IN RE)
) T.S.C.A. DOCKET NO. PCB-80-03
BIG HORN FRACTURATION)
) INITIAL DECISION
Respondent)

Preliminary Statement

This is a proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), instituted by a complaint issued October 9, 1980 by the Director of Enforcement Division, Region VIII, United States Environmental Protection Agency (EPA), against Big Horn Fracturation, the Respondent herein, for alleged violations of the act and the regulations issued thereunder.[1/]

1/ Section 16(a) of the act provides, in part, as follows:

> (a) Civil. - (1) 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" or to "(3) fail or refuse to (A) establish or maintain records...as required by this Act or a rule promulgated thereunder."

Specifically, the complaint alleges that the Respondent failed to mark an area used for the storage of PCBs and that the building used for storage of PCBs failed to have a continuous curbing, all in violation of the act and the pertinent regulations issued pursuant, in effect, of section 6 of the act (15 U.S.C. 2605). The complaint proposed a civil penalty in the total amount of $13,000.00 for such violations.

The initial answer filed by the Respondent denied all of the allegations in the complaint. However, shortly prior to the hearing a stipulation between the parties was filed wherein the Respondent admitted that there were regulable concentrations of PCBs on its property, that the Respondent does not claim an inability to pay the penalty proposed by Complainant, and that on the day of the inspection the PCBs were stored in an unmarked storage area on a concrete slab with no curbing. Since the Complainant admitted the factual allegations which form the basis for the complaint in this matter, the only matter left for decision is the appropriateness of the proposed civil penalty.

The parties submitted pre-hearing materials pursuant to section 22.19(e) of the pertinent rules of practice. A hearing was held on March 10, 1981 in Denver, Colorado before Thomas B. Yost, Administrative Law Judge, United States Environmental Protection Agency. Complainant was represented by Stephen A. Chavez and David J. Janik, attorneys at law, Enforcement Division, Region VIII, United States Environmental Protection Agency, and the Respondent was represented by John J. Flynn, Jr., attorney at law, Denver, Colorado. Complainant presented two witnesses and introduced no exhibits into evidence. Three witnesses testified on the behalf of the Respondent and it introduced one exhibit into evidence.

After the hearing and at the end of the briefing period, Complainant moved to amend a typographical error in the complaint which motion is hereby granted. The typographical involved a mis-cite of the regulations in the complaint; to wit, in Count I the regulation concerning the violation of failure to mark an area used for storage of PCBs was cited as 40 C.F.R. 761.42(c)(4) when in fact the proper citation would be 40 C.F.R. 761.42(c)(3). The amendment to the complaint was deemed not to prejudice Respondent since both parties impliedly consented to trying the issue of the marking violation at the hearing, and the Respondent had actual notice of the alleged marking violation and was therefore not mislead as to the nature of the defense that should have been provided. It should be noted that the Respondent did not notice the typographical error until it filed its reply brief and in conjunction therewith moved to file an amended finding of fact which in essence would have dismissed the charge represented by the mis-quoted regulation. The Respondent's motion to amend its findings of fact based on that typographical error is denied.

Findings of Fact

1. Respondent, Big Horn Fracturation, is a corporation general partnership doing business in Rozet, Wyoming.

2. On February 6, 1980, the day of the U.S. Environmental Protection Agency's inspection of this complaint, PCBs were stored in an unmarked storage area on a concrete slab with no curbing.

3. The PCB oil on Respondent's property was over 50 ppm as stipulated by the parties.

4. Respondent did not claim an inability to pay the penalty proposed by Complainant.

5. The base penalty proposed by the Environmental Protection Agency was calculated according to the guidelines established by Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a) and more specifically the Environmental Protection Agency's penalty policy directed toward violations of T.S.C.A. 45 F.R. 59770, taking into account the significance, the extent, the gravity and the circumstances of the violations alleged in this case.

6. The Environmental Protection Agency further considered various other factors including Respondent's: (a) history of violations, (b) culpability, and (c) economic conditions, and any other such factors as justice may require prior to concluding that circumstances did not warrant either an upward or downward adjustment of the base penalty proposed.

7. Respondent was made aware of the existence and requirements of the PCB regulations on January 9, 1980 during a phone call between Henry Bonzak, an EPA inspector, and Mr. Rhinehart, Respondent's plant superintendent. (Tr. 47).

