

5/26/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
JOHN E. CHILDS,)	TSCA Docket No. VII-92-T-372
)	
Respondent)	

ORDER ON DEFAULT

On February 8, 1993, an Order Setting Prehearing Procedures was issued herein requiring that the parties file their prehearing exchanges by April 19, 1993. Complainant filed its prehearing exchange on April 19, 1993.

On April 22, 1993, the Presiding Judge issued an Order Requiring Compliance directing the Respondent to comply, on or before May 24, 1993, with the prehearing exchange requirement established by the Order Setting Prehearing Procedures. This Order noted Respondent's failure to claim certified mail and stated: "If the Respondent continues to refuse to accept mail from the Complainant and the Presiding Judge, or fails to comply with the requirements of the Order Setting Prehearing Procedures by the date provided in this Order, Respondent may be subject to the entry of a default" (Order Requiring Compliance, pp. 1-2). The Order Requiring Compliance was sent to Respondent John E. Childs by regular mail at two addresses: (1) RR #1, Box 158, Augusta, Missouri, 63332, the address reflected in Respondent's letters responding to the Complaint (first letter dated September 23, 1992; second letter undated, received by the Regional Hearing

Clerk on December 8, 1992); and (2) 901 Femme Osage Ridge Road, Augusta, Missouri, 63332, the location of the inspection and the address reported to the Presiding Judge by Complainant on April 8, 1993, following Respondent's failure to claim certified mail. Respondent did not comply with this new deadline.

Complainant, on May 27, 1993, filed a Motion for Default Order requesting that a default be entered against the Respondent for failure to submit the prehearing exchange as required by the Order Requiring Compliance. The Motion for Default Order was served by certified mail, return receipt requested, on Respondent at 901 Femme Osage Ridge Road, Augusta, Missouri, 63332. In a status letter dated June 29, 1993, Complainant indicated that its Motion for Default Order had been returned because the Respondent did not claim it. Complainant indicated in the status letter that it was sending a copy of that letter to the Respondent via both regular and certified mail. To date, the Respondent has not submitted an answer to the Motion for Default Order.

On July 13, 1993, the Presiding Judge issued an Order to Show Cause, requiring Respondent to show why he did not file his prehearing exchange by May 24, 1993 and why a default order should not be entered against him. The Order to Show Cause was sent by regular mail to both addresses noted above.

On September 9, 1994, Complainant filed a status letter and a Second Motion for Default, again based on Respondent's failure to comply with the prehearing orders of the Presiding Judge. Complainant stated that the status letter and motion would be

sent by regular and certified mail to Respondent and the certificate of service indicates that copies of the motion were sent by certified mail, return receipt requested, and by regular mail to the Respondent at 901 Femme Osage Ridge Road, Augusta, Missouri, 63332.

On January 31, 1995, Complainant filed a status letter requesting that, in light of Respondent's failure to answer the Order to Show Cause, the Presiding Judge enter a default order against Respondent. The status letter was sent to Respondent by certified mail, return receipt requested, and by regular mail to the Respondent at 901 Femme Osage Ridge Road, Augusta, Missouri, 63332.

Under Section 22.17(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.17(a), a party may be found in default upon failure to comply with a prehearing order of the Presiding Judge. By not filing a prehearing exchange, Respondent has failed to comply with the February 8, 1993 Order Setting Prehearing Procedures and with the May 23, 1993 Order Requiring Compliance. In addition, Respondent has failed to comply with the July 13, 1993 Order to Show Cause. Therefore, the issuance of this Order on Default is warranted, and the Complainant's Motion for Default Order is hereby granted. This Order on Default is being served by certified mail, return receipt requested, and by regular mail on the Respondent at the two addresses noted above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent John E. Childs is the owner of property

located at 901 Femme Osage Ridge Road, St. Charles County, Augusta, Missouri (the Site). See Complainant's Prehearing Exchange (PHE), Exhibits 2, 9, 10, 12, and 13.

