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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
PACIFIC REFINING CO.,	)	Docket No. TSCA-09-92-0010
Respondent	)	

INITIAL DECISION

APPEARANCES

David M. Jones, on behalf of the Complainant.

Lawrence A. Hobel and Jennifer Coppo, on behalf of the Respondent.

I. Background

This case arises from 17 alleged violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. §§ 2601 - 2692, committed by Pacific Refining Company ("Respondent" or "Pacific") at its petroleum feedstock refining facility at 4901 San Pablo Avenue, Hercules, California.

On April 15, 1991 the Complainant, Region 9 of the United States Environmental Protection Agency ("Complainant" or "EPA") filed a Complaint and Notice of Opportunity for Hearing ("Complaint"). The Complaint charged the Respondent with the above-mentioned 17 violations. The Complaint is based on an EPA Region 9 inspection conducted on March 14, 1990.

A hearing was held in San Francisco, California on June 22 and 23, 1993. Witnesses were presented by EPA and Pacific. Briefing was completed on October 29, 1993.

EPA proposes the following penalties:

Count	Circumstance Level	Extent of Damages	Penalty Sought
I	2	Minor	$ 3,000
II	2	Minor	3,000
III	2	Minor	3,000
IV	2	Minor	3,000
V	2	Major	20,000
VI	2	Major	20,000
VII	2	Major	20,000
VIII	2	Major	20,000
IX	2	Major	20,000
X	2	Significant	13,000
XI	2	Significant	13,000
XII	1	Significant	17,000
XIII	1	Minor	5,000
XIV	4	Major	10,000
XV	4	Major	10,000
XVI	4	Major	10,000
XVII	4	Major	10,000
		TOTAL	$200,000

II. Summary of Decision

This decision finds Pacific liable on 8 of the 17 counts and assesses a $62,938 penalty.

III. Penalty Assessment Criteria

In the course of this decision, I have made numerous adjustments to the penalty recommended by Complainant. I have

done so after giving full consideration to the facts surrounding each alleged violation. The extent to which the actions or conduct of Respondent may have mitigated or minimized the potential threat and adverse consequences to the environment was also considered. An EPA civil penalty policy document provided guidance in this endeavor. That policy, however, is not a prescription, but a guide. The TSCA statute provides the underlying framework for the assessment of penalties. The EPA rules makes clear that the Administrative Law Judge must apply the criteria set forth in the Act as well as the civil penalty policies of the agency. When the facts warrant, the Judge may increase or decrease the penalty recommended by the EPA staff in a complaint. 40 C.F.R. Section 22.27.

The penalty policy describes a two-step approach. First, determine the gravity-based penalty. Next, consider adjustments to the gravity-based penalty in light of equitable considerations such as: culpability, history of prior violations, ability to continue in business, and other factors as justice requires.

The gravity-based penalty assessment is itself a two-step process: first, determine the circumstance level (the amount of use and requirements under the regulations); then assess the extent of potential damages (which is generally determined by the quantity of PCBs involved).

With this brief backdrop and context, the penalty policy will be discussed and applied to each of the counts in the manner just described.

A. Counts I - VIII

1. Liability

Counts I-VIII relate to Pacific's alleged failure to conduct annual PCB transformer inspections for the years 1981-1986 in violation of 40 C.F.R. § 763.30(a)(i)(xiii).

Counts I - IV charge Pacific with failure to conduct annual inspections of its PCB Transformer serial number F-957600 for the years 1981-1983, 1984, 1985, and 1986, respectively. Counts V - VIII charge Pacific with similar failures to inspect an additional nine transformers for the same years. The nine transformers are all in one location and are identified by their serial numbers as F-9575996, F-956597A, F-957596A, F-957596B, F-957595A, F-957595C, 2375/480, F-957595B, and F-957595D.

