11/5/85

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-III-136
STATE OF WEST VIRGINIA, DEPARTMENT OF HIGHWAYS	)	
	)	
	)	INITIAL DECISION
Respondent	)	

1. Toxic Substances Control Act - PCB - Acclerated decision as to liability should issue where Respondent, in its Answer, admits the factual allegations which comprise the violations alleged in the Complaint.

2. Toxic Substances Control Act - Penalty Calculation - Where the Agency correctly applied the Agency's published penalty policy in arriving at the proposed penalty, the burden for showing that such penalty amount should be reduced shifts to the Respondent.

3. Toxic Substances Control Act - Penalty Calculation - The mere fact that a Respondent is a government entity and supported solely by tax revenues is not a valid basis for reducing a penalty.

4. Toxic Substances Control Act - Penalty Calculation - Presentation of data which purports to show that, in other cases the Agency has, through settlement, accepted a reduced penalty is not a persuasive or valid reason to reduce a penalty in any other case.

Appearances:

Henry H. Sprague, Esquire
U.S. Environmental Protection Agency
Region III
Philadelphia, Pennsylvania

Robert F. Bible, Esquire
West Virginia Department of Highways
Charleston, West Virginia

INITIAL DECISION

This matter is before me for decision on the sole issue of the amount of the civil penalty to be assessed.

Procedural Background

Following the issuance of the Complaint in this matter and the filing of an Answer, the Complainant moved for an accelerated decision pursuant to 40 C.F.R. § 22.20 on the question of liability for the offenses set out in the Complaint on the basis that the Answer admitted the material facts which comprised the three Counts of the Complaint.

The motion was granted and an Acclerated Decision on the question of liability was issued on January 7, 1986. That Decision, which is attached hereto and made a part of this Decision, required the parties to advise the Court no later than February 6, 1986 as to whether they wished to submit the question of the amount of the penalty on briefs without a hearing. The parties, being unable to informally resolve the penalty issue, elected to submit that question on briefs and forego a hearing.

I have carefully considered the briefs filed, the materials submitted by the parties pursuant thereto as well as the documents provided in the prehearing exchange, to the extent that I find them to be reliable, admissible and relevant.

Discussion

The Complainant alleged three separate violations, hereinafter referred to as Counts I, II and III. The first Count involved the failure to inspect and keep records on 18 PCB transformers used in the Respondent's Wheeling Interstate 70 tunnel. The Complaint sought a $10,000 penalty for these two violations. The failure to inspect and to keep records thereof constitute two separate violations for which the Agency elected to levy one penalty. The Answer alleged that the inspections were actually made, but admitted that no record of such inspections were kept. The Court, in its Accelerated Decision, supra, suggested that some possible reduction of this penalty be considered, given the fact that the inspections were made. The Complainant replied that the $10,000 penalty was combined and since only one penalty was sought for two violations, either of which would spearately warrant a $10,000 penalty, no reduction is warranted.

The second Count involved the failure to mark the PCB transformers with the required markings specified in the regulations. A $15,000 penalty was proposed for this violation.

As to Count III, the Complaint alleged and the Answer admitted that the Respondent failed to keep records involving the use and quantities of materials involved in the 18 transformers. The records are to be kept and form the basis of an annual document prepared for each facility on July 1 of every year and that in this instance the Respondent failed to maintain annual documents for the 18 transformers for the calendar years 1978, 1979, 1980, 1981 and 1982 as required by 40 C.F.R. § 761.180(a). For this violation, the Complaint sought a penalty of $2,000.

The total of all of the above-mentioned violations is $27,000. However, since the inspection occurred on the basis of a request for assistance by the Respondent to the EPA to assist it in dealing with the PCB items in its possession, the Agency reduced the total penalty by 15 per cent, arriving at a net penalty of $22,950.

The penalties suggested were calculated by utilizing the Agency penalty policy concerning PCB violations which appeared in the Federal Register and were effective on April 24, 1980. This penalty policy is accepted by the Court as being a rationale and logical means of calculating penalties and its terms and conditions appear to be consistent with the statutory requirements and the intent of Congress in establishing the penalty philosophy associated with PCB violations. Like several previous penalty policies adopted by the Agency for calculating civil penalties involving other statutes, this document describes in some detail a methodology for determining the seriousness of the violations in several aspects and ultimately utilizes a matrix which attempts to incorporate all of the elements inherent in the violation consistent with the requirements of the statute. The matrix on one axis breaks down the violations as to the extent of potential damage into major, significant and minor categories; and then on the other axis it establishes a six-point range of figures which attempt to reflect the circumstances surrounding the violation. These circumstances are characterized as high range, mid-range, and low range, with each range having two figures associated with it. Each of the figures numbering one through six have associated with them a different penalty amount and once the proper designation of the two axis are determined by analysis of the violations it becomes a matter of applying these designations to the matrix and coming up with proposed civil penalties which are then incorporated into the Complaint. This exercise results in a base number

which is called the gravity-based penalty and then the penalty policy goes on to describe how additions or substractions to this base number may be calculated when one applies certain required factors to the violations, such as: culpability, history of prior violations, ability to pay, good faith, and such other matters as justice may require. Some of these adjustments may only be in an upward direction, some of them only in a downward direction and some can possibly go either way depending on the facts of the case.

