

4/22/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

INLAND AQUA-TECH PRECIOUS METALS,)
INC.; INLAND AQUA-TECH CO., INC.;)
and INLAND AQUA-TECH EQUIPMENT)
SYSTEMS,)

Docket No. [TSCA]-
1092-09-17-2615

Respondents)

ORDER DENYING CROSS-MOTIONS FOR ACCELERATED DECISION

On December 14, 1992, Region X of the United States Environmental Protection Agency (Complainant) filed a Complaint alleging that Inland Aqua-Tech Precious Metals, Inc., Inland Aqua-Tech Company, Inc., and Inland Aqua-Tech Equipment Systems, Inc. (Respondents) violated Section 15 of the Toxic Substances Control Act (the Act), 15 U.S.C. § 2614, by failing to comply with the requirements of Part 761 of the EPA Regulations, 40 C.F.R. Part 761 (the PCB Regulations). Specifically, the Complaint alleged that Respondents violated the disposal, storage for disposal, recordkeeping, and marking requirements of the PCB Regulations at their Dayrock Mine facility in Wallace, Idaho. For the four violations alleged in the Complaint, Complainant seeks a penalty of \$16,000.

Respondents filed their Answer on March 3, 1993, claiming that the transformers and any associated waste described in the Complaint were the property of a third party, Hecla Mining Company (Hecla); that Respondents had followed EPA-directed abatement measures following the inspection; that Respondents had continuously inspected the transformers to ensure no further leaking; and that Respondents lacked the ability to pay a substantial fine (Answer, pp. 3, 6).

On January 24, 1994, Respondents filed a Motion for Accelerated Decision, seeking an order dismissing the Complaint with prejudice. Respondents argues that the transformers in question had been drained, reclassified and properly removed from the regulatory scheme by Hecla in 1985 and therefore were no longer subject to the requirements of TSCA (Memorandum in Support of Motion for Accelerated Decision, p. 14). Accordingly, Respondents claim that Complainant can support no violations of the PCB Regulations and the Complaint should be dismissed.

On February 1, 1994, Complainant filed its Cross Motion for Partial Accelerated Decision and Response to Respondents' Motion for Accelerated Decision, in which it was requested that Respondents' Motion be denied as to Counts 2, 3, and 4 of the Complaint and asking that accelerated decision be entered in favor of Complainant as to Counts 2 and 4. Complainant also stipulated to the withdrawal of Count 1 of the Complaint. Complainant's central argument is that Respondents failed to satisfy the requirements of the regulation permitting reclassification of PCB-contaminated electrical equipment by failing to maintain the transformers in service for at least three months following the removal of PCB fluid. Additionally, Complainant argues, subsequent testing demonstrated that PCB fluid from at least three of the transformers still contained over 50 ppm PCBs and therefore remained subject to regulation. Consequently, Complainant claims, Respondents' Motion should be denied and, because the transformers were regulated and no genuine issue of material fact remains as to the other elements of the violations alleged in Counts Two and Four, accelerated decision should be granted in Complainant's favor on these two violations.

Respondents' Reply Memorandum, filed on March 1, 1994, shifted at least the emphasis

of their argument from the claim that the transformers were reclassified under Section 761.30(a)(2)(v) of the PCB Regulations to the theory that they were drained and disposed of as allowed by Section 761.60(b)(4) of the PCB Regulations. Under this theory, the PCB-contaminated transformers in question were drained not in order to be reclassified but rather for disposal, and, once drained, were no longer subject to the requirements of the PCB Regulations. According to Respondents, the PCB-containing oil in the transformer carcasses was to be expected, was contemplated by the Regulations, and did not bring the properly disposed of transformers back within the regulatory scheme (Reply Memorandum, p. 8).

On March 16, 1995, the parties participated in a conference call during which Complainant's Motion to Strike Respondents' Reply Memorandum (as untimely filed) was denied and the withdrawal of Count 1 of the Complaint by stipulation was approved.

On March 27, 1995, Complainant filed its Response, arguing that the transformers were within the regulatory scheme because evidence submitted by Respondents did not demonstrate that all transformers were drained, residual amounts of fluid remained in the transformers, and sample results confirmed that three transformers contained PCBs in excess of 50 ppm in 1992. Therefore, Complainant argues, the three transformers were PCB-contaminated electrical equipment and contained liquid whose disposal was subject to Section 761.60 of the PCB Regulations.

Respondents' Reply, dated April 7, 1995, argued again that the drained transformers were not subject to regulation and that small amounts of residual oil do not create an issue of fact as to the proper draining of the transformers of free-flowing oil in 1985 (Respondents' Reply, p. 3).

Under Section 22.20(a) of the EPA Rules of Practice, 40 C.F.R. § 22.20(a), an

accelerated decision is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law as to all or any part of the proceeding. On analysis, factual issues remain in this proceeding and both Motions for Accelerated Decision must be denied.

