

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of)
Grad Electric Salvage, Inc.,) Docket No. TSCA-PCB-VIII-91-03
Respondent)

Toxic Substances Control Act - PCB Penalty Policy - Adjustment Factors - Ability to Pay

Where Respondent contested proposed penalty for violations of Act primarily upon the ground of inability to pay and evidence established that taking an average of gross sales over a four-year period did not truly reflect Respondent's financial condition, four percent rule specified by TSCA Penalty Guideline was applied to average gross sales over a 2.5-year period. Additionally, other adjustments were made considering the attitude of the violator.

Appearance for Complainant:

Charles L. Figur, Esq.
Office of Regional Counsel
U.S. EPA, Region VIII
Denver, CO

Appearance for Respondent:

Jack Grad, President
Grad Electric Salvage, Inc.
Madison, SD

INITIAL DECISION

This is a proceeding for the assessment of a civil penalty pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615.

The complaint, filed on December 31, 1990, seeks a civil penalty in the amount of \$23,500. The complaint charges, in five counts that Respondent, Grad Electric Salvage, Inc. (Grad Electric), violated Section 15 of the Act and regulations located at 40 CFR Part 761, concerning the proper marking, storage, storage for disposal and disposal of Polychlorinated Biphenyls (PCB's). These charges resulted from a June 6, 1990, inspection of Grad Electric's facility.

Specifically Count I alleges that an empty, aboveground 1,000-gallon tank, had been used to store 861 gallons of fluid with a PCB concentration of 79 parts per million (ppm). This tank was not properly marked as a "PCB container" and as such was alleged to be in violation of 40 CFR § 761.40. Count II alleges that the tank described in Count I of the complaint was or had been leaking PCB's having a concentration of 79 ppm, thus constituting improper disposal in violation of 40 CFR § 761.60. Count III alleges that Grad Electric failed to comply with any of the storage requirements in 40 CFR § 761.65 for the 861 gallons of PCB contaminated oil, which was stored in the tank for at least one year.

Count IV of the complaint alleges that Grad Electric failed to comply with the storage for disposal requirements of 40 CFR § 761.65 as to four transformers being held at its facility.

Finally, Count V of the complaint charges that two of the four transformers described in Count IV were leaking fluid with PCB concentrations assumed to be between 50 and 500 ppm.

Responding to the complaint, Grad Electric, acting pro se, submitted a letter-answer, dated January 18, 1991, signed by Mr. Jack Grad, President. The letter acknowledged that the 1,000-gallon tank, referred to in Count I, had been used to store 861 gallons of transformer oil which had tested 79 ppm PCB. Mr. Grad stated that the tank was not marked, because he thought the marking requirements were not applicable to PCB contaminated containers, i.e., those holding PCBs at concentrations of 50 to 500 ppm.^{1/}

As to Count II, the alleged leaks from the tank referred to in Count I, Grad Electric's letter-answer stated that an oil-pan had been placed under the valve to detect any dripping and that no leakage had been observed. An oily residue on the valve and under part of the tank was allegedly on the tank when it was purchased. As to Count III, the reason oil in the mentioned tank, which had been disposed of on May 11, 1990, had been stored for so long was because of the financial condition of Grad Electric. The letter stated that "(w)hen I was financially able to do so, . . . I disposed of this oil in the proper manner."

^{1/} This impression is understandable, because 40 CFR § 761.40(a)(2) states that "(m)arking of PCB-contaminated electrical equipment is not required." A "PCB container," however, is defined in 40 CFR § 761.3 as "any package, can, bottle, bag, barrel, drum, tank, or other device whose surfaces have been in contact with PCBs." Inasmuch as 40 CFR § 761.40(a)(1) requires marking of PCB containers," the tank was required to be marked with an M₁ label.

Regarding the four transformers referred to in Counts IV and V, Mr. Grad asserted that he believed these transformers and others were empty. After finding that the transformers contained oil, the oil amounting to approximately 35 gallons, was drained into a 55-gallon drum.^{2/} The oil was tested, found to contain 355 ppm PCB and disposed of on June 29, 1990.

Notwithstanding these explanations, Grad Electric's letter-answer provides that "I am, in essence, stating 'no contest' to Counts I-V." The letter stated, however, that "I would like to request a hearing on the matter of the proposed penalty. . .," as the penalty is excessive considering the size and financial condition of Grad Electric Salvage, Inc. The letter continues "I would have to sell all of the assets of the company in order to pay a fine of this enormous size."

