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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

P3:39

In the Matter of	)	
	)	
George J. Huth, d/b/a Huth Oil Company and Joyce Nichols,	)	Docket No. TSCA-V-C-196
	)	
	)	
Respondents	)	

Toxic Substances Control Act - Inspections - Search Warrants - Consent as Waiver - Where evidence established that owner and operator of waste oil facility voluntarily consented to RCRA and TSCA inspections, and freely permitted collection of samples, such consent operated as a waiver not only of any requirement for a warrant pursuant to the Fourth Amendment of the U.S. Constitution, but also of RCRA and TSCA requisites to inspections and evidence so obtained was properly admitted and for consideration in proceeding for violation of Act.

Toxic Substances Control Act - Rules of Practice - Evidence - Depositions - Depositions of parties in State court action (Respondents in the instant proceeding) were properly admitted into evidence under Rule 22.22 (40 CFR Part 22) which directs ALJ to admit all evidence except that which is irrelevant, immaterial, unduly repetitious or otherwise

unreliable. The depositions were also held to constitute admissions of parties and thus also admissible under Federal Evidence Rule 801(d)(2).

Toxic Substances Control Act - Strict Liability - Owners and Operators - Where evidence failed to establish that holder of bare legal title to property upon which PCBs were located, participated in operation of business or contributed in any way to violations of PCB regulation (40 CFR Part 761), holder could not be held liable for such violation and complaint as to such holder was dismissed.

Toxic Substances Control Act - Rules of Practice - Determination of Penalty - Remittance - Disposal - Where evidence established that payment of penalty and proper disposal of PCBs were beyond Respondent's financial capability and it appeared that only possibility of accomplishing proper disposal of PCBs and retention of Respondent as a viable business entity was remission of penalty, penalty would be remitted, provided PCBs were removed from storage and disposed of in accordance with the regulation.

Appearances for Complainant:	James Thunder, Esq. Debra A. Klassman, Esq. U.S. EPA, Region V Chicago, Illinois
Appearances for Respondent George J. Huth:	J. Ross Haffey, Jr., Esq. Edward G. Bohnert, Esq. Bernard, Haffey & Bosco Co., L.P.A. Lyndhurst, Ohio
Appearance for Respondent Joyce Nichols:	Frederick C. Bougher, Esq. Laribee & Cooper Medina, Ohio

Initial Decision

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). The proceeding was commenced on December 7, 1983, by the issuance of a complaint charging Respondent, Huth Oil Company, with violations of the Act and applicable regulations concerning PCBs, 40 CFR Part 761.[1/] Specifically, Respondent was charged with maintaining on April 15, 1983, a tank (No. 60-B) holding approximately 25,000 gallons of waste oil and sludge containing PCBs in concentrations of 50 ppm or greater in violation of 40 CFR 761.60(a), failure to mark the mentioned tank with the M_L label illustrated in 40 CFR 761.45(a) as required by § 761.40 (a)(1) and failure to develop and maintain annual PCB documents as required by 40 CFR 761.180(a). For these alleged violations, it was proposed to assess a penalty totaling $40,000.

Respondent through counsel answered, denying knowledge of PCBs on the premises, denying applicability of the cited regulations, denying responsibility for the alleged PCBs and requesting a hearing. As affirmative defenses, Respondent alleged that it maintained records, but the records were destroyed in a fire, that if PCBs are in the tank, they were secreted therein in oil

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1/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
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> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;
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> * * *.

The instant rules were promulgated under § 6(e) of the Act.

delivered to the premises by others at times unknown to Respondent and that the PCBs were delivered to the premises prior to the effective date of the regulations. After lengthy prehearing proceedings during which it appeared that the matter might be settled, Complainant on May 15, 1985, filed a motion for leave to amend the complaint. The amended complaint sought to add as a respondent, one Joyce Nichols upon the ground that she was the record owner of the property upon which Tank No. 60-B was located. The amended complaint designated the proceeding as George J. Huth, d/b/a Huth Oil Company and Joyce Nichols and clarified the basis for Count I as failure to remove the contents of Tank No. 60-B from storage prior to January 1, 1984, as required by 40 CFR 761.65(a) and (b). Respondent Nichols filed an answer, denying for want of knowledge the factual allegations of the complaint, alleging, inter alia, that she held title to the premises in question as fiduciary for Respondent, George J. Huth and requesting a hearing.

A hearing on this matter was held in Cleveland, Ohio on February 18, 19 and 20, 1986. At the hearing, Complainant moved to add a further count to the complaint, and to increase the proposed penalty by 5,000 to $45,000, because Tank No. 60-B was allegedly leaking at the time of an inspection on September 5, 1985.

Based on the entire record including the proposed findings and conclusions and briefs of the parties, I make the following:

Findings of Fact

1. Respondent, George J. Huth, d/b/a Huth Oil Company, is the owner of the property at 2891-3006 E. 83rd Street, Cleveland, Ohio. Mr. Huth

has been in the used or recycled oil business for 38 years and purchased the property from Ashland Oil Company, Inc. in 1981.

2. The mentioned property was conveyed by George J. Huth to Respondent, Joyce Nichols, by quit-claim deed, dated November 29, 1983 (Complainant's Exh S).

3. The property was reconveyed by Joyce Nichols to George J. Huth by quit-claim deed, dated December 4, 1985. This reconveyance was as a result of a lawsuit, George J. Huth v. Joyce Nichols, Case No. 85-085768-CV, Court of Common Pleas, Cuyahoga County, Ohio (complaint and amended complaint in the above styled action, Complainant's Exhs Y[2/] and R and Order of Partial Dismissal, dated December 24, 1985, Nichols' Exh 1). In this action, plaintiff, inter alia, denied that the conveyance referred to in the preceding finding was his free act and deed.

