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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
KETCHIKAN PULP COMPANY	)	[TSCA] Docket No. 1094-04-07-2615
	)	
Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AND GRANTING IN PART AND DENYING IN PART RESPONDENT'S CROSS MOTION FOR PARTIAL ACCELERATED DECISION

BACKGROUND

This is a proceeding under the authority of Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). Following the assignment of this matter to Judge Frank Vanderheyden[1], Prehearing Exchanges were filed by Complainant[2] and Respondent[3]. On August 17, 1995, Complainant filed a motion, pursuant to 40 C.F.R. §§ 22.16(a) and 20.20(a), for partial accelerated decision on liability. By pleading dated September 1, 1995, Respondent filed a response to Complainant's motion and a cross motion for partial accelerated decision.[4] By pleading dated

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[1] In re Ketchikan Pulp Co., [TSCA] Docket No. 1094-04-07-2615, (Order of Designation, November 10, 1994).

[2] Complainant is Region 10, United States Environmental Protection Agency.

[3] Respondent is Ketchikan Pulp Company.

[4] Respondent also moved that its original Answer be amended to include a denial of the allegation in paragraph 24 of Complainant's original Complaint. Judge Vanderheyden granted that request. In (continued...)

October 11, 1995, Complainant responded to Respondent's cross motion.[5] For the reasons set forth below, Complainant's motion shall be granted in part and denied in part and Respondent's cross motion shall be granted in part and denied in part.

DISCUSSION

I. Did Respondent Comply with the Requirement to Develop and Maintain Annual Document Logs for 1990, 1991, and 1992, and the Requirement to Develop and Maintain an Annual Document for 1989?

Complainant alleges (and Respondent agrees) that for the years 1990, 1991, and 1992, Respondent was an owner or operator of a facility, other than a commercial storer of PCB waste, using or storing at any one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB containers, or one or more PCB transformers, or 50 or more PCB large High or Low Voltage Capacitors.[6] As such,

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[4](...continued)
re Ketchikan Pulp Co., [TSCA] Docket No. 1094-04-07-2615 (Order, September 1, 1995). Accordingly, that portion of Complainant's argument (pp. 3-4) that Respondent's failure to "admit, deny, or explain" the allegation contained in paragraph 24 of Complainant's original Complaint constitutes an admission of the allegation set forth in paragraph 24, is rejected.

[5] Subsequently, by order dated January 23, 1996, the proceedings were suspended due to the retirement from federal service of Judge Vanderheyden. In re Ketchikan Pulp Co., [TSCA] Docket No. 1094-04-07-2615 (Order Suspending Proceedings, January 23, 1996). By subsequent order, the undersigned was designated to preside in this proceeding. In re Ketchikan Pulp Co., [TSCA] Docket No. 1094-04-07-2615 (Order of Redesignation, June 27, 1996).

[6] Paragraphs 4, 6 and 8 of Answer referring to paragraphs 4, 14 and 25 of Complaint.

Respondent was subject to 40 C.F.R. § 761.180 (1990), "Records and Monitoring," which provides in pertinent part:

> Beginning February 5, 1990, each owner or operator of a facility . . . using or storing at any one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB Container(s), or one or more PCB Transformers, or 50 or more PCB Large High or Low Voltage Capacitors shall develop and maintain at the facility . . . all annual records and the written annual document log of the disposition of PCBs and PCB Items. The written annual document log must be prepared for each facility by July 1 covering the previous calendar year . . . .

Thus, Respondent was required to develop and maintain annual document logs on the disposition of PCBs and PCB Items for the 1990, 1991, and 1992 periods by July 1, 1991, July 1, 1992, and July 1, 1993, respectively.

Additionally, pursuant to a similar provision, Respondent was required to develop and maintain by July 1, 1990, an annual document for 1989.[7] That provision, 40 C.F.R. § 761.180(a) (1989), provides, in pertinent part, as follows:

> Beginning July 2, 1978, each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB Container(s) or one or more PCB Transformers, or 50 or more PCB Large High or Low Voltage Capacitors shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year . . . .

Thus, Respondent was required to develop and maintain by July 1, 1990, an annual document for 1989, pursuant to 40 C.F.R. § 761.180(a) (1989).

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[7] Paragraph 10 of Answer referring to paragraph 33 of Complaint makes clear that Respondent and Complainant agree that, for the period in question, Respondent was subject to 40 C.F.R. § 761.180(a) (1989).