In this particular case, the extent of potential damage in all instances was determined to be in the Major category because of the quantity of PCBs involved. The number of gallons of PCBs involved in this matter was 3,203. According to the penalty policy, violations involving over 1,100 gallons of PCBs are considered to be Major in extent and therefore the Major category was chosen in regard to all three Counts of the Complaint since they involve the same PCB transformers and obviously the same volume of PCBs. Since the Count I involved a "use" violation under the regulations, the penalty policy suggests that two levels in the matrix are appropriate -- level 2 or level 4. In this case since the use violation was not "improper use" which would require it to be placed in level 2, but rather a failure to keep records of the required use inspections, the violations was set at level 4 which resulted in the suggested penalty of $10,000.

As to Count II the marking violation, is Major for the reasons discussed above and since marking violations fit only one level of the matrix according to the penalty policy, that being level 3, this results in a penalty of $15,000.

As to Count III the record-keeping violation, this was also of necessity a Major violation on the probability scale and level 6 was chosen on the circumstances matrix, because, although the Respondent did not compile its

reports as required by the regulations, all the information necessary to do so was in the Respondent's possession. Instead of using level 4 in the matrix EPA used level 6 to indicate a lower probability of damage. Applying these elements to the matrix one arrives at a proposed penalty of $2,000 for Count III of the Complaint.

The Complainant points out that even though these violations had continued over a period of years and therefore the Agency, if it had chosen, could have legitimately assessed multiple day violations for these failures to comply which would have amounted to several million dollars, they elected to assess only a single day violation thus through the exercise of discretion utilized an approach to the calculation which worked to the substantial benefit of the Respondent.

The Respondent, in its brief on the penalty issue, makes several arguments. The first of which is that the Agency is seeking an extremely high penalty against this Respondent in relation to the penalties actually obtained from other persons who have violated the PCB regulations. The Respondent arrives at this conclusion by an examination of Volume 8 of the BNA Chemical Regulation Reporter which shows that during 1984 and 1985, PCB penalties actually assessed averaged a little over $6,000, whereas proposed penalties for the next following period averaged $57,000 for an extrapolated reduction of 89 per cent. The Respondent then suggested that applying this reduction to the proposed penalty in this case would result in a final assessment of $2,525. The Respondent then goes on to cite two examples of the arbritrariness of the Agency's penalty in this case citing a violation of the Clean Air Act against the City of Philadelphia where the penalty was reduced from $327,000 to $20,000, and secondly, a criminal action against Holley Electric Corporation under TSCA where a proposed penalty of $60,000 was sought and a ultimate penalty of $15,000 was assessed.

The Respondent also argues that since it is a governmental agency and is funded from state tax revenues and therefore the taxpayers of West Virginia will ultimately pay any penalty assessed, this factor should mitigate against the assessment of the penalty requested.

The Respondent further argues that the proposed penalty does not serve the purpose stated by the Agency in its March 10, 1980 announcement, i.e., that the penalties be appropriate for the violations committed; and that economic incentives for violating TSCA should be eliminated; and that persons will be deterred from committing TSCA violations. Applying this philosophy to the instant case, the Respondent argues that since it is a state agency there is no monetary gain to it for committing a violation and that there is no need to deter the Respondent from committing TSCA violations since there was never any intent on the part of the agency to violate TSCA in the first place.

The Respondent also alludes to some concern it had about the fact that the informal settlement negotiations entered into between it and the Agency was sabotaged by the fact that new counsel was assigned to the case and he reverted to the initial position of seeking the full penalty as originally assessed.

As part of its submission, the Complainant moved to exclude from the Court's consideration the 36 pages of enclosures which the Respondent had attached to its brief and further urges the Court to strike any discussions relative to settlement negotiations between the parties prior to submitting this matter to the Court on briefs. Some of the materials referred to by the Complainant in its motion to exclude have to do with documentation of the Respondent's efforts to come into compliance with the regulations following the intial inspection during which the deficiencies were pointed out to the

state. The Complainant takes the position that actions taken by a Respondent following the notification by the Agency of prior violations is irrelevant in calculating a penalty. As to these matters, the Court agrees with the Complainant that good-faith efforts to comply, after the fact, in most instances, have no bearing on the calculation of the penalty which had its genesis and basis in violations which occurred in the past. As to the reference to settlement negotiations, such matters are ordinarily excluded by the rules of practice applicable to these cases and in any event the arguments set forth by the Respondent in this regard are of no probative value. The Court will, therefore, exclude from its consideration any references to what transpired during settlement negotiations and will not, for purposes of this exercise, consider what the Respondent did to come into compliance following its notification of the existence of the violations by the Agency.