4. On April 15, 1983, the mentioned property was inspected by a team of EPA employees from the National Enforcement Investigation Center (NEIC), consisting of Russell Forba, Joyce Kopatich and Tom Newman (Tr. 331, 342). This inspection was part of a project, No. A-20, Waste Oil Recyclers, the purpose of which was to gather information as to the practices of waste oil recyclers, and the constituents of waste oil and was conducted pursuant to § 307 of the Resource, Conservation and Recovery Act (RCRA) (42 U.S.C. 6927), rather than the Toxic Substances Control Act (Tr. 329, 352, 354, 442-43).

2/ Although the transcript index of exhibits (Tr. 1-B) does not reflect that Complainant's Exh Y, the amended complaint in the mentioned action was admitted into evidence, the transcript at 578-79, which is consistent with the ALJ's personal record, shows that this exhibit was, in fact, admitted.

5. The mentioned team conducted inspections of nine facilities handling used or waste oil in New York and 14 in Ohio (Tr. 336). The names of facilities handling used or waste oil were furnished by the States. Huth Oil Company was on the list of such facilities furnished by the State of Ohio and Huth was the fifth such facility to be inspected by the team in Ohio (Tr. 349).

6. Mr. Forba, a senior environmental engineer for NEIC, was the project coordinator or supervisor, responsible for all sampling activities, including manner of collection, preservation, etc. (Tr. 337-38). Ms. Kopatich and Mr. Newman were technicians who performed the actual sample collection. The technicians traveled in a van which contained sampling equipment, 8 oz. bottles, materials for cleaning sampling equipment, lockers for storing collected samples, etc.

7. All inspections in connection with the Waste Oil Recycler's project including that of Huth Oil were unannounced and TSCA notice of inspection forms were not issued (Tr. 352). Mr. Forba, who traveled in a rented car, arrived at the Huth Oil Company facility at approximately 10 o'clock in the morning of April 15, 1983 (Tr. 351). He conferred with a Mr. Lou Fernandez, an employee of Huth Oil Co., explaining the purpose of the visit (Tr. 353). Mr. Fernandez stated that they would have to contact the owner, Mr. Huth, and apparently called him, for he (Huth) arrived at the facility a short time later.

8. Mr. Forba conferred with Mr. Huth in his (Huth's) car, informing him that the purpose of the visit was to gather information under RCRA for regulation development purposes, that they wanted information as to

where he obtained his oil, how it was processed, to whom it was sold and that they would be collecting samples (Tr. 354-55). Mr. Huth was cooperative, giving permission for samples to be taken, but declining the offer for split or duplicate samples, stating that he didn't need them (Tr. 356).

9. Mr. Huth informed Mr. Forba that he handled primarily crankcase oil and that approximately 20% was off-spec oil from Mobil Oil Company (Tr. 357-58). Mr. Huth designated various tanks by their capacity, e.g., Tank Nos. 250 and 158 for a 250,000-gallon tank and a 158,000-gallon tank, respectively. The mentioned tanks were for storing oil, while other tanks contained road oil and various sludges (Tr. 359). The tanks containing sludges, designated 60-A and 60-B, had been accumulating wastes for many years (Tr. 360-61). Mr. Huth was told that if the sampling disclosed substances that were regulated, the information would be furnished to the State of Ohio and U.S. EPA, Region V.

10. Concluding his discussion with Mr. Huth, Mr. Forba was shown around the facility and the location of the tanks by Mr. Fernandez. He (Fernandez) estimated the contents and quantities in the various tanks (Tr. 362-63). Mr. Forba then toured the facility with the technicians, Joyce Kopatich and Tom Newman, who either tagged the tanks to be sampled or marked them with a marker pen (Tr. 368). Tags were affixed to the valve or port in the tank from which the samples were to be drawn (Tr. 209). Although Tank No. 60-B had four ports or valves on its exterior, the only valve from which material could be drawn was the bottom valve

which was three or four feet above ground level (Tr. 365-66). After this tour, the technicians returned to the van and prepared the bottles for sampling by affixing labels thereto with numbers that corresponded to numbers on the tanks (Tr. 209-304).

11. Mr. Forba assigned station numbers, Nos. 51 through 61, to the ten tanks to be sampled (Tr. 377-78; Chain of Custody Record, Complainant's Exh C; Logbook, Complainant's Exh AA-1). Although he originally intended that the tanks would be sampled in the sequence of the station numbers, this did not in fact occur, because it was not convenient (Tr. 379). For example, Station No. 60, Tank No. 40 was sampled at 10:35 a.m., while Station No. 51, Tank No. 70, was sampled at 10:58 a.m. These are not necessarily precise times, but are approximations written on the sample tags by Mr. Forba (Tr. 399).

12. While Ms. Kopatich and Mr. Newman were drawing the samples, Mr. Forba was in the van preparing tags for the sample bottles (Tr. 388-89). The tags contained preprinted tag numbers, e.g., N-4950, and had previously been marked with the project code, A-20. Information placed on the tags by Mr. Forba included identification of the facility and the date. When the samples were brought to the van by the technicians, Mr. Forba wrote the station and tank numbers and the time the sample was taken on the tag, the technicians and Mr. Forba signed the tags and the tags were tied to the bottles (Tr. 391, 399-400, 403).

13. A total of 14 samples were taken, three of which were from Tank No. 40 and one of which was a mineral oil blank for quality control purposes (Tr. 396, 426-27; Tags, Complainant's Exhs K & X). After all the

samples were collected, the sample bottles with tags were inserted in zip-lock plastic bags, placed in a one-quart metal can packed with vermiculite, lids were placed on the cans and secured with clips and the cans placed in an ice chest (Tr. 215, 430). The Receipt for Samples and Chain of Custody Record were prepared and signed by the NEIC representatives. The Receipt for Samples was also signed by Mr. Fernandez as representative of Huth Oil and the inspection was completed at 12:00 noon.

