1/18/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | } | |
| | } | |
| TRW, Inc. | } | Docket No. TSCA-V-C 33-89 |
| | } | |
| Respondent | } | |

ORDER GRANTING MOTION FOR ACCELERATED DECISION IN PART AND SETTING FURTHER PROCEDURES

## I. Complainant's Motion

Pursuant to Section 22.20(a) of the U.S. Environmental Protection Agency (EPA) Rules of Practice (Rules), 40 C.F.R. §22.20, the Complainant has filed a Motion for Accelerated Decision (Motion) in the above-captioned case. The Motion seeks to establish the liability of TRW, Inc. (Respondent or TRW) for the two improper disposal counts set out in the Complaint. Complainant alleges that Respondent violated two conditions of its August 2, 1985 "Amended Approval Conditions for the Secure Landfill at TRW, Minerva, Ohio Manufacturing Facility" (Amended Approval), in violation of Section 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2614.

Specifically, the Complainant alleges in Count I that the failure of Respondent to sample and analyze each of the nine monitoring wells in June 1987 for groundwater composite samples, was in violation of Condition 7 of the Amended Approval and hence, in violation of disposal requirements set forth in Sections 761.60 and 761.75 of the EPA Regulations on the Disposal of PCBs (Regulations), 40 C.F.R. §§761.60 and 761.75, and in violation of Section 15 of TSCA. In Count II, Complaint avers that the failure of Respondent to report monthly leachate production in its May 27, 1988 "Secure Cell Yearly Post Closure Monitoring Report" (1988 Annual Report) to EPA, was in violation of Condition 17(b) of its Amended Approval and, therefore, also in violation of the above cited Sections of the Regulations and TSCA. Complainant does not seek to put at issue in the motion the amount of penalty to be assessed.

As background, it should be noted that, on May 31, 1985, EPA issued to Respondent an approval plan under TSCA for a chemical waste landfill at its manufacturing facility in Minerva, Ohio. The approval plan authorized a one time disposal of approximately 23,000 cubic yards of PCB contaminated materials at TRW's manufacturing facility. The August 2, 1985 Amended Approval required, among other things, the installation of nine ground

water protection wells and a leachate collection system.

Complainant alleges that under Condition 7 of the Amended Approval, TRW was required to collect and analyze individual water samples in September and March from each of the nine monitoring wells, and during the remaining months, prepare and analyze two groundwater composite samples. Complainant in its Motion states that Respondent admitted that the June 1987 well composite samples were not collected, explaining that the omission was "due to an inadvertent error by Respondent's consultant," as reported to the EPA by a letter dated July 28, 1987. The omission was also noted in TRW's 1988 Annual Report at p. 1. Motion at 3.

Condition 17(b) of the Amended Approval requires TRW to file with EPA by May 31st of each year an annual report to include, among other things, the quantity of leachate produced monthly by the leachate collection system during the previous year. Complainant asserts that the 1988 Annual Report does not contain monthly leachate production records, but rather daily averages; that no leachate production was reported between June 1987 through August 1987; and that the leachate production information submitted by TRW in its Prehearing Exchange was not timely received and, hence, does not satisfy Condition 17(b). Id. at 4, 8. The Complainant states that instead of covering the period from June 1987 to May 1988, TRW's 1988 Annual Report notes leachate production "over a nine month period between September and May," averaging it on a daily basis. Motion at 4.

Complainant also takes the position that, because the two separate approval conditions serve separate purposes and, therefore, protect against different environmental threats, at least two separate disposal violations have occurred. Motion at 6-7, 9. Complainant relies on the "Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy" (PCB Penalty Policy), 45 Fed. Reg. 59770, 59778 (September 10, 1980). The PCB Penalty Policy, 45 Fed. Reg. at 59782, recommends assessment of multiple violations where the violations are in substantially different locations and where the separate locations present separate and distinct risks to human health and the environment. Complainant contends that the well sampling is to measure any outward PCB flow from the cell whereas the purpose of recording monthly leachate production is to assure the integrity of the cell. Complainant states that a critical purpose of the leachate recording is to ensure that the leachate collection system is not clogged and that the system is working. Complainant concludes that the leachate production violation occurred within the cell itself as opposed to the sampling violation which occurred at the wells. Motion at 11.

Complainant asserts that there are no genuine issues of material fact as to either Count and that, therefore, it is

entitled to an accelerated decision establishing TRW's liability for the two violations alleged in the Complaint.

**II. TRW'S Opposition**

Respondent submits that genuine issues of material fact exist with regard to whether any violations have occurred and whether the two Counts in the Complaint are two separate violations, Opposition at 1. As to Count I, which alleges that the June 1987 well composites were not collected and analyzed pursuant to Amended Approval Condition 7, Respondent contends that this omission was an "inadvertent error," and denies the activity is a violation. Opposition at 2; Answer, ¶¶ 15,16.

