1/21/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	:	
CITY OF ST. JOSEPH	:	**Docket Number: TSCA-VII-91-T-298**
	:	Judge Greene
Respondent	:	

ORDER
ON CROSS MOTIONS FOR "ACCELERATED DECISION"

This matter arises under section 15(1) of the Toxic Substances Control Act ("TSCA" or "the Act"), 15 U.S.C. § 2614(1), which makes unlawful the failure or refusal to comply with ". . . . any rule promulgated or order issued under section 2604 or 2605" [sections 5 and 6] of TSCA; and under section 16(a)(1) of TSCA [15 U.S.C. §2615(a)(1)], which provides for the imposition of civil penalties for violations of section 15 "in an amount not to exceed $25,000 for each such violation." [1]

[1] Section 2614(2) makes it unlawful for any person to fail or refuse to establish or maintain records.

The Act also provides that "[E]ach day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 [section 15 of TSCA] of this title".

The complaint charges violations of 40 C.F.R. Part 761, which pertains to the manufacture, processing, use, distribution in commerce, disposal, storage, and "marking" of polychlorinated biphenyls ("PCBs"). Violations of these regulations, which were promulgated pursuant to section 6(e) of the Act, constitute violations of Section 15 of TSCA, 15 U.S.C. § 2614. The violations alleged relate to improper disposal of PCBs [Counts I - III], improper storage for disposal [Counts IV and V], failure to dispose of PCB equipment [Count VI], and failure to prepare certain required records in connection with respondent's electrical equipment [Counts VII, VIII]. A total civil penalty of $85,000 is proposed.

Specifically, the complaint charges in Count I that respondent improperly disposed of 54 gallons of fluid containing PCBs[2] in excess of 50 ppm in violation of 40 C.F.R. § 761.60, and then failed to clean up the site in a timely manner, failed to keep records pertaining to the spill and cleanup, and failed to perform post-cleanup sampling of soil in the area of the spill as required

---

[2] 40 C.F.R. § 761.3 defines "disposal" as ". . . . intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs . . . Disposal includes spills, leaks, and other uncontrolled discharges of PCBs . . . . "

40 C.F.R. § 761.60, **Disposal requirements,** provides in pertinent part as follows:

> (a) PCBs. (1) Except as provided . . . PCBs at concentrations off 50 ppm or greater must be disposed of in an incinerator . . . . (2) Mineral oil dielectric fluid from PCB Contaminated Electrical Equipment containing PCBs in concentrations of 50 ppm or greater, but less than 500 ppm, must be disposed of . . . in an incinerator . . . in a chemical waste landfill. . . .

by 40 C.F.R. §§ 761.125 and 761.130. The spill is alleged to have come from an untested transformer[3] (evidence submitted in pretrial exchange indicates that the spill occurred near a baseball park[4]) on June 18, 1990. Complainant proposes a civil penalty of $25,000 for Count I. In Counts IV and V it is alleged that the PCB transformer from which the 54 gallons of PCBs spilled had not been stored for disposal after the spill in accordance with 40 C.F.R. § 761.65(a)(1), and was not dated when placed in storage in violation of 40 C.F.R. § 761.65(c)(8). Civil penalties of $3000 and $1000, respectively, are proposed for Counts IV and V.

Count II of the complaint charges that improper disposal of PCBs in violation of 40 C.F.R. § 761.60 occurred as a result of a release of PCBs from 47 PCB capacitors and five PCB-contaminated transformers[5], which were stored in a facility operated by

---

[3] 40 C.F.R. § 761.3, **PCB Contaminated Equipment**, provides that oil filled electrical equipment other than circuit breakers, reclosers, and cable, whose PCB concentration is unknown must be assumed to be PCB contaminated electrical equipment.