As to the other arguments made by the Respondent in support of its position that the proposed penalty is too high, such arguments are in my judgement not persuasive. The recitation of statistical information gathered from a reputable legal publication suggesting considerable reduction of proposed penalties following and growing out of informal settlement negotiations of other TSCA cases is of no particular value. This is true because in the first place the Court has no idea as to what the circumstances of each of the reported cases were and secondly, as pointed out by the Complainant, in many cases the Agency will settle a case prior to a hearing for a substantially reduced amount for several reasons not the least of which is to save the Government the cost and time of trying a case, and secondly, that normally such settlements are made in the context of prompt remedial action being taken by the Respondent, a situation which does not necessarily exist in circumstances where trial is required.

Apparently the Respondent simply does not like the result obtained by applying the Agency's penalty policy to the facts in this case. My review of the Agency's procedures in applying the facts in this case to the rationale contained in the penalty policy reveals that such exercise was done properly and it applied the correct factors in arriving at the proposed penalty amounts set forth in the Complaint. The Respondent's argument that it being a tax supported state agency in some way places it in a special category when one comes to the point of calculating a penalty is totally without merit. The statute and the regulations make no special case for governmental entities at any level and as pointed out by the Complainant, a governmental agency who is charged with protecting the health and safety of the citizens it serves certainly should provide an exemplary example to the private sector and the fact that it has no financial motives for violating the Act in no way diminishes the potential harm that its violations pose to the environment and the general public. I am, therefore, of the opinion that the arguments set forth by the Respondent in its initial and reply briefs on the issue of the proper amount of the penalty are not persuasive and do not provide the Court with any rational, legal or logical basis to reduce the penalty proposed by the Complaint.

Accordingly, it is concluded that a total penalty of $22,950 should be assessed for the violations found in this case.

ORDER[1]

Pursuant to § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $22,950 is hereby assessed against the Respondent, State of West Virginia, Department of Highways, for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by submitting a certified or cashier's check payable to the United States of America. The check shall be forwarded to:

EPA - Region 3
(Regional Hearing Clerk)
P. O. Box 360515M
Pittsburgh, PA 15251

DATED: March 21, 1986

Thomas B. Yost
Administrative Law Judge

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1 40 C.F.R. § 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its dervice upon the parties unless: (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 C.F.R. § 22.30(a) provides that such appeal may be taken by filing a Notice of kAppeal within twenty (20) days after service of this Decision.

IN RE

STATE OF WEST VIRGINIA,
DEPARTMENT OF HIGHWAYS

Respondent

RCRA-III-136

ACCELERATED DECISION

Pursuant to 40 C.F.R. § 22.20, the Complainant has moved for an accelerated decision solely on the issue of the Respondent's liability.

In support of the motion, the Complainant argues that the Answer filed by the Respondent essentially admitted the material facts which comprise the elements of the three Counts set out in the Complaint.

In its reply to the motion dated December 30, 1985, the Respondent argues that the motion should be denied as to Count I of the Complaint since a genuine issue of material fact exists as to that Count. In support of its position, Respondent states that Count I contains two parts, i.e., (1) the failure to make visual inspections of the PCB transformers as required by 40 C.F.R. § 761.30(a)(1)(ii), and (2) failure to maintain a record of such inspections and to keep such records for three years following the disposition of said transformers as required by 40 C.F.R. § 761.30(a)(1)(iv). In its Answer, the Respondent admitted that it failed to keep the required records, but stated that the inspections were made and on a more frequent basis than the Agency's rules require. Respondent argues that the Complainant's own inspection reports, which have been filed as exhibits in this case, support these statements. Respondent makes no arguments as to Counts II and III of the Complaint.

My review of the pleadings and other documents filed on the parties reveal that the Respondent has admitted violating Counts II and III of the Complaint and a portion of Count I, as discussed above.

It is clear, therefore, that an accelerated decision as to those admitted violations is appropriate, and I so find. As to the contested portion of Count I, since the proposed penalty therefore is not described but rather a single penalty of $8,5000.00 is proposed for the whole Count, I suggest that the parties may wish to discuss the matter toward the end that the Complainant may decide to adjust the penalty as to the "failure to inspect" element. I say this since the record indicates that these inspections were, in fact, made. If the Complainant decides to drop that portion of Count I having to do with the failure to inspect, the question of the amount of the penalty could be submitted to the Court on briefs without the necessity of a hearing.

Accordingly, it is hereby ordered that:

1. The Respondent violated Counts II and III of the Complaint and the recordkeeping portion of Count I.

2. The parties should consult on the issue of the amount of the penalty in an attempt to settle that question.

3. If the parties are unable to resolve the penalty issue, they should explore the notion of presenting that matter to the Court on briefs without a hearing.

4. The parties shall advise the Court, no later than February 6, 1986, as to how they wish to proceed with this case.

DATED: January 7, 1986

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, USEPA Region III; and that true and correct copies were served on: Henry H. Sprague, Esquire, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; and Robert F. Bible, Esquire, West Virginia Department of Highways, A519, 1900 Washington Street, East, Charleston, West Virginia 25305 (service by certified mail return receipt requested). Dated in Atlanta, Georgia this 7th day of January 1986.

Sandra A. Beck
Legal Assistant to Judge Yost

HONORABLE THOMAS B. YOST
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404/347-2681, Comm. 257-2681, FTS