Pacific acknowledges that Transformer F-957600 and the nine transformers grouped together were sufficiently distant from each other to require two sets of inspections. Pacific, however, argues that it has been unjustifiably overcharged and the 8 counts against it should be reduced to 2 counts.

At issue is the following language of the EPA's PCB Penalty Policy (penalty policy) dated April 9, 1990 (Respondent Ex. 21 at 13):

> A separate count shall be charged for each annual document or annual inspection missed during the prior 3 years, and one count for all documents or inspections missed from three years and beyond.

Respondent interprets the "prior 3 years" to be 1988, 1989, and 1990, the three years immediately preceding the Complaint filing of April 10, 1991. Since the alleged violations related to 1981-1986, Respondent argues that under the penalty policy, it should only be subject to a one-count charge.

An EPA witness testified that the "prior 3 years" here are 1984, 1985, and 1986 and they should be subject to separate charges. Tr. 56-57. EPA believes that the "prior 3 years" should begin with the last violation, no matter when it occurred. In this case the year of the last violation is 1986, since beginning in 1987, inspections were properly conducted.

I find that Respondent's reading of the policy is more reasonable. Limiting individual penalty assessments for all violations 4 years and beyond appears intended to distinguish between older violations from those more recent. To adopt EPA's view would mean that whenever the most recent violation occurred, whether it is 5 or 10 years ago, individual counts could always

be brought going back from the last violation an additional 3 years. Complainant's interpretation would read the key word "prior" out of the policy. If the EPA intended that the last three years of violations (whenever they occurred) to be subject to separate counts, it could have easily done so by clear language to that effect.

Pacific's recent history of compliance is not at issue. Adequate inspections were conducted in the 3 years immediately preceding the Complaint filing (April 1991). Therefore, the charges brought under Counts I-IV exceed those contemplated by the penalty policy. Only one count (Count I) will be assessed against Pacific for all failures to inspect Transformer F-957600 from 1981-1986 and only one count (Count V) will incorporate all failures to inspect the remaining nine transformers for the same period.

2. Gravity-Based Penalty

The regulation requires "[a] reduced visual inspection frequency of at least once every 12 months....." 40 C.F.R. § 761.30(a)(1)(xiii).

Respondent does not contest the "extent" determinations for Counts I and V. It maintains, however, that EPA's assessment for both counts of circumstance level 2 is too harsh. Pacific argues

that circumstance 4, "failure to conduct all required visual inspections, but where a significant percentage was conducted," is more appropriate. Pacific asserts that outside consultants and Pacific's electricians had been conducting walk-throughs to inspect the transformers regularly. Initial Br. p. 9.

Circumstance level 2 shows indicated penalties of $3,000 (Count I) and $20,000 (Count V). Circumstance level 4 shows indicated penalties of $1,000 (Count I) and $10,000 (Count V).

The violations here relate to the period 1981-1986. Pacific's consultants did not begin their inspections until 1987. Complainant Ex. 1, p. 4. As to the walk-through by Pacific's electricians before 1987, no records were available to document the inspections. Id. Therefore, there is no way to substantiate Pacific's assertions that all the transformers were inspected at the appropriate intervals. At the same time, I cannot cavalierly dismiss the information given by Pacific to the EPA inspector that facility electricians had been doing "walk throughs" and have done visual inspections on the transformers since the beginning of the company. Complainant Ex. 1,p.4.

In recognition that there was some form of visual but undocumented inspections during the period, a 25% downward adjustment will be made in the circumstance level 2 penalty. The

penalties for Counts I and V are $2,250 ($3,000 x 75%) and $15,000 ($20,000 x 75%), respectively.

Pacific argues that a 75% downward adjustment should be made to the gravity-based penalty because the transformers were in use. It contends that a transformer in use presents a lower probability of harm for any failure to meet the letter of the regulations than for transformers that were out-of-service or were of marginal use for a particular business. In support of its proposition Pacific cites the case In re Bell & Howell Co. No. TSCA-V-C-033, 034, 035, 1983 TSCA Lexis 8, (E.P.A. Dec. 2, 1983).

