4/9/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
University of Delaware,	)	Docket No. TSCA-III-452
	)	
Respondent	)	

ORDER DENYING MOTION TO EXCLUDE
AND GRANTING MOTION TO AMEND PRIOR ORDER

With its prehearing exchange, the University included copies of documents relating to proceedings instituted by Region III of EPA against other colleges and universities accused of violating the "PCB Rule," 40 CFR Part 761. The stated purpose of referring to these proceedings, most of which were apparently settled by consent agreements,[1/] was to demonstrate the extent to which EPA deviates from the matrix in the Penalty Policy and thus to support the University's contention that the penalty proposed herein is contrary to EPA's objective of achieving uniform and consistent results in penalty assessments (letter, dated August 9, 1990). Additionally, the University referred to an offer of settlement, which slightly reduced the proposed penalty, as being at odds with the mentioned EPA policy.

[1/] The documents include an initial decision which, of course, may be cited for its precedential value irrespective of the ruling herein.

On September 13, 1990, Complainant filed a motion to exclude, asserting that evidence relating to settlement or compromise, which would be excluded under the Federal Rules of Evidence (Rule 408), is not admissible under the Consolidated Rules of Practice (Rule 22.22(a)). With respect to proceedings to which the University is not a party, Complainant asserts that such evidence has little or no probative value and should be excluded as irrelevant.

Opposing the motion, the University points out that a goal of the Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, PCB Penalty Policy, 45 Fed. Reg. 59770 et seq. (September 10, 1980), is that penalties be assessed in a fair, uniform and consistent manner (Response To Motion, dated September 28, 1990). It argues that the need for "even-handed" treatment in assessing penalties is fundamental and is required by the Act, i.e., "such other matters as justice may require" in section 16(a)(2)(B). The University expresses a willingness to accept the penalty to the extent liability is proven, if all PCB penalties were determined finally and solely by application of the penalty matrix. It points out, however that the initial penalty assessment is only the first and not the most important step in assuring that uniformity is achieved and that, in practice, penalty matrix numbers are dramatically reduced.[2/]

[2/] Data from BNA Chemical Regulation Reporter, cited in State of West Virginia, Department of Highways, TSCA-III-136 (continued...)

Under such circumstances, the University claims that the best and only way to assure evenhandedness is to compare cases, that is, results and factual context.

The University argues that the cases cited by Complainant, State of West Virginia, Department of Highways, supra[3/] and Briggs and Stratton Corp., TSCA Appeal No. 81-1 (February 4, 1981) actually support its position rather than Complainant's. This is so, according to the University, because, although the evidence [of other cases] was found unpersuasive, in neither case was the evidence excluded.

As to the reference to a settlement offer, the University points out that while Federal Evidence Rule 408 is intended to exclude evidence, which, if admissible, would discourage attempts to settle cases, the Rule expressly does not require exclusion, when the evidence is offered for another purpose, such as proving bias or prejudice of a witness. The University asserts that such is the case here as it wishes to offer the evidence for the purpose of showing that Complainant is ignoring TSCA provisions which address reduction of penalties

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[2/](...continued)
(Initial Decision, March 21, 1986) reflect an extrapolated reduction of 89% in actual as compared to proposed penalties.

[3/] State of West Virginia, Department of Highways, supra, was affirmed by the Judicial Officer, TSCA Appeal No. 86-2 (January 21, 1987). He adopted the ALJ's reasoning and conclusion as to the lack of relevance, for comparative purposes, of criminal penalties assessed under TSCA and the Clean Air Act.

and evenhanded treatment. It argues that evidence of the non-uniform application of TSCA section 16 and the PCB penalty system should be admissible.

The parties have exchanged additional memoranda which essentially repeat previous arguments summarized above.