Under date of September 27, 1991, the parties filed a Joint Motion for Accelerated Decision on Liability and Initial Decision on Penalty. Documents attached to the motion and stipulated into evidence are as follows: a copy of Grad Electric's corporate income tax returns for the years 1987 to 1990, inclusive (Exhs 1-3 and 5); balance sheets and profit and loss statements (unaudited) for periods ending February 28, 1989, and February 28, 1990 (Exhs 4 and 6), and for periods ending May 31, 1991, and August 31, 1991 (Exhs 7 and 8). Exhibit 9 is the PCB Penalty Policy, dated April 9, 1990, Exhibit 10 is the Guidelines for Assessment of Civil

^{2/} The capacity of the four transformers alleged to have been improperly stored is 29 gallons.

Penalties Under Section 16 of the Toxic Substances Control Act (45 Fed. Reg. 59770-776, September 10, 1980), hereinafter TSCA Penalty Guideline, and Exhibit 11 is a memorandum, dated September 3, 1990, reflecting the recalculation of the claimed penalty to \$5,628.

The stipulation provides, inter alia, that all allegations contained in the complaint are admitted, that there are no material facts in dispute regarding the violations, that Grad Electric has remedied all of the alleged violations and that an appropriate penalty can be determined based on the documentation submitted.

Based on the pleadings, the stipulation and the attached exhibits, I make the following:

Findings of Fact

1. Respondent, Grad Electric Salvage, Inc. (Grad Electric), is a corporation and thus a person within the meaning of 40 CFR § 761.3.
2. Grad Electric owns and/or operates a facility in or near Madison, South Dakota.
3. The mentioned facility was inspected by representatives of the U.S. EPA on or about June 6, 1990. The inspectors observed an empty, aboveground tank having a capacity of 1,000 gallons. Grad Electric had used this tank to store 861 gallons of fluid having a PCB concentration of 79 ppm for at least one year.
4. The tank referred to above had been drained and the contents disposed of by Grad Electric approximately one month prior to the inspection.

5. During the period the tank referred to in findings 3 and 4 contained fluid at a PCB concentration of 79 ppm, the tank was not marked with the PCB M₁ label illustrated in 40 CFR § 761.45, the tank leaked an undetermined amount of fluid and the tank was not stored in accordance with 40 CFR § 761.45.^{3/}
6. At the time of the inspection of Grad Electric's facility on June 6, 1990, the inspectors observed four transformers, i.e., two GE Transformers, Serial Nos. B9566341 and B953223 and two Westinghouse Transformers, Serial Nos. 55A11053 and 55A11052. These transformers, having a total capacity of 29 gallons, were stored for disposal. The transformers had not been tested by Grad Electric and were assumed by the inspectors to contain PCBs at a concentration of between 50 ppm and 500 ppm. The transformers were not stored in compliance with 40 CFR § 761.65.
7. At the time of the inspection of Grad Electric's facility on June 6, 1990, the two GE Transformers identified in finding 6, having a capacity of five gallons, were leaking fluid assumed to have a PCB concentration of between 50 ppm and 500 ppm.
8. Complainant has recalculated the proposed penalty by multiplying four percent of Grad Electric's average gross

^{3/} Section 761.65 requires, inter alia, that PCBs stored for disposal at concentrations of 50 ppm or greater be stored with adequate roof and walls to prevent rain water from reaching the PCBs and have an adequate floor with continuous curbing at least six inches high. Additionally, for tanks of the capacity at issue here, preparation of a Spill Prevention Control and Countermeasures Plan is required.

annual receipts for the years 1987 to 1990, inclusive, as reflected by its corporate income tax returns for those years (Exh 11). The tax returns show gross receipts of \$241,175 in 1987, \$178,869 in 1988, \$70,121 in 1989 and \$72,644 in 1990. This results in an average of \$140,702 which multiplied by four percent equals \$5,628, the recomputed penalty sought by Complainant. The four percent is derived from the TSCA Penalty Guideline, 45 Fed. Reg. 59775 (Exh 10).

