6/5/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
JAY'S AUTO SALES	)	DOCKET NO. TSCA-III-373
&	)	
PAUL TAYLOR,	)	
	)	
	)	
RESPONDENTS	)	

ORDER TO SHOW CAUSE;
ORDER DENYING COMPLAINANT'S
MOTION FOR DEFAULT

The complaint in this proceeding under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), issued on October 4, 1989, charged Respondent, Jay's Auto Sales, Inc. (Jay's Auto), with six counts of violating the polychlorinated biphenyls (PCBs) rules, 40 C.F.R. Part 761.[1/] Complainant amended the complaint on October 10, 1989, and added Paul Taylor as a Respondent.[2/] Counts I-IV of the amended complaint alleged failure to develop or maintain annual documents for the years 1983, 1984,

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[1/] TSCA § 6(e), 15 U.S.C. § 2605(e) authorizes the Administrator to promulgate regulations concerning storage, disposal, manufacture, process, distribution in commerce, or use of PCBs. TSCA § 15, 15 U.S.C. § 2614, makes it unlawful for any person to fail or refuse to comply with the PCB rules. TSCA § 16, 15 U.S.C. § 2615, provides that any person who violates a provision of section 15 shall be liable for a civil penalty not to exceed $25,000 per day of violation.

[2/] Jay's Auto Sales was represented by Judy Taylor and Jerry Taylor. All references to "Taylor" or "Mr. Taylor" will refer to Respondent Paul Taylor. The other Taylors will be identified by their first and last names.

1985, and 1986 as required by 40 C.F.R. § 761.180(a), Count V alleged improper disposal of PCBs in violation of 40 C.F.R. § 761.60(d), and Count VI alleged improper marking and storage in violation of 40 C.F.R. § 761.60(b)(6) & (c)(3) and 40 C.F.R. § 761.65(a), (b), & (c). Complainant proposes to assess Respondents a civil penalty of $44,850.

Respondent Jay's Auto, appearing pro se, filed a letter-answer, dated November 20, 1989, denying any knowledge of, or control over the PCB contamination. Although Jay's Auto did not specifically request a hearing, the complaint at 5 states that the denial of any material fact or the raising of any affirmative defense shall be construed as a request for hearing.[3/] Respondent Taylor, appearing through counsel, filed an answer dated November 24, 1989, denying any violation of TSCA, disputing some facts, and requesting dismissal, reduction of penalty, attorney's fees, and a hearing.[4/]

Jay's Auto Sales, Inc. operated a used car lot at 3411 Jefferson Davis Highway, Richmond, Virginia (the site). Paul Taylor owned the real property at the site and leased it to Jay's

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[3/] "A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer." 40 CFR § 22.15(c).

[4/] As will be discussed, no counts of the complaint will be dismissed at this time. The penalty will be considered at a later date, and Respondent's request for attorney's fees is premature. A prevailing party may be entitled to an award under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, if the government's action was not substantially justified. 40 C.F.R. Part 17 sets forth procedures for submitting and adjudicating a claim under the EAJA.

Auto, beginning November 10, 1983.[5/] The record does not reveal when Mr. Taylor acquired the property. At least three underground storage tanks were installed at the site sometime before August, 1958.[6/] The Richmond Fire Marshal discovered the tanks during an August, 1987 inspection, informed Paul Taylor that the tanks must be removed, and issued a permit, on December 4, 1987, for their removal.[7/] Mr. Taylor invited proposals from at least two companies to remove the tanks: Baker's Gasoline Equipment, Inc.(Baker) and Belpar Environmental of Virginia, Inc. (Belpar). Mr. Taylor signed Baker's proposal on December 3, 1987, employing Baker to remove three 3,000-gallon and one 550-gallon underground storage tanks. CPH, ex.1. Baker, in turn, employed Environmental Services, Inc., who subcontracted with Froehling and Robertson, Inc. (F&R), to sample and analyze each tank's contents. F&R collected samples from

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[5/] Complainant's Prehearing Exchange, exhibit 4, Deed and Lease between Paul Taylor, Jr. and Jay's Auto Sales, Inc., dated Nov. 10, 1983 (CPH, ex.4).

[6/] Complainant's Prehearing Exchange, dated April 8, 1991, exhibit 1, EPA Region III Inspection Report, dated June 14, 1988, and attachments (CPH, ex.1).

[7/] CPH, ex.1. The Fire Marshal determined that the tanks had not been used for some time, violating a city ordinance requiring removal of the tanks if not used for more than one year. Id.

the tanks on December 17, 1987. CPH, ex.1. F&R's test results were as follows:[8/]

	(PCB) Milligrams per kilogram [ppm]
Composite	54
Blank	0.5
Tank #1	52
Tank #2	26
Tank #3	61
Tank #4	110
Soil	17

According to Jerry Taylor, F&R left some debris, used in collecting the samples, in a 50 gallon drum on the premises, marked the drum with PCB labels, instructed Jay's Auto not to touch or remove the drum, and indicated that a F&R representative would return to conduct proper disposal.[9/]

Belpar also collected samples from the tanks, on February 5, 1988 and sent the samples to Applied Science Laboratories, Inc. of Richmond (ASL) for analysis. The ASL tests showed less than 5.0 mg/kg of PCB in two samples.[10/]

[8/] CPH, ex. 1. The amended complaint alleges contamination in two of the four tanks: tank 3 and tank 4. F&R's conclusion that tank 1 contained concentrations of PCBs of 52 ppm was apparently considered to be unsubstantiated.

