

UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
SUMMIT COUNTY AGRICULTURAL SOCIETY) Docket No. TSCA-5-99-022
)
Respondent)

INITIAL DECISION AND ORDER GRANTING MOTION FOR DEFAULT

INTRODUCTION

On January 4, 2001, Complainant, the Chief of the Pesticides and Toxics Branch of the United States Environmental Protection Agency (U.S. EPA), Region 5, filed the Complainant's Motion for Default Order (Motion) pursuant to 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"). The motion requests that the undersigned enter an order finding Respondent Summit County Agricultural Society in default and assessing the full proposed penalty of \$9,750 against Respondent. For the reasons set forth below, the Motion is granted and a \$9,750 penalty is assessed against Respondent.

The Complaint was filed against Respondent on September 27, 1999. Respondent submitted letters dated December 26, 1999, and February 23, 2000. Respondent filed its Answer (dated March 1, 2000) with the Regional Hearing Clerk on March 3, 2000. Following the assignment of this case to the undersigned on August 3, 2000, I issued an order dated August 7, 2000 which, among other things, established dates for the parties to submit their respective prehearing exchanges. Complainant timely submitted its prehearing exchange on September 18, 2000.

The August 7, 2000 order, pursuant to 40 C.F.R. § 22.19(a), directed Respondent on October 9, 2000 to file either: (a) its prehearing exchange or (b) a statement that it elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence. Respondent made no filing. The August 7 order stated that the "failure of Respondent to file either (a) its prehearing exchange or (b) a statement that Respondent is electing to forgo the presentation of answering evidence and is electing to cross-examine EPA witnesses, shall result in a default order being issued against Respondent." The basis of this statement is 40 C.F.R. § 22.17(a) which permits a default

order to be issued against a party "upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." Respondent's failure to comply with the above-cited provisions of the August 7 order and 40 C.F.R. § 22.17(a) support the issuance of this default order.

Default by a respondent "constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Therefore, Respondent in this proceeding is deemed to have admitted all of the facts alleged in the Complaint and has waived its right to a hearing on these facts. The findings of fact and conclusions of law are set forth below.

DISCUSSION

Liability

The Complainant filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against the Respondent on September 27, 1999, alleging in five counts several violations of the PCB Manufacturing, Processing, Distribution in Commerce and Use Regulations (codified at 40 C.F.R. Part 761) and Section 15 of the Toxic Substances Control Act, 15 U.S.C. § 2614. The Polychlorinated Biphenyls (PCB) Disposal and Marking regulations were lawfully promulgated pursuant to Section 6 of TSCA, 15 U.S.C. § 2605, on February 17, 1978 (43 Fed. Reg. 7150). The PCB Manufacturing, Processing, Distribution in Commerce and Use regulations (PCB rule) were lawfully promulgated on May 31, 1979 (44 Fed. Reg. 31514), and incorporated the disposal and marking regulations. The PCB rule was subsequently amended and partially re-codified at 40 C.F.R. Part 761.

Respondent is, and at all times relevant to the Complaint was, a "person" as defined at 40 C.F.R. § 761.3 and is subject to the prohibitions set forth at 40 C.F.R. Part 761. Respondent is, and at all times relevant to the Complaint was, lessee of a facility at 289 Howe Road, Tallmadge, Ohio, sometimes referred to as the Summit County Fairgrounds (facility). Respondent operates, and at all times relevant to this Complaint operated, an annual county fair and other promotions and activities at the facility. Respondent is, and at all times relevant to this Complaint was, the operator of the facility.

On January 23, 1997, representatives of the U.S. EPA inspected Respondent's facility to determine compliance with the PCB rule. At the time of the inspection, four transformers were stored in the northeast part of the facility property. Respondent placed the four transformers in storage in the northeast part of the facility property no later than the Fall of 1996. At the time of the inspection, the four transformers had

been in storage for more than thirty days.