The Bell & Howell case is not the sweeping decision that Pacific describes. Bell & Howell dealt with record keeping violations. In affirming the Initial Decision, Chief Judicial Officer McCallum noted its limited scope, finding that the Administrative Law Judge merely held that "based on the facts of this particular case, that the probability of damage was lessened because of evidence tending to show that Respondent followed reasonable procedures for cleaning up spills and leaks." Id., at p. 8.

Here, it has not been shown that the requirement for annual visual inspections of PCB transformers was directed principally at PCB transformers not in service. Nor has it been shown that

PCB transformers in service present less of a threat to the environment than PCB transformers that are out-of-service. Pacific reads more into the Bell & Howell case than is there. Indeed, one of the significant holdings of that case was that "there is no basis in the record for concluding that . . . in service items are, as a general rule, inherently safer than out-of-service items." Id.

Accordingly, Pacific's proposed 75% downward adjustment is rejected.

B. Count IX

1. Liability

40 C.F.R. § 761.30(a)(1)(vi) requires that as of December 1, 1985 that all PCB Transformers must be registered with fire response personnel with primary jurisdiction. The regulation goes on to explain that the fire response personnel with primary jurisdiction is the fire department or fire brigade which would normally be called upon for the initial response to a fire involving the equipment. The information to be supplied with the registration includes the location of the PCB transformers, the principal constituent of the dielectric fluid in the transformer and the name and telephone number of the person to call in the event of fire.

In this case, Pacific failed to inform the Hercules/Rodeo Fire District of the existence of any of its ten PCB transformers until after receipt of EPA's April 15, 1991, Complaint--some six years beyond the regulatory deadline. Respondent argues that its own operating technicians are the fire brigade with initial response authority, and they inherently need no such formal notification.

Respondent's self-notification does not meet the requirements of the regulation. A reasonable reading of the regulation suggests that notification be given to those professionally trained personnel, whose sole responsibility is to combat fires, namely the local fire department. Presumably in-house personnel would already possess the information required to be supplied with the registration. The notification to an outside fire department is necessary in light of the fact that neighboring structures and the public at large may be impacted. In-house personnel's obligations do not extend beyond company property.

Respondent is found liable on this count.

2. Gravity-Based Penalty

Complainant characterizes the failure to notify the primary fire department as circumstance 2, "major use" violation--a $20,000 penalty. Respondent argues that circumstance 4, "failure to provide complete transformer registration, but the fire department or adjacent building owners are aware of the transformer[s] locations," is more appropriate--a $10,000 penalty.

The penalty policy is specific in describing a major use violation of § 761.30(a)(1)(vi) as a "[f]ailure to register PCB Transformers with the local fire jurisdiction or the building owner within the required time." This is not a question of incomplete registration, but rather the absence of any. The language "or the building owner" does not mean self-notification. Moreover, the regulation speaks strongly to this precondition when it states that ". . . [A]ll PCB Transformers . . . must be registered with [local fire departments]." 40 C.F.R. § 761.30(a)(1)(vi). (emphasis added).

However, recognition will be given to the fact that Pacific's operating personnel knew the location of the transformers and had engaged in systematic training as firefighters. In addition to training at the refinery, Pacific's personnel spent a week of firefighting training at the University of Nevada at Reno. Tr.138-139. A fireplan existed and, as part of their

training, Pacific's personnel had to be familiar with hazardous materials locations and the contents of each storage tank. Tr. 164-165. Taking these measures into consideration, a $5,000 downward adjustment will be made in the proposed $20,000 penalty.

