

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of)
Transformer Service (Ohio), Inc.,) Docket No. TSCA-IX-84-0013
) Respondent)

Toxic Substances Control Act - Rules of Practice - Default Orders -
Assessment of Penalty - Where an accelerated decision finding that Respondent had violated the Act as charged in the complaint had been issued and only issue remaining was appropriateness of penalty and Respondent failed without explanation to appear at duly noticed hearing set for the purpose of receiving evidence on that issue, penalty proposed in the complaint would be conclusively deemed appropriate.

Appearance for Complainant: David M. Jones, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
San Francisco, California

Appearance for Respondent: None

Default Order

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615). The complaint, issued on April 16, 1984, charged Respondent with violations of the Act and regulations in that PCBs stored for disposal at the BKK site, Beatty, Nevada, prior to January 1, 1983, had not been removed and disposed of prior to January 1, 1984, as required by 40 CFR § 761.65(a). A penalty of \$10,000 for the violation was proposed to be assessed. Facts surrounding the violation and leading to an amendment of the complaint for the reason that the action was instituted against the wrong party are fully set forth in the accelerated decision issued by the undersigned on January 16, 1985, which is incorporated herein by reference, and will be repeated here only insofar as necessary to an understanding of the decision reached.

The complaint, as originally issued, named Transformer Service, Inc. (TSI) as respondent. However, upon Respondent's presentation of evidence that it was a New Hampshire corporation separate and distinct from Transformer Service (Ohio), Inc., an Ohio corporation, which was the actual owner and generator of the wastes involved, the complaint was amended to name Transformer Service (Ohio), Inc. (TSO), as respondent.^{1/} The pleadings and documentary evidence (a purchase order and manifests) established

^{1/} Although Respondent has alleged that TSI and TSO are separate and distinct corporations having no common officers, directors or shareholders, a Dun & Bradstreet report, dated May 15, 1985, attached to counsel's posthearing memorandum, indicates that Greg Booth is President and that Maureen Booth is Secretary of TSO. These individuals were identified as contact people for TSI in records maintained by BKK concerning the PCBs in storage here concerned.

that in February 1979, TSO had ordered the transportation from Hayward, California and the storage at the BKK facility, Beatty, Nevada, of approximately 125 gallons of PCB liquid waste and that this waste was not removed from the mentioned site for proper disposal until March 24, 1984. These facts were deemed to establish that TSO had violated 40 CFR § 761.65(a), which requires that PCB articles or containers stored for disposal before January 1, 1983, be removed from storage and disposed of in accordance with Subpart D prior to January 1, 1984. While no issue of material fact relating to the violation remained, Respondent was held to be entitled to a hearing in accordance with 40 CFR Part 22 as to the appropriateness of the proposed penalty.

A notice setting the hearing at EPA Headquarters, in Washington, D.C., one of the locations Respondent's counsel had previously agreed was appropriate, on Thursday, May 2, 1985, at 9:30 a.m. was issued on March 20, 1985. Under date of March 25, 1985, Roetzel and Andress, Akron, Ohio, by and through Jeffrey J. Casto filed notice of withdrawal as counsel of record for Respondent.

Respondent did not appear at the date and time duly set and noticed for hearing as stated above and has not made any effort to explain such failure. Testimony from Complainant's sole witness is to the effect that the penalty was calculated in accordance with the PCB Penalty Policy (45 FR 59770, September 10, 1980) upon the assumption that the seven drums stored at the BKK facility on February 2, 1979, which were removed on March 24, 1984, each contained 55 gallons of PCB fluid. This assumption is not supported by the

documentary evidence, the purchase order of February 2, 1979, calling for the transport and storage of approximately 125 gallons of PCB liquid waste and the manifest of March 24, 1984, by which the material was removed from storage, indicating that three of the drums were empty and that PCB liquids in two drums totalled 100 gallons.

The witness testified, however, that Respondent was considered to have knowledge of the PCB rule, indicating that the violation was willful and that in accordance with the penalty policy, a 25% upward adjustment in the penalty for culpability was warranted. The witness further testified that the penalty as adjusted (\$14,000) was for a one-time violation and that if this were regarded as a continuing violation and the mentioned sum multiplied by the 58 (actually 60) days between the date of inspection of the BKK facility (January 24, 1984) and the date Respondent contracted for removal of the PCB items (March 24, 1984), an appropriate penalty would be the sum of \$812,000.

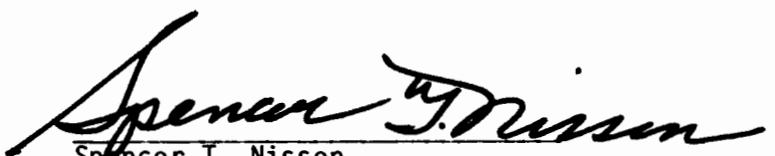
In his posthearing memorandum, counsel for Complainant alludes to the above facts, but appears to recognize that 40 CFR § 22.27(b) precludes the ALJ from raising the penalty proposed in the complaint where respondent has defaulted, and argues that \$10,000, the amount proposed in the complaint, is appropriate.

By failing to appear at the hearing without explanation, Respondent is in default and in accordance with 40 CFR § 22.17(a), the penalty proposed in the complaint is due and payable 60 days after entry of a final order.

Order

Respondent, Transformer Service (Ohio), Inc., having violated Section 14 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations thereunder (40 CFR § 761.65), as charged in the complaint, a penalty of \$10,000 is assessed against Respondent in accordance with § 16(a) of the Act (15 U.S.C. 2615). Payment of the full amount of the penalty shall be made by forwarding a cashier's or certificate check payable to the Treasurer of the United States to: EPA - Region IX (Regional Hearing Clerk), P. O. Box 360863M, Pittsburgh, Pennsylvania 15251, within 60 days of receipt of this order.^{2/}

Dated this 28th day of June 1985.



Spencer T. Nissen
Administrative Law Judge

2/ In accordance with 40 CFR § 22.17(b) this Default Order constitutes an initial decision and unless appealed in accordance with 40 CFR § 22.30, or reviewed by the Administrator, *sua sponte*, as therein provided, will become the final order of the Administrator in accordance with 40 CFR § 22.27(c).