[9/] Respondent Jay's Auto's Answer, dated November 20, 1989. The EPA inspector also reported that the F&R employee who took the samples told him that debris from the sampling were placed in a drum and that a PCB M_L label was affixed to the drum. CPH, ex.1.

[10/] Mr. Michael Schlenkfer, of Belpar, told EPA's inspector that samples from tanks 1, 3, and 4 were composited into one sample while tank 2, due to the low liquid level, was sampled separately. CPH, ex.1.

An EPA inspector, George Houghton, inspected the property on March 22, 1988 and measured the contents of the tanks.[11/] Mr. Taylor had provided verbal approval for the inspection and L. Wayne Towsend, Mr. Taylor's attorney, provided information to Mr. Houghton and accepted the receipt for samples and documents. CPH, ex.1. Mr. Houghton returned to the site on April 12, 1988 and sampled four underground tanks and the soil outside the tank No. 4 standpipe.[12/] The results of the EPA tests were as follows:

	Result (ppm)
tank 1 (3 samples)	ND; ND; ND
tank 2 (one sample)	ND
tank 3 (3 samples)	130; 130; 130
tank 4 (3 samples)	1; <1; 180(top); 23(bottom)
soil (adjacent to tank 4)	33

The undersigned Administrative Law Judge (ALJ) was designated to preside in this matter on December 15, 1989. On January 17, 1990, the ALJ directed the parties to submit prehearing exchanges on or before March 30, 1990. Jay's Auto timely responded on February 25, 1990. Complainant filed its first status report and motion for extension of time on March 8, 1990, requesting an extension of time to file its prehearing exchange because the parties were negotiating settlement. For the next 13 months, EPA and Paul Taylor filed a series of motions for extensions of time to

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[11/] CPH, ex. 1. On February 22, 1988, the Fire Marshal informed EPA that unacceptable levels of PCB existed at the site and the property owner and contractors had not yet taken any steps to clean up the condition. Id.

[12/] Complainant's prehearing exchange., exhibit 2, EPA Region III Inspection Report, undated, stamped "Received" by Region III on January 5, 1989, and attachments (CPH, ex.2).

file prehearing exchanges, alleging they were progressing towards settlement, all of which were granted. While EPA negotiated a proposed settlement with Mr. Taylor, the record suggests that EPA did not communicate with Jay's Auto.[13/]

Respondent Taylor filed a motion, on April 5, 1991, indicating complications in settlement negotiations, after which EPA submitted prehearing exchange documents on April 8, 1991. By an order, dated April 12, 1991, the ALJ granted an extension, to April 15, 1991, for Mr. Taylor to file prehearing exchange documents. Complainant filed a status report on April 19, 1991, announcing that EPA and Mr. Taylor had reached a settlement in principle and that counsel for Complainant was drafting a consent agreement and final order (CAFO). In light of the reported settlement, the ALJ, by order dated April 30, 1991, vacated the prehearing exchange requirement for Mr. Taylor and ordered EPA to file a copy of the CAFO or report monthly as to the status of settlement, including the status of the matter as to Jay's Auto. On June 18, 1991, EPA filed a status report informing the ALJ that Mr. Taylor had executed a CAFO, which was undergoing review by EPA, and that settlement would resolve violations as to all parties.

At this point, the proceedings lay fallow for 10 months. The ALJ issued an order, on April 7, 1992, directing Complainant to either file a copy of the CAFO or report monthly as to the status

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[13/] EPA indicated on three requests for extension of time, filed July 27, 1990, December 10, 1990, and February 21, 1991, that it attempted, and was unable to reach Jay's Auto.

of settlement. EPA filed a status report, on May 1, 1992, explaining that Paul Taylor had executed a CAFO, however, before EPA executed it, EPA succeeded in contacting Jerry Taylor, who then also agreed to execute the CAFO.[14/] EPA reissued the CAFO and sent copies to both respondents for execution, but EPA had not yet received the executed agreement. EPA also informed the ALJ that Respondent's counsel expressed difficulty in communicating with Mr. Taylor, who had relocated, but counsel had "located Mr. Paul Taylor and expect[ed] to have the agreement executed and forwarded to Mr. Jerry Taylor for his signature shortly."

EPA's next status report, dated July 9, 1992, informed the ALJ that EPA was aware of continued communications problems between Mr. Taylor and his attorney, Brian Redd. EPA again reported that Mr. Redd had spoken with his client, who indicated that he would execute the CAFO and forward it to Jerry Taylor for signature. On August 26, 1992, EPA filed a status report announcing that it had not received the executed agreement from either respondent, and that attempts to contact Mr. Redd were unsuccessful. EPA did not report any attempts to contact Jay's Auto. EPA submitted another status report on November 5, 1992, informing the ALJ that it had learned that neither Mr. Redd, nor his law firm, continued to

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[14/] Complainant explained the statement, in the June 18, 1991 status report, to the effect that settlement was sufficient to resolve violations as to all parties, was due to the fact that EPA was unable to reach Jerry Taylor. Apparently, EPA had announced imminent settlement without engaging Jay's Auto representatives in settlement discussions!

represent Mr. Taylor.[15/] In this report, EPA stated that, despite efforts to do so, it had been unable to contact either Paul or Jerry Taylor and was attempting to determine their current addresses and telephone numbers. EPA expressed its belief that settlement appeared unlikely and that prehearing exchanges should proceed.

