UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No. **TSCA-08-2005-0009**

2005 APR -7 AM 8:31

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:

Jerry's Electric, Inc. 23170 471st Avenue Colman, South Dakota 57017 Respondent.	))))))	**PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING**

JURISDICTION

1. This civil administrative enforcement action is authorized by Congress in section 16 (a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). The United States Environmental Protection Agency (EPA) regulations governing polychlorinated biphenyls ("PCBs") authorized by the statute are set out in part 761 of title 40 of the Code of Federal Regulations (CFR) and violations of the regulations constitute violations of the section 15 of TSCA, 15 U.S.C. § 2614 . The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated section 15 of TSCA, 15 U.S.C. § 2614, and proposes the assessment of a civil penalty as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk , U. S. EPA, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202-2466, within 30 days of receiving this Complaint. The answer must clearly admit, deny or explain the factual allegations of the Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE**

WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in the Complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this Complaint, payment must be made, within thirty (30) calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to the attorney listed below.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Alicia N. Hoegh at 1-800- 227-9441, extension 6876 or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

7. The term "person" defined at 40 CFR § 761.3, means "any natural or judicial person including any individual, corporation, ..."

8. Respondent Jerry's Electric, Inc., a South Dakota corporation, owns and operates a business located at 23170 471st Avenue, Colman, South Dakota, ("facility"), which refurbishes, resells, and/or sends for disposal PCB transformers and other items.

9. Respondent is a corporation and is, therefore, subject to the requirements of TSCA and the regulations at 40 CFR part 761.

10. The term, PCB Item" defined at 40 CFR § 761.3, means "any PCB Article, PCB Article Container, PCB Container, PCB Equipment, or anything that deliberately or unintentionally contains or has as a part of it any PCB or PCBs."

11. The term "PCB Article" defined at 40 CFR § 761.3, means "any manufactured article, other than a PCB Container, that contains PCBs and whose surface(s) has been in direct contact with PCBs. PCB Articles includes capacitors, transformers, electric motors, pumps, pipes and any other manufactured item ...."

12. The term "Capacitor" defined at 40 CFR § 761.3, means "a device for accumulating and holding a charge of electricity and consisting of conducting surfaces separated by a dielectric. Types of capacitors are as follows: ... Large high voltage capacitor."

12. The term "Large High Voltage Capacitor" defined at 40 CFR § 761.3, means "a capacitor which contains 1.36 kg (3 lbs.) or more of dielectric fluid and which operates at 2,000 volts (a.c. or d.c.) or above."

13. The term "Mark" defined at 40 CFR § 761.3, means "the descriptive name, instructions, cautions, or other information applied to PCBs and PCB Items, or other objects subject to these regulations."

14. The term "Marked" defined at 40 CFR § 761.3, means "the marking of PCB Items and PCB storage areas and transport vehicles by means of applying a legible mark by painting, fixation of an adhesive label, or by any other method that meets the requirements of these regulations."

15. The term, "disposal" defined at 40 CFR § 761.3, means "intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs...."

16. The term, "leak or leaking," defined at 40 CFR § 761.3, means "any instance in which a PCB Article, PCB Container, or PCB Equipment has any PCBs on any portion of its external surface.

17. The PCB regulations require that PCB liquids be disposed of by the methods specified in 40 CFR § 761.60(a).

18. On October 8, 2004, an authorized EPA inspector entered the facility with the consent of Respondent to inspect it for compliance with TSCA and the regulations found at 40 CFR part 761.

19. At the time of the inspection Respondent was storing, among other things, Large High Voltage Capacitors for disposal or reuse in its PCB storage warehouse.

COUNT ONE
(Improper disposal - 40 CFR § 761.60(a))

This Count incorporates by reference paragraphs 7 through 14, and 17 through 19, above.

20. At the time of the inspection, there was a capacitor (Westinghouse Dynavac PCB capacitor, bearing serial number 73063657, dated October 16, 2004), in the PCB storage warehouse that contained dielectric fluid with a concentration of PCBs of over 500 ppm which was leaking on the bottom of the capacitor in an area of approximately three foot by three inches.

