

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:)
)
Nicor Gas,) **DOCKET NO. TSCA-HQ-2015-5017**
)
Respondent.)

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

In accordance with 40 C.F.R. §§ 22.16(a) and 22.19(g) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, Complainant, the Acting Director of the Waste and Chemicals Enforcement Division of the United States Environmental Protection Agency, submits Complainant’s Rebuttal Prehearing Exchange.

ADDITIONAL WITNESSES INTENDED TO BE CALLED

Tony (Henry) Baney: Mr. Baney was included in Complainant’s initial prehearing exchange as a fact witness. In addition to the testimony previously identified, his testimony will also cover the development of the Disposal of Polychlorinated Biphenyls (PCBs) Rule, 63 F.R. 35384 (1998).

Dr. Justin Roberts: Dr. Roberts is a chemist in EPA’s Office of Pollution Prevention and Toxics. Dr. Roberts has a Ph.D. in Organic Chemistry and a Masters in Organic Chemistry from Princeton University. He will testify as an expert witness regarding secondary exposure relating to inhalation of the PCBs and transformation from PCBS to other compounds (dioxins and furans) through a process of heating and volatilization.

Dr. Michelle Watters: Dr. Watters was included in Complainant’s initial

prehearing exchange. As mentioned in the initial prehearing exchange, complainant is supplementing with her expert report.

EPA Region 5 Laboratory Staff and EPA R5 Data Custodians- Sylvia Griffin, and Robert Snyder, serve as Region 5 data custodians. Scott Cooper, Jim Blough, Edgar Santiago, Erlinda Evangelista, Priscilla Fonscea, William among others serve as EPA lab staff responsible for agency data samples and associated business records and will authenticate agency data samples and associated business records.

DOCUMENTS AND EXHIBITS INTENDED TO BE INTRODUCED

Complainant intends to introduce the following additional documents into evidence at hearing. Copies of these additional documents are attached to this prehearing exchange.

CX16	Chain of custody and QA for data associated with CX20
CX18	Chain of custody and QA or data associated with CX22
CX19	Chain of custody and QA for data associated with CX24
CX31	Chicago Tribune Article, July 26, 2007
CX32	The 1998 PCB Disposal Amendments, September 1998, John Woodyard
CX33	Nicor Interconnect Agreement
CX34	PCB Pipeline Information Request
CX35	Nicor Operations of Pipelines, Document B-8
CX36	Nicor Interconnect List
CX37	Nicor Public Interconnect List Website
CX42	Nicor - EPA Tolling Agreements
CX46	Report on Public Health Implications From Community Exposure to Polychlorinated Bipheynls (PCBs) Prepared By Michelle Watters, MD, Phd, MPH
CX47	Resume for Dr. Justin Roberts

3(B): AFFIRMATIVE DEFENSES

In response to Respondent's affirmative defenses, Complainant has prepared the included **Attachment A** rebutting the applicable defenses.

3(C): All Factual Information Respondent Considers Relevant To The Assessment Of A Penalty And Any Supporting Documentation

and

3(D): Narrative Statement Explaining Factual And Legal Bases For Position That The Proposed Penalty Should Be Reduced Or Eliminated And Supporting Documentation

A. The Proposed Penalty Should be Assessed by the ALJ in This Matter As Nicor is Liable on All Counts

Complaint, as detailed in Complainant's Prehearing Exchange and Complainant's Rebuttal Prehearing Exchange, has established that Nicor, as an owner of a natural gas pipeline system with PCBs at concentrations ≥ 50 ppm has failed to meet its requirements of 40 C.F.R. § 761.30(i)(1)(iii)(A)(2), (3) & (5). Specifically, Nicor:

- (1) Failed to characterize the extent of the PCB contamination within 120 days of Nicor's discovery of PCBs ≥ 50 ppm in its natural gas pipeline system in February 2007 as Nicor, contrary to its belief that it previously characterized the extent of PCB contamination (EPA assumes Nicor is referencing the 50 samples taken from the natural gas pipeline system in 1981), is obligated to do under the use authorization whenever Nicor discovers PCB ≥ 50 ppm (*see of* ("Within 120 days after discovery . . . , or by December 28, 1998, *whichever is later* . . .));
- (2) Has potential sources (*i.e.*, natural gas compressors, filters, scrubbers and/or interconnects) within its natural gas pipeline system [CX14 Table 1; CX51 at (G8), (G9), (G10), (G11) and (G12 and G13)] and failed to meet its obligation, upon the discovery and characterization of PCB contamination ≥ 50 ppm, to sample and

analyze the potential sources to locate the demonstrated source (i.e., actual source) and address the demonstrated sources introducing the PCBs \geq 50 ppm into the natural gas pipeline system (*see* 40 C.F.R. § 761.30(i)(1)(iii)(A)(3)-(4); and

- (3) Failed to repeat sample and analyze where PCBs \geq 50 ppm were discovered at four locations (*see* 40 C.F.R. §761.30(i)(1)(iii)(A)(5)), as the samples from these four location do qualify as characterization samples (*see* 40 C.F.R. §761.30(i)(4)) since the locations were part of the regime to define the extent of PCB contamination throughout the Park Ridge area [RX66 (Region’s comments on Nicor’s plan); RX 100 (approval Nicor’s plan)], and the sampling collection points are within Nicor’s natural gas pipeline system.

Complaint will further address Respondent’s claim that Nicor is not liable in prehearing motions and/or at hearing.

B. The Proposed Penalty Should be Assessed by the ALJ in This Matter As Nicor is Liable on All Counts

1. Gravity: Complaint has properly assessed the gravity of Respondent’s violations and calculated a penalty for Respondent’s violations in accordance with the statutory factors set forth in Section 16 of TSCA, as well as the guidance set for in the PCB Penalty Policy.

Respondent improperly describes the use violations in this case as representing minor risk and, therefore, minor use violations. Respondent fails in its Prehearing Exchange to fully provide the range of situations that exemplify “Level 2” which include not only those noted by Respondent but also cover a range of situations including but not limited to the failure to keep records of transformer inspections, failure to timely register transformer locations with building owners or fire departments, and failure to inspect transformers. It is EPA’s position that the failure to

characterize the extent of PCB contamination in a pipeline system after a discovery, to repeat sampling at locations where PCBs had been discovered or found during characterization until such time as the PCBs are reduced to < 50 ppm, and to identify and sample potential sources of PCBs in a natural gas pipeline system so as to locate the actual source of the PCB contamination each clearly falls within the range of the existing examples on pages 10 and 11 of the 1990 PCB Penalty Policy characterizing these failures as major use violations. Therefore, EPA is justified in classifying these violations as Circumstance High, Level 2.

2. Number of Days of Violation: Regarding the number of days of violations associated with each count, Complainant's response is as follows:

- a. For Count 1, it is clear from the Complaint and information provided Complainant's Prehearing Exchange that Respondent did not undertake action to characterize within the 120 days as required by 40 C.F.R. § 761.30(i)(1)(iii)(A)(2). Furthermore, Respondent's statement that "[a]ny delay in characterization was based on negotiations with EPA . . ." is at best misleading; it is Respondent's delay to address its obligation that caused it to be in violation, not any discussion Respondent had with EPA regarding its already existing non-compliance.
- b. For Count 2, first Nicor did not implement the 2007 sampling protocol as set out. Nicor did conduct sampling at a number of customer meters in Park Ridge in an attempt to define the overall extent of the PCB problem. However, there were no samples taken to EPA's knowledge from potential sources during that period. As such, Respondent failed to comply with by 40 C.F.R. § 761.30(i)(1)(iii)(A)(3). Secondly, the assessment of per-day penalties "is reserved for repeated acts, or [other things]..." (*emphasis added*). "Each day of such violations is significant and warrants a separate penalty." The term

“repeated acts” covers a Respondent’s failure to act when required *or failure to complete a required act*, such as sampling and analyzing all potential sources of PCB, over an extended period of time until that act is completed. PCB Penalty Policy, p. 13 (*Assessing Penalties for Continuing or Repeat Violations*). Therefore, Respondent’s failure to complete requirements in 40 C.F.R. § 761.30(i)(1)(iii)(A)(3) over an extended period of time warrants a per-day penalty assessment.