EPA's next status report, filed February 26, 1993, explained that it had been unable to contact either respondent, despite several efforts. Also on February 26, 1993, EPA filed a motion for an order directing Respondents to notify EPA of their current addresses and telephone numbers and directing completion of a prehearing exchange by Respondent Paul Taylor. The ALJ issued an order, on March 30, 1993, directing both respondents to notify Complainant of their current addresses and telephone numbers on or before April 23, 1993 and directing Paul Taylor to file his prehearing exchange documents on or before May 7, 1993. Neither Respondent responded to this order. The proceeding lay dormant for over a year, then EPA filed a Motion for Default and Draft Default Order on June 16, 1995, arguing that both respondents defaulted when they failed to notify EPA of their respective current addresses and that Respondent Paul Taylor also defaulted when he failed to submit his prehearing exchange.

[15/] Mr. Redd left private practice. His former law firm officially informed the ALJ by letter dated April 5, 1993 that it no longer represented Mr. Taylor.

As will appear, it is concluded that Complainant has not made a prima facie case against Respondent Jay's Auto for all counts of the amended complaint, Complainant has failed to establish a prima facie case against Respondent Paul Taylor for Counts I-V, and Complainant has established a prima facie against Respondent Paul Taylor for Count VI. Complainant will be ordered to show cause why the amended complaint against Jay's Auto should not be dismissed and why Counts I-V against Paul Taylor should not be dismissed. Complainant's motion for default will be denied.

DISCUSSION

Under the Consolidated Rules of Practice, "A party may be found to be in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the [ALJ]." 40 C.F.R. § 22.17(a). A finding of default by the respondent "constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." Id. The ALJ must conclude that Complainant has established a prima facie case of liability against each respondent before granting a motion for

default.[16] To establish a prima facie case, Complainant must present evidence that "is sufficient to establish a given fact...which if not rebutted or contradicted, will remain sufficient...to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990). It is not sufficient for EPA to demonstrate that a violation has occurred, EPA must also establish that each respondent named in the complaint is a party responsible for the violation.[17]

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[16] Before granting a motion for default the ALJ must establish "findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed." 40 C.F.R. § 22.17(c).

[17] "Causation is the essence of the violation and is therefore properly included in the Region's prima facie case. Consequently, the Region has the burden of persuasion and the initial burden of production on that element." In re City of Detroit , TSCA Appeal 89-5, 3 EAD 514, 529 (CJO, Feb. 6, 1991). See also, 40 C.F.R. § 22.24; In re Nello Santacroce & Dominic Fanelli d/b/a Gilroy Assoc., TSCA Appeal No. 92-6, 4 EAD 586, 598 (EAB, Mar. 25, 1993)[hereinafter Gilroy]("To make a case against a particular respondent, however, it is not enough to show that someone committed a violation. The Agency must also show that the Respondent is responsible for the violation. The Agency's prima facie case, therefore, must include a nexus between the Respondent and the violation.") quoting In re City of Detroit (Order on Motion for Reconsideration and on Motion to Supplement the Record)(CJO, July 9, 1991).

Counts I-IV: Record-keeping

Complainant alleges that Respondents failed to develop and maintain annual documents as required by 40 C.F.R. § 761.180(a). Section 761.180(a) requires "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) ... [to] develop and maintain records on the disposition of PCBs and PCB Items ... [which] shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year." 40 C.F.R. § 761.180(a). The documents must be maintained for at least five years after the facility stops using or storing PCBs. Id. Respondents have not presented the documents required by section 761.180(a).[18/] Respondents, however, are only liable for failing to comply with the rule if they are "owners or operators" of the storage tanks.

The statute and regulations do not define "owner," "operator," or "facility." The EAB and ALJs, however, have made it clear that the party responsible for section 761.180(a) compliance is the "owner or operator" of the PCBs themselves, and not necessarily the

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[18/] See, CPH, ex. 1. Mr. Houghton measured the contents of the storage tanks and EPA tested for PCBs. For this order, it is assumed that EPA's witnesses at a hearing would be able to use these calculations to show the presence of at least 99.4 pounds of PCBs.

owner of the real property, or operator of a non-PCB related business operating on-site. The respondent, in In re Gilroy, TSCA Appeal No. 92-6, 4 EAD 586 (EAB, Mar. 25, 1993), was a partnership that owned and operated a storage facility and recreational vehicle park. An in-service PCB transformer was on the premises. The Agency alleged liability for several violations of the PCB rules, including failure to prepare section 761.180(a) annual documents. The EAB affirmed the Initial Decision dismissing the complaint because the complainant had not established, by a preponderance of the evidence, that the respondents owned or operated the transformer. The Board stated, "The requirements do not apply to an owner of property on which a transformer is located if that owner neither owns nor controls (i.e., operates) that transformer." Id. at 594.