Respondent claims that Count II relates to the format and method of reporting in the Annual Report, both of which need to be determined at an evidentiary hearing. Respondent denies that the May 27, 1988 monitoring report does not report monthly leachate production and further states that such report provides all required leachate production information. Opposition at 3; Answer at ¶ 21. An affidavit of Richard Struthers attached to the Opposition is presented by Respondent as support for the completeness of the data.

Regarding the issue of multiple violations, Respondent submits it is a factual issue to be determined at hearing, Opposition at 1. To counter Complainant's assertion that separate violations should be charged because the violations occurred in substantially different locations that present separate and distinct risks, Respondent argues that the purpose of regulating Respondent's facility is to secure the landfill, that the cell in question constitutes a single facility, and that the conditions at issue here are directed toward the integrity of the cell as supported by the affidavit of Stephen Johnson, dated April 23, 1990, and attached to Complainant's Motion. Opposition at 4; Affidavit of Stephen Johnson, ¶¶ 9, 17, and 20.

Respondent also objects to Complainant's reference to the PCB Penalty Policy in the Complainant's memorandum supporting the Motion on the basis that the policy is not a regulation but an internal document, Opposition at 4. Nonetheless, Respondent argues that examples from the PCB Penalty Policy which do not call for multiple violations are similar to the instant case, Opposition at 4; 45 Fed. Reg. at 59782.

**III. Analysis and Resolution**

Section 22.20(a) of the EPA Rules authorizes the Presiding Judge to render an accelerated decision as to all or any part of the proceeding if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

A. Count I - Groundwater Samples

As to Count I, alleging that the Respondent violated Condition 7 of the Amended Approval by failing to collect and analyze the June 1987 groundwater monitoring well composites, Respondent's admission in its Answer is uncontested evidence that a violation of Condition 7 occurred. See Answer, ¶ 15. The explanation that the omission was due to an "inadvertent error" by the Respondent's consultant and was reported to the EPA by letter dated July 28, 1987, is not a defense, but may be taken into consideration in determining the amount of penalty.

As Complainant correctly argues, when TRW violated any of the conditions in the Amended Approval, it also violated the chemical waste disposal requirements of the EPA Regulations and Section 15 of TSCA. Specifically, Section 761.60(a)(4) of the EPA Regulations requires that non-liquid PCBs at concentrations greater than 50 ppm are to be disposed of in an incinerator which complies with Section 761.70 or in a chemical waste landfill which complies with Section 761.75 of the Regulations. Respondent opted for the chemical waste landfill. Under Section 761.75(c), an owner or operator of a chemical waste landfill must receive written approval of the EPA Regional Administrator prior to disposing of any PCBs and PCB items in the landfill. And, pursuant to Section 761.75(c)(3)(ii), the Regional Administrator may include in the approval any other requirements he finds necessary to ensure that the operation of the landfill does not present an unreasonable risk of injury to health or the environment from PCBs. In the present case, such other requirements are contained as conditions in the August 2, 1985 Amended Approval. As a result, a violation of any of the Amended Approval conditions is a violation of the two EPA Regulations noted above.

Also, since the two regulations were adopted pursuant to Section 2605 of TSCA, a violation of any of the conditions is a violation of Section 15 of TSCA, which makes it illegal to violate regulations issued under Section 2605. Therefore, when TRW violated Condition 7, it violated Sections 761.60 and 761.75 of the EPA Regulations and Section 15 of TSCA. Accordingly, in view of TRW's admission in its Answer that it omitted the June 1987 test well monitoring required by Condition 7 of the Amended Approval, no issue of material fact remains as to that issue and it must be concluded that the Respondent is liable for the violation set forth in Count I of the Complaint.

B. Count II - Monthly Leachate Production

With regard to Count II, the issue is whether TRW in its 1988 Annual Report satisfied Amended Approval Condition 17(b). Again, the same statutory and regulatory scheme outlined above with regard to Condition 7 equally applies to Condition 17(b).

Specifically, Condition 17(b) provides that an annual report shall be sent to the PCB Disposal Coordinator of Region V, which annual report shall include, inter alia, the following information: ". . .(b) The quantity of leachate produced monthly by the leachate collection system."