C. Count X

1. Liability

Complainant maintains that PCB Transformers 2375/480 and F-957597A were leaking and hence Pacific had a duty under 40 C.F.R. § 761.30(a)(1)(x) to conduct daily visual inspections of both transformers. Respondent concedes conducting only weekly inspections of Transformer 2375/480, but maintains that Transformer F-957597A was not leaking. Since this one count incorporates the failure to inspect both transformers daily and since Respondent concedes liability for one transformer, the issue of whether one or both were leaking goes to the issue of penalty, not liability.

2. Gravity-Based Penalty

Complainant charged Pacific with failing to conduct daily inspections of leaking Transformers F-957597A and 2375/480. As discussed later, EPA has not met its burden in establishing that

Transformer F-957597A was leaking. The penalty, therefore, must be assessed solely in relation to Pacific's failure to inspect daily Transformer 2375/480.

The circumstance level 2, violation recommended by EPA is for "failure to inspect PCB transformers." It carries a $13,000 penalty. Respondent claims that this is an incorrect characterization of its actions. Pacific argues that its weekly inspections describe a circumstance level 4 minor use violation--"failure to conduct all required visual inspections, but where a significant percentage was conducted."

In light of Pacific's weekly inspections of 2375/480 (Complainant Ex. 1 at 14), I find that a level 2 violation would be excessive. At the same time, a once a week inspection does not qualify as a significant percentage of the required daily inspections. In these circumstances, the more appropriate penalty level is $10,000. This gives appropriate weight to the small percentage (14%) of required inspections conducted.

D. Count XI

1. Liability

40 C.F.R. § 761.40(j) requires that the means of access to a PCB transformer must be marked to warn of the PCB item inside.

While Transformer 2375/480 was properly marked as a PCB transformer, Respondent concedes that the "M_L" stamp required by 40 C.F.R. § 761.40(j) was not placed on the fence enclosing that transformer. Initial Br. p. 21.

Respondent is found liable on this count.

2. Gravity-Based Penalty

For failure to mark the fence enclosing the transformer, EPA proposes a $13,000 penalty--a major marking violation as defined by circumstance level 2 of the penalty policy (at 11) as:

> ...a situation where there is no indication to someone familiar with PCBs that PCBs are present, such as a failure to label the access to a PCB Transformer or failure to label the transformer.

Pacific says the violation should be categorized as a circumstance level 5 minor marking violation which carries an indicated $3,000 penalty. It is described by the penalty policy (at 12) as:

> ... situations in which some requirements of the rule have not been followed, but there is sufficient

indication that PCBs are present and PCB Items can be identified.

While the fence was not marked, the PCB transformer was clearly marked. In his report the EPA inspector noted that "[t]he PCB M_L located on the transformer was visible through the fence." Complainant Ex.1, p.5. The evidence also shows that the photograph of the transformer with the PCB marking (Complainant Ex. 1,attachment 9, photo 2) was taken with the photographer's back to the point of access. Tr.128-129. This would indicate that the marking was visible from the point of access to the enclosure. Therefore, there is a reasonable likelihood that someone entering the enclosure would see the marking on the transformer.

The evidence is more in line with that of a circumstance 5 minor marking violation. Accordingly, the penalty assessed is $3,000.

E. Count XII

1. Liability

At the time of the inspection on March 14, 1990, the EPA inspector observed an active leak and spill from two separate

locations on Pacific's PCB Transformer 2375/480 which resulted in a stained area of approximately 20 square feet. A PCB leak constitutes an illegal disposal of PCBs in violation of 40 C.F.R. § 761.60(d)(1).

Respondent concedes that an active leak existed at Transformer 2375/480 and recognizes that the violation exists because the spill occurred, regardless of the absence of fault. Initial Br. p. 16.

Respondent is found liable on this count.

2. Gravity-Based Penalty

For leaks emanating from Transformer 2375/480, the PCB penalty policy indicates a circumstance level of 1, "major disposal." The "extent of potential damage" is assessed by square footage of the stained area on a porous floor. Twenty square feet are precisely the demarcation between a minor extent (20 sq. ft. or less) and a significant extent (20-100 sq. ft.). The EPA inspector, noted a spill of "approximately 5 feet by 4 feet." EPA Inspection Report at 5.

