

5/27/92

**FILED**

**JUN 0 1 1992**

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
HEARING CLERK

IN THE MATTER OF	)	
	)	
AMERECO ENVIRONMENTAL SERVICES,	)	Docket No. TSCA-09-90-0019
INC.,	)	
	)	
Respondent	)	

ORDER ON DEFAULT

I. Preliminary Statement

This civil administrative proceeding for the assessment of a penalty was initiated by the issuance of a complaint pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). The complaint charges in two counts that at the time of an inspection by a representative of the United States Environmental Protection Agency (EPA) on January 22, 1990, the inspector found that Respondent stored PCBs and PCB Items which had a concentration level of 50 parts per million or greater at a facility which was either owned or operated by AmerEco Environmental Services, Inc. (AmerEco or Respondent) located at 4425 Santa Fe Drive, Kingman, Arizona 86401. The inspector found that PCBs and PCB Items were in storage for a period of time exceeding one year. In addition, at the time of the inspection the Respondent had in use at the facility storage containers of a size which required the implementation of a Spill Prevention Control and Countermeasure (SPCC) Plan. The inspector obtained a copy of the Plan which was reviewed by EPA, Region 9. In their review of the

Plan the Region found that the Plan did not meet the requirements of 40 C.F.R. Part 112.

## II. Initial Findings of Fact

1. On May 17, 1990, the Director, Air and Toxics Division, EPA, Region 9, issued a Complaint and Notice of Opportunity for Hearing to Respondent pursuant to Section 16(a) of TSCA [15 U.S.C. § 2615(a)] alleging that Respondent had violated 40 C.F.R. § 761.65 by storing PCBs in excess of one year and failing to prepare an SPCC Plan as described in 40 C.F.R. Part 112 with respect to the storage of PCBs.

2. The Complainant proposed the assessment of a civil penalty of \$16,000.00 that was calculated in accordance with "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," 55 Fed. Reg. 13955 (April 13, 1990).

3. Respondent filed an answer to the charges in the Complaint on May 22, 1990, denying the charges set out therein and requested that the Complaint be withdrawn or, in the alternative, that an adjudicatory hearing be held on the matter.

4. On July 2, 1990, the Presiding Chief Administrative Law Judge issued a directive requiring the parties to submit their respective prehearing exchanges on September 5, 1990, if a settlement had not been reached by that date. Both parties were served via certified mail, return receipt requested.

5. The Presiding Chief Administrative Law Judge received Complainant's prehearing exchange on September 11, 1991.

6. On December 4, 1990, the Presiding Chief Administrative Law Judge issued an Order to Show Cause, "why Respondent's prehearing exchange or a motion for extension of time in which to file its prehearing exchange, has not been filed . . . ." The Order cited the relevant portion of 40 C.F.R. § 22.17(a) which provides that a party may be found to be in default upon failure to comply with a prehearing order of the Presiding Officer. The Order to Show Cause was delivered to Respondent via certified mail, return receipt requested.

7. On February 19, 1991, Charles L. House, counsel for AmerEco Environmental Services, Inc., in bankruptcy, entered his appearance in this matter and filed a response to the show cause order and requested that the Presiding Chief Administrative Law Judge "set a new date to allow counsel for both sides to confer and complete scheduling."

8. On March 18, 1991, the Presiding Chief Administrative Law Judge issued an Order Scheduling Prehearing Exchange setting the date for Respondent to make the prehearing exchange as April 19, 1991.

9. On June 10, 1991, the Presiding Chief Administrative Law Judge issued, sua sponte, an Order Directing Prehearing Exchange extending the date for Respondent to make the prehearing exchange to June 28, 1991. That order once again directed Respondent's attention to 40 C.F.R. § 22.17(a) and stated that the "[f]ailure of Respondent to comply with this directive will compel the

undersigned to issue a default judgment against Respondent." Both parties were served via certified mail, return receipt requested.

10. Respondent failed to comply with the Presiding Chief Administrative Law Judge's Order of June 10, 1991 directing a prehearing exchange.

11. On January 28, 1992, the Presiding Chief Administrative Law Judge issued an order directing Complainant to draft and submit a proposed default order in this matter. Both parties were served via certified mail, return receipt requested.

