UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	:	
TRANSFORMERS UNLIMITED CORPORATION	:	Docket No.
	:	PCB - 79 - 003
Respondent	:	

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HC3031

Clifford E. Blackwell, III, Esq., and Steven B. Cherry, Esq., Lincoln Tower Building, 1860 Lincoln Street, Suite 103, Denver, Colorado 80225, for the Complainant;

John M. Deisch, Esq., Deisch and Marion, P. C., 723 Sherman Street, Denver, Colorado 80203, for the Respondent.

(Decided March 20, 1981)

Before: J. F. Greene, Administrative Law Judge

DECISION AND ORDER

This matter arises under 15 U.S.C. 2615 (a)(1), Section 16 (a)(1) of the Toxic Substances Control Act, 15 U.S.C. 2601 et seq., hereafter "the Act," and regulations issued pursuant to authority contained therein 1/ at 40 C.F.R. Part 761.1 et seq., the polychlorinated biphenyls 2/ "disposal and marking" regulations (43 Federal Register 7150, as amended August 2, 1978, 43 Federal Register 33918) effective February 17, 1978. In this civil action, the Environmental Protection Agency, the complainant herein, seeks assessment of civil penalties against the respondent pursuant to Section 16(a)(1) and (2)(A), 15 U.S.C. 2615 (a)(1), (2)(A), for certain alleged violations of the Act.

The complaint alleges that the respondent corporation, with respect to eight PCB-containing transformers and ten large high-voltage PCB containing capacitors, all allegedly being stored on its premises, failed to mark them in accordance with 40 C.F.R. 761.20(a)(1)(ii) and (iii) 3/; failed to date them as required by 40 C.F.R. 761.42(c)(7) 4/; and failed to store them in accordance with 40 C.F.R. 761.42(b) 5/. The failure to comply with regulations issued pursuant to Section 6 of the Act constitutes a violation of Section 15 of the Act. 6/

1/ Section 6(e)(1), 15 U. S. C. 2605 (e)(1).

2/ Hereafter "PCBs".

3/ This section requires PCB transformers in existence on or after July 1, 1978, to be marked in accordance with Section 761.44(a), Figure 1 (see 43 Federal Register 7163, or Appendix for this illustration) at the time of manufacture, or when distributed in commerce if they are not already labeled, and at the time of removal from use if not already labeled.

4/ This section requires "PCB articles," which includes transformers and capacitors that contain PCBs [Section 761.2(r)] to be dated "when they are placed in storage under paragraph (b) or (c)(1)or (c)(2)" of Section 761.42; see note 5/ relating to paragraph (b).

5/ This section requires that PCBs "designated for disposal" be placed in facilities which have certain physical attributes, such as "adequate roof and walls to prevent rain water from reaching the stored PCBs," and numerous other features; see Sections 761.42(b)(1)(i), (ii), (iii), (iv) and (v).

6/ Section 15(1)(C), 15 U. S. C. 2614 (1)(C).

Regarding Count I of the complaint, wherein it is charged that the eight transformers described in paragraph 4 were not marked on December 12, 1978, in accordance with Part 761.44(a) 7/, and that the respondent's failure to mark or label them in the required manner constitutes a violation of 761.20(a)(1)(ii), it is clear from the record that none of the eight were so labeled, and that the respondent had not labeled them. It is therefore important to consider the exact language of the applicable regulation:

> § 761.20 - Marking Requirements.
>
> (a) The following marking requirements shall apply:
>
> (1) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 . . . Section 761.44(a) . . . .
>
> (i) PCB containers;
>
> (ii) PCB transformers at the time of manufacture, at the time of distribution in commerce if not already labeled, and at the time of removal from use if not already labeled;
>
> (iii) PCB large high voltage capacitors at the time of manufacture, at the time of distribution in commerce if not already labeled, and at the time of removal from use if not already labeled. . . . . [all emphasis supplied].

Under the language of subparagraph (ii), if the respondent had resold any of the transformers, it is arguable that a responsibility to mark them would thereby have been created (" . . . at the time of distribution in commerce"), although it is equally arguable that the first such distribution after manufacture is the occasion referred to 8/, in which case the respondent would not be liable if it did not mark them upon resale for distribution in commerce.

