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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
LIHUE PLANTATION CO., LTD.,) Docket No. TSCA-0990-0001
Respondent)

1. TSCA: Section 11(a); 15 U.S.C. § 2610(a): Respondent in effect consented to a TSCA inspection by failing to voice any objection to the inspection when the inspector failed to provide written notice thereof, and further by voluntarily complying with the inspector's requests that he be shown PCB transformers and that Respondent collect and analyze samples therefrom and submit the results to EPA.
2. TSCA: Section 6(e); 15 U.S.C. § 2605(e): 40 C.F.R. § 761.30(a): In determining whether a PCB item poses an exposure risk to food or feed, the definition that a PCB Item poses an exposure risk to food or feed if PCBs released in any way from the PCB Item have a potential pathway to human food should be interpreted and applied in a reasonable manner so that the exposure risk is clearly dependent on the specific location of the transformer in relation to food and feed products.
3. TSCA: Section 6(e); 15 U.S.C. § 2605(e): 40 C.F.R. § 761.30(a): Based upon the facts found herein as determined by the evidence introduced into the record, while there was a remote possibility of contact between PCBs and food, there was no reasonable possibility of such contact.

Appearances:

For Complainant:

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Agency
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For Respondent:

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Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background

A. Violation Alleged and Penalty Proposed; Respondent's Answer

This civil administrative proceeding was instituted under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (TSCA or the Act). An administrative complaint was issued on December 19, 1989 by the United States Environmental Protection Agency (the EPA or Complainant), against Lihue Plantation Co., Ltd. (Lihue or Respondent), pursuant to Section 16(a) of the Act, 15 U.S.C. § 2615(a).¹ The Respondent was charged in the complaint with a single count of Section 15 of TSCA, 15 U.S.C. § 2614,² and of rules promulgated pursuant to Section 15. The complaint alleged that Lihue had violated 40 C.F.R. § 761.30(a)(1)(i) which, as of October 1, 1985, prohibited the use and storage for reuse of PCB transformers that pose an exposure risk to food or feed through Lihue's use of PCB transformer serial number 8633155. For the alleged violation, the Complainant proposed a civil penalty in the amount of \$19,500.00.

¹15 U.S.C. § 2615(a) provides, in relevant part: "(1) Any person who violates a provision of section 2614 [Prohibited acts] of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation."

²15 U.S.C. § 2614 provides, in relevant part: "It shall be unlawful for any person to---

(1) fail or refuse to comply with . . . (c) any rule promulgated or order issued under section 2604 or 2605 of this title

In its answer to the complaint Respondent admitted that until June 10, 1989, it owned and operated two PCB transformers and, hence, was subject to 40 C.F.R. § 761.30(a). However, Respondent denied that its PCB transformer serial number 8633155 posed an exposure risk to food and feed.

B. Processing of the Case

Following unsuccessful attempts by the parties to settle the case, a hearing was held in Honolulu, Hawaii, on February 5, 1991. At the close of the hearing, the parties moved for an extension of the usual time provided for post hearing submissions in 40 C.F.R. § 22.26. The motion was granted and as a result, proposed findings of fact, conclusions of law and a proposed order, together with briefs in support thereof, were filed by the parties on May 31, 1991. Responses to the post hearing submissions were filed by the Complainant on June 20, 1991 and by Respondent on June 21, 1991. Subsequently, on August 28, 1991, Respondent filed a supplemental closing brief, and Complainant filed a response thereto on October 3, 1991.

II. Findings of Fact

On the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance

of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. Lihue Plantation Co., Ltd., a corporation organized under the laws of the State of Hawaii, operates a facility located at 2970 Kele Street, Lihue, Hawaii. (Complaint at 2; Answer at 1.)

2. The main business of Lihue is the growing of sugar cane and the manufacturing of raw sugar. Lihue also operates the Kauai Sugar Storage facility, which provides temporary storage of raw sugar while awaiting shipment. (Tr. 111-12, 114.)