### III. Conclusions of Law

1. Respondent has failed to comply with the order of the Presiding Chief Administrative Law Judge to file its prehearing exchange, and has failed to comply with the Presiding Chief Administrative Law Judge's Order to Show Cause, or in any other way to show good cause as to why its prehearing exchange has not been filed, and is therefore in default pursuant to 40 C.F.R. § 22.17(a).

2. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations...

Therefore, I make the following:

### IV. Additional Findings of Fact and Conclusions of Law as Alleged by Complainant

1. AmerEco Environmental Services, Inc. was at the time of the violation charged in the Complaint and Notice of Opportunity

(Complaint) on file in this action, a Missouri corporation authorized to do business through its wholly owned subsidiary, AmerEco-Az, in the State of Arizona.

2. Respondent is a "person" as that term is defined in 40 C.F.R. § 761.3.

3. At the time of the inspection, January 22, 1990, according to Respondent's records, the bulk storage tank at the facility identified as Tank #303 contained 235 gallons of PCB fluid in concentrations exceeding 10,000 parts per million that was placed into storage at the following time intervals and quantities:

January 12, 1989 - 53 gallons  
January 12, 1989 - 23 gallons  
January 12, 1989 - 53 gallons  
January 17, 1989 - 53 gallons  
January 17, 1989 - 53 gallons

4. At the time of the inspection, January 22, 1990, according to Respondent's records, the bulk storage tank at the facility identified as Tank #302 contained 42 gallons of PCB fluid exceeding 500 parts per million that was placed into storage for disposal on January 16, 1989.

5. The TSCA regulations at 40 C.F.R. § 761.65 require that PCBs at concentrations of 50 parts per million and higher that are placed in storage for disposal be removed and disposed within one year from the date that the PCBs were placed in storage.

6. At the time of the inspection, January 22, 1990, the Respondent had in use three storage containers with an estimated capacity for storage of 10,000 gallons of dielectric fluid

containing PCBs that were larger than the containers specified in 40 C.F.R. § 761.65(c)(6).

7. Use of containers larger than those specified in § 761.65(c)(6) can be allowed provided that the conditions of § 761.65(c)(7)(i) and (ii) are met. Specifically, § 761.65(c)(7)(ii) requires that the owners or operators of any facility using containers described in § 761.65(c)(7)(i) shall prepare and implement a SPCC Plan as described in Part 112.

8. The SPCC Plan obtained by the inspector from Respondent's representatives during the inspection on January 22, 1990, was not in accordance with the technical requirements of 40 C.F.R. Part 112 as required by 40 C.F.R. § 761.65(c)(7)(ii), particularly Section 112.7.

#### V. Discussion and Ultimate Conclusion

Respondent's answer to the Complaint does not raise any matter which could support a decision that Complainant has failed to establish a prima facie case or could justify the dismissal of the Complaint. An examination of the prehearing exchange documents submitted by Complainant buttresses the allegations in the Complaint that Respondent violated Section 15(1) of TSCA, 15 U.S.C. § 2614(1)(c), and 40 C.F.R. § 761.65 as alleged in the Complaint. I therefore conclude that Respondent is in violation of Section 15(1)(c) of TSCA, 15 U.S.C. § 2614(1)(c), and 40 C.F.R. § 761.65.

## VI. The Penalty

Section 16(a) of TSCA, 15 U.S.C. § 2615(a), authorizes a civil penalty of up to \$25,000 per day for each violation of Section 15 of TSCA, 15 U.S.C. § 2614. Section 16(a)(1)(B) requires that the following factors be taken into account when determining the amount of a civil penalty:

[T]he nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

These factors have been incorporated into the "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy" (55 Fed. Reg. 13955 (April 13, 1990)).

The purpose of the PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations.

The policy implements a system for determining penalties in administrative civil actions brought pursuant to Section 16 of the Toxic Substances Control Act (TSCA). Penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- (1) the "nature" of the violation;
- (2) the "extent" of potential or actual environmental harm from a given violation; and
- (3) the "circumstances" of the violation.

These factors are incorporated in a matrix which allows determination of the appropriate proposed GBP.