[4] Complainant's Exhibit [CX] 1 in pretrial exchange, a memorandum from one of respondent's employees, states that "On June 18, 1990 a wind storm blew doen a tree which tore down three phase primary lines, and a transformer bank which was completely destroyed spilling transformer oil. This transformer bank is located approx. 20 ft. from the center field fence of a baseball diamond. The quantity of oil spilled is appeox. 55 gals. A very small amount of oil remained and a sample was taken and sent to PPM Inc. for testing. On 8-28-90 the test results were received. . . F612010-66P tested at 594 ppm."

[5] 40 C.F.R. § 761.3 defines "PCB-Contaminated Electrical Equipment" to mean " . . . . any electrical equipment, including but not limited to transformers . . . capacitors, circuit breakers . . . that contain 50 ppm or greater PCB, but less than 500 ppm PCB. Oil filled electrical equipment other than circuit breakers, reclosers, and cable whose PCB concentration is unknown must be assumed to be PCB-Contaminated Electrical Equipment."

respondent known as the "City Yard." The release is alleged to have occurred on October 18, 1988, when an employee damaged the capacitors and transformers with a front-end loader. A civil penalty of $25,000 is sought for these alleged violations.

In connection with the same alleged release, Count III of the complaint charges that respondent improperly disposed of PCB-contaminated debris and protective suits used in the sampling of the City Yard spill area by placing them in a landfill, in violation 40 C.F.R. § 761.60(d)(2). A penalty of $1500 for this alleged violation is proposed.

Count VI alleges that the 47 PCB capacitors and "related PCB material"[6] involved in the City Yard incident were not disposed of within one year, as required by 40 C.F.R. § 761.65(a).[7] Complainant proposes a penalty of $10,000 for this alleged violation.

Counts VII and VIII charge that respondent failed to prepare "annual documents" relating to PCBs in service or projected for disposal for calendar years 1988 and 1989, in violation of 40 C.F.R. § 761.180(a).[8] A civil penalty of $10,000 is proposed for

---

[6] **Complaint** at Count VI, paragraph 57.

[7] 40 C.F.R. § 761.65, **Storage for Disposal**, provides at (a) in pertinent part that "(A)ny PCB Article . . . stored for disposal after January 1, 1983, shall be removed from storage and disposed of as required by subpart D of this part within one year from the date when it was first placed into storage."

[8] 40 C.F.R. § 761.180, **Records and monitoring**, provides in pertinent part at subparagraph (a) that ". . . . Beginning February 5, 1990, each owner or operator of a facility . . . using or storing at any one time at least 45 kilograms (99.4 pounds) of PCBs . . . or one or more PCB Transformers, or 50 or more PCB Large High

each charge.

In its answer to the complaint, respondent denied every charge, alleging affirmatively that it had acted in good faith and had met all requirements of the regulations. It was asserted that none of the counts of the complaint "state a claim upon which relief can be granted." In addition, respondent urged that Counts IV and V are moot because the transformer in question had been removed. [9]

The parties were unable to settle, and pretrial exchange was made according to schedule. The only stipulations which the parties could reach were that on or about October 18, 1988, a discharge of PCBs occurred at respondent's City Yard site; and that "in the past respondent City has utilized some electrical apparatus containing PCBs." Complainant thereupon moved for "accelerated decision," urging that no material facts remain in dispute and that complainant is entitled to judgment as a matter of law. Respondent responded with a document entitled **Respondent's Response to Complainant's Motion for Accelerated Decision, or, in the Alternative, Counter-Motion for Accelerated Decision in Favor of Respondent**. ["Response to Motion"].

---

or Low Voltage Capacitors shall develop and maintain at the facility . . . all annual records and the written annual document log of the disposition of PCBs and PCB items. The written annual document log must be prepared for each facility by July 1 covering the previous calendar year . . . ." The annual records must include all signed manifests generated by the facility during the calendar year, all certificates of disposal received by the facility, and numerous other items.

[9] Answer to Counts IV and V, **Respondent's Answer to the Complaint and Request for Hearing** at (unnumbered pages) 5-6.