3. Until June 13, 1989, Respondent owned and used a transformer with approximately 285 gallons of dielectric fluid containing PCBs in a concentration exceeding 500 ppm. The serial number of the transformer was 8633155. The transformer was located at the Kauai Sugar Storage Pier. (Complainant's Findings of Fact, Conclusions of Law and Brief at 16-17; Respondent's Reply Brief at 10.)

4. On May 11, 1989, Mr. Ronald Clawson, an EPA compliance inspector conducted an inspection of Lihue. The primary purpose of the inspection was to determine whether Lihue was in compliance with the NPDES permit requirements under the Clean Water Act. (Tr. 69; Compl. Exh. 3.)

5. While at Lihue's facility, Mr. Clawson requested an opportunity to look at any active PCB transformers. (Tr. 69.)

6. Mr. Clawson did not provide written notice to Respondents of his intention to conduct an inspection under TSCA. (Tr. 77-78.)

7. Mr. Clawson was taken to the Kauai Sugar Storage Pier where he observed a General Electric Unit Substation Pyranol Transformer inside the head house. (Tr. 70; Compl. Exh. 3).

8. Mr. Clawson observed what appeared to be an oily substance on the external cooling fins of the transformer. He noted that the catch basin located below the transformer was partially filled with a wet, oily material. (Tr. 71; Compl. Exh. 3 and Photographs 3 and 4 attached thereto.)

9. Mr. Clawson asked Lihue officials to collect samples from the outside of the transformer and from the catch basin below the transformer, have the samples analyzed and submit the results to EPA. The Lihue officials complied with his requests. (Tr. 72, 82, 133; Compl. Exhs. 4 and 5.)

10. Lihue officials sent EPA the results of the analysis of the samples which showed that PCBs were found in the wipe samples from the outside of the transformer in a range of 1.1 to 4.5 micrograms per 100 centimeters squared. However, no PCBs were detected in the sample from the catch pan. (Tr. 72-74, 157, 193; Compl. Exhs. 4 and 5.)

11. The analysis of the dielectric fluid inside the transformer showed a concentration of PCBs in a ratio of 579,000 parts per million. (Tr. 136; Resp. Exh. 18.)

12. Raw sugar is stored in the warehouse storage area located on the hill above the pier throughout the year but is shipped out

only 14 or 15 times per year or approximately once every three or four weeks. (Tr. 116; Resp. Exhs. 1, 22.)

13. When a ship arrives to be loaded, the raw sugar is moved from the warehouse by a system of conveyor belts located in enclosed structures until the sugar reaches the head house. In the head house the sugar is split onto two conveyor belts. (Tr. 117-19, 123; Resp. Exhs. 1 and 2.)

14. The belts carry the sugar from the second or middle level of the head house along the pier shed on two separate conveyor belts from which it goes through a gantry into the various holds on the ship. (Tr. 120-21; Resp. Exhs. 1 and 2.)

15. The conveyor belts are used to transport raw sugar only when a ship is being loaded at which time the operators of the loading system are present. Someone is at level II in the head house during the loading. (Tr. 130-31.)

16. During the process of transporting the sugar on the conveyor belts, the sugar does not reach the bottom level or level I of the head house where the transformer was located. The lowest level which the sugar reaches is level II or the second of the three levels in the structure. (Tr. 122-24, 128, 186; Resp. Exh. 2.)

17. The conveyor belt is scraped before it enters level I of the head house. (Tr. 126-28.)

18. A position of the conveyor belt system, consisting of two devices used to maintain tension on the conveyor belt, is located on level I of the head house in the same room as the transformer.

Each of these devices consists of a large roller around which the conveyor belt passes, and a concrete counterweight hanging below. (Tr. 124, 179; Resp. Exh. 2.)

