UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	
	)	
Allis-Chalmers Corporation,	)	Docket No. TSCA V-C-020
	)	
Respondent	)	

INITIAL DECISION

This is a proceeding instituted by a complaint issued January 20, 1981, by the United States Environmental Protection Agency (Complainant) under the Toxic Substances Control Act ("TSCA") Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violations of rules promulgated under Section 6(e) of the Act, 15 U.S.C. 2605(e). 1/

The Complaint alleges violations of the Polychlorinated Biphenyls ("PCBs") Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 40 CFR 761, promulgated under TSCA, which constitute violations of Section 15 of the Act (15 U.S.C. §2614).

1/ TSCA, Section 16(a)(1), 15 U.S.C. 2615(a)(1) provides as follows:

> Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.

Section 15 of the Act, 15 U.S.C. 2614, provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . .(B) any requirement prescribed by section. . .6, or (C) any rule promulgated under section. . .6."

The Complaint charges Respondent, Allis-Chalmers Corporation, with violations at its facility located at 1205 South 70th Street, Milwaukee, Wisconsin. The Complaint consists of three counts: (1) failure to test a PCB contaminated hydraulic system for residual PCBs (Count I); (2) failure to mark a PCB contaminated hydraulic system with the ML-PCB label (Count II); and (3) failure to properly dispose of a PCB transformer (Count III).

Assessment of a penalty in the amount of $33,000 was originally proposed, but during the prehearing exchange of materials this proposed penalty was reviewed and recalculated to the amount of $19,000. This recalculation was accomplished in accordance with EPA's penalty policy for PCB rule violations issued under the guidelines for assessment of civil penalties under TSCA, Section 16, and made effective for administrative proceedings pending on or instituted after April 24, 1980. (45 FR 59776, 59777, Sept. 10, 1980).

Allis-Chalmers answered and requested a hearing pursuant to the rules of practice governing these proceedings, 40 CFR 22. Hearing was held on September 9, 1981. Complainant was represented by Katherine Buttolph, Attorney, Enforcement Division, U.S. Environmental Protection Agency, Region V, Chicago, Illinois. Respondent was represented by Thomas Shillinglaw, Esquire, Milwaukee, Wisconsin. Complainant presented one witness and 24 Exhibits. Respondent presented three witnesses and 10 Exhibits.

Pursuant to stipulation of the parties, the following facts were agreed upon: (EPA 24)

1. Complainant has jurisdiction to bring this action.

2. Respondent, with the assistance of personnel from the Wisconsin Department of Natural Resources, had drained the German Roll hydraulic system of PCB hydraulic fluid in November/December 1977 and had refilled it with Monsanto 50E non-PCB hydraulic oil.

3. Respondent's German Roll hydraulic system was not tested for PCBs by November 1, 1979.

4. Respondent's German Roll hydraulic system was not marked on April 23, 1980, the day of the EPA inspection.

5. Respondent's German Roll hydraulic system contains 220 to 1100 gallons of hydraulic fluid.

6. Respondent does not dispute its ability to pay the proposed penalty of $19,000.

7. Respondent's 583 KVA/404 gallon chlorextol filled PCB transformer was removed from service on November 22, 1979, and was disposed of at an Annex II landfill.

8. Respondent's 583 KVA/404 gallon chlorextol filled PCB transformer was drained of its PCB liquid, it then stood empty for approximately three (3) months, but it was not filled with solvent for a period of 18 hours prior to its disposal in an Annex II landfill.

9. There was no alleged damage to the environment resulting from any of Respondent's acts contained in the Complaint.

The issues remaining to be resolved are:

1. Were the PCBs contained in the hydraulic system of the German Roll Machine used "in a totally enclosed manner"?

2. Was Respondent's 583 KVA/404 gallon chlorextol filled PCB transformer properly flushed prior to its disposal in an Annex II landfill?

Following the hearing, the parties submitted briefs on the legal and factual issues, and this decision is rendered on consideration of the entire record and the briefs submitted by the parties. Question (1) and (2) above are answered in the negative, but the actions taken by Respondent are mitigating factors which serve to reduce substantially the amount of the penalty. All proposed findings of fact inconsistent with this decision are rejected.

