

37-1110

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Transformer Substation Supply,) Docket No. TSCA-III-703
Inc.,)
)
)
RESPONDENT)

ORDER TO SHOW CAUSE

The complaint in this proceeding under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), issued on December 22, 1993, charged Respondent, Transformer Substation Supply, Inc. (TSS) with six counts of violating the polychlorinated biphenyls (PCBs) rules, 40 C.F.R. Part 761.^{1/} Count I alleged failure to mark PCB Containers with the PCB Label, M₁, as required by 40 C.F.R. § 761.40(a)(1); Count II alleged improper storage of PCB Containers without continuous curbing, as required by 40 C.F.R. § 761.65(b)(1); Count III alleged failure to inspect stored PCB containers for leaks at least once every 30 days, as required by 40 C.F.R. § 761.65(c)(5); Count IV alleged failure to display, on the PCB articles and containers, the date they were placed into storage, as required by 40 C.F.R. § 761.65(c)(8); Count V alleged

^{1/} TSCA § 6(e), 15 U.S.C. § 2605(e) authorizes the Administrator to promulgate regulations for storage, disposal, manufacture, process, distribution in commerce, or use of PCBs. TSCA § 15, 15 U.S.C. § 2614, makes it unlawful for any person to fail or refuse to comply with the PCB rules. TSCA § 16, 15 U.S.C. § 2615, provides that any person who violates a provision of section 15 shall be liable for a civil penalty not to exceed \$25,000 per day of violation.

failure to maintain batch records as required by 40 C.F.R. § 761.65(c)(8); and Count VI alleged failure to notify EPA of storage activities as required by 40 C.F.R. § 761.205(a)(2). For these alleged violations, Complainant proposes to assess Respondent a civil penalty of \$65,500.

Respondent TSS, appearing pro se, filed an undated letter-answer, received by the Regional Hearing Clerk on March 21, 1994.^{2/} Respondent essentially admitted the factual underpinnings of Counts I-IV and Count VI, with explanations, and denied liability for Count V. Although Respondent did not request a hearing, the complaint at 9 states that the denial of any material fact or the raising of any affirmative defense shall be construed as a request for hearing.^{3/} Complainant filed a motion, on April 8, 1994, to schedule expedited prehearing exchange to encourage Respondent to submit information, allegedly promised in settlement discussions, that was necessary before EPA could agree to a settlement.

^{2/} When a respondent wishes to contest material facts, amount of proposed penalty, or legal basis of a complaint, the Consolidated Rules of Practice require the respondent to file a written answer to the complaint with the Regional Hearing Clerk within 20 days after service of the complaint. 40 C.F.R. § 22.15(a). Service of the complaint is completed when the return receipt is signed. 40 C.F.R. § 22.07(c). Although the return receipt is not a part of the written record on motion for default, Complainant informed the ALJ that Respondent's answer was untimely filed. Because Complainant is not challenging its admission, Respondent's answer will be accepted.

^{3/} "A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer." 40 C.F.R. § 22.15(c).

The undersigned Administrative Law Judge (ALJ) was designated to preside in this matter on April 15, 1994. On August 11, 1994, the ALJ directed the parties to submit prehearing exchanges on or before October 14, 1994 and ordered Complainant to report on the status of settlement on or before September 19, 1994. Complainant reported, on September 16, 1994, that settlement appeared unlikely because Respondent had not provided the promised documents, despite repeated requests therefor, had not returned telephone calls, and was unresponsive to EPA's attempts at settlement. EPA subsequently informed the ALJ, in a motion for extension of time to file prehearing exchange, dated October 14, 1994, that both parties had attempted, unsuccessfully, to contact each other, they had not discussed the matter directly, and in recognition of Respondent's efforts to confer, Complainant requested an additional 30 days for both parties to file prehearing exchange. By order dated October 28, 1994, the ALJ granted the request for an extension until November 21, 1994. Complainant submitted prehearing exchange information on November 21, 1994. Respondent, to date, however, has submitted nothing in addition to its answer.

Complainant filed a motion for default and draft default order, dated October 17, 1995, arguing that Respondent defaulted when it failed to comply with the ALJ's order to file a prehearing exchange. Respondent did not submit a response to this motion. Respondent will be ordered to show cause why Complainant's motion for default should not be granted.

Discussion

Respondent asserted in its answer that, although it did not mark the PCB containers located at its facility with the M₁ label, it labeled the containers with a sticker indicating PCB content that provided sufficient information. Respondent also explained that, although it does not have a formal procedure to inspect the drums and tanks monthly, the tanks were located in an area where employees see the drums daily and cure leaks if and when they are discovered. According to Respondent, they have not had any leaks or spills. Additionally, Respondent asserted that, although it did not date the PCB drums, it had internal records that would allow compilation of the proper information. Respondent alleged that the oil was in the tanks when the property was acquired and that "we" have not pumped "high" PCB into the tanks during the period for which batch records were required. The prehearing exchange order required Respondent to submit information substantiating these claims, and to submit information to demonstrate the level of Respondent's ability to pay a penalty. Respondent's justifications may be considered to determine possible defenses and mitigation of penalty, however, the value of Respondent's explanations is minimal without the documentation requested in the prehearing order.