19. The distance between the transformer and the two rollers and counterweights at which the conveyor belts were located at level I of the head house was approximately five and eight feet, respectively. (Tr. 187-88.)

20. "Sugar wash" does enter the level I room of the head house. After every shipment the entire facility is hosed down with water. The water mixes with any remaining raw sugar on the surfaces of the conveyor belts or on the surfaces of the structures in which the belts are located creating a sugar wash which drips into level I of the head house where the transformer was located. (Tr. 128, 138-39, 186-87.)

21. A corrugated or galvanized metal panel was installed in level I of the head house above the transformer prior to June 1987 and it thereafter served as a ceiling or roof above the transformer. (Tr. 93, 181.)

22. A containment or catch basin consisting of a welded metal plate berm four (4) inches high and 1/4 inch thick was located on the floor beneath the transformer. (Tr. 126, 129, 185.)

23. An electrical cabinet approximately as wide as the transformer (excluding the cooling fins) and about 14 to 16 inches deep was located between the transformer and the conveyor belt. (Tr. 125-26, 156, 184.)

24. In the event of an explosion, the transformer would not continue to operate. (Tr. 92, 129-30, 156.)

25. If the transformer was without power, the conveyor belt would be without power and, hence, would not move. (Tr. 93-94, 188-89.)

26. On June 21, 1989, a representative of the U.S. EPA, Ms. Mary Grisier, conducted an inspection of the facility to determine compliance with Federal regulations, 40 C.F.R. Part 761 et seq., governing PCBs. (Complaint at 2, Answer at 1; Tr. 16.)

27. The decision to remove the transformer had been made before Mr. Clawson conducted the inspection in May of 1989. Arrangements already had been made with General Electric to come to the pier and pick up the transformer prior to his inspection. However, the removal was delayed because Lihue was forced to wait for a contractor to be available to hook up new transformers before removal of the old ones. The transformer (along with another from a different location) was removed on June 13, 1989. (Tr. 132, 194-95; Resp. Exhs. 19, 20.)

28. On November 25, 1985, a civil administrative complaint had been issued by EPA against Lihue Plantation Co., Ltd., alleging: that Lihue had violated TSCA by owning or otherwise using a PCB transformer that was so situated that it posed an exposure risk to food or feed; that PCBs were leaking from transformers; and that quarterly records of inspection and maintenance of the transformers had not been maintained. On April 17, 1986, a consent agreement and final order was approved by the Regional

Administrator for EPA by which Lihue consented to the assessment of a civil penalty in the amount of \$8,000.00 and agreed to take a number of specific corrective actions to come into compliance with all applicable requirements of TSCA.

III. Contentions of the Parties

A. The Complainant's Contentions

Complainant contends that the PCB transformer used at the Kauai Sugar Storage Pier did pose an exposure risk to food after October 1, 1985 and that a civil penalty should be assessed against Respondent for use of the PCB transformer between October 1, 1985 and June 13, 1989.

Complainant contends that potential pathways between the PCBs and the conveyor belt exist as a result of the possibility of: (a) a pinhole leak in the transformer through which an aerosol spray of PCB oil could spurt, landing on the belt; (b) an explosion; or (c) a fire. Complainant asserts that the conveyor belt, after contamination by PCBs in the room in which the transformer was located, would become the pathway to the raw sugar, the human food, at the time that the belt picked up the sugar during the loading process.

Complainant submits that the definition of "posing an exposure risk to food or feed" applies to two distinctly different situations: one, a "speculative" situation in which PCBs are being used in a "totally enclosed manner" and no release has occurred "but if it should occur, the location of the PCB Item may result in the proscribed exposure;" and two, a situation in which PCBs are no

longer being used in a "totally enclosed manner" and "all that is required is a potential, as opposed to an actual, pathway to either human food or the human food chain." Complainant contends that the Statement of General Policy (Statement) published in the Federal Register on February 18, 1983,³ which provides guidance as to the proper interpretation of the definition of "posing an exposure risk to food or feed," "is to be read within the limits of reasonableness and where, as in the case at bar, there is a release of PCBs it is incumbent upon Complainant to show a potential pathway to food, but the reasonableness standard in showing that potential pathway should be substantially relaxed from the situation where no leak or release of PCBs is alleged."⁴

