UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Electric Utilities Company,	)	Docket No. TSCA-V-C-011
	)	
Respondent	)	

1. Toxic Substances Control Act - PCBs - A proceeding to assess civil penalties for violation of the PCB Ban Rule is not automatically stayed by Respondent's filing of a petition in bankruptcy, but falls within the exclusion provided by 11 U.S.C. 362(b)(4) and (b)(5).
2. Toxic Substances Control Act - PCBs - A proceeding to assess a civil penalty is not mooted by the filing of a Chapter XI bankruptcy petition by a corporate respondent, first, because the assessment of a civil penalty reduces the claim to a fixed amount, second, because the EPA is entitled to have the merits of its case resolved, and third, because the penalty may be relevant in assessing future penalties against the reorganized respondent.
3. Toxic Substances Control Act - PCBs - Penalty of $55,000 proposed in the complaint assessed against Respondent who has defaulted notwithstanding Respondent's intervening bankruptcy.

Appearances:

Eric Cohen, Esquire, United States Environmental Protection Agency, Region V, Chicago, IL, for Complainant.

Mr. Richard L. Hauser, President, Electric Utilities Co., 309 Anderson Avenue, Farmville, N.C., Respondent.

ORDER ON DEFAULT

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a) for the assessment of civil penalties for violations of the EPA's regulations governing the manufacturing, processing, distribution and use of polychlorinated biphenyls ("PCB Ban Rule"), 40 CFR Part 761. 1/ The proceeding was instituted by a complaint issued by the EPA, Region V, charging Respondent Electric Utilities Company with the improper storage and disposal of PCBs, and the failure to properly mark its PCBs. A penalty of $55,000 was requested. Respondent answered, admitting that some PCBs had not been stored in full requirements with the PCB Ban Rule, but asserting that in charging Respondent with the improper storage and disposal of other PCBs, the EPA was relying on samples which had been improperly collected and were contaminated. Respondent also denied the marking violation. Finally, Respondent contended that the proposed penalty was unreasonably large and that payment would adversely affect its ability to continue in business. The matter is before me on the question of whether to issue a default order as authorized by 40 CFR 22.17.

1/ TSCA, section 16(a) of the Act, provides as follows:

> (a) Civil. (1) Any person who violated a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.

Section 15 of the Act, 15 U.S.C. 2614, provides in pertinent part that "It shall be unlawful for any person to ____ (1) fail or refuse to comply with . . . (c) any rule promulgated or order issued under section 6 . . . ." The PCB Ban Rule was issued under section 6(e) of the Act, 15 U.S.C. 2605(e).

Respondent requested a hearing in its answer and the case was assigned to me by order of the Chief Administrative Law Judge on April 7, 1983. On April 15, 1983, I wrote the parties directing the filing of a prehearing exchange by June 6, 1983, unless the case were settled. At the request of both parties the time to make the prehearing exchange was extended first to September 6, 1983, and then to December 6, 1983, to allow settlement discussions to continue. On October 25, 1983, the EPA was notified that Respondent had filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act. By my letter of May 4, 1984, the parties were advised that I did not consider this matter automatically stayed by the bankruptcy proceeding. Several extensions, however, were thereafter granted to permit settlement negotiations to continue. These negotiations have been unsuccessful and have apparently reached a stage where it would serve no purpose to continue them. 2/ Complainant submitted its prehearing exchange on November 6, 1984. Respondent has made it plain that it has no intention of submitting its prehearing exchange although Respondent has been continually warned that failure to do so would subject it to a default order.

As to whether this proceeding is subject to the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362, it is clear that since this is a proceeding to assess a civil penalty for failure to comply with the environmental laws, it is not, but is excluded from the stay provisions by 11 U.S.C. 362(b)(4) and (b)(5). See Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d. 267 (3d Cir. 1984) (state proceeding to

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2/ See Complainant's letter of January 14, 1985

compel debtor to correct environmental damage not automatically stayed); NLRB v. Evan's Publishing Co., 639 F.2d 291 (5th Cir. 1981) (Unfair labor practice proceeding before NLRB against debtor for reinstatement of employees and for back pay not automatically stayed); In re. Tauscher, 7 Bankr. 918 (E.D. Wisc. 1981) (Proceeding to assess civil penalties against debtor for violation of Fair Labor Standards Acts not automatically stayed). In Kovacs v. Ohio, 717 F.2d 984, (6th Cir. 1983), aff'd, 53 U.S.L.W. 4068 (U.S. January 9, 1985), the court held that enforcement of what was in essence a money judgment for expenses in cleaning up a site was stayed but recognized that a proceeding to assess a penalty would not have been stayed. The court stated, 717 F.2d at 988,

> If Ohio had elected to have a money penalty assessed against Kovacs for the environmental damage he caused, we would have faced a different question. Proceedings to assess such a penalty would not have been subject to the automatic stay of § 362, although enforcement of the assessment would have been stayed.

