," and, as a consequence, is liable for violations charged in Counts I through VII of the complaint.⁸

Respondent's two transformers each had nameplates which identified them as "Square D Co. Askarel" transformers. Askarel is a dielectric fluid that contains PCBs in excess of 500 parts per million.⁹

The Federal Register of May 31, 1979, at volume 44, page 31517, explicitly provides that transformers must be assumed to be PCB transformers if ". . . the nameplate indicates that the

⁷ As has been noted, respondent denies having failed to inspect the transformers for the third quarter of 1990, as charged in Count I. However, it does not deny that no record of the inspection was kept, which is also alleged in Count I.

⁸ See discussion at 7, note 11, *infra*, regarding Count VIII of the complaint.

⁹ Report on Inspection to Determine Compliance with 40 C.F.R. Part 761 PCB Regulations, Attachment A to complainant's Motion for Accelerated Decision. See also 56 Fed. Reg. 26738, 26741, June 10, 1991; and 44 Fed. Reg. 13514, at 13517, May 31, 1979. See further In the Matter of National Railroad Passenger Corporation (AMTRAK), TSCA Appeal 82-1, April 28, 1982, at note 7. See further In the Matter of Hollins Electric and Engineering, Inc., Docket No. TSCA-09-90-0082, March 16, 1993, at 7-11 slip opinion.

transformer contains PCB dielectric fluid."¹⁰ On the same page, at the section designated "4. Discussion of Transformer Categories," it is stated that

(T)he owner . . . must ascertain which of these three categories, PCB Transformer, PCB-Contaminated Transformer, or Non-PCB Transformer, is applicable . . .
a. **Determining Appropriate Categories:** Transformers originally designed to use concentrated PCBs usually have a nameplate indicating that they contain PCB dielectric fluid. Such transformers must be assumed to be PCB Transformers unless tested and found to contain less than 500 ppm PCB . . . (I)f a transformer does not have a nameplate or if there is no information available to indicate the type of dielectric fluid in it, the transformer must be assumed to be a PCB Transformer. [Emphasis supplied].

This section leaves no doubt that when the transformer has a nameplate which indicates that the transformer originally contained PCB dielectric fluid, it must be considered a "PCB transformer". Where the transformer has no nameplate and no information is available to indicate the type of dielectric fluid it contains, it must be assumed to be a "PCB transformer" until shown to contain something less than 500 parts per million PCBs.

As a member of the regulated community, respondent is charged with knowledge of the contents of the Federal Register as they relate to its situation. It is clear and well settled that where there is reason to believe that the contents exceed 500 parts per million PCBs -- and the nameplate "Askarel" provides such reason to believe -- transformers must be treated as though they are "PCB transformers," i. e. as though the PCB contents exceed 500 parts

¹⁰ Preamble to PCB regulations, 44 FR 31514, 31517, May 31, 1979. See also Fed. Reg. 26738 at 26741, June 10, 1991, at section "C. Policy Regarding the Definition of a PCB Transformer."

per million. Case law supports the explicit language of the preamble to the regulations that where there is reason to believe the PCB content exceeds 500 parts per million, the transformer must be assumed to be, and treated as though it is, a "PCB transformer" until it becomes clear that it is something less. Here, respondent asserts that it did not know that its transformers contained in excess of 500 parts per million, but this is not a defense to the charges. Respondent's transformers were labelled, thereby giving respondent reason to believe that they were "PCB transformers." The "Askarel" labels remove these transformers from any question of being considered "PCB contaminated." Here the concentration was unknown only because respondent did not learn that the "Askarel" labels meant, almost certainly, that the transformers contained PCB dielectric fluid in excess of 500 parts per million, and did not have the fluid tested. The information was available, but was not obtained. The definition of "PCB-contaminated electrical equipment" at 40 C.F.R. § 761.3, which states that equipment whose PCB concentration is unknown may be treated as "PCB contaminated," does not apply to transformers that are labelled "Askarel," and does not refer to equipment which owners have simply not looked at or investigated closely enough.

Congress has determined that PCBs must be strictly controlled, and has provided EPA with authority to issue implementing regulations. These regulations contemplate regular, preventive inspection and recordkeeping. They have the force and effect of law, and, indeed, violations of these regulations constitute

violations of Section 15 of the Act. As it pertains to this case, the Federal Register recitation of the regulations leaves no room for doubt or for interpretation.

Here it is charged that respondent failed to make visual inspections of the transformers every three months as required by 40 C.F.R. § 761.30(a)(1)(ix), (xi) and 15 U.S.C. § 2614 for "PCB transformers," and maintain records of such inspection and of the maintenance history for 1981 through the third quarter of 1990 (Counts I - IV); and that respondent failed to develop and maintain complete records and to have annual documents on the disposal of its "PCB items" for calendar years 1981 through the third quarter of 1990, as required by 40 C.F.R. § 761.180(a). (Counts V - VIII).

It is evident that no material facts are at issue. Complainant is entitled to judgment as a matter of law on these facts and regulations. It is determined that complainant's motion must be granted as to Counts I through VII of the complaint, and that respondent's motion to dismiss should be granted as to Count VIII, since the events recited in Count VIII took place more than five years before the complaint herein was filed.¹¹

¹¹ Count VIII of the complaint relates to events which occurred in 1981 - 1986, more than five years before the complaint herein was filed (March 23, 1992). Accordingly, such events are outside the five year period provided by the general statute of limitations at 28 U.S.C. § 2462. *3M Company (Minnesota Mining and Manufacturing) v. Browner and U. S. Environmental Protection Agency*, March 4, 1994, U. S. Court of Appeals for the District of Columbia Circuit, at 19, slip opinion.