With respect to Count I of the complaint, complainant urges that respondent's own documents, some of which were filed in pretrial exchange by complainant, establish the fact of a 55 gallon spill, the 594 ppm concentration of the PCBs spilled, and the failure of timely and proper cleanup[10], thus constituting a basis for enforcement for improper disposal pursuant to 40 C.F.R. §761.60.[11] In response to the challenge of the summary judgment motion, respondent did not deny the factual allegations recited in Count I, but stated that the spill did not constitute a violation of TSCA because it was the result of an "Act of God, thereby relieving [respondent] from any liability that may have resulted from such accident." Respondent asserts also that the "sample from the damaged transformer was not representative of the true content of PCB to volume . . . [but was] the highly concentrated dregs of the transformer fluid, and therefore, application of 40 C.F.R. §

---

[10] Complainant refers here to Respondent's Exhibit 10 in pretrial exchange, 16th unnumbered page. **Motion for Accelerated Decision**, at 4.

[11] Complainant's **Motion for Accelerated Decision**, at 2. See also 40 C.F.R. §761.135(a), which sets forth a presumption against enforcment for penalties if the cleanup of a spill has been timely and proper:

> Effect of compliance with this policy and enforcement. (a) Although a spill of material containing 50 ppm or greater PCBs is considered improper disposal, this policy establishes requirements that EPA considers to be adequate cleanup of the spilled PCBs. Cleanup in accordance with this policy means compliance with the procedural as well as the numerical requirements of this policy. Compliance with this policy creates a presumption against both enforcement action for penalties and the need for further cleanup under TSCA.

761.60 is improper."[12] No evidence in support of this assertion was provided.[13] In the absence of evidence either that the fluid spilled did not contain in excess of 50 ppm PCBs, or that the fluid tested was not "respresentative" of the transformer's fluid contents (at least a rationale in affidavit form as to why the small amount of fluid[14] remaining in the transformer would have had a higher PCB content than the spilled fluid), respondent's assertion is mere speculation.[15] As such, it does not overcome the summary judgment challenge. The regulation provides that PCBs in excess of 50 ppm must be disposed of in an incinerator. "Disposal" is defined to include accidental spills.

It is clear that the Act and regulations which govern here do not make an exception for spills, i. e. improper disposals,[16] of PCBs, which occur as a result of an "Act of God". No distinction is made either in the Act or in the implementing regulations for

---

[12] **Response to Motion** at (unnumbered pages) 1-2.

[13] Complainant's reply to the Response to Motion suggests that "pooled fluid" would not show a higher concentration of PCBs. **Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision and Complainant's Response to Respondent's Counter Motion for Accelerated Decision in Favor of Respondent**, at 2.

[14] Respondent's affidavit of Mr. Bowser, paragraph 4.

[15] Bearing in mind that the spill apparently occurred as the result of a lightning strike and that there was little fluid left in the transformer at the time the sample was taken a few days after the spill, no logical reason to believe that such fluid was concentrated -- apart from the question of whether "concentrated" fluid would have had a higher level of PCBs -- has been advanced.

[16] 40 C.F.R. § 761.3 defines the term "disposal" to include spills, leaks, and other uncontrolled discharges of PCBs.

the escape of these highly toxic substances to the environment according to the particular manner in which they escaped. Indeed, the definition of "disposed" includes "accidental." It does not matter, from the point of view of liability under the Act, that respondent did not deliberately or directly cause the spill described in Count I or that the spill was not respondent's "fault," although clearly speed -- or lack of it -- in cleaning up would be a factor to consider in determining whether enforcement for penalties would be instituted.[17] For purposes of a determination as to liability alone, it matters only that the spill (failure to incinerate) occurred, and that it contained over 50 parts per million of PCBs. Here, however, since respondent brings nothing further to bear upon the question of liability for this charge, it must be held that no material facts remain in dispute, even taking respondent's evidence at its strongest, and that complainant is entitled to judgment respecting Count I of the complaint as a matter of law. Conjecture is an insufficient basis for denial of summary judgment action.