14. The samples were delivered to the NEIC laboratory in Denver by Mr. Newman on May 2, 1983 (Tr. 218, 224; Chain of Custody Record, Complainant's Exh C). Receipt of the samples was acknowledged by Mr. Timothy Meszzaros, a chemist and laboratory sample custodian (Tr. 20, 24, 25; Chain of Custody Record). A pink copy of the Chain of Custody Record (Complainant's Exh C-1) was delivered to Mr. Newman who in turn gave it to Mr. Forba.

15. The Huth samples were analyzed for the presence of chlorinated paraffins, various metals and PCBs (Tr. 539-40). PCB analyses were conducted by Mr. Eric Nottingham, an NEIC chemist, with the assistance of a Ms. Janet Harris (Tr. 520). The analyses were conducted in accordance with EPA Test Method "The Determination of Polychlorinated Biphenyls in Transformer Fluid and Waste Oils," September 1982, Complainant's Exh L (Tr. 523-24). Sample No. N-4950 from Tank No. 60-B tested 500 parts per million (ppm) PCBs (Aroclor 1242) (Tr. 536-37, 539-40; Complainant's Exh J). Mr. Forba was informed of the results of the analyses by Mr. Nottingham and Mr. Forba relayed the information by telephone to the Ohio EPA and to U.S. EPA, Region V (Tr. 434).

16. On July 29, 1983, the Huth Oil Company facility was inspected by Ms. Patricia Klahr, an environmental scientist employed by the Ohio EPA (Tr. 81-83; Investigation Report, Complainant's Exh E). The purpose of the inspection was to inform Huth Oil Company of the PCB contamination, of Huth's responsibilities in connection therewith, to verify that the oil was on the site and that the tank was not leaking. Ms. Klahr conferred with George Huth, identified as President of Huth Oil Company, and they proceeded to Tank No. 60-B. Mr. Huth estimated the contents of the tank as approximately 25,000 gallons (Tr. 86). Mr. Huth is quoted as saying that Tank No. 60-B had been taken out of service over ten years ago because the topmost valve leaked and that nothing had been taken out of or added to the tank during that period (Tr. 89; Complainant's Exh E). Mr. Huth is also reported as stating that he formerly handled oil from electric utilities, which may have been the source of the PCBs, and that he did not feel responsible for their disposal. Ms. Klahr provided Mr. Huth with a PCB label as illustrated in 40 CFR 761.45 and Mr. Huth affixed the label to Tank No. 60-B (Tr. 89, 107).

17. The Huth Oil Company facility was next inspected on September 5, 1985, by Messrs. David Fisher, George Carter and Michael Dalton of the Ohio EPA as a result of a call from the Cleveland Fire Department that a PCB-labeled oil storage tank at the Huth Oil Company facility was leaking (Tr. 124; Inter-Office Communication, with enclosure, dated January 26, 1986, Complainant's Exh H). Proceeding to Tank No. 60-B, which had a PCB label, Mr. Fisher observed oil leaking from the third port from the bottom at the rate of approximately two drops per

minute (Tr. 134, 138). Amplifying this testimony, he indicated the actual leak was from the pipe leading from Port No. 3 to a point near the ground (Tr. 138, 140, schematic, Complainant's Exh E). He stated that the oil was collecting in a pool approximately six inches by six inches at the base of the tank. He testified that oil on one side of the tank had accumulated to within one-foot of the top of the dike surrounding the tank, which he estimated at approximately two-feet in height (Tr. 140-41, 148, 149-50). Mr. Huth was informed that the leak should be repaired and the material disposed of immediately (Tr. 142). On September 12, 1985, Mr. Huth called Mr. Fisher and told him that the leak had been stopped.

18. The proposed penalty, totaling $45,000, was computed in accordance with the PCB Penalty Policy (Complainant's Exh F), based on an estimated quantity of 25,000 gallons of PCB contaminated oil (Tr. 168-74). Because this worked out to 5,000 kilograms (kg) or more, the extent of potential damage was determined to be major and the probability of damage was determined to be in the mid-range (Circumstances Level 3), resulting in a proposed penalty of $15,000 for the violation alleged in Count I of the complaint, improper storage. An identical penalty of $15,000, based on the same reasoning, was proposed for Count II of the complaint, failure to mark the tank with a PCB label (Tr. 182-87). The penalty proposed for the violation alleged in Count III, failure to maintain records, was $10,000, the extent of potential damage again being classified as major, based on the quantity of PCBs, and probability of damage (Circumstances) being regarded as Level 4. As to Count IV, leaking of PCBs, improper disposal is Circumstance Level 1,

but inasmuch as the area contaminated was less than 150 sq. ft., the extent of potential damage was considered to be minor and a penalty of $5,000 was proposed (Tr. 190-91). Huth Oil Company's ability to pay was not considered, it being regarded as the company's obligation to submit information in that respect.

19. Evidence as to the financial condition of the sole proprietorship, Huth Oil Company, was introduced through Mr. James Jenkins, a certified public accountant with the firm of Jenkins, Kucharson and Company. Mr. Jenkins prepared financial statements for Huth Oil Company, i.e., a balance sheet as of December 31, 1985 and a statement of income for the year ending December 31, 1985, and a draft 1985 income tax return for Mr. Huth (Huth Exhs 2 and 3). The financial statements are compilations, i.e., based solely on information furnished by the owner, and are not audited nor is their accuracy vouched for by the preparing accountants.3/ The balance sheet shows a net worth of just under $200,000, of which approximately 37.5% consists of current assets (cash, accounts receivable and merchandise inventory). The amount of cash was established to Mr. Jenkin's satisfaction by bank statements and accounts receivable were established by invoices (Tr. 628-29). Merchandise (reclamation oil) inventory constitutes just over 25% of net worth. Inventory value was based solely on Mr. Huth's representation. Fixed assets--land, buildings and improvements, equipment, tanks and vehicles, net of depreciation--constitute the remaining 62.5% of net worth or owner's equity. Current

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3/ Pursuant to motion of counsel for Huth, the ALJ entered an order on February 21, 1986, directing that these exhibits be treated as confidential. Although confidential status of the exhibits will be retained, it is considered that the information therein can be discussed in general terms without breaching confidences. This is especially true, because neither the motion nor the order referred to the transcript.

liabilities in excess of $36,000 include a loan of $23,000 from John Huth, brother of Respondent George J. Huth, which is payable on demand and in arrears as to interest.