Both the land owner and a current lessee in In re Mexico Feed & Seed Co., Inc., TSCA VII-84-T-312, (ALJ, Oct. 25, 1985) were held not to be responsible for PCB reporting and storage violations when the land owner leased his property to one company, Mexico Feed & Seed Co., Inc. (Mexico), for the purpose of conducting a feed and seed business, and leased a portion of the same real property to a third party, one Jack Pierce, who installed tanks for the purpose of storing waste oil. The complaint resulted from PCB contaminated oil in the storage tanks. The land was owned by J.F. Covington and controlled by Mexico. After concluding that Mr. Pierce owned the tanks and oil, the ALJ assessed a penalty solely against Mr. Pierce and dismissed the complaint against Covington. The ALJ stated,

"[T]he Act (TSCA) does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor, and therefore, [sic] is no logical or legal basis for holding Respondent J.F. Covington responsible for violations committed by the lessee [Pierce] under the theory of vicarious liability."[19/]

[19/] Id. See also, In re City of Detroit , TSCA Appeal 89-5 (CJO, Feb. 6, 1991)("A mere title holder to a piece of property, who neither owns nor controls any PCB sources does not engage in any of [the regulated] activities"); In re Suburban Station, TSCA-III-40, 14-15 (Initial Decision, Sept. 4, 1984)(property owner was not liable for storage violations caused by the City of Philadelphia, who was licensed to renovate and perform construction at the site when there was no indication that the City had consulted or discussed the PCB clean up activities with the property owner); In re Huth, TSCA-V-C-196, 25 (Initial Decision, June 2, 1986)(Owner of property not jointly and severally liable for improper storage of PCBs resulting from cleanup operations by its licensee where there was no showing that the owner was in any way involved in the cleanup activities); In re New Waterbury, Ltd., TSCA-I-88-1069 (Initial Decision, July 8, 1992) (Lease clearly placed responsibility for environmental compliance on lessee, and not upon the lessor/owner), remanded on other grounds, TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994) In re Employers Insurance Co. Of Wausau, TSCA-V-C-62-90 (Sept. 29, 1995) ("Liability under TSCA is not established merely on the basis of ownership").

Complainant asserted that both Paul Taylor and Jay's Auto were "operators" of the tanks.[20/] In order to establish that they were operators, EPA must provide proof of "active management" of the storage tanks.[21/] It cannot be concluded from EPA's evidence that Jay's Auto actively managed or controlled the tanks. Jay's Auto was in the business of operating a used car lot and had no reason to operate the storage tanks. Like Mexico in Mexico Feed & Seed, TSCA VII-84-T-312, Jay's Auto had some control over the real property; however, it did not own or operate the storage tanks or the PCBs themselves. Nothing in the lease of the property indicates that Jay's Auto leased, or intended to use, the tanks. The only suggestion that Jay's Auto operated the tanks was a reference in the inspector's report that there was a funnel inside the inlet to one of the tanks, surfacing inside the service bay of the building.

[20/] EPA's inspection report, CPH, ex.1, and Jay's Auto's answer stated that F&R placed the drum at the site in December, 1987. Because the drum was not on the property in 1983-85, there was no section 761.180(a) violation in those years resulting from the drum.

[21/] See, In re Gilroy, TSCA Appeal No. 92-6, 4 EAD 586, 613 (EAB, Mar. 25, 1993)(stating that "[t]o establish operator status would require proof of active management of the transformer itself").

CPH, ex.1. Absent any indication that the funnel had recently been used, or that liquids had recently been added to the tank, this is not sufficient to support a conclusion that Jay's Auto operated the tank.[22/] Because Complainant has not established that Jay's Auto had a duty to comply with section 761.180(a), Complainant will be ordered to show cause why Counts I-IV of the complaint against Jay's Auto should not be dismissed.

On the other hand, there is some evidence that Paul Taylor was an operator of the tanks. The Fire Marshal contacted Mr. Taylor regarding removal of the tanks, Mr. Taylor hired a contractor to remove the tanks, Mr. Taylor gave permission for inspection of the tanks, and his representative met with the EPA inspector. Complainant also alleges that Mr. Taylor may have exercised managerial control over operations of the tanks prior to leasing the property to Jay's Auto, although no evidence has been submitted to substantiate this allegation. CPH, 19.

Complainant also alleged that Paul Taylor is the owner of the tanks. His ownership of the real property, combined with the control he maintained over the testing and removal of the tanks suggest that he owned the tanks. Complainant further asserts that, under Virginia law, the tanks were fixtures transferred to Mr. Taylor at the time he acquired the property, citing Transcontinental Gas Pipe Line Corp. V. Prince William County, 210

[22/] Jerry Taylor explained to the inspector that he did not use the tank and the funnel was inside the inlet to prevent people from stumbling over the lip of the inlet. CPH, ex.1.

Va. 550, 172 S.E. 2d 757 (1970). CPH, 17. The Virginia Supreme Court, in Transcontinental, held that underground gas mains owned and operated by a gas transmission company were part of the real property, because the mains were buried in the ground, adapted to the use of the property to which they were annexed, essential to the purpose of easements obtained by the company, and it was the company's intention to permanently annex them to the land. Transcontinental, 172 S.E. 2d at 762. Although Respondent might challenge the applicability of Transcontinental to this case, Complainant has presented evidence that prima facie Respondent, Paul Taylor, was the owner or operator of the underground storage tanks. Absent any showing to the contrary, he was subject to, and required to comply with, all obligations imposed by the rules upon owners or operators.