- c. For Count 3, Respondent has failed to acknowledge that the provision at 40 C.F.R. § 761.30(i)(1)(iii)(A)(5) requires repeat sampling and analysis at *least annually* where PCBs ≥ 50 ppm have been discovered until the sampling results indicate that the natural gas pipeline segment or component is <50 ppm PCBs in two successive samples. Respondent’s lack of sampling does not negate the fact that Respondent is required to sample at least annually until such time as the sampling indicates the PCBs are < 50 ppm.
- d. Respondent is incorrect when it states that for a penalty to be assessed in Counts 2 and 3 there needs to be repeated intentional conduct on the part of Nicor. The Toxic Substances Control Act is a strict liability statute (*see PCB Penalty Policy*, p. 2). Therefore, violations of the TSCA PCB regulations are not predicated on the intentional conduct or acts of a potential violator.

Complainant’s position is still that the requested penalty specified in the Complaint and justified in its Prehearing Exchange is warranted in this matter.

3. Adjustment Factors: Compliant correctly evaluated and applied the adjustment factors in the PCB Penalty Policy. Regarding Respondent’s claim that Nicor lacks culpability in this matter is simply wrong. PCBs are authorized for use, at concentrations ≥ 50 ppm, by a seller or distributor of natural gas as long as the owner or operator complies with 40 C.F.R. §

761.30(i)(1)(iii). The regulations make no distinction as to how the natural gas pipeline became contaminated with PCBs \geq 50 ppm. The evidence will clearly show that Respondent failed to comply with 40 C.F.R. § 761.30(i)(1)(iii), therefore Respondent is culpable for the violations and no additional reduction in the penalty is warranted under this factor. As for applying any possible reduction in the assessed penalty for a voluntary disclosure or based on the Respondent's attitude, Complainant made adjustment for these factors (*see* Complainant's Prehearing Exchange, Exhibit CX 40, Civil Penalty Assessment Worksheet), and believes that no further reduction than that already applied should be given.

RESERVATION OF RIGHTS

Complainant respectfully reserves the right to elect to not introduce any of the foregoing exhibits at the hearing and/or, in accordance with Rule 22.22(f) of the Rules of Practice, 40 C.F.R. § 22.19(f), to supplement its prehearing exchange with additional exhibits and witnesses not listed above. Complainant and will provide reasonable notice by motion to the Presiding Officer and Respondents concerning any modifications to the above exhibit list and witness list. Complainant incorporates by reference, as if fully set forth herein, the list of Respondent's exhibits set forth in its Prehearing Exchange. Complainant may present any or all exhibits as part of its case and may call any witness identified by Respondent. Respondents' exhibits have been produced by Respondent and, therefore, are not being separately produced by Complainant. To the extent documents support the factual allegations denied or otherwise not admitted in Respondents' Answer, those documents are included among the exhibits identified in Complainant's Initial Prehearing Exchange, Respondents' Prehearing Exchange, and Complainant's Rebuttal Prehearing Exchange.

Complaint further reserves the right to request the exclusion of identified witnesses and exhibits in Respondent's Prehearing Exchange upon reasonable notice to the Court and Respondent, and upon motion to the Court. Complainant reserves the right to supplement its Prehearing Exchange with additional documents if any of Nicor's expert witness submits an expert report.

EPA also notes that certain errors in the Complaint have been identified and EPA is preparing to motion the Court to amend the Complaint to make the necessary corrections. EPA will wait on amending until Nicor completes its investigation (Citing page 18, line 6 in Respondent's pre-hearing exchange regarding 610 S. Clifton Street.)

10.7.2016
Date

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(Complainant Exhibits)
(Certificate of Service)

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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CERTIFICATE OF SERVICE

I hereby certify that the original of the Complainant’s Motion to Compel Compliance with Prehearing Order and Motion for Extension of Time, Docket No. TSCA-HQ-2015-5017, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

Mark R. Ter Molen
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10.7.2016
Date

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