

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Patrick J. Neman, d/b/a)	Docket No. TSCA-V-C-024-88
The Main Exchange)	
)	
Respondent)	

ORDER ON DEFAULT

On November 20, 1992, pursuant to Rule 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, Complainant filed a motion for a default order. A party's default constitutes an admission of the facts alleged in the complaint and an order, if entered, will result in assessment of the full amount of the proposed penalty without further proceedings.

In a three-count Complaint, filed December 24, 1987, Respondent was charged with violations of Section 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, and of the PCB Manufacturing, Processing, Distribution in Commerce and Use Regulations ("PCB Rule"), 40 C.F.R. Part 761. These charges followed an on-site inspection by EPA Representatives on January 13, 1986. The alleged violations included (I), inadequate record-keeping of disposition of PCB items for the years 1983 and 1984 in violation of 40 C.F.R. § 761.180(a); (II), failure to maintain quarterly inspection and maintenance records of PCB transformers for the years 1983-1986 and failure to register PCB transformers with fire response personnel in violation of 40 C.F.R.

§§ 761.30(a)(1)(ix), (xii), and (vi); and (III), improper disposal of PCBs following an uncontrolled discharge in violation of 40 C.F.R. § 761.60(a)(1) and (4) and (d)(1). Complainant proposed to assess Respondent a civil penalty of \$6,000 for Count I, \$13,000 for Count II, and \$5,000 for Count III, for a total of \$24,000.

Respondent filed an Answer and Request for Hearing on February 5, 1988. Respondent denied the allegations in Count I, alleging that the PCB items were not in use. Respondent admitted the allegation in Count II that quarterly inspection records were not kept, but stated that such records were not required, because the transformers were not in storage for reuse and had never been used by Respondent. Respondent denied the allegation that it had failed to register the transformers with fire response personnel. Allegations of improper disposal in Count III were denied for lack of knowledge.

Status reports were filed by EPA counsel on April 15, 1988; October 3, 1988; December 9, 1988; May 10, 1989; and June 29, 1990. These reports indicated, among other things, that settlement negotiations were underway, centered on the cost of disposal of seven PCB transformers at Respondent's facility and the cost of PCB cleanup. Additionally, the reports state that on August 18, 1988, Respondent filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. On December 30, 1988, the Department of Justice, on behalf of EPA, filed a proof of claim with the Bankruptcy Court, In Re Neman, Case No. 588-1466 (N.D. Ohio). This claim was amended on April 21, 1989.

An inspection of Respondent's facility by the Ohio Environmental Protection Agency (OEPA) on January 5, 1989, reportedly resulted in findings that contaminated areas identified in the complaint had not been adequately cleaned up, that the seven PCB transformers were not being properly stored, that these transformers and certain drums of PCB fluids were not marked with the date when the items were placed in storage and that there was no record of quarterly inspections being performed since the inspection of January 13, 1986.

In responding to the ALJ's order, dated February 8, 1991, to show cause why the complaint should not be dismissed for lack of prosecution, Complainant reported, inter alia, that Respondent had failed to follow through on his assurances that PCBs at the facility would be cleaned up and disposed of, that an EPA inspection in August 1990 resulted in the facility being designated a Superfund removal site pursuant to CERCLA, 42 U.S.C. 9601 et seq. and that Respondent's bankruptcy under Chapter 11 had been converted to a liquidation under Chapter 7.

As authorized by an order of the Administrative Law Judge, dated March 28, 1991, Complainant filed an amended complaint on April 26, 1991. This complaint alleged, inter alia, that at the time of an EPA inspection on January 16, 1986, Respondent had seven PCB transformers on hand which were stored for reuse. These transformers were allegedly nameplated as "pyranol" and "no-flamol" and assertedly contained 830 gallons of PCBs in concentrations greater than 500 ppm. At the time of the OEPA inspection on

January 5, 1989, and a U.S. EPA inspection on August 16, 1990, Respondent allegedly had on hand seven PCB transformer carcasses, 12 55-gallon drums containing PCB dielectric fluid, and five 55-gallon drums containing soil contaminated with PCBs. These items were stored for disposal.