As for the words ". . . . at the time of removal from use if not already labeled," the meaning here is also open to some interpretation. The respondent urges that "removal from use" means the equivalent of removal permanently from service as a transformer. It may also be construed to mean the specific occasion when the transformers were disconnected and

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7/ See Appendix, page 10 herein; and 43 FR 7163.

8/ The transformers had been used before the respondent acquired them.

taken out of operation for the first time after July 1, 1978 (even if they were to be or could be used again) which would cause liability for violation of this provision to fall upon someone other than this respondent, unless he removed them from use before or after purchase, which has not been shown. One interpretation that cannot reasonably be placed upon the words "at the time of removal from use" is that every unmarked PCB transformer not in use must have been marked by whomever happened to own or hold it at the moment the Environmental Protection Agency arrived for an inspection (i. e. before January 1, 1979), even if the presence of weeds around the transformer suggests to the inspector that it has been there for a while. 9/

If the respondent's interpretation is used, the complainant would have to establish that the transformers were in fact permanently out of service and that the respondent intended them not to be used again. Otherwise, on the date of the inspection, the language of this provision is simply not applicable to these transformers. 10/ The mere appearance of storage -- arguable on this record in any case -- does not constitute a final removal from use which would create liability in the respondent to mark the transformers. The evidence in this record that the transformers described in paragraph 4 of the complaint were permanently out of service, and/or that the respondent intended them not to be used again, or, in the alternative, was making no effort to sell them, could not have sold them, or would not have sold them if a buyer had appeared is insufficient to establish a violation. It must be concluded that the unmarked PCB transformers described in the complaint in respondent's possession on December 12, 1978, were not, on that date, at least, required to have been

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9/ The presence of weeds will be discussed later in considering the "storage" aspects of the complaint. If there were weeds under the transformers, which is not known, then the transformers could have been recent arrivals.

10/ On January 1, 1979, however, the provisions of section 761.20(a)(3) would have become applicable: ". . . . (A)s of January 1, 1979, the following PCBs shall be marked: . . . (i) all transformers not marked under paragraph 1 of this section . . . .", 43 Federal Register 7159. Accordingly, the allegation of paragraph 5 of the complaint ("The regulations at . . . 761.20(a)(1)(ii) require that all PCB transformers be marked . . . ." is not quite correct, since not all PCB transformers were required to be marked before January 1, 1979.

marked by the respondent. Accordingly, a violation of Section 761.20(a)(1)(ii) has not been established. 11/

Inasmuch as the language of Section 761.20(1)(iii) raises the same questions with respect to the capacitors described in paragraph 15 of the complaint 12/, and since the evidence that they had been permanently removed from service is inconclusive, it will be held that a violation of that provision has not been established. 13/

Regarding Count II of the complaint, wherein it is charged (paragraph 10) that the respondent's failure to date the transformers "as to when they were placed in storage" constitutes a violation of 40 C.F.R. 761.42(c)(7), this charge rests upon an interpretation of that section, expressed in paragraph 9, that is not complete, as a reading of the full wording of (c)(7) makes plain:

> (7) PCB articles . . . shall be dated when they are placed in storage under paragraph (b) or subparagraph (c)(1) or (c)(2). . . . [emphasis supplied].

The complaint does not charge that the transformers were stored "under paragraph (b). . . ."; however, since paragraph (b) [761.42(b)] has been incorporated into 761.42(c)(7), and is incorporated in (c)(1) and (c)(2), its terms must be read into the charge:

> (b) Except as provided in paragraph (c) of this section, after July 1, 1978, owners or operators of any facilities used for the storage of PCBs designated for disposal shall comply with the following requirements . . . . [emphasis added].

The clear meaning of this latter section is reinforced by the title of the section in which it appears: "Section 761.42 - Storage for Disposal," 43 Federal Register 7162, February 17, 1978. 14/ Inasmuch as there is no clear or persuasive evidence on this record that the transformers or the PCBs were being

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11/ In fairness to counsel for the complainant, it is hard to see what evidence in this case could have established a violation under this subparagraph, in view of its terms.