Complainant alleges in Counts One through Four that Respondent failed to develop and maintain annual document logs for 1990, 1991, and 1992 and failed to develop and maintain an annual document for 1989 in accordance with the previously cited regulations.[8] Complainant states that while the respective regulations do not specify a specific format for the respective annual documents, applicable precedent has made clear that the document requirement is not satisfied by the maintenance of the required information in separate records that are disorganized and incomplete.

Respondent asserts that all of the material required was either specifically prepared as an annual document or was in a form suitable for incorporation into the annual documents. Respondent asserts that its respective annual document logs and annual documents were self-contained in two volumes, which consisted in part of a specifically prefaced document and in part of documents from its annual records. Since EPA had not prescribed any particular format for preparation of the annual documents, Respondent asserts that the form of its data was in compliance with the applicable regulations. Respondent argues that agencies such as the EPA are required to draft their regulations with sufficient clarity so that ordinary persons are aware of that which is

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[8] Complainant also alleges that such violations should result in an assessment of penalties against Respondent. However, the issue of penalties is not the subject of either party's motion for partial accelerated decision.

required of them.[9] Since the regulations in question don't prohibit development of annual documents by physically incorporating material, Respondent argues that Counts One through Four should be dismissed pursuant to its cross motion for accelerated decision.

Respondent's arguments are persuasive. It is clear from the applicable regulations that there is a separate requirement to maintain annual records, 40 C.F.R. § 761.180(a)(j), which include manifests and certificates of disposal, and an additional requirement to prepare a "written annual document log" containing information listed in 40 C.F.R. § 761.180(a)(2).[10] Complainant correctly points out that the annual document log includes a very specific list of information "from each manifest," 40 C.F.R. § 761.180(a)(2)(ii), that is also required in the manifest itself, 40 C.F.R. § 761.207(a).

Respondent submitted the affidavit of Cyril J. Young, the Assistant Director of Environmental Control for Ketchikan Pulp Company. Mr. Young is responsible for administering the compliance activities with respect to PCB removal, disposal, and recordkeeping. Affidavit, ¶ 1. Mr. Young states that prior to 1994, he had prepared annual document logs which consisted of two volumes for each year. The first volume contained a memorandum and

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[9] Respondent cites the following cases as support for its position: General Electric Co. v. U.S. Environmental Protection Agency, 53 F.3d 1324 (D.C. Cir. 1995) and United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987).

[10] For 1989, the comparable term is "annual document." 40 C.F.R. § 761.180(a) (1989).

attached documents. The second volume contained the manifests that were referenced in the first volume. Affidavit, ¶ 4. Both volumes together, according to Mr. Young, constitute the annual document log for the year in question. See Respondent's Exhibits RX 1a and RX 1b (1992), RX 2a and RX 2b (1991), RX 3a and RX 3b (1990), RX 4a and RX 4b (1989). Respondent asserts, and Complainant agrees[11], that all of the information required to be compiled in the annual document logs is contained in the two volumes. Respondent asserts that the regulations do not prohibit the physical incorporation of documents, such as manifests, to comprise part of the annual document log.[12] Complainant states that the only items that comprise the annual document logs are the three-page memoranda prepared by Ketchikan, and not the other documents in the first and second volumes of what Ketchikan calls its annual document logs because these additional documents are items that also comprise the annual records. Complainant's arguments are not persuasive.

It is clear from the regulations and applicable case law that a company such as Ketchikan cannot merely make reference to information in its records to comply with its obligation to prepare an annual document log. A separate document that is self-contained must be prepared. In the case entitled In re Bell & Howell Co.,

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[11] Complainant's Response to Respondent's Motion for Partial Accelerated Decision at 2.

[12] Mr. Young states that when the Region 10 office of EPA requested that Ketchikan adopt a format that the Region 10 EPA office had developed for PCB annual document logs, Ketchikan reformatted its annual document logs to comply with that suggestion. Affidavit, ¶ 6.