The inquiry into Counts I-IV does not end with a review of ownership and operation. Subsequent to the filing of the amended complaint in this proceeding, the U.S. Court of Appeals for the District of Columbia ruled that the five year statute of limitations, 28 U.S.C. § 2462, applied to administrative proceedings. 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). EPA must commence an action within five years of the date of the violation giving rise to the penalty. Judge Harwood, in In re Lazarus, Inc., TSCA-V-C-32-93 (Initial Decision, May 25, 1995), applied the statute of limitations to bar an action for failure to inspect PCB transformers quarterly and maintain records, as required by 40 C.F.R. § 761.30(a), because the inspections were to

have occurred more than five years prior to the issuance of the complaint. Complainant also charged the respondent in Lazarus with violating section 761.180(a), however, the statute of limitations for these violations was not considered, because the respondent did not invoke the statute in that context.

Judge Harwood, however, dismissed two counts alleging section 761.180(a) violations, because the record-keeping requirements violated the Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35. The PRA requires a control number, issued by the Office of Management and Budget (OMB), to be displayed on an information collection request and precludes the assessment of a penalty for the failure to comply with an information request if an OMB control number is not displayed thereon.[23/] After concluding that the section 761.180(a) record-keeping requirements are subject to the PRA as information collection requests, Judge Harwood dismissed the

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[23/] 44 U.S.C. § 3512. The PRA precludes assessing a penalty for failure to maintain or provide information, requested after December 31, 1981, unless the information collection request either displays a current OMB control number or states that the PRA does not apply. Id. Although the Act does not define "display," the former OMB regulation defined "display" to require publication of the control number in the C.F.R. and in the Federal Register, as a part of the regulatory text or as a technical amendment. 5 C.F.R. § 1320.7(e)(2)(1984). See, In re Zaclon, RCRA-V-W-92-R-9, (Initial Decision, March 19, 1996) (holding that it is not sufficient for the OMB control number to be contained in the preamble to the regulation). The PRA has been amended (Public Law 104-13, May 22, 1995) and OMB has revised its regulations to provide that the "display" requirement is satisfied, if the OMB control number is published in the Federal Register preamble [to a regulation], in the regulatory text (C.F.R.) or in a technical amendment or separate notice, 60 Fed. Reg. 44977 (August 29, 1995). The revised definition does not apply, however, to information collection requests dated on or prior to September 30, 1995, 5 C.F.R. § 1320.2 (1996).

counts because there were lapses in OMB approval for the record requirements of section 761.180(a) from 9/30/82 -- 2/14/83 and 9/30/85 -- 12/10/85, and an OMB control number was not displayed in the text of the regulations published in the Federal Register or in the Code of Federal Regulations until the regulation's amendment in 1989. Judge Harwood explained, however, that if the respondent knew of OMB's approval of the record-keeping requirements, EPA's failure to display the control number in the regulation would not necessarily excuse respondent of liability.[24/]

In light of the 3M and Lazarus decisions, it appears, facially, that Count I of the amended complaint is barred by the statute of limitations and Counts I-IV are barred by EPA's failure to comply with the PRA prior to 1989. Dismissal, however, would not be appropriate until EPA has an opportunity to review the amended complaint and explain why it is still valid. EPA will be ordered to show cause why Counts I-IV of the amended complaint should not be dismissed.

Counts V-VI: Disposal and Storage

Count V alleges improper disposal of PCBs in violation of 40 C.F.R. § 761.60(d) because of PCB contaminated soil adjacent to the tank 4 inlet. Section 761.60(d) states, "(1) Spills and other

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[24/] In re Lazarus, TSCA-V-C-32-93, n.70 (Initial Decision, May 25, 1995) ("To excuse the party who knew of the OMB approval from complying with the recordkeeping requirement simply because the prescribed form of notice was not given would not serve the purpose of informing the party of OMB approval and would deprive EPA of useful information").

uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs. (2) PCBs resulting from the clean-up and removal of spills, leaks, or other uncontrolled discharges, must be stored and disposed of in accordance with paragraph (a) of this section..."

The PCBs in the soil near tank 4 were clearly the result of a spill, leak, or uncontrolled discharge that must be disposed of in accordance with section 761.60(a), regardless of when the discharge occurred.[25/] The record, however, does not appear to support EPA's assertion that the discharge on the soil contained PCBs at concentrations of 50 ppm or greater. The record includes the results of two tests of soil samples: the F&R test showed 17 ppm PCBs and EPA's test showed 33 ppm PCBs.[26/] EPA alleged, in its motion for default, that the soil contained PCBs at 180 ppm.[27/] Section 761.1(b) states that "[n]o provision specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided." This "anti-dilution" rule

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25/ "From the unexplained presence of PCBs in the soil or on the floor, it can be inferred that one or more 'uncontrolled discharges' of PCBs took place." In re City of Detroit, TSCA Appeal 89-5, 3 EAD 514, 515-516 (CJO, Feb. 6, 1991), citing In re Standard Scrap Metal Co., TSCA Appeal 87-4 (CJO, Aug. 2, 1990). "PCBs in the soil must be regarded as out of service even if they were discharged onto the soil before the PCB disposal requirements became effective." Id.

26/ Applied Sciences apparently did not test the soil.

27/ The amended complaint, paragraph 7, alleges that the soil had "33 ppm PCBs present."

creates a presumption that the soil contamination remained above the regulatory threshold of 50 ppm if, at the time of the spill, the tank contained greater than 50 ppm, despite the lower concentration in the soil at the time of testing.[28/] Because none of the submitted data showed current contamination at 50 ppm or greater, and EPA has not identified the level of PCB concentration at the time of discharge, EPA will be ordered to explain the basis for the allegation that the spill violated section 761.60(d).