While certain of the events recited in Counts IV and VII also took place before March 23, 1987, others (records and inspection for the second, third, and fourth quarters of 1987 and annual documents for the balance of 1987) are within the statutory period.

Respondent's motion to dismiss or, alternatively, for "accelerated decision" as to Counts II through VII will be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Accordingly, complainant's findings and conclusions are adopted, with modifications, as follows:

1. Respondent is a "person" as defined in 40 C.F.R. Part 761.
2. Respondent is and was at all relevant times a limited partnership operating under the laws of the State of Michigan, with a place of business at 23100 Providence, Suite 192, Southfield, Michigan.
3. On October 31, 1990, a representative of the U. S. EPA inspected respondent's facility located at 133 West Main Street, Northville, Michigan to determine compliance with the PCB rule.
4. At the time of the inspection, respondent had two PCB transformers which were being removed for disposal. These transformers had been used by respondent from 1981 to 1990.
5. Respondent's PCB transformers combined contain greater than 220 but not more than 1,100 gallons of PCBs in concentrations greater than 500 ppm. Both transformers were identified on their nameplates as "Square D Co. Askarel," thereby giving reason to believe the transformers contained PCBs in excess of 500 parts per million. Askarel is a trade name for PCB dielectric fluid. Where there is reason to believe that a transformer contains PCBs in excess of 500 parts per million, it must be treated as a PCB

transformer in accordance with 40 C.F.R. § 761.30(a)(1)(ix), (xi).

6. On October 31, 1990, respondent did not have records of transformer inspections or maintenance history for the third quarter of 1990 for its two PCB transformers.

7. For the second quarter of 1990 respondent did not perform a visual inspection of its two PCB transformers.

8. On October 31, 1990, respondent did not have records of transformer inspections or maintenance history for the second quarter of 1990 for its two PCB transformers.

9. For this first quarter of 1990 respondent did not perform a visual inspection of its two PCB transformers.

10. On October 31, 1990, respondent did not have records of transformer inspections or maintenance history for the first quarter of 1990 for its two PCB transformers.

11. From the second quarter of 1987 through 1989, respondent did not perform a visual inspection of its two PCB transformers.

12. On October 31, 1990, respondent did not have records of transformer inspections or maintenance history from the second quarter of 1987 through the fourth quarter of 1989 for its two PCB transformers.

13. During the years 1981 - 1989, respondent was using or storing two PCB transformers at its facility.

14. On July 1, 1990, respondent had not yet developed and maintained complete records and did not have annual documents on the disposition of its PCB items for calendar year 1989.

15. On July 1, 1989, respondent had not yet developed and

maintained complete records and did not have annual documents on the disposition of its PCB items for calendar year 1988.

16. On July 1, 1988, respondent had not yet developed and maintained complete records and did not have annual documents on the disposition of its PCB items for calendar year 1987.

17. 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 Federal Register 7150). The PCBs Manufacturing, Processing, distribution in Commerce and Use regulations ("PCB rule") were lawfully promulgated on May 31, 1979 (44 Federal Register 31514), and incorporated the disposal and marking regulations.

18. Respondent was required to, but did not, manage its transformers as PCB transformers until such time as it determined that they were not PCB transformers. Accordingly, respondent's lack of knowledge of the level of PCBs in the transformers until August or September of 1990 does not constitute a defense to the complaint.

19. Respondent's failure to conduct inspections of its PCB transformers and maintain records of such inspections constitutes violations of 40 C.F.R. Part 761, Appendix B(III), Interim Measures Program, 46 Federal Register 16090 (March 10, 1981); subsequently codified as amended at 40 C.F.R. § 761.30(a)(1), and Section 15 of TSCA, 15 U.S.C. § 2614.

20. Respondent's failure to develop and maintain records and annual documents relating to its PCB transformers constitutes a

violaton of 40 C.F.R. Part 761, 43 Federal Register 7150 (Feb. 17, 1978); 40 C.F.R. § 761.180(a), and Section 15 TSCA, 15 U.S.C. § 2614.

21. Respondent is liable for a civil penalty pursuant to sections 15 and 16 of the Act.

ORDER

It is **ORDERED** that complainant's motion for "accelerated decision" as to liability be, and it is hereby, granted as to Counts I through VII of the complaint. The motion is denied as to Count VIII of the complaint. Respondent's motion to dismiss is hereby granted as to Count VIII of the complaint. Respondent's motion to dismiss and/or for "accelerated decision" is hereby denied as to Counts II through VII.

And it is **FURTHER ORDERED** that the parties shall confer for the purpose of attempting to reach a settlement respecting the remaining issue of the civil penalty to be assessed for the violations found, and shall report upon the status of their effort during the week ending April 15, 1994.

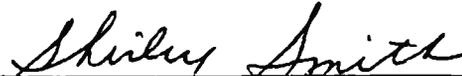


J. F. Greene
Administrative Law Judge

Washington, D. C.
March 16, 1994

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 March 16, 1994.



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

NAME OF RESPONDENT: Northville Square Associates
DOCKET NUMBER: TSCA-V-C-017-92

Ms. A. Marie Hook
Regional Hearing Clerk
Region V - EPA
77 West Jackson Blvd
Chicago, IL 60604-3590

David Mucha, Esq.
Office of Regional Counsel
Region V - EPA
77 West Jackson Blvd
Chicago, IL 60604-3590

Paul Revere, III, Esq.
2290 First National Building
Detroit, Michigan 48226