Docket Nos. TSCA-V-C-033, 034, 035, at 23-24 (Initial Decision, February 3, 1983),[13] the Respondent clearly failed to prepare annual documents for the years 1978 and 1979, and prepared an incomplete annual document for 1980. In the case entitled In re City of Detroit, Docket Nos. TSCA-V-C-82-87, 83-87, 94-87, 92-87 at 27-97 (Initial Decision, August 25, 1989),[14] Respondent admitted that it prepared no annual documents for the year 1978 to 1985 but argued that this was unnecessary because the information was contained in its records. In the case entitled In re State of West Virginia Department of Highways, Docket No. TSCA-III-136, at 3, 5-6 (Initial Decision, March 21, 1986),[15] Respondent failed to prepare annual documents for 1978, 1979, 1980, 1981, and 1982, but argued in its defense that this information was available from its records. In the case entitled In re Western Compliance Services, Inc., TSCA Docket No. 1087-11-01-2615 (X) at 11-13, (Initial Decision, February 10, 1989), Respondent failed to prepare annual documents for the years 1983, 1984, and 1985. Respondent argued that the information was available in its records, and that it could have prepared the annual documents after the EPA inspector's visit. Finally, in the case entitled In re Marcal Paper Mills, Inc., Docket No. TSCA-PCB-II-91-0110, at 2, 9-11, (Order Granting in Part Motion for Accelerated Decision, April 20, 1993), the Judge found that Respondent had "not shown that it had compiled that

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[13] Aff'd in part, Final Decision, December 2, 1993.

[14] Final Order on other counts, February 6, 1990.

[15] Penalty affirmed, Final Order, January 21, 1987.

information into an annual log, or even that it had all of that information compiled in any format 'prepared for each facility by July 1, covering the previous calendar year' and 'available for inspection at the facility' at the time of the EPA's inspection." In finding against the Respondent, the Judge emphasized the requirement that all of the information be compiled into one document. Marcal at 10-11. All of the above-entitled cases, which were cited by Complainant and in which the respective respondents were found liable, do not support Complainant's motion for partial accelerated decision on this issue.

In all of the above-cited cases, the information was not compiled in one place. In the instant case, for each year at issue, Ketchikan compiled all of the information into one two-volume set. As noted earlier, Complainant agrees that each of the four two-volume sets contains all of the information that 40 C.F.R. § 761.180(a)(2) requires to be included in the annual document log.[16] Therefore, I find that Ketchikan has substantially complied with 40 C.F.R. § 761.180(a)(2) by compiling all of the required information in one "document" consisting of a two-volume set of information, and that the information is sufficiently cross-referenced for reasonable access. Further, Ketchikan, when advised by EPA, revised the format of its annual document log for 1994 per EPA's suggestion. Complainant's motion for partial accelerated

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[16] For 1989, the respective references are "40 C.F.R. § 761.180(a)(2) (1989)" and "annual document."

decision on Counts One through Four is **denied**. Respondent's cross-motion for dismissal of Counts One through Four is **granted**.

II. Did Respondent Violate 40 C.F.R. § 761.202(b)(1)(ii) by Offering PCB Waste to Boyer Alaska Barge Lines, Inc.?

40 C.F.R. § 761.202(b)(1)(ii) prohibits, after June 4, 1990, a generator of PCB waste from offering that waste to a transporter who has not received an EPA identification number. An "EPA identification number" is defined by 40 C.F.R. § 761.3 as the 12-digit number assigned to a facility by EPA upon notification of PCB waste activity. For the period from approximately December 17, 1991 through December 14, 1992, Ketchikan released PCB waste to transporter Boyer Alaska Barge Lines, Inc. (Boyer).[17]

Thereafter, on May 3, 1994, Boyer filed its Notification of PCB Activity with EPA. On May 31, 1994, EPA assigned the use of an EPA identification number to Boyer to use for reporting PCB activity.[18] As to these aforementioned facts, there is no disagreement between Complainant and Respondent.

Complainant argues that since Respondent was a generator of PCB waste, and offered that PCB waste to Boyer, a transporter, who at the time it accepted the waste (during 1991 and 1992) had no valid EPA identification number from EPA for PCB activity, Respondent violated the prohibition contained in 40 C.F.R. § 761.202(b). Respondent asserts that Boyer indicated that it, in fact, had a valid EPA identification number, AKD126916782.

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[17] See Complainant's Exhibit Nos. 5, 6, 7, 8, 9, 10, 11 and 12.

[18] Exhibit Nos. 13 and 14.

Respondent states that there was nothing ostensibly different about the number that Boyer gave for use on Respondent's manifests that alerted, or should have alerted, Respondent that the EPA number, while valid, was not valid for transporting PCB waste.[19] Respondent asserts that it diligently asked Boyer for its PCB waste EPA number and was given a number which looked like a valid PCB waste EPA identification number. Respondent argues that it failed to discern that the number was a RCRA, not a PCB waste number, because of the ambiguity of EPA's regulation and of EPA's system for establishing identification numbers that are not sufficiently distinct to show which EPA program they are applicable to. Further, Respondent notes that it has used Boyer to transport hazardous waste for years without any problems, including during the applicable years of 1991 and 1992.