Findings of Fact

1. The Respondent, Allis-Chalmers Corporation, maintains a place of business at 1205 South 70th Street, Milwaukee, Wisconsin. (Comp. Ex. 3)

2. On April 23, 1980, an inspection was conducted at this facility by the U.S. EPA to determine compliance with the PCB Manufacturing Processing, Distribution in Commerce, and Use Prohibitions. (Calhoun Tr., p. 6) (Comp. Ex. 1)

3. Participants in the inspection were Michael Calhoun and William Leedy, employees of Versar, Inc., and Thomas Goss, Warren St. John, Ralph Ellis, Chauncey Barber, H. A. Lang, and Richard Skeen, employees of Allis-Chalmers Corporation. (Calhoun Tr., p. 7) (Comp. Ex. 3)

4. Written notice of the inspection was provided to Allis-Chalmers Corporation officials before it was conducted. (Calhoun Tr., p. 6) (Comp. Ex. 1)

5. Records examined during the inspection indicated that the German Roll, a hydraulic machine, used Monsanto PCB hydraulic fluid until 1977. (Calhoun Tr., p. 7) (Resp. Ex. 3, Comp.. Ex. 6a)

6. In November/December, 1977, the German Roll hydraulic system was drained and refilled with Monsanto non-PCB hydraulic fluid. (Calhoun

Tr., p. 15, Estes Tr., p. 37) (Comp. Ex. 24)

7. Allis-Chalmers Corporation did not test the hydraulic fluid in the German Roll for PCBs after it was refilled with non-PCB fluid to insure it contained less than 50 ppm. (Calhoun Tr., p 15, Estes Tr., p. 39) (Comp. Ex. 24)

8. Samples taken of the hydraulic fluid in the German Roll at the time of inspection revealed the presence of 150 ppm of PCBs. (Calhoun Tr., p. 8) (Comp. Ex. 2)

9. The German Roll hydraulic machine was not marked with an ML-PCB label at the time of inspection. (Calhoun Tr., p. 8) (Comp. Ex. 24)

10. There is the possibility that the hydraulic fluid in the German Roll machine may leak, after which it would be recaptured through open troughs and funnelled to a reservoir. (Calhoun Tr., p. 11)

11. The level of hydraulic fluid in the German Roll is reduced by vaporization. It is solvents contained therein which contribute to this reduction in fluid level. (Estes Tr., p. 32, 42)

12. In 1980 there were ten maintenance problems that required a maintenance man to visit the pit where the hydraulic system is located. (Estes Tr., p. 35, 28)

13. The cost of changing the hydraulic fluid in the German Roll Machine was in excess of $20,000. (Estes Tr., p. 36)

15. Allis-Chalmers did not test the hydraulic fluid in the German Roll Machine for PCBs after it was refilled with non-PCB fluid. (Calhoun Tr., p. 15, Estes Tr., p. 39) (Comp. Ex. 24)

16. Respondent's German Roll hydraulic system was not marked with the ML-PCB label as required by 40 CFR 761.20(a)(7) on April 23, 1980, the day of the inspection.

17. At the time of the inspection, on April 23, 1980, records of the Respondent did not mention if a PCB transformer had been soaked with solvent for 18 hours prior to disposal. (Tr., p. 16)

18. Respondent admits that the PCB transformer was not filled with solvent for a period of 18 hours prior to disposal. (Comp. Ex. 24)

20. There was no alleged damage to the environment resulting from any of Respondent's acts contained in the Complaint.

Discussion and Conclusion

1. Were the PCBs contained in the hydraulic system of the German Roll Machine used "in a totally enclosed manner?"

Complainant contends that the intent of the regulations is to designate all hydraulic systems as nontotally enclosed units which must be tested for residual PCBs until the level falls below 50 ppm.

Respondent contends that the system is totally enclosed and, therefore, no testing for PCBs was required. In furtherance of this contention, Respondent describes the hydraulic system as follows:

> The hydraulic system of the German Roll Machine is a closed loop system, with a reservoir and an in-line pump (the latter of which maintains the fluid in the lines at designated pressures). From the reservoir, the liquid goes to an outlet, through the piping and then back through an inlet into the same reservoir.

All the fluid is continually enclosed within the closed loop system -- there can be no opening in the system, since the system would then lose the pressure it needs to maintain in order to operate. [Hearing transcript, pp. 28 & 29]. In addition to the hydraulic system of the German Roll being a totally enclosed system, the hydraulic system itself is located in a concrete pit, the floor of which is about 8 feet thick. The floor is poured concrete, so it is a single piece foundation. The pit is about 14 feet deep and about 14 feet wide. Thus, even if the system were to malfunction at some time in the future and have a leakage, there would be no possibility of PCBs leaking from the system's enclosure.

Furthermore, the top of the pit is protected by a 42 inch high handrail. The entrance to go down into the pit is locked, with a chain across the front of the stairs. The reservoir, mentioned above, is covered securely, and locked with a padlock. [See Allis-Chalmers Exhibit 10, referred to on p. 27 of the hearing transcript]. The only person with a key to the entrance to the pit and to the reservoir is the supervisor of maintenance. There were only 10 recorded maintenance problems in 1980 (electrical, mechanical, preventive or conceivably hydraulic) which required a maintenance man to go into the pit. Allis-Chalmers has installed on the German Roll, above the pit, an alarm system which indicates when fluid has to be added from time to time to the hydraulic system (due to vaporization of the solvents in the fluid). Fluid is added without having anyone go into the pit.