Counts I-IV alleged failure to visually inspect and keep quarterly maintenance and inspection records for 7 PCB transformers for (I) the first quarter of 1988, (II) the fourth quarter of 1987, (III) the third quarter of 1987, and (IV) the third quarter of 1983 through the second quarter of 1987. These failures constitute violations of 40 C.F.R. Part 761, Appendix B(III), Interim Measures Program, 46 Fed. Reg. 16090 (March 10, 1981), codified 40 C.F.R. § 761.30(a)(1), and Section 15 of TSCA, 15 U.S.C. § 2614.

Count V alleged failure to register PCBs with fire response personnel in violation of 40 C.F.R. 761.30(a)(1)(vi). Counts VI and VII alleged failure to mark the PCB storage area and nine PCB containers with the M₁ label illustrated in 40 C.F.R. § 761.45 as required by 40 C.F.R. § 761.40.

Counts XIII and IX alleged failure to properly dispose of uncontrolled discharges of PCBs by incineration in violation of 40 C.F.R. § 761.60.

Count X cited improper storage of PCBs in an area without curbing in violation of 40 C.F.R. § 761.65(b).

Count XI alleged a failure to mark the seven PCB transformers and 17 PCB containers with the date they were placed in storage for disposal in violation of 40 C.F.R. § 761.65(c)(8).

Counts XII and XIII alleged failure to develop and maintain records and annual documents on the disposition of PCB items for 1984 and 1983, respectively. Such failures constitute violations of 40 C.F.R. § 761.180(a) and Section 15 of TSCA, 15 U.S.C. § 2614.

The proposed civil penalty was as follows:

Counts	I-V:	\$13,000	(each count)
Count	VI:	\$ 3,000	
Count	VII:	\$13,000	
Count	VIII:	\$25,000	
Count	IX:	\$ 5,000	
Count	X:	\$13,000	
Counts	XI-XIII:	<u>\$ 6,000</u>	(each count)
Total Penalty:		\$142,000	

A certificate of service and an affidavit by Mr. Scott Cooper, an environmental specialist in EPA's Region V office, reflects that on April 26, 1991, the amended complaint was mailed to Respondent, Patrick J. Neman, 665 West Market Street, Akron, Ohio 44303, and that a copy was mailed to his attorney, John J. Guy, Guy, Lammert and Towne, 2210 First National Tower, Akron, Ohio 44308. Mr. Scott's affidavit states Respondent has not filed an answer to the amended complaint.

On November 20, 1992, Complainant filed a Motion for a Default Order on the basis that Respondent did not file an answer to the Amended Complaint within the twenty day period as required by Rule 22.15(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22. To date, Respondent has not filed an answer to the Amended Complaint and has not replied to the default motion.

D I S C U S S I O N

Rule 22.17(a), the default provision under the Consolidated Rules of Practice, 40 C.F.R. Part 22, provides in pertinent part:

A party may be found to be in default... (1) after motion, upon failure to file a timely answer to the complaint... The defaulting party shall have twenty (20) days from service to reply to the motion. Default by 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. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

In accordance with this rule, Respondent's failure to respond to the Amended Complaint, dated April 26, 1991, within 20 days of its service constitutes grounds for a Default Order in favor of Complainant.

With regard to Respondent's bankruptcy proceedings, the only question is whether this case falls within the stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, thereby making the question of default moot. Section 362(b)(4) exempts from the stay provisions:

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers.

The rule is that a proceeding to assess a civil penalty for failure to comply with the environmental laws is excluded from the stay provisions by 11 U.S.C. § 362(b)(4). See Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267 (3rd Cir. 1984) (exempting from automatic stay provisions, action by state

Department of Environmental Resources seeking compliance by bankrupt coal mine operator with environmental statute); United States v. Nicolet, Inc., 857 F.2d 202 (3rd Cir. 1988) (exempting from automatic stay provisions, cost recovery action brought by the U.S. government under CERCLA).^{1/} See also, In Re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990) (automatic stay provision did not bar government's action against debtors under False Claims Act). Clearly, the immediate case falls within the Environmental Protection Agency's regulatory powers and, thus, is with the ambit of section b(4). Consequently, Respondent's bankruptcy proceedings have no bearing on Respondent's default.