20. Although the Huth Oil statement of income for the year ending December 31, 1985, reflects a net income in excess of $30,000, the draft income tax return reflects a loss and no taxable income. Complainant has stipulated that the cost of removing and properly disposing of the oil is $136,000 (Tr. 650).

21. Although present in the hearing room, Respondents George J. Huth and Joyce Nichols, were not called as witnesses. Their depositions, taken on July 11, 1985, in connection with the litigation referred to in finding 3, were, however, admitted into evidence over the vigorous objections of counsel for Respondents.4/ Mr. Huth, 83 years of age at the time of the hearing, was partially handicapped from birth (A-6, 7). The impression created by the deposition is that he is a strong-willed man, in full possession of his faculties and possessing a good memory. Except for approximately one year, Mr. Huth has always operated his oil business from the 83rd Street address mentioned in finding 1 (A-12). In early June 1974, the office and records of Huth Oil Company were destroyed in a fire, which Mr. Huth attributed to arson (A-19, 20). Regarding PCBs, he denied knowing of their presence, but acknowledged having a suspicion PCBs might be there (A-30).

4/ Tr. 586, Complainant's Exhs A & B. For reasons discussed infra at 21, it is concluded that the depositions were properly admitted under Rule 22.22 (40 CFR Part 22) and also under Federal Evidence Rule 801(d)(2), concerning admissions by a party opponent. Deposition references will be to the exhibit letter followed by the page number.

22. Respondent, Joyce Nichols, was employed as a bookkeeper by Huth Oil Company in about 1972. Although Ms. Nichols had other duties in addition to bookkeeping, Mr. Huth stated that he personally handled almost all sales work, because it was a specialized business, requiring knowledge of chemistry, the qualities of oil, etc. (A-21, 22, 37). At some point in time not precisely ascertainable from the record, Ms. Nichols formed a sole proprietorship called Action Oil and entered into a contract in late 1981 or early 1982 with Mr. Huth to supply oil to Huth Oil Company, which included the lease to Action of a Mack truck (A-25 - A-28). According to Mr. Huth, he dealt with Ms. Nichols concerning oil purchases for a couple of months before he knew she owned Action Oil (A-27, 35).

23. On January 26, 1981, George J. Huth and Joyce Nichols entered into a purchase agreement whereby Joyce Nichols purported to purchase all of the assets of Huth Oil Service for the sum of $100,408.42 (Complainant's Exh P). Notwithstanding that the assets transferred included oil and inventory valued at $50,000, accounts receivable valued at $1,000, a 1979 Mack truck valued at over $34,000[5/] and other equipment, the initial down payment of only $3,000 was due within 15 days of the agreement and additional payments were contingent on annual profits in excess of $20,000 from the business being realized. Moreover, the accompanying instrument of indebtedness provides that upon Mr. Huth's death, any remaining indebtedness is to be canceled.

5/ Although Mr. Huth denied that the signatures on the purchase agreement and agreement of indebtedness were his, the fact that the purchase agreement included a Mack truck indicates that he may have been confused as to the supposed contract and lease agreement with Action Oil (finding 22).

Mr. Huth denied that the signatures on the purchase agreement and on the quit-claim deed conveying the 83rd Street property to Ms. Nichols were his (A-38, 39, 89-93, 95-97). He was adamant that Ms. Nichols would not be able to operate the business, because it was too specialized, and testified that he operated it 99% on his own.

24. Ms. Nichols, who now resides in Las Vegas, Nevada, testified that she obtained an Ohio real estate license during the period 1977-79 and that, in addition to selling real estate, she engaged in the waste oil business under the names Huth Oil and Action Oil (B-7, B-9, 10). Action Oil was formed in 1982. The waste oil businesses were conducted from the East 83rd Street address in Cleveland mentioned in finding 1. Ms. Nichols stated that her affiliation with Huth Oil and activities in the oil business terminated in the fall of 1984 (B-11, B-25).

25. Referring to the purchase agreement (finding 23), Ms. Nichols testified that she operated Huth Oil Company from the date of the agreement, January 26, 1981, until the fall of 1984 (B-22-24). According to Ms. Nichols, Mr. Huth stayed around and did whatever he wanted to do. She claimed that the conveyance of the 83rd Street property to her (finding 2) was part of a transaction whereby she sold Action Oil to a firm called Speedy Oil (B-52-54, 57-59). Although she indicated that Mr. Huth could have the property back at any time he wished, she testified that she could not be certain Mr. Huth knew she had acquired title to the property (B-59, 60).

Conclusions

1. Samples and evidence obtained at the inspection of the Huth Oil Company facility on April 15, 1983, were properly admitted into evidence

and are for consideration in resolving the issues presented by this proceeding.

2. The depositions of George J. Huth (Complainant's Exh A) and Joyce Nichols (Complainant's Exh B) taken in the action styled, George J. Huth vs. Joyce Nichols, No. 85-085768-CV, Court of Common Pleas, Cuyahoga County, Ohio, contain relevant evidence and were properly admitted into the record of this proceeding under Rule 22.22 (40 CFR Part 22). Moreover, the depositions constitute admissions and thus were properly admitted pursuant to Federal Evidence Rule 801(d)(2).