12/ It was stipulated that the capacitors were not marked in accordance with Section 761.20(a)(1)(iii), TR p. 6.

13/ On January 1, 1979, however, these capacitors would have to be marked by whomever possessed or owned them on that date. See 761.20(3)(ii).

14/ Note 14 appears on page 6.

stored for disposal, as "disposal" and "storage for disposal" are defined at Section 761.2(g) and 761.2(z) of 40 C.F.R. (43 Federal Register 7157), it will be held that this charge has not been established. 15/

Inasmuch as the same provisions are applicable to the capacitors referred to in paragraph 21 of the complaint (Count V), that charge too must be held not to have been established. 16/ With respect to these capacitors, there is no clear or persuasive evidence that the respondent intended them for disposal (as, for example, was present in Briggs & Stratton Corporation, TSCA-V-C-001, 002, 003; TSCA Appeal No. 81-1, decided February 4, 1981; see slip opinion at p. 9: respondent's agents had said "we are going to get rid of that," and "they were intending to remove it," with respect to capacitors in an induction furnace). It is not sufficient to show, in this case, that there weeds growing around the equipment, or that the market for resale of capacitors or transformers was small. 17/

14/ The regulations published on May 31, 1979, at 44 Federal Register 31514, effective July 2, 1979, omit the words "under paragraph (b)". Compare the corresponding paragraph at Section 761.42(c)(8), 44 Federal Register 31556. This is the only instance, with respect to the charges of this complaint, where the July 2, 1979, regulations differ from those applicable to this case.

15/ The language of Section 761.10(2), 43 Federal Register 7158, does not change things (". . . storage . . . prior to disposal") since the concept of disposal would still be present. See also "note" immediately following the heading "761,10 - Disposal Requirements," that ". . . . when PCBs are removed from service and disposed of, disposal must be undertaken in accordance with these regulations." 43 Federal Register 7157. (Emphasis supplied).

16/ Note that the word "transformers" in the last sentence of paragraph 21 of the complaint is a typographical error. See TR at page 8, where the parties agreed to amend the complaint to reflect this fact.

17/ Again, it is difficult to see what evidence, in the circumstances of this case, could have been used by complaint counsel to support a charge that the PCB transformers or capacitors here had been designated for disposal.

Turning to Count III of the complaint, wherein it is alleged that the respondent had not stored the PCB transformers in a proper facility i. e. one that met the requirements of 40 C. F. R. 761.42(b) (see paragraphs 12 and 13), and that the respondent's failure to store the transformers in such a facility constituted a violation of Section 761.42(b), it is true, as the complainant urges, that the respondent had no facility for storage that met the requirements of that Section. However, if the PCBs were not designated for disposal, the requirement for a proper facility does not attach. In this instance, the evidence that the transformers were being stored for disposal is not adequate to support a finding that they were in fact being so held or stored. The presence of tall weeds around the equipment, by itself, does not establish that disposal was intended. Taken with other evidence that the transformers and capacitors were not leaking or in need of repair, and even considering a remark obviously made in anger about a PCB item sold to him by the Government Services Administration, whose description had been erroneous, thereby causing him to acquire a PCB item that he had not intended to acquire, the total of the evidence does not support the finding urged by counsel for the complainant. It is clear that the respondent did sometimes "dispose" of PCB items, but that does not relate to the equipment described in the complaint. Accordingly, it must be held that the violation alleged in Count III has not been established, and it must also be found that a violation alleged in Count VI of the complaint has not been shown, since the same considerations apply to the capacitors described therein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Transformers Unlimited Corporation is a corporation organized, existing, and doing business under the laws of the State of Colorado, having its principal place of business located at Interstate 25 and Weld County Road No. 6, near Erie, Colorado, with annual gross sales in excess of $490,000. (TR p. 6).

2. At all relevant times herein, the respondent was engaged in the purchase, sale, brokerage, and some repair of transformers, capacitors, and ancillary equipment (TR, p. 6).