This proceeding not being subject to an automatic stay, the only remaining consideration is whether there are any compelling reasons for refusing to grant Complainant's motion for a default order. As it stands, no such reasons exist. Indeed, given (1) Respondent's past non-cooperation in settlement negotiations, (2)

^{1/} Both of these cases uphold the conclusion that the entry of a money judgment against a party who violates the environmental laws is not effected by the stay provision of § 362. Indeed, the House and Senate Reports on the provision clearly state that:

Where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, safety, or similar police or regulatory powers, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S.Rep. No. 989, at 52, 1978 U.S. Code Cong. & Admin. News at 5838; H.R.Rep. No. 595, at 343, 1978 U.S. Code Cong. & Admin. News at 6299. Note, however, that enforcement of the money judgment against Respondent is subject to the stay provision under § 362(b)(5). See Id. As such, enforcement of the money judgment is in the hands of the bankruptcy court.

Respondent's past and more recent violations, (3) the time span of this litigation, and (4) the EPA's right to resolution of claims, a default order is appropriate.

Accordingly, Respondent is found in default under Rule 22.17 of the Consolidated Rules of Practice, 40 C.F.R. Part 22, for failure to respond to Complainant's Amended Complaint, dated April 26, 1991. As previously stated, Respondent's default constitutes, for purposes of this proceeding, an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations.

FINDINGS OF FACT

1. The Respondent is Patrick J. Neman, d/b/a The Main Exchange, who, at all times relevant to the Amended Complaint, was a sole proprietorship operating under the laws of the State of Ohio.
2. Respondent is a "person" as defined in 40 C.F.R. § 761.3 and is subject to the prohibitions set forth in 40 C.F.R. Part 761.
3. Respondent was, at all pertinent times, the owner and operator of the facility, at 444 South Main Street, Akron, Ohio.
4. At the time of the Environmental Protection Agency's ("Ohio EPA") January 13, 1986, inspection, Respondent had seven PCB transformers on hand.

5. These seven PCB transformers were nameplated as "pyranol" and "no-flamol" and contained 830 gallons of PCBs in concentrations greater than 500 ppm.
6. At the time of the January 13, 1986, inspection, these seven PCB transformers were stored for reuse.
7. At the time of Ohio EPA's January 5, 1989, and U.S. EPA's August 16, 1990, inspections, Respondent had in storage for disposal seven drained PCB transformer carcasses, 12 55-gallon drums containing PCB dielectric fluid, and five 55-gallon drums containing soil contaminated with PCBs.
8. The 12 55-gallon drums of PCB dielectric fluid contained approximately 720 gallons of PCB dielectric fluid at concentrations greater than 500 ppm, and the five 55-gallon drums contained soil contaminated with PCBs at concentrations greater than 500 ppm.
9. Respondent's seven PCB transformers, 12 55-gallon drums containing PCB dielectric fluid, and 5 55-gallon drums containing soil contaminated with PCBs were PCB items as defined in 40 C.F.R. § 761.3.
10. On April 26, 1991, Complainant filed an Amended Complaint and Notice of Opportunity for Hearing against Respondent, pursuant to Section 15 of TSCA, 15 U.S.C. § 2614. The Complaint alleged in 13 counts violations of TSCA and the regulations promulgated pursuant thereto.
11. The Amended Complaint was mailed to Respondent on or about April 26, 1991. A copy of this complaint was also mailed to

Respondent's attorney, John J. Guy of Guy, Lammert & Towne, 2210 First National Tower, Akron, Ohio.

12. Respondent failed to file an Answer to the Amended Complaint.
13. The penalty proposed in the Amended Complaint was properly computed pursuant to the Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990. The Policy applies to violations alleged in complaints issued after April 9, 1990, irrespective of the date of the violations.

