UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

JUN 19 10:30

In the Matter of	)	
	)	
Frankfort Power and Light,	)	Docket No. TSCA-II-PCB-85-0268
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - Default Orders - Withdrawal of Answer and Request For Hearing - Where Respondent withdrew its answer and request for hearing, but, nevertheless, insisted that proposed penalty was excessive and record provided substantial support for this contention, Complainant's motion for a default order in accordance with Rule 22.17 (40 CFR Part 22) was denied.

Toxic Substances Control Act - Rules of Practice - Determination of Penalty - Lack of Culpability - Where evidence established that only reason Respondent was required to prepare an annual document was that PCB oil, PCB contaminated soil and debris resulting from cleanup activities after a capacitor explosion exceeded 45 kilograms specified by 40 CFR 761.80(a) and proper disposition of PCBs and PCB materials was accomplished, Respondent's lack of culpability was held to justify a substantial reduction in penalty proposed for failure to prepare an annual document.

Appearance for Complainant: Paul Simon, Esq.
U.S. EPA, Region II
New York, New York

Appearance for Respondent: John J. Bono, Esq.
Frankfort, New York

Initial Decision

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)).1/ The complaint issued October 16, 1985, alleged that in 1981 Respondent used or stored more than 45 kilograms of PCBs at one time and that at the time of an inspection on July 23, 1985, did not have an annual document for the year 1981 as required by 40 CFR 761.180(a). For this alleged violation, it was proposed to assess Respondent a penalty of $6,000.

Respondent, through counsel, filed an answer denying the alleged violation and setting forth various affirmative defenses, which may be summarized as lack of knowledge of the requirement, that the necessary information was available in its files, administrative confusion arising from changes in department heads and the Village Board and financial difficulties. A hearing was requested.

By letter, dated November 27, 1985, the ALJ directed that the parties exchange certain prehearing information on or before January 17, 1986. Information requested from Respondent consisted of a summary of evidence to

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1/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
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> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;
>
> * * *.

The instant rules were promulgated under § 6(e) of the Act.

support the allegation that all information required to prepare an annual document for the year 1981 was available in its files and financial statements or other evidence to support the assertion payment of the proposed penalty would be an undue hardship. Complainant furnished the information required of it in a timely fashion. Respondent, however, failed to do so and indeed, failed to make any reply to the ALJ's letter.

On February 25, 1986, the ALJ issued an order directing Respondent to show cause, if any there be, on or before March 17, 1986, why a default order finding the violation charged, and assessing the penalty proposed, in the complaint should not be entered.

By letter, dated March 14, 1986, addressed to counsel for Complainant, counsel for Respondent forwarded documents showing, inter alia, capacitors on hand, list of capacitors removed from service in 1981, manifests and certificates of disposal for capacitors removed from service and recent test results on transformers. The letter stated that my sole request at this point is that the penalty be minimized as much as possible. In a letter of even date addressed to the ALJ, counsel for Respondent purported to enclose copies of documents furnished opposing counsel and stated that "* * * the Village of Frankfort withdraws its request for hearing and answer to the complaint."[2/] The ALJ did not receive this letter.

By letter, dated April 30, 1986, Complainant's counsel forwarded to the ALJ the mentioned correspondence and noting the withdrawal of the answer and request for hearing, moved for the entry of a default order pursuant to Rule 22.17(b), 40 CFR Part 22. In a letter, dated May 6, 1986,

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2/ The withdrawal was referred to in the letter to Complainant's counsel and was stated to be "* * in the light of your contention that there is no defense to this matter on the part of the Village of Frankfort and that failure or lack of knowledge of the requirement of preparation and filing of an annual document constitutes no defense."

Respondent's counsel referred to a telephone conversation between counsel and representatives of the parties and expressed amazement that the penalty imposed would be $6,000, stating that he assumed this was a determination to be made by the ALJ. The letter stated that the proposed penalty amounted to $2.00 plus for every inhabitant of the village, alleged that it had paid out one-half of its real property tax revenue on two notes, leaving very little to operate the village and again requested that consideration be given [to reducing] the amount of the penalty.

In a letter, dated May 20, 1986, the ALJ pointed out that inasmuch as counsel's letter, dated May 6, 1986, indicated that it desired to contest the appropriateness of the penalty, the letter withdrawing its request for hearing was considered to be occasioned by a misunderstanding and that it would be inappropriate to grant Complainant's motion for a default order. Respondent was directed to file a statement as to whether it desired a hearing on the penalty or whether it wished the ALJ to decide that issue on briefs and any further documentary evidence submitted by the parties. By letter, dated May 23, 1986, counsel for Respondent stated that it did not desire a hearing on the penalty, did not have a brief to submit, authorized imposition of the required penalty on whatever papers have thus far been submitted and repeated its withdrawal of its answer and request for a hearing.