The 1988 Annual Report, at pp. 4-5, which is included in Complainant's prehearing exchange as proposed Exhibit 2,[1] includes the following report on leachate volume:

> The volume of leachate in the leachate collection tanks is monitored by TRW personnel at the Minerva facility through the use of the level indicating device in the tank. TRW reports that the tank was last emptied, leaving approximately 2 inches of fluid in the tank, in September 1987. A reading of the level in May 1988 indicated approximately 10 inches of leachate in the tank. The tank is approximately eight feet in diameter and 19 feet long. Thus an increase in 8 inches correspond to approximately 570 gallons. Over the nine month period between September and May this corresponds to an average daily leachate production of approximately 2 to 2.5 gallons per day. This is about the same production rate that was reported for April and May 1987 in the Yearly Closure Report for 1987.

As noted above, Complainant takes the position that the above quoted language in the 1988 Annual Report does not meet Condition 17(b) since it does not report any leachate for June through August 1987 and since it reports leachate production averaged on a daily basis over the nine month September 1987 through May 1988 period. Complainant notes that Condition 17(b) requires the annual report to set out the quantity of leachate produced monthly and so contends that TRW's 1988 Annual Report does not comply with Condition 17(b), even though the Respondent has specifically denied in paragraph 21 of its Answer that its 1988 Annual Report does not report monthly leachate production. See Motion at 3-4,8.

Respondent in its Opposition at 3 argues that factual issues exist which relate to the format of the reporting in the annual report. Although the Respondent does not elaborate on what the factual issues on format are, an explanation that would have been helpful to resolve this Motion, nonetheless it is not

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[1]Complainant's proposed Exhibit 2 discussed herein has not formally by affidavit or otherwise been made part of the evidentiary record for the purpose of deciding the Motion for Accelerated Decision. However, in light of the resolution of the part of the Motion that Exhibit 2 relates to, it is not necessary to cure this lack of evidentiary foundation.

unreasonable to conclude that Condition 17(b) is subject to different interpretations. It can be construed, as Complainant suggests, that the condition requires actual monthly leachate quantities for every month in the reporting period. On the other hand, Condition 17(b) can be interpreted as having been met by providing daily averages that, with a small amount of addition, can be turned into average monthly leachate quantities. The condition itself does not spell out whether the quantities must be actual as opposed to average. While no final determination on this potential factual conflict need be made now, it is appropriate, for purposes of resolving the Motion, to interpret factual inferences in favor of the Respondent who is opposing the motion, as would be the case in Federal court practice in deciding a motion for summary judgment, 6 Moore's Federal Practice, 2d ed., ¶ 56.15 [8], p.56-344. Triable issues do exist, therefore, as to what Condition 17(b) requires and as to whether the language on leachate quantity in TRW's 1988 Annual Report satisfies Condition 17(b).

In view of the above holding that there are material issues of fact for resolution at hearing with regard to Count II, the Motion for Accelerated Decision must be denied insofar as it relates to Count II.

C. Multiple Counts

The parties are also in disagreement over the issue raised by the Motion as to whether the two Counts involve one or two violations. As pointed out previously, Complainant asserts that there are two violations, while TRW contends only one alleged violation is involved in the two Counts. From the pleadings presented, it is clear that factual issues exist regarding the purpose of the testing and reporting, the characteristics of the cell, the risks and the proper interpretation of the EPA PCB Penalty Policy, 49 Fed. Reg. 59770 (September 10, 1980).[2] As a result, the Motion for Accelerated Decision must be denied insofar as it seeks resolution of the separate violations issue.

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[2] As mentioned earlier, Respondent in its Opposition objects to references to the PCB Penalty Policy in Complainant's Motion for Accelerated Decision, since the policy is not a regulation but only internal procedural guidance. Complainant filed a motion seeking permission to reply on this issue. This later motion was unopposed and is hereby granted. On this point, TRW's position is not persuasive. Complainant correctly points out that the PCB Penalty Policy has been appropriately considered in other EPA administrative hearings, and there is no reason it should not be considered in evaluating the multiple violations issue.

**IV. Further Procedures**

Since this proceeding now appears to be at issue, the parties are directed to submit, on or before February 18, 1991, either an agreed-upon or separate written proposals suggesting a date and location for scheduling the evidentiary hearing.

**SO ORDERED.**

Daniel M. Head
Administrative Law Judge

Dated: January 18, 1991
Washington, D.C.

**IN THE MATTER OF TRW, INC.,** Respondent
**Docket No. IF&R-V-09-90**

**CERTIFICATE OF SERVICE**

I certify that the foregoing Order Granting Motion of Accelerated Decision in Part and Setting Further Procedures, dated January 18, 1991, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Ms. Beverly Shorty
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
230 South Dearborn Street
Chicago, IL 60604

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

Monica S. Smyth, Esquire
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Counsel for Respondent:

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Senior Counsel - Environmental
TRW, Inc.
1900 Richmond Road
Cleveland, Ohio 44

Secretary

Dated: January 22, 1991
Washington, D.C.