A key question presented involves whether the transformers whose storage forms the basis of the violations alleged in Counts 2, 3, and 4 of the Complaint had in fact been drained of PCB-contaminated fluid and thereby removed from the scope of the PCB regulatory scheme. According to Respondents, the transformers were drained of their PCB-contaminated fluid in 1985 and have therefore been outside of TSCA's regulatory scheme ever since, including the period during which Complainant alleges violations of the PCB Regulations (Respondents' Motion for Accelerated Decision, pp. 13-14). In support of this claim, Respondents offer records regarding their transformers and affidavits from two witnesses who, apparently based on a review of records regarding the facility, state that the transformers were drained and that the PCB-contaminated fluid was properly disposed of off site by a licensed contractor (Respondents' Motion for Accelerated Decision, Exhibits 2 and 3).

Complainant raises two legitimate issues about the claimed draining of their transformers. First, Complainant highlights what is at least an inconsistency in the evidence supporting Respondents' claim that all of the transformers at issue were drained in 1985. Respondents' contention that the transformers were drained is based on their own records, including four quarterly log sheets. Respondents, in their Motion, assert that these logs show that the transformers were drained in 1985 (Respondents' Motion for Accelerated Decision, pp. 4-9, citing Exhibit C to Affidavit of Don Beck). However, while three of the log sheets listing

transformers are marked drained and two of these three also indicate that the transformers were shipped for disposal (presumably referring to the drained fluid), one of the four logs bears no indication that the transformers were drained or that the fluid was shipped for disposal (Respondents' Motion for Accelerated Decision, Exhibit C to Affidavit of Don Beck, p. 3).

Therefore, Respondents' claim that these logs show that the transformers listed on this page were drained may not be supported by the evidence.¹

Second, Complainant points out that Respondents' own evidence demonstrates that in 1992 three of the transformers that records indicated had been drained in 1985 still contained fluid with concentrations of PCBs over 50 ppm. Therefore, Complainant argues that these three transformers continued to be PCB-Contaminated Electrical Equipment even after servicing in 1985 because they contained oil with a PCB concentration in excess of 50 ppm. (Complainant's Cross Motion for Accelerated Decision, p. 12). The record does not reveal how much PCB-contaminated fluid remained in these transformers in 1992.

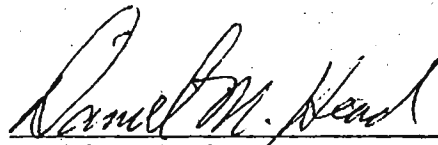
Moreover, certain previous administrative decisions have found that transformers purportedly drained of fluid and the residual fluid still present were, in fact, subject to the regulatory requirements of the PCB Regulations. In Timothy R. (Tim) Ward, VII-86-T-635, Initial Decision issued Nov. 24, 1987, pp. 4-12, transformers that Respondent had claimed were drained and free of contamination still contained one to two inches of residual oil that, cumulatively, supported findings of violations of the PCB Regulations. Similarly, in Standard Scrap Metal Company, TSCA-V-C-288, Initial Decision issued Jan. 5, 1987, p. 8, rev'd on other

¹Respondents offer no answer in their Reply to Complainant's argument to this effect, which appears in Complainant's Response, pp. 3-4.

grounds, 3 E.A.D. 267 (CJO, Aug. 2, 1990), transformers that had been drained of oil could still sometimes contain up to a half-inch of oil, fluid whose improper disposal was prohibited after the effective date of the PCB Regulations. See also Patrick J. Neman, TSCA-V-C-024-88, Order on Default issued July 9, 1993, 1993 TSCA LEXIS 412, rev'd on other grounds, TSCA Appeal 93-3 (EAB, Aug. 26, 1994).

In this proceeding, at least two genuine issues of material fact remain: whether the transformers listed on the third quarterly log sheet presented by Respondents were drained at all and whether the transformers still containing PCB-contaminated oil in 1992 were drained as that term is used in the PCB Regulations. Therefore, both Respondents' Motion for Accelerated Decision and Complainant's Cross-Motion for Accelerated Decision are denied.

SO ORDERED.



Daniel M. Head
Administrative Law Judge

Dated: April 22, 1996
Washington, DC

IN THE MATTER OF INLAND AQUA-TECH PRECIOUS METALS, INC.; INLAND
AQUA-TECH CO., INC.; and INLAND AQUA-TECH EQUIPMENT SYSTEMS,
Respondent
Docket No. TSCA-1092-09-17-2615

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Cross-Motions for Accelerated Decision, dated April 22, 1996, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Mary Shillcutt
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

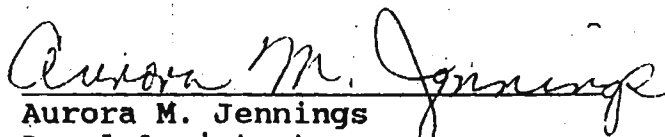
Copy by Certified Mail, Return
Receipt Requested to:

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Aurora M. Jennings
Legal Assistant
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Law Judges

Dated: April 22, 1996
Washington, DC