Thus, the pit creates another self-contained enclosure for the German Roll hydraulic system, a system which is itself totally enclosed.

Due to the fact that there is some confusion at this time regarding the status of pertinent regulations which might have resolved the instant issue, the court has no other option than to look to the intent of the drafters of the regulations and then as a matter of fact, not law, decide this issue. Environmental Defense Fund v. Environmental Protection Agency, 15 ERC 1081, October 30, 1980, offers no enlightenment except that EPA has no basis for designating certain items as totally enclosed, absent substantial evidence that the items could not and would not leak.

40 CFR §761.31 begins by stating: "The following nontotally enclosed PCB activities are authorized pursuant to §6(e)(2)(B) of TSCA." Section 761.31 goes on to list (a) through (k) as those nontotally enclosed activities which are authorized. §761.31(e) applies to "Use in Hydraulic Systems." In the Preamble to these regulations, "authorization" is defined as "an exception to the TSCA Section 6(e)(2) January 1, 1978, ban of nontotally enclosed activities." (44 F.R. 31528 5/31/79). The authorization for use in hydraulic systems is therefore an exception to TSCA's ban of nontotally enclosed activities. The rule states that "no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner." (TSCA §6(e)(2)(A), emphasis added). An exception is use in hydraulic systems, a use which is "other than a totally enclosed manner."

The preamble discusses the rationale for designating hydraulic systems as nontotally enclosed activities.

> "Some systems have been topped-off with non-PCB fluids, and others have been drained and flushed in an attempt to reduce PCB contamination. However, systems may still be contaminated with residual PCBs that either remain after flushing or are gradually released from interior surfaces. As a consequence, hydraulic systems can contain concentrations of PCB ranging from less than 10 ppm to thousands of parts per million PCB. These systems normally leak fluid, even when properly maintained. In addition, some of the fluid volatilizes as a result of the high operating temperatures. These losses result in PCB-contaminated water effluents as well as air emissions, both of which have contributed to existing levels of PCB contamination in the environment. Therefore, this use of PCBs is clearly not use in a totally enclosed manner." 44 F.R. 31534 5/31/79. (Emphasis added).

The proposed rule covered only die casting systems; the final rule extended the authorization, (or exception), "to apply to the use of PCBs in all

hydraulic systems." (44 F.R. 31535). "Under the final rule, each hydraulic system must be tested no later than November 1, 1979." (44 F.R. 31535). "Under the final rule, persons who own hydraulic systems are required to test for the concentration of PCB annually" until such time as the level reaches 50 ppm. (44 F.R. 31535). "Records of this testing must be retained for five years after the hydraulic system reaches 50 ppm." (44 F.R. 31535). "EPA believes that an annual requirement to test and drain any fluids that contain more than 50 ppm is essential to reduce, as expeditiously as possible, the potential for PCB exposure. . . . Allowing concentrations of PCBs above 50 ppm in these systems over time is not acceptable to EPA in terms of the significant risks to health and the environment associated with the leakage from these systems." (44 F.R. 31535).

It is quite clear from this discussion that EPA considers all hydraulic systems to be nontotally enclosed and as a result, has attempted to write regulations which will reduce the exposure of people and the environment of PCBs released from such systems.

Respondent's German Roll hydraulic system is not exempt from these regulations. Respondent has admitted that the solvent in the hydraulic fluid volatilizes (Tr. p. 32 and 42) because the level of fluid falls below a designated operating level and requires replenishing. (Tr. p. 31 and 41). Volatilization occurs as a result of high operating temperatures. (Tr. p. 42). Volatilization may result in the release of PCBs into the air, contaminating the environment.

According to 40 CFR §761.2(hh), a "Totally Enclosed Manner" means any manner that will ensure that any exposure of human beings or the environment to any concentration of PCBs will be insignificant; that is, not measurable

or detectable by any scientifically acceptable analytical method." The Preamble, quoted above, states that concentrations of PCBs above 50 ppm in hydraulic systems creates a significant risk to health and the environment. 40 CFR §761.30 states: "Since any exposure to PCBs is found to be significant exposure, a totally enclosed manner is a manner that results in no exposure of humans or the environment to PCBs." (Emphasis added).

The German Roll hydraulic fluid contained a measurable amount of PCBs, 150 ppm. Respondent admits that the solvent in the fluid vaporizes. This contradicts the definition of a Totally Enclosed Manner.

In Environmental Defense Fund v. Environmental Protection Agency, the court did comment that "Congress left to the Administrator the task of deciding which uses were to be deemed totally enclosed." (p. 1096). The Toxic Substances Control Act, §6(e)(2)(C) reads:

> For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule. (Emphasis added).