9. In a "Further Statement By Respondent Regarding The Proposed Penalty," included in the stipulation, Mr. Grad stated that he had not even been able to take a salary [from his company] since January 1991 and that in order to pay the proposed penalty of \$5,268 (\$5,628) he would be forced to sell assets of the corporation and be essentially "put out of business."
10. Grad Electric's balance sheet as of August 31, 1991, shows cash in the bank of \$1,056 and total assets of \$5,772.^{4/} Inventory as of that date was only \$227, accounts receivable are shown as \$3,105 and the largest assets listed are vehicles at \$29,826 and equipment and tools of \$29,765. Depreciation and amortization are shown as \$58,608 and \$748, respectively. Additionally, the profit and loss statement as of August 31, 1991, shows gross sales for the year to date of only \$28,398, cost of goods sold totaling \$18,319 and expenses totaling \$9,412 for a net profit of \$667 (Exh 8).

^{4/} Exh 8. All figures from Grad Electric's financial statements are rounded to the nearest dollar.

C O N C L U S I O N S

1. Grad Electric having stipulated that the allegations in the complaint are admitted, Grad Electric has violated the Act and regulations in the particulars alleged in the complaint as detailed in the above findings.
2. In accordance with Section 16 of the Act (15 U.S.C. § 2615), Grad Electric is liable for a civil penalty for the violations herein found.
3. Although Complainant's method of calculating the proposed penalty as revised, i.e., four percent of Grad Electric's gross sales for the years 1987-1990, inclusive, is in accordance with the TSCA Penalty Guideline, this method does not truly reflect Grad Electric's financial condition, because it does not adequately account for the drastic decline in gross income for the years 1989 and 1990, which has continued in 1991. Moreover, this calculation fails to consider that the corporation's net worth, as shown on the balance sheet for the period ending August 31, 1991, exceeds the proposed penalty by less than \$150.
4. An appropriate penalty is the sum of \$1,650.

D I S C U S S I O N

Section 16 of the Act^{5/} contemplates that penalties for violations will be determined in two steps, i.e., determination of a gravity based penalty (GBP) and application of any adjustment factors based on the situation of the violator.^{6/} Although there are reasons for questioning the gravity of failing to mark the tank with the PCB label and the unquantified leaks therefrom,^{7/} determination of an appropriate penalty in this instance rests primarily on the adjustment factors, i.e., "ability to pay" and

^{5/} Section 16(a)(2)(B) of the Act (15 U.S.C. § 2615) provides:

(B) In determining the amount of a civil penalty, the Administrator shall take into account the 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.

^{6/} PCB Penalty Policy, dated April 9, 1990, at 1, 2. See also, 3M Company (Minnesota Mining and Manufacturing), TSCA Appeal No. 90-3, Final Decision (February 28, 1992).

^{7/} Inasmuch as PCB contaminated electrical equipment is not required to be marked (supra note 1), the logic of requiring containers containing PCB concentrations of between 50 ppm and 500 ppm to be marked, may well be questioned. At the very least, this throws doubt on the gravity of failing to mark such a container with the PCB label.

effect on ability to continue in business," which are sometimes considered as one factor, "degree of culpability" and "other factors as justice may require." The GBP is assumed to have been appropriately determined.

The recalculated penalty of \$5,628 sought by Complainant was determined by taking four percent of Grad Electric's average gross sales or receipts for the 1987-90, inclusive, as shown by its corporate tax returns for those years (finding 8). This method is in accordance with the TSCA Penalty Guideline. While I am required to consider the guideline, I am not required to follow it. See Rule 22.27(b) of the Rules of Practice (40 CFR Part 22).

Grad Electric's gross sales for 1987 were \$241,178, gross sales were \$178,869 in 1988 and were only \$70,121 and \$72,644 in 1989 and 1990, respectively (finding 8). This drastic decline in gross sales has continued in 1991, totaling only \$28,398 as of August 31, 1991 (finding 10). Averages, of course, can be very misleading,^{8/} and it is obvious that averaging Grad Electric's gross sales over the period 1987-90 does not truly reflect the firm's financial condition. This conclusion is buttressed by the balance sheet, showing total assets of \$5,772 as of August 31, 1991, which exceeds the amount of the penalty sought by less than \$150.