21. At the time of the inspection, there was a capacitor (Westinghouse Dynavac PCB capacitor, bearing serial number 720243316, dated October 16, 2004), in the PCB storage warehouse that contained dielectric fluid with a concentration of PCBs of over 500 ppm which was leaking on the bottom of the capacitor in an area of approximately three feet by eight inches.

22. Respondent's failure to properly dispose of PCBs from the leaking capacitors as required by 40 CFR § 761.60(a) constitutes a violation of TSCA Section 15, 15 U.S.C. § 2614.

COUNT TWO
(Failure to Mark- 40 CFR § 761.40(a)(3))

This Count incorporates by reference paragraphs 7 through 14, 18 and 19, above.

23. The regulations at 40 CFR § 761.40(a)(3) require all PCB Large High Voltage Capacitors to be marked with the "CAUTION CONTAINS PCBs...." mark illustrated in figure 1 shown at 40 CFR § 761.45.

24. Respondent stored capacitor Westinghouse Dynavac PCB capacitor, bearing serial number 73063657, dated October 16, 2004 , in the PCB storage warehouse that contained dielectric fluid with a concentration of PCBs of over 500 ppm. The PCB capacitor was not labeled with the PCB mark as illustrated in 40 CFR 761.45.

25. Respondent's failure to mark the Large High Voltage Capacitor with the mark illustrated in 40 CFR § 761.45 is a violation of 40 CFR 761.40(a)(3) and, therefore, a violation of section 15 of TSCA, 15 U.S.C. § 2614.

COUNT THREE
(Failure to Mark - 40 CFR § 761.40(a)(3))

This Count incorporates by reference paragraphs 7 through 14, 18 and 19, above.

26. The regulations at 40 CFR § 761.40(a)(3) require all PCB Large High Voltage Capacitors to be marked with the "CAUTION CONTAINS PCBs...." mark illustrated in figure 1 shown at 40 CFR § 761.45.

27. Respondent stored capacitor Westinghouse Dynavac PCB capacitor, bearing serial number 720243316, dated October 16, 2004, in the PCB storage warehouse that contained dielectric fluid with a concentration of PCBs of 500 ppm. The PCB capacitor was not labeled with the PCB mark as illustrated in 40 CFR 761.45.

23. Respondent's failure to mark the capacitor with the mark illustrated in 40 CFR § 761.45 is a violation of 40 CFR 761.40(a)(3) and, therefore, a violation of section 15 of TSCA, 15 U.S.C. § 2614.

PROPOSED CIVIL PENALTY

24. Section 16 of TSCA, 15 U.S.C. § 2615, as amended, and the regulations promulgated under section 6 of TSCA, 15 U.S.C. § 2605, authorize the assessment of a civil penalty of up to $32,500 per day of violation for each violation of TSCA. In arriving at the amount of the penalty proposed below, EPA, as required by Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(b), has taken into consideration, to the extent known at this time, the following factors: the nature, circumstances, extent and gravity of the violation, and with respect to respondent, the ability to pay, effect on ability to continue in business, any history of prior violations, degree of culpability, and such other matters as justice may require.

25. EPA has written a penalty policy entitled, Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990, that provides a rational, consistent and equitable method for applying these statutory factors to the facts and circumstances of specific cases. Using the policy to apply the statutory factors to the facts of this case, EPA proposes that a penalty of Two Thousand Five Hundred Dollars ($2,500.00) be assessed against Respondent for the violations alleged above. The penalty policy, calculation, and narrative are enclosed and incorporated as attachment A to this Complaint.

26. The Administrative Law Judge is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute.

To discuss settlement or ask any questions you may have about this process, please contact Alicia N. Hoegh, Enforcement Attorney, at 1-800- 227-9441, extension 6876, or the address below.