Sections 761.60(b)(6) and (c)(3) require PCB Articles and PCB Containers (with a few exceptions not relevant to this proceeding), with concentrations at 50 ppm or greater, to be stored prior to disposal in accordance with section 761.65. Section 761.65(a) requires the removal from storage and proper disposal before January 1, 1984 of any PCB Article or Container that had been placed in storage before January 1, 1983, and the removal and proper disposal within one year from the date of storage, of any PCB Article or Container that was stored after January 1, 1983. After July 1, 1978, owners or operators of storage facilities were required to comply with 40 C.F.R. § 761.65(b). This section provides criteria for PCB storage facilities, i.e., an adequate roof, walls, and an impervious floor with continuous curbing and containment volume, no drain valves, floor drains, expansion

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[28/] In re Ketchikan Pulp Company, TSCA-X-86-01-14-2615 (Initial Decision, December 8, 1986) ("In effect, Section 761.1(b) creates a conclusive presumption that substances and materials in contact with, or contaminated with, PCBs at concentrations equal to or above 50 ppm remain above the regulatory threshold").

joints, sewer lines, or other openings, and proper construction and siting. 40 C.F.R. § 761.65(b).

The rules also required marking of containers with the date placed in storage and labeling with the M_L mark in compliance with 761.40(a)(10). 40 C.F.R. § 761.65(c)(3). Some PCB Items, including PCB Containers containing nonliquid rags and debris or liquid PCBs at a concentration between 50 ppm and 500 ppm, could be stored for up to thirty days from the date of their removal from service without compliance with § 761.65(b)(1), provided certain conditions were satisfied (§ 761.65(b)(2)). Section 761.65(c) required PCB storage containers to either comply with listed provisions of the Shipping Container Specifications of the Department of Transportation, 49 C.F.R. § 178, or satisfy the requirements of 761.65(c)(7). The latter section authorized use of storage containers larger than those permitted under 761.65(c)(6), provided the enumerated conditions were satisfied. These conditions included a Spill Prevention Control and Countermeasure Plan (SPCCP) and batch records.

The tanks at the 3411 site are PCB Containers that must be stored prior to disposal in accordance with the regulations.[29/] Tank Nos. 3 and 4 were stored in violation of 761.60 and 761.65, because they contained greater than 50 ppm liquid PCBs, did not have adequate roofing, walls, curbing, and marking, and there were

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[29/] A PCB Container is "any package, can, bottle, bag, barrel, drum, tank or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs." 40 C.F.R. § 761.3.

no SPCCP or batch records. The drum containing PCB contaminated debris was also improperly stored, because it was left at the site for greater than thirty days and was not stored in an area with the required roofing, walls and curbing.[30/] Because of the anti-dilution rule, discussed supra, the PCB contaminated debris are also subject to the PCB rule, even though the debris were not tested for PCB concentration.[31/]

The storage and disposal rules do not identify the party to whom the requirements are intended to apply.[32/] Because the PCB rules are divided into separate parts for storage, disposal, and use, the EAB has reasoned that "the regulations on use apply to those who use PCBs; the regulations on storage apply to those who store PCBs and the regulations on disposal apply to those who

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[30/] Non-liquid PCBs, at concentrations of 50 ppm or greater, in the form of soils, rags, and other debris must be disposed according to 40 C.F.R. § 761.60(a)(4).

[31/] Ketchikan, supra note 28. "...[T]o the extent the contaminated rags and clothing resulted from cleanup activities or contact with PCBs equal to or in excess of 50 ppm, the drums containing such materials are clearly subject to the PCB rule."

[32/] As the Chief Judicial Officer (CJO) explained In re City of Detroit, TSCA Appeal 89-5, 3 EAD 514, 522, n.15 (CJO Feb. 6, 1991), "the disposal requirements are written in the passive voice, stating how the PCBs must be disposed of, but not saying who is responsible for an improper discharge of PCBs...Generally, the use of the passive voice in a regulation creates vagueness and confusion about the persons who are subject to the regulation."

dispose of PCBs."[33/] The party responsible for compliance is the one who engages in the regulated activity. Respondents are only liable for storage violations if they stored PCBs and they are only liable for disposal violations if they disposed of PCBs.

Mere ownership of real property upon which PCBs are stored or disposed is not sufficient to impose liability for violations of the PCB rule.[34/] City of Detroit announced that "a person will be held responsible if that person caused (or contributed to the cause of) the disposal, and (2) in cases involving uncontrolled discharges, the person who owned the source of the PCBs at the time of the discharge will be deemed in most cases to have caused the discharge."(emphasis in original).[35/]

In City of Detroit, the respondent, Detroit, owned a stamping plant, formerly owned and operated by Chrysler Motors Corp. After Detroit acquired title to the property, but before it had taken possession, three PCB transformers leaked as a result of vandalism.

[33/] In re Gilroy, TSCA Appeal No. 92-6, 4 EAD 586, 593 (EAB, Mar. 25, 1993), quoting In re City of Detroit , TSCA Appeal 89-5 (CJO, Feb. 6, 1991). See also, In re Employers Insurance Co. Of Wausau, TSCA-V-C-62-90, 15 (Sept. 29, 1995) ("Liability under TSCA is not established merely on the basis of ownership").

[34/] Supra, note 19.