Complainant argues that finding the presence of PCBs in a detectable quantity on the exterior of the transformer "is evidence that the PCBs were at some time part of the two hundred eighty-five gallons of PCB dielectric fluid in the transformer." Although the full extent of the presence of PCBs on the exterior of the transformer could not be accurately determined because of the washdown after each loading operation, Complainant asserts that its evidence presents a strong basis for a finding that PCBs were leaking from the transformer.

Although Inspector Clawson failed to provide Respondent with written notice of a TSCA inspection, Complainant maintains that

³48 Fed. Reg. 7172.

⁴Complainant's Post Hearing Brief at 14.

Respondent consented to the inspection and, hence, presentation of the written notice was unnecessary.

Finally, in answer to Respondent's objections in its reply brief to Complainant's interpretation of "the risk to food or feed" regulation and the Complainant's reliance upon the definition of "totally enclosed manner," Complainant submits that the hearing under 40 C.F.R. Part 22 is evidentiary in nature and that such arguments pertaining to the law and its application belong in the post hearing briefs as provided in 40 C.F.R. § 22.26. Since these arguments were in Complainant's post hearing brief, Respondent's objections should be rejected.

B. The Respondent's Contentions

Respondent asserts that EPA failed to provide written notice of its inspection and that Lihue did not waive such notice. Therefore, the evidence obtained by Inspector Clawson must be excluded and judgment rendered in favor of the Respondent.

Respondent maintains that EPA failed to meet its burden to demonstrate by a preponderance of the evidence that the PCB transformer at issue here posed an exposure risk to food or feed in violation of TSCA because there was no reasonable possibility of contact between PCB fluid from the transformer in the head house and raw sugar on the conveyor belt system. Respondent disputes Complainant's suggested interpretation and application of the Statement as being unprecedented and without support. Respondent insists that the Statement is clear and unambiguous and creates only one standard which applies to all electrical equipment which

may pose an exposure risk - that standard being consideration of the location of the PCB item and whether there is a reasonable possibility of contact between PCBs and the food or feed.

Respondent also contends that the transformer was adequately isolated and contained to prevent it from posing an exposure risk to the raw sugar and that even the occurrence of remote events would not cause the transformer to pose an exposure risk to the raw sugar.

Respondent claims that Complainant's discussion of and reliance on the definition of "totally enclosed manner" in its post hearing submissions comes as a complete surprise to Respondent and pleads that "[t]his new evidence must not be admitted."

IV. Discussion

A. The Inspection and the Notice Requirement

Respondent contends that the evidence obtained by Mr. Clawson during his inspection pertaining to violation of TSCA alleged herein should be excluded and the complaint dismissed because EPA failed to provide written notice of its inspection to Lihue as required by TSCA. Section 11(a)⁵ of TSCA states that "an inspection may only be made upon the presentation . . . of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each such inspection" Mr. Clawson did not

⁵15 U.S.C. § 2610(a).

provide written notice of his intention to conduct an inspection under TSCA.

During the course of his inspection conducted under the auspices of the Clean Water Act, Mr. Clawson asked the representatives of Lihue to show him any active PCB transformers at the facility in order to determine the existence of any potential violations of TSCA. Respondent's representative did not object. Indeed, they complied with his request and took him to the Kauai Sugar Storage Pier where he was shown the transformer in question. At that time, Mr. Clawson took two photographs of the transformer and asked the Lihue representative to collect samples from the outside of the transformer and from the catch basin below the transformer, have the samples analyzed and submit the results of the analysis to him. Lihue subsequently complied with each of these requests.