3. The respondent corporation is a "person" within the meaning of 40 C.F.R. 761.1(x), and is subject to the regulations contained in 40 C.F.R. 761.1 et seq.

4. On December 12, 1978, eight PCB transformers and ten large high

voltage PCB capacitators, "PCB articles" within the meaning of 40 C.F.R. 761.2(r) were located on the respondent's premises (TR, p. 6).

5. On December 12, 1978, the transformers and capacitors were not marked as illustrated in Figure 1, 40 C. F. R. 761.44(a), nor were the capacitors so marked.

6. Section 761.20 (a)(1)(ii) does not require that all transformers be marked in that manner on December 12, 1978; otherwise the language of Section 761.20(a)(3)(i), which refers to transformers not marked under (a)(1)(ii) would be meaningless. The language of Section 761.20(a)(1)(ii) standing alone does not require that all PCB transformers be so marked.

The section further did not require the respondent herein to have placed such markings upon the eight transformers by that date, inasmuch as there was no evidence that the respondent was in control of them at the time they were removed from use, if the words "at the time of removal from use" refers to a specific time, and inasmuch as there is insufficient evidence that the transformers could not have been sold or returned to use, if "at the time of removal from use" means permanent removal from use.

7. Section 761.20(a)(1)(iii) did not require that all capacitors be marked as illustrated in Figure 1, Section 761.44(a), on December 12, 1978, otherwise the language of Section 761.20(a)(3)(ii) is meaningless. The language of Section 761.20(a)(1)(iii) standing alone does not require that all PCB capacitors be so marked.

The section further did not require the respondent herein to have placed such markings upon the ten capacitors by that date, inasmuch as there was no evidence that the respondent was in control of them at the time they were removed from use, if the words "at the time of removal from use" refers to a specific time, and inasmuch as there is insufficient evidence that the capacitors could not have been sold or returned to use, if "at the time of removal from use" means permanent removal from use.

8. The respondent did not violate 761.20 (a)(1)(ii) or (iii) by failing to mark the eight transformers and ten capacitors on or before December 12, 1978.

9. At the time of inspection, neither the transformers nor the capacitors were dated pursuant to Section 761.42(c)(7). However, they were not required to be so dated unless they had been "placed in storage under paragraph (b)". Since there is insufficient evidence to establish that the PCB items had been "designated for disposal," which must be established to support a charge that the respondent violated Section 761.42(c)(7) by failing to date the items, there is no requirement that the items be stored in a facility with the attributes described in paragraph (b).

10. There is insufficient evidence on this record to support a finding that the PCBs in the capacitors and transformers referred to in the complaint, or the capacitors and transformers themselves, had been "designated for disposal" within the meaning of that term as it is used in paragraph (b) of Section 761.42, or as "disposal" is defined at Section 761.1(g). 18/ That being the case, the requirement that PCBs "designated for disposal" must be stored in a facility having the attributes set out in paragraph (b) does not arise, and did not apply to the capacitors and transformers referred to in the complaint.

*

ORDER

Accordingly, it is ordered that the charges of the complaint be, and they are hereby, dismissed.

J. F. GREENE
Administrative Law Judge

March 20, 1981
Washington, D. C.

18/ "Disposal" means to intentionally or accidentally discard, throw way, or otherwise complete or terminate the useful life of an object or substance. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating, or confining those substances, mixtures, or articles that are being disposed." 43 Federal Register 7157. No argument has been made that the facility or actions, or lack of action on the part of the respondent constituted "destroying" or "degrading".

APPENDIX

Section 761.44(a), Figure 1:

CAUTION

CONTAINS

PCBs

(Polychlorinated Biphenyls)

A toxic environmental contaminant requiring special handling and disposal in accordance with U.S. Environmental Protection Agency Regulations 40 CFR 761 For Disposal Information contact the nearest U.S. E.P.A. Office.

In case of accident or spill, call toll free the U.S. Coast Guard National Response Center, 800-424-8802

Also Contact _____

Tel. No. _____

Figure 1