Once the GBP has been determined, upward or downward adjustments to the proposed penalty amount may be made in consideration of these factors:

- (1) culpability;
- (2) history of such violations;
- (3) ability to pay;
- (4) ability to continue in business; and
- (5) other matters as justice may require, such as environmentally beneficial expenditures.

Under the PCB Penalty Policy, the violations in this matter are considered to be chemical control in nature.

For the purpose of the policy, violations of PCB rules fall into two broad categories: nondisposal violations and disposal violations. The particular violations in this case fall into the nondisposal category and the circumstances are classified as minor storage violations (e.g., "Storage of PCBs in excess of 1 year . . . ."). The extent of such a violation is determined by the amount of PCB material involved.

The penalty for Count I is based on the storage of 277 gallons of PCB liquid with a concentration of 10,000 parts per million or greater for the bulk of the liquid and 42 gallons of liquid with a concentration exceeding 500 parts per million for a period exceeding one year. The penalty for Count II is based on

Respondent's failure to comply with the regulatory storage requirements, mainly the implementation of a SPCC Plan. Since the amount of PCBs which were stored for more than one year was 277 total gallons (235 gallons plus 42 gallons) the extent is classified as significant (220 to 1,100 gallons) whereas the 10,000 gallon containers used in connection with the SPCC Plan violation warrant a classification of major (in excess of 1,100 gallons).

Utilizing the gravity based penalty matrix, the appropriate penalty for the storage violation (circumstances level 4/extent B) is \$6,000 while the appropriate penalty for the SPCC Plan violations (circumstances level 4/extent A) is \$10,000.

No adjustments were made to the GBP amount based on the adjustment factors of culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require. Although Respondent has alleged no ability to pay any penalty, Respondent has provided no concrete evidence (e.g., audited financial statements or tax returns) to support this allegation.

Pursuant to 40 C.F.R. § 22.17, the penalty of \$16,000 proposed in the Complaint shall become due and payable by Respondent without further proceedings sixty (60) days after issuance of this Default Order.<sup>1</sup>

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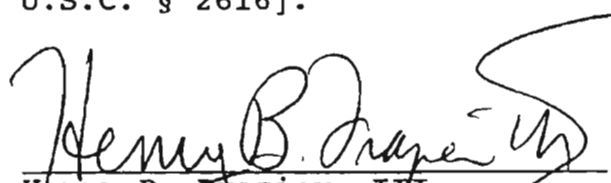
<sup>1</sup>See 40 C.F.R. § 22.30 for provisions governing an appeal from this Default Order.

ORDER

Under the authority of the Toxic Substances Control Act and the Consolidated Rules of Practice, 40 C.F.R. Part 22, I hereby issue a Default Order in this matter. Within sixty (60) days of the date of this Order, Respondent shall submit by cashier's or certified check, payable to Treasurer, United States of America, payment in the amount of sixteen thousand dollars (\$16,000) addressed to:

EPA - Region 9  
(Regional Hearing Clerk)  
P.O. Box 360863M  
Pittsburgh, PA 15251

In the event of failure by Respondent to make said payment within sixty days of receipt of this order, the matter may be referred to a United States Attorney for recovery by appropriate action in the United States District Court. [15 U.S.C. § 2616].

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated:

May 27, 1992  
Washington, DC

1992 JUN 18 AM 9:52

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing INITIAL DECISION AND DEFAULT ORDER, in the matter of Amereco Environmental Services, Inc. (TSCA-09-90-0019), issued by the Chief Administrative Law Judge Henry B. Frazier III, has been filed with the Regional Hearing Clerk, and a copy was served on each of the parties, addressed as follows, by mailing first class, or by hand delivering, as indicated below:

Dennis Nix, President  
AMERECO ENVIRONMENTAL  
SERVICES, INCORPORATED  
Route 1, Box 159  
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David M. Jones, Esq.  
Office of Regional Counsel  
U.S. EPA, REGION 9  
75 Hawthorne Street  
San Francisco, CA. 94105

Hand Delivered

Dated at San Francisco, California, this 15th day of June, 1992.

  
Steven Armsey  
Regional Hearing Clerk  
EPA, Region 9