In connection with Count II, complainant points to numerous documents indicating that respondent's employee damaged 47 capacitors and five transformers with a front end loader on October 18, 1988, which resulted in a release of fluid containing greater than 50 ppm PCBs. Respondent's response to the motion with respect to Count II is that the "City timely and in good faith effected testing and clean-up of the City Yard spill site in compliance with

---

[17] See note 12, **supra**.

40 CFR Sections 761.120 and 125, and, therefore, EPA's Count III is improper under 40 CFR Section 761.135(a); . . . at all times in pursuing clean-up of the City Yard spill the Respondent City acted timely and in good faith in selecting independent contractor AmerEco Environmental Services, Inc. to perform the testing and clean-up at the City Yard site."[18] Respondent's pretrial exchange shows that as of March, 1990 -- more than a year after the spill, cleanup was not yet complete.[19],[20] Nothing in the response to the motion reveals a dispute as to whether or not a spill occurred, and, accordingly, it must be held that factual allegations in Count II respecting the spill are not in dispute. The response does not constitute a defense to the charge that fluid containing in excess of 50 ppm was improperly disposed of. In essence, respondent merely restates its earlier denial as to this count, asserts that Count II does not state a claim upon which relief can be granted, and suggests that its duty to clean up was discharged by hiring an independent contractor to test and clean up. As noted above, respondent must do more than deny liability in response to a motion for summary judgment; in this case the only response beyond denial is that respondent hired an independent contractor for cleanup, which is not a defense after the fact of the spill, even in

---

[18] **Response to Motion** at (unnumbered pages) 1-2, 14-15.

[19] **Response to the Motion**, Affidavits of Mr. Burris (paragraphs 1, 18, 23-24) and Mr. Leftin (paragraph 3).

[20] Complainant's pretrial exchange exhibits marked 4, 5, 9, 11, 12, 14, and 15; respondent's pretrial exchange exhibits 1, 2, 3, 6, 10-12. See complainant's **Motion for Accelerated Decision** at 4-8.

connection with cleanup. The responsibility to clean up in a manner consistent with the regulations is respondent's alone, regardless of the involvement of a contractor.[21] In connection with 40 C.F.R. § 761.125, respondent must show compliance with the PCB Spill Cleanup Policy (40 C.F.R. § 761.120) in order to have an argument that enforcement for penalties is inappropriate.

Respondent denies that the spill was "major," in that "there was no run-off of contaminated soil or water to the river." This argument goes to the amount of penalty to be assessed rather than to the issue of liability. Respondent also argues, not without engendering some sympathy, that the city's rules and regulations require competitive bidding on any publically funded project. This process appears to have been time-consuming,[22] and may account for portions of the time elapsed between the spill and the beginning of cleanup. This factor, however, like the question of whether the spill was "major," does not go to liability for a violation in a statutory scheme that provides for strict liability. Such arguments will be considered during the penalty phase of this proceeding, if the penalty issue is not the subject of a settlement between the parties.

Respecting Count III, respondent asserts in response to the motion that the protective wear and empty glass vials which were disposed of in the city landfill were not contaminated by PCBs and

---

[21] Whether the contractor performed according to the contract, of course, is a separate issue.

[22] See Affidavit of Mr. Leftin, attached to **Response to Motion**.

were not required to be disposed of as PCB-contaminated waste pursuant to 40 C.F.R. § 761.60(a) and (b)(2). The affidavit of a Department of Public Works and Transportation supervisor states that he "observed City employee in hazardous protective wear take samples from the area soil around the discharge," and "at no time did [he] observe any contact with the discharge by the employee." Further, he "did not observe any discharge on the hazardous protective wear."[23] The affidavit goes on to state, in support of respondent's assertion that the items buried in the landfill were not contaminated, that the vials which were sent to the city landfill had not been used. A second affidavit, that of the Director of Public Works and Transportation, states that he, too, observed no "direct contact" with the PCBs by the person who took the sample.[24]

It will be held that a factual issue has been shown to exist, since in connection with summary judgment the case for the non-moving party must be taken at face value in examining the evidence put forth in response to the motion. The accuracy of respondent's affiants' observations, what is meant by "direct contact," and how certain these individuals can be that no PCBs touched, for example, the protective boots, are all questions to be raised on examination at trial.[25] Accordingly, it is held that respondent has

---

[23] **Affidavit of Mr. John Bowser**, paragraphs 9, 10.