Notwithstanding that withdrawal of an answer[3/] and request for a hearing will ordinarily be construed as an admission of the facts alleged in the complaint and a consent to the imposition of the proposed penalty,

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3/ While Rule 22.15(e) (40 CFR Part 22) provides that an answer may be amended upon motion granted by the ALJ, it is at least questionable to construe this provision as requiring consent to withdrawals of answers.

i.e., authorizing a default order, Respondent insists that the penalty proposed is excessive, the record provides substantial support for that contention and Complainant's motion for a default order is denied.

Findings of Fact[4/]

1. Respondent, Frankfort Power and Light, is owned and operated by the Village of Frankfort, New York.
2. Respondent purchases power from the New York Power Authority and distributes it to 1,650 customers in the Village.
3. Respondent does not own or maintain any PCB transformers and does not now have, or has it, since the effective date of the PCB rule, owned or maintained 50 or more PCB Large High or Low Voltage capacitors.
4. In June 1981, at a date not precisely determinable from the record, three of Respondent's PCB capacitors exploded. The explosion was apparently caused by lightning.
5. As a result of cleanup activities conducted after the explosion, 22 drums of PCB contaminated soil and debris were accumulated. These drums were delivered to Cecos International, Inc., an environmental firm, on November 30, 1981, and proper disposition thereof accomplished.
6. Additionally, five drums of PCB capacitors and one drum of PCB oil were delivered to Ensco, Inc., El Dorado, Arkansas on November 30, 1981, and subsequently incinerated. This disposal by Respondent was apparently caused by or related to the mentioned capacitor explosion.

4/ Findings are based on a DEC memorandum, dated June 22, 1981 (Exh A to answer) concerning a June 17, 1981, site inspection; the report, dated August 28, 1985, of an EPA inspection conducted on July 23, 1985, and various documents enclosed with counsel for Respondent's letter, dated March 14, 1986.

7. The 22 drums of PCB contaminated soil and debris and the drum of PCB oil referred to in findings 5 and 6 weighed more than 45 kilograms.

8. Respondent did not prepare an annual document for the year 1981.

Conclusions

1. Because Respondent did not own or maintain any PCB transformer and did not own or maintain 50 or more PCB High or Low Voltage capacitors, the only reason it was obligated to prepare an annual document for the year 1981 is because the PCB oil and PCB contaminated soil and debris resulting from cleanup activities after the June explosion exceeded 45 kilograms in weight. See 40 CFR 761.180(a).

2. Although Respondent's failure to prepare an annual document for the year 1981 is a violation of 40 CFR 761.180(a), on this record, the violation appears inadvertent and Respondent is in no sense a "lucky" violator.

3. An appropriate penalty for the mentioned violation is $1,500.

Discussion

Among the factors which § 16(a)(2)(B) of the Act requires the Administrator to consider in determining the amount of the penalty are ability to pay and degree of culpability. While Respondent has alleged financial stringency as a reason for reducing the proposed penalty, data to support such contention are not in the record.5/

5/ In this connection, data on revenues, expenses, bonded indebtedness, tax rates, etc., would have been helpful.

There is, however, ample evidence from which to conclude the violation was inadvertent and that culpability is lacking. As we have seen, the only reason Respondent was required to prepare an annual document for 1981 is that the weight of PCB oil, PCB contaminated soil and debris resulting from cleanup activities after the capacitor explosion exceeded 45 kilograms (40 CFR 761.180(a)). The capacitor explosion was apparently caused by lightning and cannot be attributed to acts of Respondent. Cleanup activities were promptly undertaken and proper disposition was made of the PCB oil contaminated soil and debris. Under these circumstances, the fact that no damage did or can result from the violation is not a fortuity and Respondent is in no sense a "lucky" violator. It is therefore my conclusion that the proposed penalty is much too high and that an appropriate penalty is the sum of $1,500.6/

O R D E R

Respondent, Frankfort Power and Light, having violated the Act and regulation as charged in the complaint, a penalty of $1,500 is assessed against it in accordance with § 16(a) of the Act (15 U.S.C. 2615(a)). Respondent shall pay the full amount of the penalty by sending a cashier's or

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6/ This result is reached without regard to the PCB Penalty Policy (45 FR 59770, September 10, 1980), by which I am not bound (Rule 22.27(b)). The quantity of PCBs involved, however, make this a borderline violation separating significant and minor violations (45 FR 59776), which authorizes a 25% reduction in the gravity-based penalty, and if Respondent were given credit for a portion of the cleanup costs totaling almost $6,800 (Id. at 59775), a substantially similar result could be reached following the penalty policy.

certified check payable to the Treasurer of the United States to the following address within 60 days of the receipt of this order:7/

Regional Hearing Clerk
U.S. EPA, Reg. II
P. O. Box 360188M
Pittsburgh, Pennsylvania 15251

Dated this 19th day of June 1986.

Spencer T. Nissen
Administrative Law Judge

7/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22), or, unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with Rule 22.27(c).