CONCLUSIONS OF LAW

1. Respondent is in default for failing to file a timely answer to the Amended Complaint, dated April 26, 1991.
2. Respondent violated 40 C.F.R. § 761.30(a)(1)(ix) & (xii) and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to conduct inspections of its PCB transformers and to maintain records of such inspections.
3. Respondent violated 40 C.F.R. § 761.30(a)(1)(vi) and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to register its PCB transformers with fire response personnel.
4. Respondent violated 40 C.F.R. § 761.40 and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to mark its PCB storage area with the M₁ label.
5. Respondent violated 40 C.F.R. § 761.40 and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to mark its nine PCB containers with the M₁ label.

6. Respondent violated 40 C.F.R. § 761.60 and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to dispose of PCBs in an incinerator.
7. Respondent violated 40 C.F.R. § 761.65(b) and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to store PCB items in a proper storage facility.
8. Respondent violated 40 C.F.R. § 761.65(c)(8) and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to date its 7 PCB transformer carcasses and 17 PCB containers when they were placed in storage for disposal.
9. Respondent violated 40 C.F.R. § 761.180(a) and Section 15 of TSCA, 15 U.S.C. § 2614 by failing to develop and maintain records and annual documents of the disposition of PCBs.
10. The penalty proposed in the Amended Complaint in the amount of \$142,000 is supported by the facts and is consistent with U.S. EPA's penalty policy.

O R D E R

It having been determined that Respondent violated TSCA as alleged in the complaint, a penalty of \$142,000 is assessed against Respondent, Patrick J. Neman, d/b/a The Main Exchange, pursuant to Section 16 of TSCA, 15 U.S.C. § 2615.^{2/} The penalty shall be paid

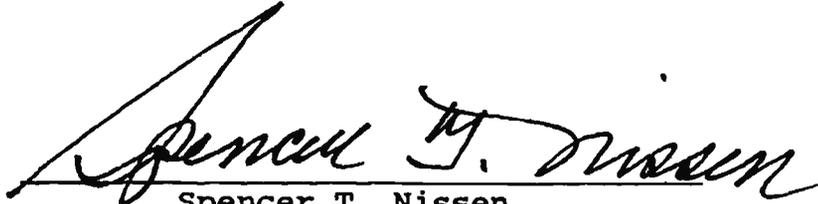
^{2/} This Order constitutes an initial decision, which, unless appealed in accordance with Section 22.30 of the Consolidated Rules of Practice (40 C.F.R. Part 22), or unless the Environmental Appeals Board (EAB) elects sua sponte to review the same as therein provided, will become the final order of the EAB in accordance with Section 22.27(c).

within sixty (60) days of receipt of this Order by the submission of a cashier's or certified check in the amount of \$142,000 payable to the Treasurer of the United States, to the following address:

Regional Hearing Clerk
U.S. EPA, Region V
P.O. Box 70753
Chicago, Illinois 60673

Failure to make payment in accordance with this Order within the prescribed time frame shall result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 U.S.C. § 102.13.

Dated this 9th day of July 1993.


Spencer T. Nissen
Administrative Law Judge

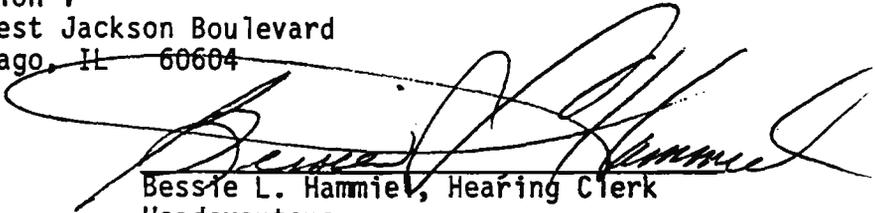
CERTIFICATE OF SERVICE

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (45 Fed. Reg., 24360-24373, April 9, 1980), I do hereby certify that the foregoing Order On Default was filed in re Patrick J. Neman, d/b/a The Main Exchange; Docket No. TSCA-V-C-024-88 by Administrative Law Judge Spencer T. Nissen and served on the parties listed below by Certified Mail postage prepaid:

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Bessie L. Hammie, Hearing Clerk
Headquarters

Dated: July 9, 1993