As of April 23, 1980, the Administrator had made no rule that use of PCBs in a hydraulic system is a totally enclosed activity. The Administrator has made a rule which authorizes use of PCBs in a nontotally enclosed system such as a hydraulic system, under certain explicit conditions. These conditions require testing of the hydraulic fluid to determine the PCB concentration therein. If the concentration exceeds 50 ppm, the system must be drained and refilled, until the concentration falls below 50 ppm. Failure to perform this test is a failure to comply with Federal regulations and constitutes a violation of 40 CFR §761.31(e).

It is concluded that the intent of this phrase, "used in a totally enclosed manner" is to not require testing of a hydraulic system where the system is, in fact, so totally enclosed as not to permit any vaporization requiring refilling, leaks, or access to the fluid, as in this instance, through the reservoir tank. This is not the case with this particular German Roll hydraulic system. Other hydraulic systems may be different.

Since application of the definition of "totally enclosed" must be made on a case by case basis, as in this instance, it is concluded here the Respondent's failure to test the German Roll hydraulic machine is a violation of 40 CFR 761.31(e).

While this violation is found, the conduct and actions of Respondent, in addition to the stipulation that "There was no alleged damage to the environment resulting from any of Respondent's acts contained in the Complaint," serve as mitigating factors in determining the penalty to be assessed.

The two primary mitigating factors, in addition to no damage to the environment, are:

1. Respondent sought the assistance of the Wisconsin Department of Natural Resources in draining the German Roll hydraulic system of PCB hydraulic fluid in 1977, and had it refilled with Monsanto 50E non-PCB hydraulic oil, and had reason to believe that no more than 50 ppm PCB residues would be found in the hydraulic fluid.

2. In the absence of more specific direction from EPA, Respondent also had reason to believe that the hydraulic system in the German Roll Machine was "totally enclosed."

Failure to Mark PCB Equipment

The conclusion reached above, the stipulation that "Respondent's German Roll hydraulic system was not marked on April 23, 1980, the day of the inspection," and the analysis of the hydraulic fluid showed PCBs in a concentration of 150 ppm necessitates a finding that Respondent has violated 40 CFR 761.20.

Failure To Properly Dispose Of A PCB Transformer

Complainant contends that Respondent has violated 15 U.S.C. Section 2614, and 40 CFR Section 761.10(b)(1)(i)(B), by failing to allow a PCB transformer to stand for 18 hours filled with solvent, prior to disposing of the transformer in an Annex II chemical waste landfill.

Stipulation (EPA 24) reads in part, as follows:

> "7. Respondent's 583 KVA/404 gallon chlorextol filled PCB transformer was removed from service on November 22, 1979, and was disposed of at an Annex II landfill.
>
> "8. Respondent's 583 KVA/404 gallon chlorextol filled PCB transformer was drained of its PCB liquid, it then stood empty for approximately three (3) months, but it was not filled with solvent for a period of 18 hours, prior to its disposal in an Annex II landfill."

While Respondent does not contest this allegation of the complaint, it argues that Allis-Chalmers has substantially complied with the regulations and that no environmental harm occurred as a result of its failure to strictly adhere to the regulatory requirements.

In preparing the transformer for disposal, Respondent let it stand for 3 months after it had been drained of its PCB contaminated fluid. Just prior to disposal, the transformer was flushed with solvent for approximately 5 hours. After the transformer was flushed with solvent, the empty

transformer was then welded into another steel container before it was properly disposed of in a proper landfill. [Hearing transcript, p. 47]. The drained oil and solvent were also properly disposed of in a licensed chemical landfill.

Respondent contends that this accomplishes the same cleaning of residual PCBs in the transformer as does the EPA requirement of having the transformer stand for 18 hours, immediately after draining, with the solvent in it.

This may or may not be true, but the fact remains the EPA requirement was not strictly followed and it must be conceded that EPA had a sound basis for its decision to require this procedure since the technical feasibility of this operation was originally challenged, which resulted in this present procedure.

Penalty

The purpose of the penalty is to assure compliance with the PCB rule by eliminating economic incentives for violating the rule and deterring persons from violating the rule.[2/]

Here it does appear that the violations are not the result of Respondent's simply disregarding the PCB rule requirements, or seeking some economic advantage by not complying, and that Respondent's actions make it unlikely that such violations will recur.

2/ See Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA, 45 FR 59770.

Conclusion

Therefore, it is concluded that Allis-Chalmers Corporation has violated the use, marking and disposal requirements of the PCB rule. However, the proposed civil penalty is reduced, as follows:

Count I	$1,500.00
Count II	500.00
Count III	1,000.00
TOTAL:	$3,000.00

O R D E R

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $3,000.00 is hereby assessed against Respondent Allis-Chalmers Corporation 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 forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Edward B. Finch
Acting Chief Administrative Law Judge

February 5, 1982