[35/] In re City of Detroit, TSCA Appeal No. 89-5, 3 EAD 514, 526 (EAB Feb. 6, 1991) ("Disposal requirements do not impose responsibility on a person who merely acquired the property after the PCBs had been discharged. Nor do they impose responsibility on a person who merely owned the property at the time of the discharge but did not cause the uncontrolled discharge and did not own or control the PCB sources on the property").

The CJO concluded that Chrysler, and not Detroit, was responsible for the spills, because "Detroit was not in possession of the property, did not own or control the PCB sources on the property, and did not cause or contribute to the discharges."[36/] The CJO recognized, however, that it is easier for a respondent to prove that it did not cause the discharge than it is for EPA to prove that the respondent did cause the discharge. Because "requiring the Region to prove causation of the disposal in every instance would severely impair the Agency's ability to enforce the PCB disposal requirements," the CJO, announced the following rebuttable presumption:

> If PCBs are found in the soil or on the surface of a piece of property so as to raise the inference that an uncontrolled discharge has taken place, then it must be presumed that the present owner caused the uncontrolled

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[36/] Following the same reasoning, several ALJs have concluded that a property owner is not vicariously liable for the violations caused by a lessee on the property. See, e.g., In re Mexico Feed & Seed, TSCA-VII-84-T-312, 25 (Oct. 25, 1985)("[TSCA] does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor and therefore, [there] is no logical or legal basis for holding respondent...responsible for violations committed by the lessee under a theory of vicarious liability") quoted by In re Employers Insurance Co. Of Wausau, TSCA-V-C-62-90, 17 (Sept. 29, 1995).

> discharge that deposited the PCBs there. In other words, to make a prima facie case on the causation element in an action against the present owner of a piece of property, the Region need only show that PCBs were found on the property in a state of improper disposal (e.g. on a surface, on the floor, or in the soil).[37/]

EPA has established a prima facie case that Mr. Taylor was liable for storage and disposal violations, because he was the owner of property on which an uncontrolled discharge occurred. EPA has not, however, established a prima facie case against Jay's Auto. EPA does not allege that Jay's Auto owned the real property, the underground storage tanks, or the 50 gallon drum; nor has EPA provided documentation to suggest that Jay's owned the tanks at the time of the discharge, was engaged in the activity of storing PCBs, or caused or contributed to the uncontrolled discharge. It is therefore concluded that EPA has not satisfied its burden of producing evidence that Jay's Auto was a storer or disposer of PCBs. EPA will be ordered to show cause why Counts V and VI of the amended complaint against Jay's Auto should not be dismissed.

[37/] In re City of Detroit , TSCA Appeal 89-5, 3 EAD 514, 530 (CJO, Feb. 6, 1991). "The Region, having made its prima facie case, the burden of production will then shift to the present property owner to show that it was not responsible for the discharge. The present owner can rebut the presumption by showing that it is more likely or equally likely that another person or other persons caused the uncontrolled discharge. If the present property owner can make this showing, the presumed fact--that the present owner caused the discharge, will cease to exist, i.e., the rebutted presumption will have no probative value. In that event the Region will lose unless it can show by other evidence that the present owner caused (or contributed to the cause of) the discharge that deposited PCBs on the property. Id.

Default

Complainant requests that the ALJ find Respondents in default for failing to respond to the ALJ's order of March 30, 1993 ordering both Respondents to submit their current addresses and telephone numbers and directing Respondent Paul Taylor to file its prehearing exchange.[38] The ALJ may find a party in default "after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the [ALJ]."[39] The ALJ's March 30th order was a prehearing order with which neither party complied. A finding of default, however, would be inappropriate at this time, because of the questions as to whether EPA has presented a prima facie case, the lack of details in the record regarding EPA's efforts to locate the parties, Respondents' previous participation in the proceedings and apparent interest in resolving the dispute, the lengthy time gaps without any apparent communication between the parties, and EPA's failure to submit monthly status reports as ordered. The law favors resolution of cases on their merits, whenever possible, and

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[38] The ALJ originally ordered prehearing exchanges to be filed on or before March 30, 1990. That order was vacated on April 30, 1991, because of EPA's report that the parties had reached a settlement. When EPA later reported that settlement had not been achieved, the ALJ, on March 30, 1993, ordered Mr. Taylor to submit prehearing exchange no later than May 7, 1993.

[39] 40 C.F.R. § 22.17(a). See, also, In re Environmental Control Systems, Inc., I.F.&R.-III-432-C (ALJ, July 13, 1993) ("[T]he mere fact a party may be in default does not entitle the opposing party to a default judgment or order as a matter of right...a finding of default is discretionary with the ALJ.") citing, In re Columbia Falls Aluminum Co., TSCA-(PCB)-VIII-91-02 (ALJ, April 13, 1993).

default, being a "drastic remedy" will not necessarily be granted because a party may technically be in default.[40/]

In this case, Respondents participated in the action until EPA lost touch with their whereabouts. At the inception of this proceeding, Jay's Auto promptly submitted all requested documents. The address used for Jay's Auto since May 1, 1992 may be current.[41/] A quick search of information available thorugh computer on-line

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[40/] See, e.g., Hoops Agri-Sales Co., I.F.&R.-VII-1233C-93P, (ALJ, Dec. 1, 1994) (denying motion for default because the respondent had a possible full defense to Count I, a good faith defense to Count II and a defense to the magnitude of any penalty; and allowing respondent another opportunity to comply with the pre-hearing requirement); In re Environmental Control Systems, Inc., I.F.&R.&R.-III-432-C (ALJ, July 13, 1993) ("The general rule both in federal courts and administratively is that default judgments are not favored and that cases should be decided on their merits whenever possible").