Discussion

In January of 1980, based upon information furnished by a PCB manufacturer, Mr. Paul Hanneman, an EPA enforcement inspector from Region VIII, called Mr. Rhinehart, a supervisor of Big Horn Fracturation, to inquire whether or not any PCB materials were on the premises of Big Horn's Rozet Facility. Upon inquiry of his staff, Mr. Rhinehart determined that there used to be about ten 55-gallon drums of the material on the property, but that they had been given to a local rancher for his use. Mr. Rhinehart immediately had the drums returned to the company property. On January 9, 1980, Mr. Bonzak, an EPA inspector, telephoned

and upon being advised that PCB materials were on the premises, told Mr. Rhinehart of the legal requirements concerning their storage. He advised Mr. Rhinehart that the drums must be marked, dated and stored in a building with roof, walls and curbing. He did not recall telling Mr. Rhinehart that the building itself should also be marked. The Respondent ordered the required labels and affixed them to the drums and placed them in a steel building which conformed to EPA requirements except that it lacked the necessary curbing.

On February 6, 1980, Mr. Hanneman inspected the Rozet facility and while there took six samples of the material in the drums, which upon later analysis were determined to have high concentrations of PCBs. While on the premises, Mr. Welch, the plant manager, called Mr. Rhinehart, his supervisor, and asked that Mr. Hanneman speak to him. He advised Mr. Rhinehart of the results of his inspection. Mr. Rhinehart, inquired as to how the company could dispose of the PCBs. Mr. Hanneman said he would look into that question and get back to him. At the time of this conversation, there were no approved PCB incinerators in the country. However, several weeks prior to the hearing, Mr. Hanneman did send Mr. Rhinehart the information on PCB disposal. By that time two approved incinerators were available.

Apparently no further contact was made by EPA with the Respondent until the complaint was filed, except that a copy of the PCB analysis was sent to them. It is Respondent's position that after advising Mr. Rhinehart of the storage requirements, Mr. Bonzak told him to do the best he could and that EPA would be in touch later. Mr. Bonzak does not recall saying that the Respondent should just do the best they could. He believes that he did not.

At no time prior to the filing of the complaint did the Respondent make any effort to find out what the regulations required as to stored PCBs. Between the time of the filing of the complaint and the hearing, the Respondent did however install the required curbing at a cost of $1,500.00.

Respondent's argument that it was mislead by EPA into believing that they had done all that the law required is not acceptable either as a defense or in mitigation of the penalty. Mr. Rhinehart testified that he was specifically advised that curbing was required. The risk involved in failing to do so must be borne by the Respondent. I find no mitigative merit to Respondent's argument on that point.

As noted above, prior to the hearing the parties entered into a stipulation wherein the Respondent, in essence, admitted the factual allegations contained in the complaint. At the beginning of the hearing Complainant made a motion for an accelerated decision pursuant to section 22.20 of the Consolidated Rules of Practice on the grounds that since there is no issue of material fact as a matter of law, Complainant is entitled to a judgement as to Count 1 and II of the complaint since they had established a prima facie case for the violation by virtue of the stipulations agreed to by both parties. Complainant further moved that the Court declare that the hearing be conducted only to determine the validity of the penalty proposed in the complaint. Counsel for the Respondent admitted that he stipulated that PCBs were found on the premises and were sitting on a concrete slab without curbing, but stated that they have affirmative defenses to the effect that the recommendations made to the Respondent by EPA were misleading, and therefore that if a penalty is assessed it should be substantially reduced or, alternatively,

none assessed at all. In order to clarify this situation the Court inquired of counsel for the Respondent as to whether his defenses went to whether or not a violation actually occurred or to whether or not there should be some mitigation or complete elimination of the penalty amount. In response to that question, counsel for the Respondent stated that it was his position that the latter portion of my question applied and that he would stipulate and admit that there was a technical violation. (See pg. 4 of the record.) Based upon that answer, Complainant's motion was granted. Despite the foregoing, in his initial brief, counsel for the Respondent urged that even in the face of the stipulation and his remarks on the record in the hearing, that EPA in fact had proved no violation since it had not been proven that the PCB materials in the uncurbed building were actually stored for disposal which is a requirement under the regulations. Respondent also raised certain constitutional defenses which will be discussed later.

Based on the record in this case I find no merit to Respondent's defense that the PCB materials were not stored for disposal. There is not one scintilla of evidence to support the notion that they were stored for any other purpose. Mr. Rhinehart specifically asked EPA how to dispose of the PCBs. The fact that the Respondent had previously given the PCBs to a local rancher clearly demonstrates that they had no further use for them and were therefore not stored for re-use.