3. On April 15, 1983, Tank No. 60-B at the Huth Oil Company facility contained PCBs at a concentration of 500 ppm.

4. The sludges and PCBs in Tank No. 60-B had been placed there more than ten years prior to the inspection, were being stored for disposal and thus were required to be removed from storage and properly disposed of prior to January 1, 1984 (40 CFR 761.65(a)).

5. At the time of an inspection on July 29, 1983, Tank No. 60-B was not marked with the M_L label illustrated in 40 CFR 761.45 as required by § 761.40.

6. At the time of an inspection on July 29, 1983, Respondent did not have records on the use and dispositon of PCBs as required by 40 CFR 761. 180.

7. At the time of an inspection on September 5, 1985, Tank No. 60-B was leaking which constitutes an improper disposal of PCBs (40 CFR 761.3 and 60(d)).

8. Although Ms. Nichols held bare legal title to the property upon which Tank No. 60-B is located during the period November 29, 1983 to

December 4, 1985, the evidence fails to establish that she participated in the operation of the business or contributed in any way to the violations found herein and thus the complaint as to her will be dismissed.

9. For the violations found herein, Respondent George J. Huth, d/b/a Huth Oil Company is liable for a civil penalty in the amount of $45,000. This penalty will be remitted and canceled, however, provided Respondent removes from storage and properly disposes of the contents of Tank 60-B and decontaminates the tank in accordance with 40 CFR 761.79 on or before December 1, 1986.

Discussion

Respondent Huth has filed a motion to strike all evidence, testimony and documents obtained directly or indirectly as a result of the EPA inspection of the Huth Oil Company facility on April 15, 1983 (Motion, Proposed Findings and Conclusions and Brief In Support Thereof, filed April 8, 1986). The basis of the motion is that the inspection was a violation of Huth's constitutional rights and also a violation of statute. Huth cites familiar cases, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967) and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) for the proposition that Fourth Amendment guarantees against unreasonable searches and seizures are applicable in civil as well as criminal proceedings and that warrantless searches are generally unreasonable (Brief at 2, 3). No issue need be taken with the mentioned proposition in order to reject the claim Huth's constitutional rights were violated, because it is well settled that a search conducted pursuant to

a valid consent is constitutionally permissible and that whether such consent has been given is a question of fact. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See also Agland Incorporated, I. F. & R. Appeal No. 83-2 (Final Decision, April 18, 1985). Here, the evidence permits only one conclusion, i.e., that Mr. Huth voluntarily consented to the inspection and the taking of samples (findings 7-10). There is no evidence of threats or coercion. Moreover, Mr. Huth was informed that if regulated substances were found the Ohio EPA and U.S. EPA, Region V would be notified (finding 9), thus negating any claim of deception or entrapment.6/ It is concluded that Mr. Huth voluntarily consented to the inspection and that a warrant for that purpose was unnecessary.

Turning to the alleged statutory violations, the inspection of April 15, 1983, was performed under RCRA rather than TSCA (finding 4). Huth points out that RCRA § 3007 (42 U.S.C. 6927), relied upon as authority for the inspection, mandates that a copy of results of any analyses on samples collected shall be furnished promptly to the owner, operator or agent in charge and that this was not done in the Huth inspection or at any of the other facilities inspected by the Forba inspection team (Brief at 11, 12). Huth also points to Mr. Forba's testimony (Tr. 341) that NEIC had made a decision prior to commencing Waste Oil Recycler's project inspections that testing for the presence of PCBs would be accomplished and argues that

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6/ Respondent's claim to the contrary (Brief at 6, 7) is not supported by the record and is rejected.

inspections for TSCA enforcement purposes must be conducted under § 11 (15 U.S.C. 2610) of that Act.7/

Huth says that the cited section of TSCA provides no express authority for the collection of samples and emphasizes the statutory language (§ 11(a)). "Such an inspection may only be made upon the presentation of appropriate

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7/ Brief at 13-15. TSCA § 11 (15 U.S.C. 2610) provides in pertinent part:

> (a) In General--For purposes of administering this Act, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce. Such an inspection may only be made upon the presentation of appropriate credentials and 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, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner.
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> (b) Scope--(1) Except as provided in paragraph (2), an inspection conducted under subsection (a) shall extend to all things within the premises or conveyance inspected (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of this Act applicable to the chemical substances or mixtures within such premises or conveyance have been complied with. (2) No inspection under subsection (a) shall extend to--
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> (A) financial data,
> (B) sales data (other than shipment data),
> (C) pricing data,
> (D) personnel data, or
> (E) research data (other than data required by this Act or under a rule promulgated thereunder),
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> unless the nature and extent of such data are described with reasonable specificity in the written notice required by subsection (a) for such inspection.
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> * * * *

credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected." Written notices of inspection were not issued to Huth or any of the other facilities inspected during the Waste Oil Recycler's project (finding 7) and arguing by analogy to the reasons for the exclusionary rule in criminal cases, Huth asserts that evidence obtained in violation of the statute should be excluded to preserve judicial integrity, deter official lawlessness and give meaning to the command of the Act (Brief at 16). Huth also complains that the inspection on July 29, 1983, conducted by Ms. Klahr of the Ohio EPA was conducted without issuing the required statutory notice.