[41/] The ALJ's order granting extension of time, dated April 12, 1991, was remailed to Jay's Auto at 4510 Jefferson Davis Highway, Richmond, VA, because the order, mailed to 3411 Jefferson Davis Highway, was returned to the Judge's office, indicating that the forwarding time had expired. The ALJ sent orders to Jay's Auto at 4510 Jefferson Davis Highway from April, 1991 through April, 1992, while Complainant continued to send copies of motions to Jay's Auto at 3411 Jefferson Davis Highway. Complainant's status report, dated May 1, 1992, informed the ALJ that it had contacted Jerry Taylor, and mailed the status report to him at a new address, 5643 Upp Street, Richmond, VA. Complainant and the ALJ have sent copies of all subsequent motions and orders to Jay's Auto at 5643 Upp Street. The ALJ's order of March 30, 1993 was not returned. Except for Jay's Auto's failure to respond to the order, there is no indication that the order was not received. Complainant has not provided any evidence that this new address is no longer valid.

systems revealed that Jerry Taylor may own the property at 5643 Upp Street and uses it as a mailing address.[42/] Other than Complainant's declarations that it has repeatedly attempted to contact Jay's Auto, there is nothing in the record explaining Complainant's attempts to locate Jerry Taylor, or to demonstrate that the address in the record is not current. For example, Complainant could provide returned letters or unsigned certified receipts, dates and consequences of attempted telephone calls or visits, or other documentation.

The address of record for Paul Taylor is the address of his former attorney, Brian Redd. Complainant informed the ALJ in its May 1, 1992 status report (prior to the ALJ's March 30, 1993 order directing Mr. Taylor to submit prehearing exchange and a current address) that it had learned that this address was not valid, because Mr. Redd no longer represented Mr. Taylor. Considering the wealth of information available through computer access, it appears that EPA should be able to locate Mr. Taylor. Furthermore, the record indicates that Mr. Taylor owned two used car lots in the Richmond, Virginia area: B&P Auto Sales and Taylor's Auto Sales, and there is evidence of at least one address for Mr. Taylor that had

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[42/] Although computer on-line databases providing addresses and telephone numbers are not always current, they are a useful starting tool for finding someone's address and support the conclusion that Jerry Taylor may still be reached at the mentioned location.

not been used for attempted service: 8705 Jefferson Davis Highway. CPH, ex.1. One of the exhibits also provides Mr. Taylor's home and office telephone numbers. CPH, ex.1. EPA has not indicated whether it attempted to contact Mr. Taylor at any of these addresses/telephone numbers.

Although it is ultimately Respondents' obligation to provide EPA with any changes of address, it would not be proper to find Respondents in default for failing to do so without a showing of good faith efforts by EPA to ascertain their current addresses.[43/] The record does not contain such a showing. If EPA demonstrates prima facie liability, and shows good faith efforts to ascertain Respondents' current addresses, it may renew its motion for default.

EPA's motion also requested default because of Mr. Taylor's failure to respond to the ALJ's order for prehearing exchange. Because it is questionable whether Mr. Taylor ever received the order and considering Mr. Taylor's prior cooperation and participation in the proceedings, it would be inappropriate to find

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[43/] 40 C.F.R. § 22.05(b)(4) states, "The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer [ALJ], and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules."

him in default at this time for failing to submit a prehearing exchange.[44/] Complainant's motion for default will be denied.

ORDER

1. Complainant's Motion for default is denied.

2. Complainant is ordered to show cause, if any therebe, why Counts I-VI of the amended complaint against Jay's Auto should not be dismissed for failure to show that it was an owner or operator of the tanks.

3. Complainant is ordered to show cause, if any therebe, why Count I of the amended complaint should not be dismissed as barred by the statute of limitations (28 U.S.C. § 2462).

4. Complainant is ordered to show cause, if any therebe, why Counts I-IV should not be dismissed, because the assessment of a penalty is barred by the Paperwork Reduction Act.

5. Complainant is ordered to show how it concluded that the soil spill violated section 761.60(d).

6. Complainant is ordered to continue to attempt to contact Respondents and submit documentation regarding its efforts to locate and serve Respondents.

[44/] See, also, 5 U.S.C. § 556(d), "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts," quoted In re Citgo Pipeline Co., OSPA 94-001 (ALJ, Feb. 27, 1996); In re B.F. Goodrich Co., 5 TSCA-95-009 (ALJ, Feb. 14, 1996).

7. Complainant shall respond to this order on or before July 5, 1996.[45/]

Dated this 5th day of June 1996.

Spencer T. Nissen
Administrative Law Judge

[45/] This order will be served on Mr. Taylor at his address of record and a copy furnished to the Regional Hearing Clerk. The Regional Hearing Clerk is requested to assist in effecting proper service by attempting to locate Mr. Taylor, serving him with a copy of this order via certified mail, and informing the ALJ and EPA's counsel regarding her success in locating and serving Mr. Taylor.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER TO SHOW CAUSE; ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT**, dated June 5, 1996, in re: Jay's Auto Sales & Paul Taylor, Dkt. No. TSCA-III-373, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: June 5, 1996

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