Respondent failed to submit the prehearing exchange, has not submitted any financial information to demonstrate an ability, or lack of ability, to pay the proposed penalty, and has not responded to EPA's motion for default. Under the Consolidated Rules of Practice, "A party may be found to be in default ... after motion

or sua sponte, upon failure to comply with a prehearing or hearing order of the [ALJ]." 40 C.F.R. § 22.17(a). A finding of default "constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." Id. Respondent will be ordered to show cause why a finding of default should not be granted. In order to avoid a default judgment, Respondent must also respond to the order for prehearing exchange, dated August 11, 1994, by either providing the information requested, or offering an explanation why the information will not be submitted. Respondent is encouraged to submit any information, financial or otherwise, that it believes may mitigate the \$65,500 proposed penalty.^{4/}

Because Respondent's ability to pay must be considered in the penalty calculation, EPA must provide an analysis of Respondent's ability to pay the proposed penalty.^{5/} Based upon a preliminary review of a Dun & Bradstreet report, for which no date was stated,

^{4/} If Respondent submits information that qualifies as "Confidential Business Information" (CBI) under TSCA § 14, 15 U.S.C. § 2613, and 40 C.F.R. § 2.208, Respondent should indicate, in writing, at the time of submission, that it wants the information kept confidential, and should submit the information in accordance with 40 C.F.R. § 2.203. Respondent is advised to consult with the Regional Hearing Clerk regarding proper procedures for asserting CBI protection.

^{5/} "In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(a)(2)(B).

EPA concluded that Respondent has the ability to pay the proposed penalty. EPA will be ordered to file a copy of the Dun & Bradstreet report and any updates thereof. If Respondent does not submit any information challenging Complainant's assertion that it is able to pay the proposed penalty, its ability to pay may be presumed.^{6/} Complainant's motion for default will be stayed pending Respondent's compliance with this order.

ORDER

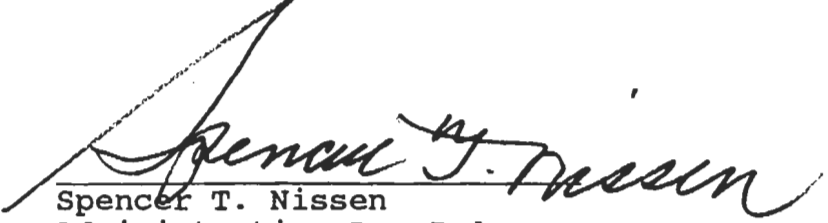
1. On or before June 21, 1996, Respondent is ordered to show cause, if any therebe, why EPA's motion for default, dated October 17, 1995, should not be granted.
2. Respondent is ordered to submit the information required by the order for prehearing exchange, dated August 11, 1994, or submit a written explanation of why this material will not be provided. Respondent is encouraged to submit any information, financial or otherwise, that would mitigate the proposed penalty.
3. Respondent must submit this information to the Regional Hearing Clerk and furnish a copy to EPA counsel and to the ALJ on or before June 21, 1996.

^{6/} In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 15 (EAB Oct. 20, 1994) ("a respondent's ability to pay may be presumed until it is put at issue by a respondent, [but]... a Region, at a penalty hearing, must as part of its prima facie case produce some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount.")emphasis in original, citations omitted.

4. On or before June 15, 1996, Complainant is ordered to submit the Dun & Bradstreet report and any updates thereof upon which it relies to support the assertion that Respondent has the ability to pay the proposed penalty.
5. Complainant is ordered to submit a status report, indicating whether settlement negotiations have resumed in light of this order, on or before June 21, 1996.

This order is being sent to Respondent's address of record via certified mail and regular mail,^{1/} and is being sent to Complainant and to the Regional Hearing Clerk via inter-agency mail.

Dated this 29th day of May 1996.


Spencer T. Nissen
Administrative Law Judge

^{1/} "The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules." 40 C.F.R. § 22.05(4).

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER TO SHOW CAUSE, dated May 29, 1996, in re: Transformer Substation Supply, Inc., Dkt. No. TSCA-III-703, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon

Helen F. Handon
Legal Staff Assistant

Date: May 29, 1996

ADDRESSEES:

Mr. John L. Einsterin III
Transformer Substation Supply, Inc.
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Huntington, WV 25772-6545

VIA CERTIFIED MAIL RETURN RECEIPT
REQUESTED AND REGULAR MAIL

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