2. On April 2, 1992, representatives of the Missouri Department of Natural Resources (MDNR) conducted an inspection of the Site. Complainant's PHE, Exhibit 2.

3. Under 40 C.F.R. § 761.3, "disposal" of Polychlorinated Biphenyls (PCBs) and PCB Items includes but is not limited to spills, leaks and other uncontrolled discharges of PCBs.

4. Under 40 C.F.R. § 761.60(a), PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with 40 C.F.R. § 761.70.

5. Under 40 C.F.R. § 761.60(a)(4), any non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, rags, or other debris shall be disposed of: (i) in an incinerator which complies with § 761.70; or (ii) in a chemical waste landfill which complies with § 761.75.

6. During the inspection referred to in Paragraph 2 above, representatives of MDNR collected Sample No. 92-4714 from an area where electrical equipment had been burned. Complainant's PHE, Exhibit 2, p. 3; Exhibit 8, p. 1; Exhibit 9; Exhibit 15; Exhibit 16 (in particular, Photographs 1, 2, 3, 14, 15, 16, and 17); Exhibit 17; Exhibit 18; Exhibit 19; Exhibit 20.

7. A laboratory sample analysis (Complainant's PHE, Exhibit 20) demonstrated that Sample No. 92-4714 contained 46.3 mg/Kg of PCB-1242 and 31.7 of PCB-1260, or a total of 78 parts

per million (ppm) PCBs.

8. The uncontrolled discharge of the materials contained in Sample 92-4714 constituted an unlawful disposal of PCBs under 40 C.F.R. § 761.60(a) and a violation of TSCA Section 15(1), 15 U.S.C. § 2614(1).

9. The Polychlorinated Biphenyls (PCB) Penalty Policy dated April 9, 1990 (hereinafter "PCB Penalty Policy") applies to all administrative actions concerning PCBs issued after April 9, 1990. 55 Fed. Reg. 13,955 (1990).

10. Under the PCB Penalty Policy, the appropriate penalty for PCB violations is calculated by first determining the "Extent" and "Circumstances" of a violation and then applying the Gravity-Based Penalty Matrix to determine the penalty corresponding to the Extent and Circumstance of the violation at issue. PCB Penalty Policy, generally; matrix appears on Page 9.

11. The "burn area" from which Sample No. 92-4714 was taken measured about 10 feet by 10 feet, or 100 square feet. Complainant's PHE, Exhibit 2, p. 3.

12. Disposal violations such as the disposal to soil here that contaminate between 60 and 300 square feet result in a violation to a "Significant" Extent. PCB Penalty Policy, p. 6.

13. This violation occurred to a "Significant" Extent.

14. Any significant uncontrolled discharge of PCBs, such as the one that occurred here, results in a Circumstance Level 1 violation. PCB Penalty Policy, p. 10.

15. Under the Gravity-Based Penalty Matrix, violations that

IN THE MATTER OF JOHN E. CHILDS, Respondent
 Docket No. TSCA-VII-92-T-372

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Default, dated _____, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Venessa Cobbs
 Regional Hearing Clerk
 U.S. Environmental Protection
 Agency, Region VII
 726 Minnesota Avenue
 Kansas City, KS 66101

Copy by Certified Mail to:

Counsel for Complainant:

Julie M. Van Horn, Esquire
 Assistant Regional Counsel
 U.S. Environmental Protection
 Agency, Region VII
 726 Minnesota Avenue
 Kansas City, KS 66101

Copies by Certified Mail
and by Regular Mail to:

Respondent:

John E. Childs
 901 Femme Osage Ridge Road
 Augusta, Missouri 63332

John E. Childs
 RR #1 Box 158
 Augusta, Missouri 63332

Aurora M. Jennings
 Legal Assistant
 Office of the Administrative
 Law Judges

Dated: _____
 Washington, DC