D I S C U S S I O N

Because of the myriad of factors which influence settlements, many of which may not be reflected in the settlement documents, settlements with other colleges and universities charged with violating the "PCB Rule" are unlikely to be probative of an appropriate penalty or settlement in the instant case. Additionally, evidence necessary to demonstrate that the circumstances of the violations in other cases are factually similar to the case at bar risks a trial of unproductive collateral issues. Notwithstanding the foregoing, the motion to exclude will be denied at this time and the University will be permitted to move for admission of the documents in the light of evidence introduced at the hearing.[4/]

PRIOR ORDER

The University having no objection to Complainant's motion that the order of February 15, 1991, which granted in part Complainant's motion for an accelerated decision, be amended so

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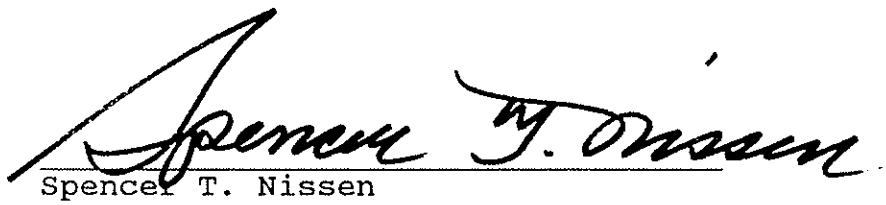
[4/] Documents included in prehearing exchanges, being analogous or equivalent to discovery, are not in evidence unless offered and admitted at the hearing.

as to require the University to furnish additional prehearing information, the motion is granted and the order accompanying the motion will be entered.

O R D E R

The motion to exclude is denied. An order granting the motion to amend the order of February 15, 1991, is entered contemporaneously.[5/]

Dated this 9th day of April 1991.



Spencer T. Nissen
Administrative Law Judge

[5/] Because the University's reply to the motion states that it will submit a new offer of settlement in the near future, I will defer scheduling this matter for hearing. Counsel are directed to report as to the status of this matter on or before May 17, 1991.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

IN RE: UNIVERSITY OF DELAWARE 417 Academy Street Newark, Delaware 19716 Respondent	Docket No. TSCA-III-452

ORDER GRANTING
COMPLAINANT'S MOTION TO AMEND ORDER

Complainant has filed a Motion to Amend the Courts Order Granting in Part Motion For An Accelerated Decision, issued on February 15, 1991. Complainant's Motion sought an order to compel Respondent to conduct exchange witness lists and documents, pursuant to 40 CFR Section 22.19. Specifically, the Complainant requests that the Respondent provide copies of all records which will be relied upon by Respondent to establish that:

(1) It performed visual inspections and maintained records of visual inspections for all its PCB Transformers.

(2) It is entitled to a reduced visual inspection schedule, pursuant to 40 CFR 761.30(a)(1)(xiii), for all its PCB Transformers.

(3) It us entitled to enforcement discretion under the PCB Spill Cleanup Policy for the improper disposal of PCBs identified in Counts XII and XIII of the Complaint.

To the extent the Respondent intends to offer expert or fact witnesses to discuss any aspect of its visual inspection records, the applicability of a reduced visual inspection schedule and/or the PCB Spill Cleanup Policy, Complainant requests that the Court order the Respondent to provide the name(s) of the witness intended to be called, together with a summary of the expected testimony, as set forth in 40 CFR 22.19(b). Further, Complainant requests that such records, lists and summaries be provided within 20 days of the issuance of the Amended Order.

The Court, being fully advised and based upon good cause shown, holds that the relief requested by Complainant will serve to expedite the disposition of this proceeding and, therefore, in accordance with the objectives of 40 CFR 22.19:

IT IS ORDERED, that Complainant's Motion to Amend Order is granted. The Court's Order Granting In Part Motion for an Accelerated Decision is hereby amended. Respondent is ordered to provide the records set forth above within 20 days of the issuance of this Amended Order.

Dated this 9th of April 1991.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the originals of the **ORDER DENYING MOTION TO EXCLUDE AND GRANTING MOTION TO AMEND PRIOR ORDER and ORDER GRANTING COMPLAINANT'S MOTION TO AMEND ORDER**, dated April 9, 1991, in re: University of Delaware, Dkt. No. TSCA-III-452, were mailed to the Regional Hearing Clerk, Reg. III, and copies were mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: April 9, 1991

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