I must reject Respondent's argument because Respondent in effect consented to the inspection by failing to voice any objection to the inspection and further, by voluntarily complying with the inspector's requests that he be shown PCB transformers and that Lihue collect and analyze samples therefrom and submit the results to EPA. "Nothing in the record suggests that this evidence was obtained by threats or coercion, either express or implied."⁶ The actions by Lihue operate as a waiver of any right to challenge

⁶Agland Incorporated, Co-op, IF&R Appeal No. 83-2 (Final Decision, April 18, 1985) at 5-6; See also, Electric Service Company, TSCA Appeal No. 82-2 (Final Decision, January 7, 1985) at 8-9; George J. Huth, d/b/a/ Huth Oil Company and Joyce Nichols, TSCA-V-C-196 (Initial Decision, June 2, 1986) at 20-21.

the admissibility of the evidence gathered during Mr. Clawson's inspection.

B. Liability of Respondent

Section 6(e) of TSCA⁷ generally prohibits the manufacture, processing, distribution in commerce and use of PCBs. The statute provides, however, two exceptions under which EPA may, by rule, allow a particular use of PCBs to continue. Under Section 6(e)(2) of TSCA, EPA may allow PCBs to be used in a "totally enclosed manner." The term "totally enclosed manner" is defined as "any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule."⁸

Section 6(e)(2)(B) allows EPA also to authorize the use of PCBs in a manner other than a totally enclosed manner if the Agency finds that the use "will not present an unreasonable risk of injury to health or the environment." The Agency has exercised this authority in 40 C.F.R. § 761.30 which provides, in pertinent part:

"The following non-totally enclosed PCB activities are authorized pursuant to section 6(e)(2)(B) of TSCA:

(a) Use in and servicing of transformers (other than railroad transformers). PCBs at any concentration may be used in transformers . . . subject to the following conditions:

⁷15 U.S.C. § 2605(e).

⁸Section 6(e)(2)(C), 15 U.S.C. § 2605(e)(2)(C).

(1) Use conditions. (i) As of October 1, 1985, the use and storage for reuse of PCB Transformers that pose an exposure risk to food or feed is prohibited."

In final rule making on August 25, 1982,⁹ EPA decided that no use of PCBs in electrical equipment should be categorized as use in a totally enclosed manner. EPA found that leakage data showed that all types of electrical equipment leak during normal operation. Since this leakage could result in some detectable exposure of humans and the environment to PCBs, EPA concluded that it was not appropriate to classify the use of PCBs in electrical equipment as use in a totally enclosed manner.¹⁰

Thus, the use of PCBs in transformers, as is the case here, has been determined by EPA to be use in a nontotally enclosed manner. This classification applies regardless of whether an actual leak has been detected or not. Further, the use of PCBs in transformers has been authorized in Section 761.30(a) of EPA's rules subject to the condition, inter alia, that the use not "pose an exposure risk to food or feed."

The question in the present case, therefore, is whether the use of the PCB transformer by Lihue posed an exposure risk to food or feed. "Posing an exposure risk to food or feed" is defined in the EPA regulations as "being in any location where human food or animal feed products could be exposed to PCBs released from a PCB Item. A PCB Item poses an exposure risk to food or feed if PCBs

⁹47 Fed. Reg. 37342.

¹⁰Id. p. 37344.

released in any way from the PCB Item have a potential pathway to human food or animal feed."¹¹

Complainant noted in its post hearing brief "the presence of PCBs in a detectable quantity on the exterior of PCB Transformer Serial No. 8633155 at the Kauai Storage Pier" and stated that "[f]ugitive PCBs on the exterior of a PCB Transformer in a sugar loading pier automatically raises the concern of posing an exposure risk to human food, the sugar." PCBs were found on the surface of the transformers in concentrations of 1.1 to 4.5 micrograms per 100 centimeters squared. However, none were found in the sample taken from the catch pan beneath the transformer. The fact that a transformer with a "detectable quantity" of PCBs on its exterior surface may be found somewhere on the premises of a company that processes human food does not, ipso facto, establish a violation of 40 C.F.R. § 761.30(a)(1)(i).