Respondent points to the disparity of the penalties for minor ($5,000) and significant ($17,000) extents and proposes a

compromise assessment of $11,000, the average of the two.

Due to the large discrepancy between the penalties, the inexact measurements taken by Complainant, and the fact that their estimation happens to lie on the dividing line, I find the appropriate gravity-based penalty for Count XII to be $11,000.

F. Count XIII

1. Liability

On his inspection, the EPA inspector observed that "PCB Transformer F-957597A had a visible leak and spill stain of about 1 foot by 1 foot." Complainant Ex. 1 at 5. As noted in Count XII, a PCB leak constitutes a violation of 40 C.F.R. § 761.60(d)(1).

Pacific argues that, absent sampling, the visual inspection conducted by the EPA is insufficient to satisfy its burden of proof in light of an alternative explanation that the stain was caused by a non-PCB switchgear located nearby. Tr. 144-145.

Pacific's witness testified that at the time of the inspection (March 1990), the EPA inspector suggested that a wipe test be made to make sure the leak was not a PCB leak. Tr. 145.

Pacific retained S.D. Myers Corporation which sampled and wipe tested the fluid from the stain in May 1991. The results show PCB concentrations below regulated levels. Respondent Ex. 10.

On cross-examination Pacific's witness Koo, its Environmental Engineer, testified as follows (Tr. 150):

> Q. Can such a sample that is taken one year after the inspection, does that accurately reflect what the inspector observed?
>
> A. I don't know.

But, on redirect examination, in response to a precise question concerning the stability of PCB over time, Mr. Koo testified as follows (Tr. 156):

> Q. Would you expect the PCBs to biodegrade or evaporate between 1990 and 1991?
>
> A. PCB is relatively stable and biodegradable is something scientists are looking at right now, but then I know its a very, very, very slow process.

On cross-examination of Pacific's Environmental Manager, Mr.Edwards, similar testimony was elicited (Tr.165-166):

> Q. Based on your understanding of PCBs, would you anticipate that there would be a degradation or other change in the PCBs such that sampling taken in '91 would not be be representative of conditions in 1990?

A. It's based on known available data and science, currently the feeling is that the degradation of PCBs is slow and over a long period of time. Therefore, I doubt that there would be any type of significant change in the level of PCBs from one year to the next.

I find that EPA has failed to establish the existence of a PCB spill at Transformer F-957597A by a preponderance of the evidence. The wipe test laboratory analysis was included as part of Pacific's initial prehearing exchange. EPA presented no empirical evidence to establish the existence of a PCB leak. EPA offered no evidence to refute the efficacy or reliability of Pacific's analysis. Nor was that study discredited on cross-examination. EPA's briefs were silent on the subject.

In the absence of contradictory evidence, a visual inspection accompanied by a photograph may be sufficient to establish the existence of a PCB leak. However, it is not sufficient, standing alone, to overcome actual test results which have not been discredited. Once the test results were presented in the prehearing exchange, EPA had the burden of going forward to prove the presence of PCBs or to discredit the test results through its own witness or through the impeachment of Pacific's evidence via cross-examination. The burden of proof remains with the EPA. It has not sustained that burden.

Count XIII is rejected.

G. Counts XIV - XVII

1. Liability

EPA charged Pacific with four counts of failing to maintain annual documents related to the use and storage of PCBs as prescribed by 40 C.F.R. § 761.180(a). The four counts cover the years 1978-1985, 1986, 1987, and 1988, respectively.

Respondent relies on the same provision of the PCB penalty policy that is at issue in Counts I-VIII.