At all times relevant to the Complaint, Respondent owned the four transformers. The four transformers had the following makes, serial numbers, and dielectric volume:

Westinghouse, Serial Number 5698794	145 gallons oil
Westinghouse, Serial Number 5698791	145 gallons oil
G.E., Serial Number J474350Y70AA	25 gallons
Westinghouse, Serial Number 5907029	25 gallons

At the time of the inspection, the following was the situation. The four transformers had been electrically disconnected, and none of the transformers were in use. The four transformers were stored on bare ground in an outdoor area with no dike, no roof, and no walls. The transformer identified as Westinghouse, Serial Number 5907029, was found lying on its side on the bare ground. A layer of snow partially covered one or more of the transformers, and three of the transformers, Westinghouse Serial Number 5698794, Westinghouse Serial Number 5698791, and Westinghouse Serial Number 5907029, had leaked dielectric. The four transformers were stored for disposal. At the time of the inspection, the transformer identified as Westinghouse Serial Number 5698791, did not have a label indicating the date the transformer was placed in storage. The area where the transformers, including the transformer identified as Westinghouse Serial Number 5698791, were stored was not marked to indicate the presence of PCBs.

On February 3, 1997, Respondent tested the dielectrics of the four transformers using Dexsil CLOR-N-OIL 50 field test kits. The test result for the transformer identified as Westinghouse, Serial Number 5698791, was slight amber indicating a PCB concentration of greater than 50 ppm. The test results for the other three transformers were purple indicating a PCB concentration of less than 50 ppm.

The four transformers remained in storage in the northeast part of the facility until April 24, 1998, when they were transported to an off-site disposal facility. Tests performed by S.D. Meyers, Inc., indicated that the transformer identified as Westinghouse, Serial Number 5698791, had a PCB concentration of 113 ppm and that the other three transformers had PCB concentrations less than 50 ppm.

At all times relevant to this Complaint, the transformer identified as Westinghouse, Serial Number 5698791, was "PCB-Contaminated Electrical Equipment" within the meaning of 40 C.F.R. § 761.3, was a "PCB Article" within the meaning of 40 C.F.R. § 761.3, and was a "PCB Item" within the meaning of 40 C.F.R. § 761.3. The transformer identified as Westinghouse, Serial Number 5698791, was not disposed of before April 27, 1998.

Count I

The PCB rule at 40 C.F.R. § 761.65(b) requires that PCBs and PCB Items stored for disposal be placed in an area with adequate roof, walls, and continuous floor and curbing constructed from smooth impervious materials with no drain valves, floor drains, expansion joints, sewer lines or other openings. At the time of the inspection, Respondent had stored for disposal the transformer identified as Westinghouse, Serial Number 5698791, a PCB Item, in a storage area without adequate roof, walls, floors or containment for greater than 30 days. Respondent's failure to store the transformer identified as Westinghouse, Serial Number 5698791, in accordance with 40 C.F.R. § 761.65(b) constitutes a violation of 40 C.F.R. § 761.65(b), and an unlawful act under Section 15 of TSCA, 15 U.S.C. § 2614.

Count II

The PCB rule at 40 C.F.R. § 761.65(c)(8) requires that the date a PCB Article is placed in storage shall be placed on the PCB Article. At the time of the inspection, Respondent had not dated the transformer identified as Westinghouse, Serial Number 5698791, a PCB Article. Respondent's failure to date the transformer identified as Westinghouse, Serial Number 5698791, with the date it was placed in storage constitutes a violation of 40 C.F.R. § 761.65(c)(8) and an unlawful act under Section 15 of TSCA, 15 U.S.C. § 2614.

Count III

The PCB rule at 40 C.F.R. § 761.65(a) requires that any PCB Article stored for disposal after January 1, 1983, must be removed from storage and disposed of as required in accordance with the PCB rule within one year from the date when it was first placed in storage. Respondent's transformer identified as Westinghouse, Serial Number 5698791, a PCB Article, was removed from storage on April 24, 1998, more than one year from the date it was first placed in storage for disposal. Respondent's failure to dispose of the transformer identified as Westinghouse, Serial Number 5698791, within one year from the date it was first placed in storage for disposal constitutes a violation of 40 C.F.R. § 761.65(a) and an unlawful act under Section 15 of TSCA, 15 U.S.C. § 2614.