The Respondent has been charged with violating Section 15(1)(c) of TSCA by using a PCB transformer which posed an exposure risk to food after October 1, 1985. The complaint does not allege the improper disposal of PCBs such as through a leak or other uncontrolled discharge. As Complainant notes, in determining whether the transformer posed an exposure risk to food or feed, a "PCB Item poses an exposure risk to food or feed if PCBs released in any way from the PCB Item have a potential pathway to human food"

¹¹40 C.F.R. § 761.3.

The EPA Statement¹² which provides guidance as to how this definition is to be interpreted and applied emphasized that this definition should be interpreted in a "reasonable manner."

The Statement provides that the exposure risk is "clearly dependent on the specific location" of the transformer "in relation to food and feed products." For example, "PCB Items that are located directly adjacent to or above food or feed products pose an exposure risk unless there is some type of secondary containment or other physical structure that prevents discharges of PCBs from contaminating food or feed."

The basic approach that one must take in applying the definition is set forth in the Statement as follows: "If, after considering the location of an individual PCB Item and all other available evidence, there is a reasonable possibility of contact between PCBs and food or feed, the PCB Item will be considered to pose an exposure risk to food or feed under 40 C.F.R. 761.3[11]."

The Statement goes on to suggest that in evaluating the exposure risk from a particular PCB Item, one should consider a hypothetical situation in which all or a portion of the PCBs are discharged in any way from the PCB Item, such as through an equipment leak or rupture. Assuming such a discharge, after considering the PCB Item's location and any relevant factors, the question to be asked is whether contact between the PCBs and food or feed is reasonably possible. Finally, the Statement stresses

¹²Supra pp. 8-9.

that "remote events" that are unrelated to the use of PCB Items are not to be considered when making these determinations.

Since EPA determined in 1982 that no use of PCBs in electrical equipment should be categorized as use in a "totally enclosed manner," I must reject Complainant's argument that the definition of "posing an exposure risk to food or feed," when read in light of the Statement, warrants two separate interpretations - one when applied to PCBs used in electrical equipment in a "totally enclosed manner" and another when applied to PCBs used in electrical equipment in a nontotally enclosed manner. All electrical equipment using PCBs must be categorized as use in a nontotally enclosed manner. Indeed, section 761.30 opens with the statement:

The following non-totally enclosed PCB activities are authorized pursuant to section 6(e)(2)(B) of TSCA¹³

That section of the rules is the section which Respondent has been alleged to have violated. Furthermore, there is no suggestion in the Statement itself that the definition should be interpreted and applied in two different ways.

In determining whether there was a reasonable possibility of contact between PCBs and the sugar, I must base my judgment upon the facts which I have found herein and those, of course, depend solely upon the evidence which the parties introduced into the record. Examining the facts in light of the guidance contained in the Statement, I must conclude that while there was a remote

¹³40 C.F.R. 761.30 (emphasis added).

possibility of contact between PCBs and the raw sugar, there was no reasonable possibility of such contact.

The transformer was not located directly above the sugar. The transformer was located on the first, or lowest, level of the head house. The raw sugar was transported by conveyor belt only through the second and third, i.e., the upper levels of the head house.

The transformer was not located directly adjacent to the raw sugar. During the process of transporting the sugar on the conveyor belts, the sugar did not reach level one of the head house and, hence, never entered the room in which the transformer was located. Only a portion of the conveyor belt system passing over two rollers with concrete counterweights hanging below them was located in the room in which the transformer was located. The path between the transformer and the conveyor belt system upon which the raw sugar was transported was blocked by an electrical cabinet approximately as wide as the transformer (excluding the cooling fins) and about 14 to 16 inches deep.