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and Environmental Justice, Complainant
999 18th Street, Suite 500 (ENF-L)
Denver, CO 80202-2466

4/4/05
Date

By: David J. Janik
Supervisory Enforcement Attorney
Legal Enforcement Program

3/28/05
Date

By: Martin Hestmark, Director
Technical Enforcement Program

4-6-05
Date

By: Alicia N. Hoegh,
Enforcement Attorney
Legal Enforcement Program

IN THE MATTER OF: Jerry's Electric, Inc.
Docket No.: TSCA-08-2005-0009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and true copy of COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING, were hand-carried, this 7th day of April 2005, to the Regional Hearing Clerk, EPA, Region VIII, 999 18th Street, Denver, Colorado, and that a true copy of the same was sent via Certified Mail, addressed to:

Troy Boulais, Registered Agent for
Jerry's Electric, Inc.
23170 471st Avenue
North Highway 77
P.O.Box 209
Colman, South Dakota 57017

Date: 4/7/05 By: Judith M McTernan
Judith McTernan, Secretary

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,

Administrator.

1st Page Only

Therefore, 40 CFR part 22 is revised to read as follows:

PART 22—COSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

22.1 Scope of this part.
22.2 Use of number and gender.
22.3 Definitions.
22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
22.5 Filing, service, and form of all filed documents; business confidentiality claims.
22.6 Filing and service of rulings, orders and decisions.
22.7 Computation and extension of time.
22.8 Ex parte discussion of proceeding.
22.9 Examination of documents filed.

Subpart B—Parties and Appearances

22.10 Appearances.
22.11 Intervention and non-party briefs.
22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

22.13 Commencement of a proceeding.
22.14 Complaint.
22.15 Answer to the complaint.
22.16 Motions.
22.17 Default.
22.18 Quick resolution; settlement; alternative dispute resolution.
22.19 Prehearing information exchange; prehearing conference; other discovery.
22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

22.21 Assignment of Presiding Officer; scheduling the hearing.
22.22 Evidence.
22.23 Objections and offers of proof.
22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
22.25 Filing the transcript.
22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

22.27 Initial decision.
22.28 Motion to reopen a hearing.

Subpart F—Appeals and Administrative Review

22.29 Appeal from or review of interlocutory orders or rulings.
22.30 Appeal from or review of initial decision.

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POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

United States Environmental Protection Agency

April 9, 1990

United States
Environmental Protection
Agency

Office of Enforcement and Compliance Assurance (2201A)
EPA 300-F-03-001 May 2003

U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance and tools to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Hotlines, Helplines and Clearinghouses

EPA sponsors approximately 89 free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements.

The National Environmental Compliance Assistance Clearinghouse provides quick access to compliance assistance tools, contacts, and planned activities from the U.S. EPA, states, and other compliance assistance providers: http://www.epa.gov/clearinghouse

Pollution Prevention Clearinghouse
http://www.epa.gov/opptintr/library/ppicindex.htm

EPA's Small Business Ombudsman Hotline can provide a list of all the hot lines and assist in determining the hotline best meeting your needs:
(800) 368-5888

Emergency Planning and Community Right-To-Know Act
(800) 424-9346

National Response Center (to report oil and hazardous substance spills)
(800) 424-8802

Toxics Substances and Asbestos Information
(202) 554-1404

Safe Drinking Water
(800) 426-4791

Stratospheric Ozone and Refrigerants Information
(800) 296-1996

Clean Air Technology Center
(919) 541-0800

Wetlands Helpline
(800) 832-7828

EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

EPA's Home Page
http://www.epa.gov

Small Business Assistance Program
http://www.epa.gov/ttn/sbap

Office of Enforcement and Compliance Assurance
http://www.epa.gov/compliance

Compliance Assistance Home Page
http://www.epa.gov/compliance/assistance

Office of Regulatory Enforcement
http://www.epa.gov/compliance/civil/index.html

Office of Site Remediation Enforcement
http://www.epa.gov/compliance/cleanup

Innovative Programs for Environmental Performance
http://www.epa.gov/partners

Small Business Ombudsman
www.sba.gov/ombudsman

Recycled/Recyclable
Printed with Soy/Canola ink on paper that contains at least 30% post consumer fiber

NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE ENVIRONMENTAL LEGAL PROCEEDINGS

Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

A. Such proceeding is material to the business or financial condition of the registrant;
B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the Office of Chief Counsel in the SEC's Division of Corporation Finance. The phone number is (202) 942-2900.