As previously found, the penalty policy distinguishes between older violations and more recent ones. For the reasons already discussed related to Counts I-VIII, only one count, (Count XIV) incorporates all failures to document PCB Items for the years 1978-1987. Accordingly, Counts XV and XVI are rejected. Count XVII may be brought because 1988 is within the 3-year period prior to the filing of the April 15, 1991 complaint.

2. Gravity-Based Penalty

Counts XIV and XVII relate to failure to maintain annual documents for all 10 PCB Transformers for 1978-1987 and 1988,

respectively.

Pacific does not dispute Complainant's characterization of Counts XIV and XVII as being major extent violations. The dispute here relates to the proper circumstance level to assign the violations.

Complainant characterizes the continued failure to maintain annual documents as circumstance 4, "significant recordkeeping." Respondent prefers level 6, "minor recordkeeping," and cites to the fact that historical data was available, but not compiled properly. Circumstance levels 4 and 6 show indicated penalties of $10,000 and $2,000, respectively.

I find that level 4 is too harsh. Examples of level 4 violations include the lack of records or the absence of data on PCB Transformers. Here, the data was not absent. Tr. 37-38. But, neither was the violation merely a clerical error nor a partial omission of facts, which is a level 6 violation. Level 5 appears to be the more appropriate circumstance level. Some of the requirements of the rule have been met, i.e., the collection of data, but the compilation of the data via annual reports was missing. Accordingly, Pacific will be assessed a $5,000 penalty for each of Counts XIV and XVII.

IV. Other Adjustment Factors

Pacific argues that the gravity-based penalty should be adjusted downward in consideration of its compliant and cooperative attitude and its ability to pay the penalty and continue in business.

Recognition will be given to Pacific's attitude and conduct by reducing the gravity-based penalty by 5%. Once it received the EPA inspection report alleging the violations, Pacific took a number of remedial steps. These included ensuring the annual reports were maintained in the future, phasing out and properly replacing and removing the PCB transformers, sending letters to the local fire department to confirm that they had the information regarding the PCB transformers, removing Transformer 2375\480 and disposing of contaminated soil, and posting a sign on the fence at Transformer 2375\480. There is no evidence to show that Pacific had not been fully cooperative with the EPA inspectors.

While the penalty policy suggests as much as a 15% adjustment for attitude and conduct (p.17) I have not made the full adjustment. Pacific waited more than a year to make the wipe tests of Transformer F-957597A which Pacific says were

suggested by the EPA inspector. Tr.145. While the wipe tests results were negative, the delay in testing might have been consequential if the unit had been leaking PCBs.

With respect to ability to pay and continue in business, I find that Pacific has failed to demonstrate its inability to pay the penalty and continue in business. Pacific filed its evidence on this matter under a claim of business confidentiality pursuant to 40 C.F.R. S 2.203, 2.306(i) and 22.22(a). The evidence was used to support Pacific's position in Docket No. EPCRA-09-90-0007 as well as the instant case. The two cases were not consolidated but were heard back to back on June 22 and 23, 1993. I hereby adopt and incorporate herein by reference my findings on this matter as set forth in my Initial Decision in Docket No. EPCRA-09-90-0007 issued this same day.

V. Conclusions

For the 8 surviving counts of the Complaint, the penalty breakdown is as follows:

Count	Gravity-Based Penalty
I	$ 2,250
V	15,000
IX	15,000
X	10,000

XI	3,000	
XII	11,000	
XIV	5,000	
XVI	5,000	
	$66,250	Total Gravity-Based Penalty
	5%	Other Adjustment Factor
	- 3,312	Other Adjustment
	$62,938	Total Penalty

IT IS ORDERED that:

1. A civil penalty in the amount of $62,938 be assessed against Respondent, Pacific Refining Company.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

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

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

4. Failure upon part of Respondent to pay the penalty within the prescribed statutory time frame after entry of the

final order may result is the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b)(c)(e).

5. Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).

Jon G. Lotis
Administrative Law Judge

Dated: December 14, 1993
Washington, D.C.