Respondent's arguments are not persuasive. There is no dispute as to the basic facts of this case. The only question to be decided is whether Respondent, as a generator of PCB waste, was under a duty to ascertain from the EPA whether Boyer was authorized to transport PCB waste, or whether its failure to do so for the period during 1991 and 1992 is excusable because Boyer had a valid EPA identification number that looked like an EPA identification

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[19] In fact, the EPA number given by Boyer to Respondent was a valid number for transporting waste under RCRA (the Resource Conservation and Recovery Act).

number authorizing transportation of PCB waste. As Complainant correctly argues, the purpose of the applicable PCB regulation is to ensure that generators of PCB waste do not offer their PCB waste to unauthorized transporters, with potentially disastrous consequences. Any transporter could offer a generator of PCB waste, such as Respondent, a number in the format of a valid EPA identification number. It follows that Respondent, like all generators of PCB waste, must independently verify that a transporter is authorized to transport the PCB waste. Thus, Complainant's partial motion for accelerated decision on Count Five is **granted** and Respondent is found liable on that count. Respondent's motion for partial accelerated decision to dismiss Count Five is **denied**.

AMOUNT OF PENALTY

The issue remaining in this proceeding is the amount of penalty for Respondent's liability for Count Five. The parties are directed to meet to attempt to resolve the penalty issue informally. The parties shall file a status report on or before September 30, 1996. Should a Consent Agreement and Final Order not be executed and filed by that date, the undersigned will establish procedures to resolve the penalty issue formally on the merits.

CONCLUSION

For the reasons set forth above, Counts One, Two, Three and Four are **dismissed** and Respondent is found liable under Count Five. The amount of the penalty under Count Five shall be resolved as discussed in the previous section.

Charles E. Bullock
Administrative Law Judge

Issued: July 25, 1996
Washington, D.C.

IN THE MATTER OF KETCHIKAN PULP COMPANY, Respondent
[TSCA] Docket No. 1094-04-07-2615

Certificate of Service

I certify that the foregoing Order, dated July 25, 1996, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Mary Shillcutt
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA

Copy by Regular Mail to:

Attorney for Complainant:

Keith E. Cohon, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10, SO-155
1200 Sixth Avenue
Seattle, WA 98101

Attorney for Respondent:

Bert P. Krages, II, Esquire
900 S.W. Fifth Avenue
Suite 1900
Portland, OR 97204

Marion Walzel

Marion Walzel
Legal Staff Assistant

Dated: July 25, 1996

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UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
KETCHIKAN PULP COMPANY,	)	[TSCA] Docket No. 1094-04-07-2615
	)	
Respondent	)	

ORDER OF REDESIGNATION

Administrative Law Judge Charles E. Bullock, Environmental Protection Agency, Washington, D.C., is hereby designated as the Administrative Law Judge to preside in this proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), pursuant to Section 22.21(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 CFR 22.21(a)).

Jon G. Lotis
Chief Administrative Law Judge

Dated: June 27, 1996
Washington, D.C.

IN THE MATTER OF KETCHIKAN PULP COMPANY, Respondent,
[TSCA] Docket No. 1094-04-07-2615

Certificate of Service

I certify that the foregoing Order of Redesignation, dated June 27, 1996, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Mary Shillcutt
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Copy by Regular Mail to:

Attorney for Complainant:

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Suite 1900
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Stacia Hyde-Eason
Stacia Hyde-Eason
Legal Staff Assistant

Dated: June 27, 1996

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
KETCHIKAN PULP COMPANY,	)	**[TSCA] Docket No. 1094-04-07-2615**
	)	
Respondent	)	

ORDER SUSPENDING PROCEEDINGS

Administrative Law Judge Frank Vanderheyden, who has served as the Presiding Administrative Law Judge in this matter, retired from the Federal service on December 31, 1995. Further proceedings in this matter are stayed until it can be assigned to another Administrative Law Judge. This order should not be construed as suspending voluntary settlement negotiations by the parties. If a settlement is reached before another Judge is assigned, the Consent Agreement and Final Order should be filed with the undersigned.

Jon G. Lotis
Chief Administrative Law Judge

Dated: January 23, 1996
Washington, D.C.

IN THE MATTER OF KETCHIKAN PULP COMPANY, Respondent,
[TSCA] Docket No. 1094-04-07-2615

Certificate of Service

I certify that the foregoing Order Suspending Proceedings, dated 1/23/96, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Mary Shillcutt
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

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Attorney for Complainant:

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Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: Jan. 23, 1996