In Electric Service Company, TSCA Appeal No. 82-2 (Final Decision, January 7, 1985), where Complainant relied in part on an inspection conducted by a representative of the Ohio EPA, who was not an authorized representative of U.S. EPA and who did not issue a notice of inspection as required by § 11(a) of TSCA, the Judicial Officer rejected arguments that the evidence should be excluded, holding that Respondent's consent to the inspection operated as a waiver of the statutory notice requirement. As an alternative basis for the decision, the Judicial Officer cited Respondent's failure to raise a timely objection. The alternative basis is not applicable here, because counsel specifically objected to admission of the report of analyses of Huth samples upon the ground that a copy of the report was not provided Huth as required by § 3007 of RCRA (Tr. 542). Although this may fall short of an objection that a written notice of inspection was not issued as required by TSCA, counsel may be forgiven for this omission, if it be such, because the April 15 inspection purported to be conducted under RCRA. Under these circumstances, the

objection is construed as encompassing failure to follow requisites to an inspection prescribed by TSCA. Because, however, consent operates as a waiver of statutory no less than constitutional objections to a search and seizure, it is concluded that the objection is not well taken, that evidence obtained in the April 15 inspection of the Huth facility was properly admitted and is for consideration herein. Electric Service Company, supra. Accordingly, the motion to strike is lacking in merit and is denied. The evidence shows that Huth also consented to the inspection of July 29, 1983, and the same ruling is applicable.

As indicated previously, the depositions of Respondents, George J. Huth and Joyce Nichols, in the Court of Common Pleas action identified in finding 3, were admitted into evidence over the vigorous objections of counsel for Respondents (finding 21). On brief, Ms. Nichols has renewed her objections and filed a motion to strike (Brief in Support of Proposed Findings of Fact, Conclusions of Law and Proposed Order, and Motion, filed April 9, 1986). The basis is that in accordance with FRCP Rule 32 depositions taken in prior proceedings, in order to be admissible, must involve the same subject matter and parties or their representatives or successors in interest (Brief at 2, 3). Because neither the parties nor the issues are the same, Nichols argues that the depositions were improperly admitted and should be stricken from the record. She also cites Federal Evidence Rule 804(b)(1), listing former testimony as an exception to the hearsay rule provided the declarant is unavailable as a witness, which is obviously not the case here.

Rule 22.22(a) of the Rules applicable to this proceeding (40 CFR Part 22) provides in pertinent part "The Presiding Officer [ALJ] shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise

unreliable or of little probative value, * * * *." The depositions of Mr. Huth and Ms. Nichols are obviously relevant, cannot be characterized as unduly repetitious and clearly have probative value. Accordingly, it is concluded that the depositions were properly admitted under Rule 22.22 irrespective of whether they would be admissible under the Federal Rules of Evidence.

Moreover, it is concluded that the depositions were and are admissible under Federal Evidence Rule 801(d), Statements Which Are Not Hearsay, and in particular (d)(2), providing in pertinent part: "(2) Admissions By Party-Opponent--The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity * * *." FRCP Rule 32(a), cited by Nichols, provides that in order for a deposition taken in one action to be admissible in a subsequent action, the subsequent action must involve the same subject matter and the same parties or their representatives or successors in interest. The requirement for substantial identity of issues and parties is readily understandable when a deposition of an unavailable witness is offered in a subsequent action.8/ No such restrictions are applicable either in logic or in law, however, where the deposition contains statements constituting admissions offered against a party.9/

8/ See Federal Evidence Rule 804(b)(1) and Hub v. Sun Valley Co., 682 F.2d 776 (9th Cir. 1982).

9/ See, e.g., United States v. Riley, 684 F.2d 542 (8th Cir. 1982) (guilty plea in state prosecution); United States v. Heffington, 682 F.2d 1075 (5th Cir. 1982) (grand jury testimony) and 4 Weinstein's Evidence 801-184 et seq. While neither of the cited cases involve depositions, it is anomalous indeed, if admissibility of sworn statements in the presence of counsel is to be more circumscribed than extrajudicial statements. Cases cited by Nichols, Alamo v. Pueblo International, Inc., 58 F.R.D. 193 (D. Puerto Rico 1972) and United States v. Silliman, 6 F.R.D. 262 (D. N.J. 1946), although containing statements supporting her view of the rule, are not controlling, because the depositions were taken in actions to which the party against whom the depositions were offered was not a party and both decisions predate the adoption of the Federal Rules of Evidence.

The statement need only be contrary to a party's interest when offered at trial.10/ Ms. Nichols' statement (finding 25) that she operated Huth Oil Company from January 26, 1981, until the fall of 1984 is clearly against her interest insofar as this proceeding is concerned and thus admissible as an admission by a party under Federal Evidence Rule 801(d)(2)(A).

Respondents have insisted that complainant carry the burden placed upon it by Rule 22.24 (40 CFR Part 22) of establishing the violations charged by a preponderance of the evidence.11/ The findings with respect to sampling, chain of custody and testing clearly establish that Tank No. 60-B contained PCBs at a concentration of 500 ppm on April 15, 1983 (finding 10-15). Respondents have made no claim to the contrary.

The conclusion that the sludges and PCBs in Tank No. 60-B had been placed there more than ten years prior to the inspection on April 15, 1983, is based on statements Mr. Huth made to inspectors (findings 9 and 16). Huth has made no attempt to show that the facts are otherwise. Indeed, questions by counsel for Huth indicate that the waste oil (sludges) in

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10/ Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714 (8th Cir. 1981).

11/ Complainant's motion for an accelerated decision upon the ground that there was no dispute as to material fact was denied (Opinion and Order, dated January 24, 1986). On brief, Complainant has alluded to FRCP provisions whereby Respondents and their counsel would be subject to sanctions for refusal to admit that Tank No. 60-B contained PCBs at a concentration in excess of 50 ppm and for unreasonably delaying and multiplying the proceedings (Brief at 10 et seq.). This argument is based upon the report of a consultant, Marine Pollution Control, employed by Huth which was apparently directed primarily toward the means and costs of disposal of the PCBs and which indicates Tank No. 60-B contained PCBs at a concentration of 222 ppm (proposed Huth Exhibit 4). Complainant predicates error on the denial of its motion to reopen the record to admit the exhibit into evidence after the proffer was withdrawn (Tr. 589-601). Decisions as whether to reopen the record after a party has rested are discretionary with the presiding ALJ and in any event, the exhibit is not in evidence solely because of counsel's objection (Tr. 591-93).