[24] **Affidavit of Mr. Burris**, at paragraph 3.

[25] Complainant urges in reply to the Response to Motion that respondent took 14 samples and that PCBs as high as 122,000 ppm were found. This is taken as an expression of doubt that there

demonstrated the existence of a factual issue with respect to whether a violation was committed as asserted in Count III, paragraphs 34-35, of the complaint.

As for Count IV, which charges that the transformer involved in the ballpark spill referred to in Count I was stored for disposal in the City Yard in violation of 40 C.F.R. § 761.65(b), respondent responded to the motion with an affidavit to the effect that the transformer had not been stored for disposal. The affidavit states that the transformer had been placed in the City Yard on June 22, 1990, after the spill, but was not stored there for disposal.[26] Respondent argues that it was city policy to repair and reuse electrical equipment where possible.[27] The same response is made to complainant's motion as it applies to Count V, which charges that the transformer had not been dated when it was placed in storage, in violation of 40 C.F.R. § 761.65(c)(8).

Assertions that a PCB transformer was not placed in storage for disposal do not raise a factual issue as to whether a transformer was improperly stored for disposal under the regulations, and do not constitute a defense to the charge. Under the regulatory scheme here, when PCBs and PCB items are removed from service, they may be placed in only two types of storage: temporary storage for up to thirty days [40 C.F.R. 761.65(c)], and

---

could have been no contamination, but it does not overcome the presence of a factual issue as to whether there was, in fact, contamination.

[26] Leftin affidavit, paragraph 2.

[27] Response to the motion, at (unnumbered) pages 15-16.

storage for disposal which may last up to one year [40 C.F.R. § 761.65(a)]. Storage for disposal [40 C.F.R. 761 -- Subpart D, Storage and Disposal] must conform to the requirements of section 761.65, **Storage for Disposal.** These requirements include adequate roof, walls, and floor; continuous smooth and impervious floor and curbing to the height of six inches; and other specifics.[28] Since respondent's storage was clearly not "temporary" as contemplated by the regulations, because the transformer had been in the City Yard for at least four months at the time it was observed during the November 7, 1990, inspection, and since the regulations do not provide for lengthy storage of PCBs for any purpose other than disposal, the storage of the damaged transformer here can fall into no category other than storage for disposal. Respondent points to no evidence which would raise a factual issue in connection with the charges set out in Counts IV and V. It must be held that there is no material fact remaining at issue.

Respondent's response to the motion as it pertains to Count VI, which charges that 47 capacitors involved in the City Yard spill and "related PCB material"[29] were not disposed of within one year of storage for disposal as required by 40 C.F.R. § 761.65(a)

---

[28] The **Declaration of Mr. Robert L. Krager** attached to the Motion for Accelerated Decision states that Mr. Krager observed ". . . . a damaged transformer that had fallen from a pole at Hyde Park. Two of the bushings on the transformer were broken. The transformer was stored outside, unprotected from the weather in an unbermed area." CX 4(d) (photograph 11) proports to show the area where the transformer was stored.

[29] Complainant describes these materials as contaminated soil from the City Yard spill. **Motion for Accelerated Decision**, at 10.

is the same as for Counts IV and V. Again, however, the existence of factual issues is not demonstrated by an argument that the capacitors were not stored for disposal. As has been noted above in connection with Counts IV and V, even if the intent was to repair the equipment at some point, no long-term storage other than one year prior to disposal is contemplated by or is permissible under the regulations once PCB equipment is removed from service.[30] This is fully consistent with the dangers posed by the extremely toxic material that is the subject of these regulations.