^{8/} Justice Douglas dissenting in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

Under the circumstances, the fixed percentage of net profit from the guideline (four percent) will be applied to Grad Electric's gross sales for the 2.5-year period ending August 31, 1991, resulting in an unadjusted penalty of \$2,739.^{9/} This figure approximates one-half of Grad Electric's net worth.^{10/} The next adjustment factors are "degree of culpability" and "other factors as justice may require."^{11/} The penalty policy considers "culpability" from two aspects, i.e., the violator's knowledge and

^{9/} This sum is calculated:

gross sales 1989	-	\$ 70,121
1990	-	72,644
6-month period		
ending 8/31/91	-	<u>28,398</u>
Total		\$171,163
divided by 2.5=68,465	x 4%	= \$2,739

^{10/} This case is quite similar to Ray Birnbaum Scrap Yard, Docket No. TSCA-PCB-VIII-91-01 (Initial Decision, August 7, 1992), presently on appeal, wherein it was held to be arbitrary to apply the four percent rule and demand a penalty of over \$16,000 from a sole proprietorship whose net worth was less than \$20,000.

^{11/} The penalty policy considers "any history of prior violations" as operating only to increase the GBP (Id. at 15, 16). In this regard, the memorandum (Exh 11) refers to a 1985 inspection which allegedly found the tank at issue here was leaking. This allegation has not been established and, in any event, is not relevant, because the penalty policy provides that only TSCA violations resulting in a final order are for consideration in evaluating a history of "prior such" violations (Id. at 16). There is no evidence of a prior enforcement proceeding or order in the record.

degree of control over the violation (Id. at 15). While Grad Electric appears to have recognized that PCB contaminated oil in the tank should have been disposed of within one year, it apparently disposed of the oil as soon as it was financially able to do so. Failure to mark the tank with a PCB label stemmed from understandable confusion as to whether such labeling was required (supra note 1). Grad Electric was certainly negligent in failing to determine whether the four transformers identified in the complaint contained fluids and in failing to test the fluid to determine, if the fluid contained PCBs. Culpability, however, means "blameworthy or guilt,"^{12/} and thus implies more than mere negligence. Because the evidence does not support such a conclusion, "culpability" warrants neither an increase nor a decrease in the penalty.

The penalty policy recognizes that the Act authorizes the Agency to use discretion in applying "other factors as justice may require" (Id. at 14). The policy reflects that this factor is regarded primarily, if not exclusively, as concerning the "attitude of the violator." A 15 percent downward adjustment is provided, if the violator immediately halts the violative activity and takes steps to rectify the situation (Id. at 17). Grad Electric took

^{12/} Webster's Third New International Dictionary (1986).

immediate action to rectify the violations and is entitled to a 15 percent downward adjustment. An additional reduction of 25 percent is provided for, if the violator voluntarily discloses the violation prior to being notified of an impending inspection. Although this adjustment is not strictly applicable here, an analogous and more environmentally beneficial action is that Grad Electric disposed of the 861 gallons of PCB-contaminated fluid in the tank approximately one month prior to the inspection. This constituted by manyfold the largest volume of PCBs involved in the violations and, although not the highest concentration, presumably the greatest risk. In view thereof, it is concluded that the penalty will be adjusted downward by an additional 25 percent and rounded to \$1,650.

This sum is considered to be appropriate and will be assessed.

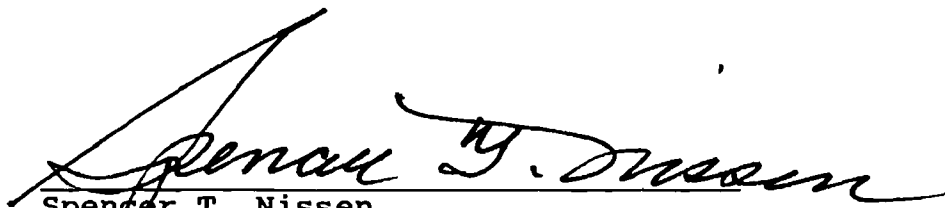
O R D E R

It having been determined that Grad Electric Salvage, Inc. has violated the Act and applicable regulations as charged in the complaint, a penalty in the amount of \$1,650 is assessed against it, in accordance with Section 16(a) of the Toxic Substances

Control Act (15 U.S.C. § 2615(a)).^{13/} Payment of the penalty shall be made within 60 days of receipt of this order by mailing a cashier's or certified check in the amount of \$1,650 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
U.S. EPA, Region VIII
P.O. Box 360859M
Pittsburgh, PA 15251

Dated this 7th day of July 1993.


Spencer T. Nissen
Administrative Law Judge

^{13/} Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Environmental Appeals Board elects sua sponte to review the same as therein provided, this decision will become the final decision of the Environmental Appeals Board in accordance with Rule 22.27(c).