Turning to the consideration of a hypothetical situation in which all or a portion of the PCBs contained in the transformer might be discharged through a leak or rupture, I conclude that there was no reasonable possibility of contact between PCBs and the raw sugar and, hence, no potential pathway for PCBs to the sugar.

Inspector Clawson testified that he was concerned that PCBs could be discharged from the transformer as a result of a fire or explosion or through a pinhole leak that would create an aerosol or a stream of dielectric fluid under pressure when the transformer

was hot. Through these means, he believed that PCBs could reach the belt and thereby contaminate sugar being transported on the conveyor belt.¹⁴ However, Mr. Clawson admitted under direct examination by EPA counsel that he possesses a "very, very limited" knowledge concerning the operations of transformers in general.¹⁵ He admitted that he had no direct, formal knowledge of phenomena related to transformers. The source of his knowledge was his study of transformers, capacitors and resistors in obtaining an FCC ham radio license about two years before.¹⁶

As for his concern about a pinhole leak, Mr. Clawson could not estimate how far a pinhole leak could spray from the unit, saying that he had no idea.¹⁷ He admitted that he made no determination at the time of his inspection as to whether the transformer was actually leaking.¹⁸

I must conclude that Mr. Clawson's testimony was, for the most part, unsubstantiated and constituted little more than speculation on his part.

Mr. Lawrence Ornellas, who served as Factory Superintendent for Lihue Plantation from June of 1987 until the date of the hearing, was responsible for the operation and maintenance of the entire factory facility. Mr. Ornellas holds a bachelor of science

¹⁴Tr. 87.

¹⁵Tr. 95.

¹⁶Id.

¹⁷Tr. 98.

¹⁸Tr. 99.

degree in electrical engineering. Throughout his career his work has involved the operation and maintenance of electrical equipment. He had previously held several positions in the electrical department at Oahu Sugar Company from a supervisory position up through the power systems superintendent.¹⁹ He is familiar with PCB transformers based on both his education and his work experience. I found Mr. Ornellas' testimony to be credible based upon his education, training, experience and resulting knowledge of electrical transformers.

Mr. Ornellas testified that he could not imagine a circumstance in which fluid would be expelled from the transformer to that part of the conveyor belt which passed through the room on level I, other than through an explosion. He explained that in the event of an explosion, the fuses would shut the transformer down which would kill all of the power. Hence, the conveyor belt would stop and any PCBs on the belt could not reach the raw sugar on the second level of the head house.²⁰

As for the possibility of the dielectric fluid spraying from a pinhole leak in the transformer, Mr. Ornellas testified that the fluid in the transformer would be under very low pressure, the pressure generally being approximately two (2) PSI. Given the fact that the highest point of the fluid was about five (5) feet, the fluid was under a pressure of approximately five (5) PSI at the

¹⁹Tr. 168-70.

²⁰Tr. 188-89, 191.

most and, hence, an aerosol spray spewing from the transformer was not a reasonable possibility.²¹

Moreover, this particular transformer had a release valve mounted at its top to prevent an increase in pressure. The release valve was covered by a dome and above the transformer itself was the galvanized metal ceiling panel. Consequently, even if it was remotely possible for a substantial amount of PCB fluid to spout from the transformer through an aerosol spray through the release valve, it would strike the dome or the ceiling panel and fall into the containment or catch basin beneath the transformer.

Since the transformer was located at a distance of five (5) and eight (8) feet, respectively, from the two conveyor belt rollers and counterweights and since an electrical cabinet was located between the transformer and the conveyor belts, any possible low pressure leak of the dielectric fluid was highly unlikely to cross such a distance and reach the conveyor belt.

In the event that the transformer should overheat as the result of a malfunction or failure, the release valve would permit the rapid release of gases and fluid, thereby preventing an explosion which otherwise could tear the transformer apart.²² Thus, the release valve would prevent any possible explosion which might result from an unwarranted increase in pressure.²³ Of course, as noted previously, in the unlikely event of an explosion,

²¹Tr. 189.