Count IV

The PCB rule at 40 C.F.R. § 761.65(c)(3) requires that any storage area subject to the requirements of 40 C.F.R. § 761.65(b) be marked, as required in 40 C.F.R. § 761.40(a)(10). The PCB rule at 40 C.F.R. § 761.40(a)(10) requires that each storage area used to store PCB Items for disposal be marked with an M_L label. Respondent's failure to mark the storage area with the M_L label

constitutes a violation of 40 C.F.R. § 761.65(c)(3) and § 761.40(a) and constitutes an unlawful act under Section 15 of TSCA, 15 U.S.C. § 2614.

Count V

PCBs at concentrations of 50 ppm or greater must be disposed of in accordance with the requirements of 40 C.F.R. § 761.60. At the time of the inspection, the inspector observed a one square foot leak of PCB contaminated dielectric from the transformer identified as Westinghouse, Serial Number 5698791, around the temperature gauge. The PCB concentration of the leaked dielectric was greater than 50 ppm. Pursuant to 40 C.F.R. § 761.60(b)(1), spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs. The leak of PCB contaminated dielectric from the transformer identified as Westinghouse, Serial Number 5698791, constituted the disposal of PCBs. The disposal of PCBs from the transformer identified as Westinghouse, Serial Number 5698791, by leaking was not in accordance with the requirements of 40 C.F.R. § 761.60. Respondent's failure to dispose of PCBs in accordance with the applicable disposal requirements constitutes a violation of 40 C.F.R. § 761.60 and an unlawful act under Section 15 of TSCA, 15 U.S.C. § 2614.

Penalty

Section 16 of TSCA, 15 U.S.C. § 2615, authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of TSCA. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, required U.S. EPA to adjust its penalties for inflation on a periodic basis. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, published at 40 C.F.R. Part 19, U.S. EPA may assess a civil penalty of up to \$27,500 per day for each violation of TSCA occurring or continuing on or after January 31, 1997.

The civil penalty proposed in the Complaint has been determined in accordance with the statutory penalty criteria of TSCA, set forth at Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which states that the Administrator, in determining the amount of a civil penalty, shall take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. In analyzing the facts and circumstances of this case in consideration of those statutory criteria, Complainant, has utilized the "Polychlorinated Biphenyls (PCB) Penalty Policy," dated April 9, 1990, Notice of Availability of Polychlorinated Biphenyls Penalty Policy, 55 Fed.

Reg. 13955 (April 13, 1990). Respondent is assessed the following civil penalty for the violations alleged in the Complaint:

COUNT I

STORAGE.....\$3,000
15 U.S.C. § 2614
40 C.F.R. § 761.65(b)

COUNT II

STORAGE.....1,000
15 U.S.C. § 2614
40 C.F.R. 761.65.(c)(8)

COUNT III

STORAGE.....1,100
15 U.S.C. § 2614
40 C.F.R. § 761.65(a)

COUNT IV

STORAGE.....3,000
15 U.S.C. § 2614
40 C.F.R. § 761.65(c)(3) and § 761.40(a)(10)

COUNT V

DISPOSAL.....1,650
15 U.S.C. § 2614
40 C.F.R. § 761.60

TOTAL PROPOSED CIVIL PENALTY.....\$9,750

ORDER

1. A civil penalty in the amount of \$9,750 is assessed against Respondent Summit County Agricultural Society.

2. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes a final order under 40 C.F.R. § 22.27(c), as provided in Paragraph 5 below. Payment shall be submitted by a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U.S. EPA - Region 5
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673

A copy of the check shall be sent to:

Section Secretary (DT-8J)
Pesticides and Toxics Enforcement Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. Failure upon the part of Respondent to pay the penalty within the prescribed statutory frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S. C. § 3717; 40 C.F.R. § 13.11.

5. The Consolidated Rules of Practice provide at 40 C.F.R. § 22.17(c) that a default order which resolves all outstanding issues and claims in the proceeding shall constitute an initial decision. This Order disposes of all such issues and claims, and therefore constitutes an Initial Decision. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become the final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to set aside a default order that constitutes an initial decision, pursuant to 40 C.F.R. § 22.17(c); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own motion, to review the Initial Decision.

Charles E. Bullock
Administrative Law Judge

Dated: May 11, 2001
Washington, D.C.