Tank No. 60-B may have been there for almost 20 years (Tr. 556). Because "disposal" is defined as including "* * actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB items" (40 CFR 761.3) and there appears to be no authorized use for this material, it is clear that the PCBs were stored for disposal within the meaning of the regulation. Because the PCBs were stored for disposal prior to January 1, 1983, in accordance with 40 CFR 761.65(a) they were required to be removed from storage and properly disposed of prior to January 1, 1984.12/

The evidence clearly establishes (finding 16) and Respondent Huth has admitted13/ that Tank No. 60-B was not marked with an M_L label as illustrated in 40 CFR 761.45 prior to the inspection of July 29, 1983. There is also no real dispute that at the time of this inspection, Respondent did not have records on the use and disposition of PCBs as required by 40 CFR 761.180. While initially maintaining that required records were destroyed in the June 1974 fire described by Mr. Huth (finding 21), Huth has denied knowledge of the presence of PCBs and thus can

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12/ Because PCBs were in Tank No. 60-B several years prior to the April 18, 1978, effective date of initial regulations implementing § 6(e) of the Toxic Substances Control Act (43 FR 7156, February 17, 1978), an argument can be made, as indicated in affirmative defenses in Huth's answer, that the regulation is being given retroactive effect and that any disposal of the PCBs is a CERCLA (Superfund) matter (42 U.S.C. 9601 et seq.). The note at 40 CFR 761.60 makes clear, however, that PCBs and PCB items landfilled prior to February 17, 1978, are exempt from the requirement of removal from storage and disposal. Here, Huth's storage of PCBs continued after the effective date of the regulation and it is concluded that the mentioned fact is appropriately for consideration in the determination of the penalty. In any event, this argument has not been repeated on brief and is deemed to have been abandoned.

13/ Response of George J. Huth, d/b/a Huth Oil Company, to Motion For An Accelerated Decision, received January 6, 1986, footnote 2.

hardly be expected to have maintained records on their use and disposition. The evidence clearly establishes, with no contention being made to the contrary, that Tank No. 60-B was leaking on September 5, 1985 (finding 17).

Regarding Respondent Nichols, the question is whether her testimony that she operated Huth Oil Company from January 26, 1981, until the fall of 1984 (finding 25) together with the fact that she held bare legal title to the 83rd Street property upon which the Huth Oil facility is located during the period November 29, 1983, to December 4, 1985, is sufficient to fasten upon her responsibility for the violations found. For the reasons hereinafter appearing, it is concluded that this question must be answered in the negative. Unlike RCRA,14/ the Toxic Substances Control Act is not a strict liability statute and it has been held that an owner was not jointly and severally liable for improper storage of PCBs resulting from cleanup operations by its licensee where there was no showing that the owner was in any way involved in the cleanup activities, Suburban Station, Docket No. TSCA-III-40 (Initial Decision, September 4, 1984). This decision was based upon the absence of any indication in the Act or regulation that liability was to be placed upon owners irrespective of whether they had caused or contributed to the violation.15/ Accordingly, it is concluded that

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14/ Arcom, Inc., Drexler Enterprises, Inc., et al., RCRA (3008) Appeal No. 86-6 (Final Decision, May 19, 1986).

15/ Suburban Station, supra, cited Amoco Oil Co. v. Environmental Protection Agency, 543 F.2d 270 (D.C. Cir. 1976), holding that a regulation under Clean Air Act imposing strict liability on refiners as lessors of retail gasoline outlets for violations of unleaded gasoline regulation was invalid where there was no indication in the Act that Congress intended liability to be imposed without regard to fault. See also Amoco Oil Co. v. United States, 450 F.Supp. 185 (D.C. Mo. 1978) (word "leases" in unleaded gasoline regulation could not be interpreted as applicable to owner, lessor of retail gasoline station so as to hold owner strictly liable for violations of unleaded gasoline regulation attributable to activities of lessee).

Ms. Nichols' bare legal title to the 83rd Street property, acquired after the PCBs were discovered and the violations found,[16/] is insufficient to hold her liable therefor.

More troublesome, is the evidence Ms. Nichols operated Huth Oil Company from the date of the purchase agreement, January 26, 1981, until the fall of 1984. This period encompasses the inspections of April 15 and July 29, 1983, the notification to Respondent Huth of the presence of PCBs and the receipt of an explanation as to the requirements of the regulation with respect thereto. There can, of course, be no question that an operator of a facility where PCBs are stored is responsible for compliance with the PCB regulation, is liable for civil penalties for violations of the regulation and can be required to properly dispose of PCBs, stored in contravention thereof. The question is whether Ms. Nichols was such an operator. Irrespective of how Ms. Nichols regarded herself, it is clear that Mr. Huth did not regard her as an operator of Huth Oil Company and indeed, did not consider her capable of doing so (finding 23). Mr. Huth apparently considered that the only contract he signed with Ms. Nichols involved the purchase of oil and the lease of a Mack truck (finding 22). See also note 5, supra. Moreover, it is significant that there is no evidence of Ms. Nichols' presence during any of the inspections of the Huth facility and that in each instance, the owner and the person in charge of the facility was Mr. Huth. Under these circumstances, it is concluded that Ms. Nichols has not been shown to be an operator of the Huth Oil

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16/ Nichols emphasizes that she was not the owner of the property on April 15, 1983 (Proposed Findings of Fact and Conclusions of Law).