²²Tr. 207.

²³Tr. 190-91.

the fuses would shut the transformer down which would cut off the electric power and the conveyor belt would stop. Hence, any PCBs which might be on the belt as the result of an explosion could not reach the raw sugar on the second level of the head house.

As for the possibility of a fire, Mr. Ornellas testified that transformers contain nitrogen or some inert gas when they are sealed.²⁴ Therefore, the oil would not be able to burn inside the transformer; the oil could burn only if a fairly substantial amount were outside the transformer. He testified that if the oil got to such a low level inside the transformer as the result of such a leak, the transformer probably would short out and blow the fuses.

A fire resulting from an external cause which might reach the transformer and cause it to burn or explode would be a catastrophic event which I would classify as a remote possibility. Nevertheless, I will consider such an event because Mr. Clawson raised it in his testimony. If such an event should occur during a period when the loading facility was being operated, the fire would be detected by Lihue personnel conducting the loading operation, particularly the person stationed on level II of the head house. If an externally caused fire occurred when the facility was not in operation, there would be no sugar on the conveyor belts and, hence, no opportunity for PCBs to reach the sugar.

In light of these conclusions, it is clear that the Respondent cannot be held liable because there was no reasonable possibility

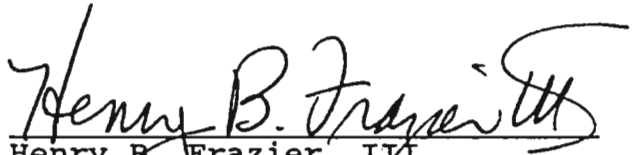
²⁴Tr. 190.

of contact between PCBs and the raw sugar. Complainant has failed to demonstrate by a preponderance of the evidence that the PCB transformer at issue here posed an exposure risk to food or feed in violation of TSCA.

Accordingly, the question of the applicability of 40 C.F.R. § 761.30(a)(1)(i) having been resolved in Respondent's favor, Respondent is entitled to a judgment in its favor. The complaint should be dismissed.

ORDER

It is hereby ordered that the complaint be, and it is hereby, DISMISSED.²⁵


Henry B. Frazier, III
Chief Administrative Law Judge

Dated:

November 13, 1991
Washington, DC

²⁵pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing INITIAL DECISION of the Presiding Officer, Henry B. Frazier III, in the matter of Lihue Plantation, TSCA-0990-0001, dated November 13, 1991 has been filed with the Regional Hearing Clerk, and a copy was served on Counsel for EPA, and on the Respondents, as indicated below:

BY FIRST CLASS MAIL:

Respondent-
(By Counsel)

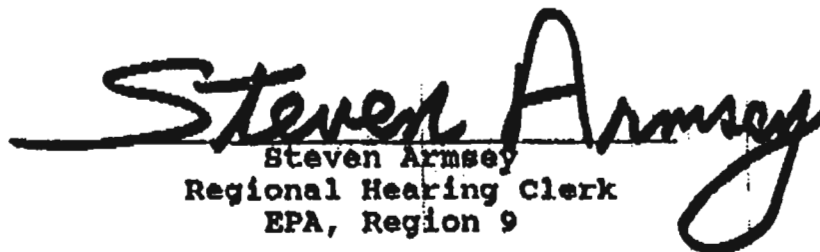
Lisa Woods Munger, Esq.
GOODSILL, ANDERSON, et. al.
1600 Bancorp Tower
Financial Plaza of the Pacific
130 Merchant Street
Honolulu, Hawaii 96813

HAND DELIVERED:

Complainant-
(By Counsel)

David M. Jones, Esq.
Office of Regional Counsel
ENVIRONMENTAL PROTECTION AGENCY
75 Hawthorne Street
San Francisco, CA. 94105

Dated at San Francisco, Calif., this 25th day of November 1991.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9