This proceeding not being subject to an automatic stay, it remains to be considered whether there are any other reasons why it should not go forward.

It could, of course, be argued that the bankruptcy proceeding has for all practical purposes mooted these proceedings, in view of Respondent's statement in its letter of December 11, 1984, that Respondent "has very little money left" which is going to be distributed under the supervision of the plan approved by the bankruptcy court. There are several reasons, however, why this proceeding is not moot.

First, the assessment of a civil penalty does reduce the penalty to a fixed amount against Respondent for purposes of determining its treatment in the plan of reorganization. 3/

Second, the EPA is entitled to a resolution of the merits of its charges, see NLRB v. Autotronics, Inc., 434 F.2d 651 (8th Cir. 1979). This has special significance here since the bankruptcy is a Chapter XI proceeding which contemplates Respondent's continued operation in some reorganized form.

Finally, this proceeding may also have relevancy in the event that the reorganized company is cited again for a violation of TSCA, since in the assessment of a civil penalty account must be taken of a respondent's prior history of violations. 4/

Respondent's attorney in a letter of November 5, 1984, states that the bankruptcy judge has forbid Respondent to incur any more legal expense in defending this and other related environmental actions beyond November 1, 1984. Presumably that action lies within the discretion of the bankruptcy court. Since this proceeding has not been stayed, it is to be hoped that Respondent also made clear to the bankruptcy court the consequence of abandoning its defense, namely, subjecting Respondent to a default judgment.

3/ The EPA's claim was apparently listed on Respondent's schedule as a disputed, contingent or unliquidated claim. See letter of N. Hunter Wyche, Jr. to EPA Region V dated October 25, 1983. This proceeding, of course, reduces the claim for a civil penalty to a sum certain. Since the claim is against a corporation and not an individual debtor, it would appear that it is not a claim which is excepted from discharge under 11 U.S.C. 523. How the claim is entitled to be treated under a Chapter XI plan is not decided here.

4/ TSCA, section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B).

Accordingly, Respondent is found in default for failure to make the prehearing exchange directed in my letter of April 15, 1983. Respondent's default constitutes for purpose of this proceeding an admission of all facts alleged in the complaint and a waiver of Respondent's right to a hearing. The findings of fact set forth below, however, are based not only on the complaint but on admissions in Respondent's answer and on information contained in Complainant's prehearing exchange, which is incorprated into the record in this proceeding.

Findings of Fact

1. On or about October 22, 1979, Respondent was storing for disposal drums and a tank truck containing PCBs.
2. Said drums and tank truck were stored in an area which did not have adequate roof and walls to prevent rain water from reaching them as required by 40 CFR 761.65(b)(1)(i) (formerly 761.42(b)(1)(ii)), and which did not have adequate floor and curbing as required by 40 CFR 765 (b)(1)(ii) (formerly 761.42(b)(1)(ii)).
3. On or about October 22, 1979, Respondent maintained a sewage collection system containing sludge with an excess of 800 parts per million PCBs and water with 56 parts per million PCBs.
4. Said PCBs in Respondent's sewage collection system have been disposed of in a manner not authorized by 40 CFR 761.60 (formerly 761.10).
5. On or about October 22, 1979, the PCB drums and tank truck referred to in Finding No. 1 above, were not marked as required by 40 CFR 761.40 (formerly 761.20).

Conclusions of Law

1. Respondent has improperly stored PCBs for disposal in violation of 40 CFR 761.65, and TSCA, section 15, 15 U.S.C. 2614.
2. Respondent has improperly disposed of PCBs in violation of 40 CFR 761.60 and TSCA, section 15.
3. Respondent has improperly marked PCB containers in violation of 40 CFR 761.40, and TSCA, section 15.

The Penalty

Pursuant to 40 CFR 22.17(a), the penalty proposed in the complaint of $55,000 is the penalty assessed. It is recognized that TSCA does specify that in determining the appropriate penalty, account must be taken of Respondent's ability to pay. 5/ Respondent by its default, however, has waived its right to contest the penalty on this ground. 6/ Further, insofar as the penalty is dischargeable by virtue of its being included in a reorganization plan, a point which is not decided here, the question of Respondent's ability to pay would seem to be merged into the question before the Bankruptcy Court of how the claim is to be treated under the plan.

5/ TSCA, section 16(a)(2)(B).

6/ See 40 CFR 22.17(a).

ORDER 6/

Pursuant to section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of $55,000 is hereby assessed against Respondent, Electric Utilities Co., for violations of the Act found herein.

Payment of the full amount of the penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or a certified check payable to the United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Feb 13, 1985

6/ Pursuant to 40 CFR 22.17(b), this order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 CFR 22.30, or the Administrator elects review this decision on his own motion, this decision shall become the final order of the Administrator. See 40 CFR 22.27(c).