Company facility so as to be responsible for the violations of the PCB rule herein found.17/

The evidence clearly establishes that Mr. Huth was the operator of the Huth Oil Company facility when the PCBs were placed in Tank No. 60-B, that he was the owner and operator at the time of the inspections on April 15 and July 29, 1983, and so far as the record discloses, was the operator, if not the legal owner, at the time of the inspection on September 5, 1985. Moreover, he was the owner and operator at the time of the hearing. Accordingly, there can be no question as to Huth's liability for penalties and responsibility for disposal of the PCBs.

Turning to the penalty, the amount thereof was calculated in accordance with the PCB Penalty Policy, 45 FR 59770 et seq. (September 10, 1980) and a penalty so calculated is prima facie appropriate.18/ The record reflects, however, that either insufficient or no consideration was given to two of the factors required to be taken into account by § 16(a)(2)(B) of the Act in determining the penalty, namely, ability to pay and degree of culpability. Regarding the former, the evidence reflects that Huth Oil Company has a net worth of just under $200,000 (finding 19) and

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17/ While it might be considered "poetic justice" to hold Ms. Nichols jointly and severally liable for the violations of the regulation herein found, this is not the forum for determining the legality or propriety of her transactions with Mr. Huth. In addition to the one-sided nature of the purported purchase agreement (finding 23), and the fact she held title to the 83rd Street property, the record reflects that she had a deed to Mr. Huth's residence and that her name was on his bank accounts.

18/ Lissner Corporation, Docket No. RCRA-V-W-84-R-065 (Initial Decision, July 30, 1985).

a penalty of $45,000 is conceivably within the firm's ability to pay.[19/] It should be noted, however, that over 25% of net worth is represented by oil inventory and it is common knowledge that the price of oil has declined substantially since December 31, 1985, the date of the statements. It is therefore concluded that ability to pay or more accurately, the lack thereof, warrants a 25% reduction in the proposed penalty of $45,000.

Regarding the degree of culpability, the fact that the PCBs were placed long prior to the effective date of the PCB rule and that Mr. Huth was unaware of their presence would ordinarily warrant a reduction of from 20% to 25% in the base penalty of $40,000. This reduction is not and should not be applicable to the $5,000 assessed for the improper disposal represented by the leaking PCBs found in the inspection on September 5, 1985, because this was long after Huth was aware of the presence of PCBs. Mr. Huth acknowledged having a suspicion that PCBs might be present (finding 21) and under those circumstances the adjustment for lack of culpability is limited to 10%. Application of these adjustments would result in a total penalty of $29,750. Because, however, this reduction would reduce the incentive to properly dispose of the PCBs, the full amount of the proposed penalty of $45,000 will be assessed.

Payment of the penalty will do nothing to eliminate the threat to the environment represented by the improperly stored PCBs and the penalty

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19/ It is recognized that the financial statements are compilations, i.e., based solely on representations of Mr. Huth. There is, however, no inherent reason for refusing to accept such statements and if the financial picture thereby presented is in accord with other evidence, including impressions from the appearance of Respondent, which the deposition establishes is the case here, the statements are clearly acceptable probative evidence. It is worthy of note that many small business concerns are in no position to furnish historical costs, consistent inventory evaluations, etc., required for audited and verified financial statements.

will be canceled and remitted, provided Respondent Huth removes from storage and properly disposes of the PCBs and decontaminates Tank No. 60-B in accordance with 40 CFR 761.79 on or before December 1, 1986.20/ It is recognized that the PCB Penalty Policy provides that cleanup costs are part of the cost of the violation and that ordinarily a reduction in the penalty for such costs is not appropriate (45 FR at 59775). Here, however, there is little chance of the violation being repeated, except for the continuing violation of improper storage, and the costs of properly disposing of the PCBs, stipulated to be $136,000, may well be beyond Huth's financial capability. Under these circumstances, remission of the penalty appears to be the only possible means of accomplishing proper disposal of the PCBs at no cost to the government and of Huth remaining a viable business entity. In any event, I am not bound by the Penalty Policy (40 CFR 22.27 (b)).

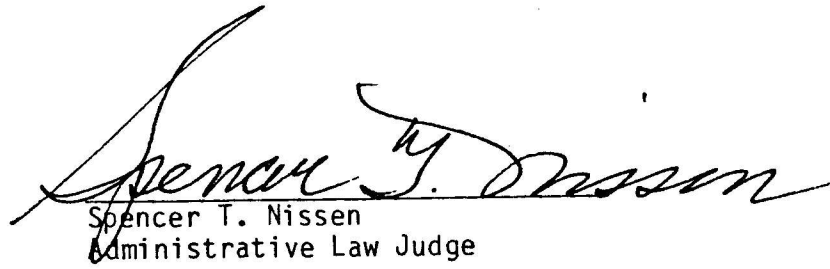
O R D E R

Having been found to have violated the Act and regulation as charged in the complaint, a penalty of $45,000 is assessed against Respondent, George J. Huth, d/b/a Huth Oil Company in accordance with § 16(a)(2)(B) of the Act (15 U.S.C. 2615). This penalty will be canceled and remitted, however, provided Respondent removes and properly disposes of the PCBs in Tank No. 60-B and decontaminates the tank in accordance with 40 CFR 761.79 on or before December 1, 1986.

20/ See, e.g., O'Leary v. Moyer's Landfill, Inc., 523 F.Supp. 642 (D.C. Pa. 1981) (civil penalties under Clean Water Act and RCRA would not be imposed where court determined money would be better spent on remedial measures).

The complaint as to Respondent Joyce Nichols is dismissed.[21]

Dated this 2d day of June 1986.



Spencer T. Nissen
Administrative Law Judge

21/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Administrator elects, sua sponte, to review the same as therein provided, this initial decision will become the final order of the Administrator in accordance with Rule 22.27(c).