Respondent also alleges violation of the due process clause of the Fifth Amendment to the U.S. Constitution because the Agency used a penalty policy which did not become effective until April 24, 1980 for a violation that occurred on February 6, 1980. First of all, I have no authority to consider constitutional issues in these proceedings.

Secondly, the argument has no validity in law which even approaches a constitutional violation. The complaint was issued on October 8, 1980 almost six months after the penalty policy became effective. The penalty policy specifically directs that the guidance is immediately applicable and should be used to calculate penalties regardless of the date of violation. It should also be noted that since the penalty policy is not a regulation, there is no requirement that it be published. The Agency did however publish it in the Federal Register on September 10, 1980 at Vol. 45, No. 177, pp. 59770-58783. Clearly, no due process violation is involved since we are dealing with an internal agency policy statement and not a statute or a regulation.

As noted in the findings of fact, the Complainant in calculating the proposed penalty properly considered all of the factors required by both section 16(a)(2)(B)[2/] of the act and the penalty policy guidance issued by EPA. (See testimony of Mr. Blackwell, Tr. 8-12.) The presiding officer is not however bound by the penalty proposed by the Agency in its complaint nor the published penalty policy.[3/] As pointed out in the case of Yaffe Iron & Metal Co., Inc., T.S.C.A. Docket No. VI-1C:

> "Complainant should be commended for the publication of proposed guidelines as they are informative and helpful to the regulated public and constitute an attempt to impose uniformity and uniform

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2/ Section 16(a)(2)(B) of the act (15 U.S.C. 2615(a)(2)(B)) provides that in determining the amount of a civil penalty "The Administrator shall take into account the nature, circumstances, extent, and gravity of the...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".

3/ Section 22.27(b) of the Rules of Practice (45 F.R. 24360), the rules of practice applicable herein, provides as follows:

> (b) Amount of civil penalty. The presiding officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines published under the act. The presiding officer may increase or decrease the assessed penalty from the amount proposed to be assessed in the complaint.

treatment where complaints are issued in 10 regions and occasionally by EPA headquarters. But, their basic usefulness relates to the penalties to be proposed in the complaint to be issued. Obviously, they cannot reflect the situation after a hearing when more information is then available. We believe, however, that deference should be accorded the guidelines in the assessment of the civil penalty to the extent possible."

The Respondent made a good faith effort to comply with the regulations upon being advised of their requirements, except for the curbing. I am also impressed by the fact that Respondent retrieved the PCB materials previously given away out of its concern that they might have been improperly used or disposed of by the rancher. The record did not disclose when the drums were removed from the Respondent's property, and it is possible that they had no legal responsibility to bring them back.

As to the "failure to provide curbing" violation, the record revealed that the materials were marked, dated and placed in a steel building with a roof, concrete flooring and walls.[4/] The drums were also in good condition with no evidence of leaks or defects. It is true, as pointed out by the Complainant, that if one of the drums were to rupture, it is likely that the PCB material could have been released to the environment and it is this potential that the rules are designed to prevent. However, they did not rupture and proper curbing was installed prior to the hearing. The complaint assessed a penalty of $10,000.00 for this violation, which is in accordance with the figure specified in the gravity based penalty matrix found in the penalty policy. The extent of potential damage was considered to be "significant" based upon the amount of PCBs involved. The "probability of damages" factor was considered to be at Level 3 of the mid-range value.

4/ This is in contrast to most of the situations we see in other cases where the PCB materials were found out in the open with no protection at all.

I have no particular quarrel with these initial determiniations, but based upon the cooperative attitude of the Respondent and its good faith efforts to take proper precautions, I find that a penalty of $7,000.00 is more appropriate for the "no curbing" violation.

The complaint assessed a penalty of $3,000 for the "failure to mark the building" violation. This figure corresponds to the higher value of the "low range" probability matrix. The facility in question is located about three miles from Rozet, Wyoming, a town of about 25 people. The Respondent only employs one person at the facility, who knows that the drums contain PCBs and it is therefore rather unlikely that someone would wonder onto the facility and be exposed to the PCBs. This is especially true since they are located in a closed building and the drums themselves are marked with the required EPA warning labels. In view of all of these circumstances, I find that the figure contained in Level 6 of the low range probability matrix of $1,300.00 is more appropriate.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

Order[5/]

Pursuant to section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $8,300.00 is hereby assessed against Respondent, Big Horn Fracturation, 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.

Thomas B. Yost
Administrative Law Judge

DATED: May 1, 1981

5/ Unless an appeal is taken pursuant to section 22.30 of the interim rules of practice or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. (See section 22.27(c)).