Respondent's response to complainant's motion as it relates to Counts VII and VIII, failure to prepare annual documents for PCBs and PCB items for 1988 and 1989, is that there is "no set format" for such reports, and that respondent's inventory records for those years meet the requirements of 40 C.F.R. § 761.180(a). While it is true that the regulations prescribe no set format, 40 C.F.R. § 761.180(a) does provide that annual documents shall contain specific information that is clearly lacking in respondent's inventory[31]. Respondent offers no explanation for the absence of the required information, or for the failure to have prepared the documents in a timely fashion. Accordingly, it must be held that no factual issue has been raised, and that, both because the inventory does not meet the requirements of the regulation and because it was not timely prepared, complainant is entitled to

---

[30] Complainant asserts that the equipment could not be repaired, **Reply to Response** at 4-5; and **Motion for Accelerated Decision** at 6, 9.

[31] Exhibit 1 attached to affidavit of Mr. Burris.

judgment as a matter of law with respect to Counts VII and VIII.

Accordingly, it must be found that there are no issues of fact to be determined with respect to Counts I, II, IV, V, VI, VII, and VIII of the complaint, and that complainant is entitled to judgment as a matter of law as to those counts. Consequently, respondent violated the regulations recited in those charges, and also violated section 15(1) of TSCA, 15 U.S.C. § 2614(1), as charged. It will be found that respondent has raised an issue of fact with respect to the charge set forth in Count III.

The issue of appropriate penalty herein is clearly in dispute, and in this case must be set for trial if a settlement cannot be reached. Motions for accelerated decision are rarely granted as to the penalty for violations found, and only in unusual circumstances not seen here.[32]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No material issues of fact remain in dispute as to Counts I, II, IV- VIII. Complainant is entitled to judgment as a matter of law with respect to respondent's liability for these counts.

2. Respondent violated 40 C.F.R. §§ 761.60, 761.65(b)(1), 761.65(c)(8), 761.65(a), and 761.180(a) as charged in the

---

[32] There is great reluctance to impose civil sanctions without an oral evidentiary hearing. Further, credibility determinations must frequently be made in order to set a penalty in the appropriate amount, and, in this connection, live testimony is helpful. See **In the Matter of Jenny Rose, Inc., Decision and Order**, Docket No. IF&R III-395C, Feruary 22, 1993; **Swing-A-Way Manufacturing Co., Order Denying Motion for "Accelerated Decision" as to Penalty for Certain Counts**, March 12, 1993.

complaint, and, as a consequence, violated section 15(1) of TSCA as charged.

3. Respondent is liable for civil penalties for these violations.

4. Respondent has raised an issue of fact with respect to the violation charged in Count III of the complaint, i. e. whether or not any protective gear worn by respondent's employee in taking a sample of the City Yard spill area was contaminated by PCBs. This issue will be tried if it is not settled by agreement of the parties.

5. The issue of appropriate penalty for the violations found herein remains and will be tried if it is not the subject of an agreement between the parties.

ORDER

Accordingly, complainant's motion for "accelerated decision" is hereby granted as to liability for the violations charged in Counts I, II, IV, V, VI, VII, and VIII. Complainant's motion is denied with respect to Count III of the complaint and as to the issue of the penalty for Counts I, II, and IV - VIII.

Respondent's alternative motion for "accelerated decision" is hereby denied.

And it is **FURTHER ORDERED** that the parties shall confer for the purpose of attempting to reach settlement of the charge set

forth in Count III of the complaint as well as the the penalty issues remaining herein.

It is **further ORDERED** that they shall report upon the progress of their effort during the week ending February 25, 1994.

J. F. Greene

January 21, 1994
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on January 24, 1994.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: City of St. Joseph
DOCKET NUMBER: TSCA-VII-91-T-298

Ms. Venessa Cobbs
Regional Hearing Clerk
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

Henry F. Rompage, Esq.
Office of Regional Counsel
Region VII - EPA
726 Minnesota Avenue
Kansas City, KS 66101

Pamela M. Schweder, Esq.
Room 307, City Hall
11th & Frederick Avenue
St. Joseph, MO 64501