UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF THE
ADMINISTRATOR

IN RE	)	
	)	T.S.C.A. No. VI-8C
LIBERTY LIGHT & POWER	)	
	)	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 January 16, 1980 and subsequently amended by complaint issued June 12, 1980 by the Director of the Enforcement Division, Region VI, United States Environmental Protection Agency, against Liberty Light and Power, the Respondent herein, for alleged violations of the act and the regulations issued thereunder.[1/] Specifically, the complaint alleges that the Respondent improperly disposed of PCB materials, failed to properly store PCB materials, failed to keep proper records concerning PCB materials, and failed to mark the PCB items all as required by the law and the regulations promulgated pursuant thereto. The complaint proposed a civil penalty in the total amount of $9,000.00 for such violations.

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 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."

The original complaint filed in January 1980 suggested a civil penalty in the amount of $28,800.00, the amended complaint alleged the same violations, but reduced the amount of proposed civil penalty to $9,000.00. This reduction in proposed penalty was a result of additional guidance from EPA headquarters concerning the assessment of penalties under the act. The original answer filed by the City of Liberty, Texas essentially denied all allegations in the complaint and asked that the complaint be dismissed. The amended answer essentially denied all of the allegations in the complaint but admitted that 42 capacitors were stored on a concrete pad on the premises of the Respondent. The Respondent additionally contested the appropriateness of any civil penalty should it be found to have violated the act.

The parties submitted pre-hearing materials pursuant to section 22.19(e) of the pertinent rules of practice. A hearing was held on this matter on January 14, 1981 in Dallas, Texas at which the Complainant was represented by Mary E. Kale of the Environmental Protection Agency, Region VI, and the Respondent was represented by George Carlton of Dallas, Texas. Two stipulations were filed on the day of the hearing. Those portions of the section entitled "Factual Background" marked with an asterick will identify the stipulated material. Complainant presented two witnesses and introduced four exhibits into evidence. Two witnesses testified on behalf of the Respondent and no exhibits were introduced into evidence by the Respondent. After the hearing the parties filed their respective proposed findings of fact and conclusions of law with briefs in support thereof.

Factual Background

The Respondent, Liberty Light and Power, is a part of the governmental operations of the City of Liberty, Texas, a political subdivision of the State of Texas, being comprised of approximately 9,000 persons. The City of Liberty

in cooperation with three other cities purchases electrical power wholesale from Gulf States Power Company and retails the power to their respective citizens through municipally owned power systems. On or about August 8, 1979, Respondent was inspected by an employee of the United States Environmental Protection Agency.* Upon such inspection it was determined that the Respondent had 42 PCB capacitors stored outdoors on a cement slab which had no roof, walls or curbing.* At the time of the inspection, at least one of the 42 capacitors was observed to be leaking an oily substance.* A sample of the oily substance was collected and upon analysis was determined to contain 51.7 per cent PCBs and a second sample of soil collected near the base of the leaking capacitor was found to contain 27.2 per cent PCBs.* At the time of the inspection none of the 42 PCB capacitors in storage nor the ones in use in the system were marked with the M_L label described in 40 C.F.R. §761,44(a).* Respondents records did not identify which units contained PCBs nor the total quantity of PCBs in use in its system, nor had an annual report for July 1, 1978 to December 31, 1978 been prepared.* The Respondent has no history of previous violations and at the time of the inspection, the Respondent apparently had no actual knowledge of the requirements of the PCB regulations.* In addition to the 42 capacitors noted by the inspector, the Respondent's witness, Roy Bennett, City Manager of Liberty, Texas, testified that there are probably 28 additional capacitors in service in the Respondent's system, many of which contained PCBs.

Discussion

A. Disposal

The Complainant argues that the leaking of PCBs from one of the 42 capacitors found on Respondent's premises constitutes an illegal disposal of said PCBs, as that term is defined by the regulations. The Agency's theory in this

regard is that the "leak" constitutes a "spill" and since §761.10(d)(1) states that "spills and other uncontrolled discharge of PCBs constitute the disposal of PCBs" the leak is a form of disposal.

Respondent vigorously disputes this reasoning. It argues that the definition of leak (§761.2(k)) contained in the regulations, unlike the definition of spills, does not state that it is to be considered a disposal. "Had the drafters of this regulation intended a leak to be a disposal, the definition would have been clearly stated as it was for a spill." (Brief p. 4).

The record indicates that the EPA inspector found a small amount of oily material on the top and side of one of the 42 capacitors, all of which were sitting on a concrete pad. He collected one sample from the side of the capacitor and another from some dirt and debris at the base of the capacitor. Both samples were later found to contain rather high percentages of PCBs. No flow was observed and the total amount of oily material observed was very small. No evidence was presented to show that the oily substance ever left the immediate area of the capacitor or ran off the concrete slab.

§761.10(e)(2) of the regulations states that:

> ...In order to determine if a spill of PCBs has produced at any point in a suspected zone of soil, gravel, sludge, fill, rubble, or other land based substances a contamination level that exceeds 500 parts per million of PCBs, the person who spills PCBs should consult with the appropriate EPA Regional Administrator to obtain information on sampling methods and analytical procedures for determining the contamination levels associated with the spill. (Underscore added.)

The regulations apparently envision a spill as an event wherein PCBs find their way to the ground in such an amount and concentration as to eventually contaminate the environment and pose a hazard to man or terrestrial or aquatic organisms. I am not persuaded that the leak in question constituted a spill and thus a disposal as the Agency would have us believe. See In Re, Yaffe Iron

and Metal Co., Inc., T.S.C.A. Docket No. VI-1C, wherein it was held at p. 19 that:

> "The fact that the sticky PCB mixture on the side of the drum constituted a "leak" under the regulations does not appear to have any relevance to the violation charged." (In that case disposal.)

Accordingly, I find no basis to support the improper disposal count contained in the complaint.

B. Improper Storage of PCBs

It has been stipulated that there were 42 PCB capacitors[2/] stored on the Respondent's premises on a concrete slab without walls, roof or curbing as required by 40 C.F.R. 761.42. In order for these circumstances to constitute a violation it must be shown that the PCB articles were stored for disposal. §761.2(2) defines storage for disposal as the temporary storage of PCBs "that have been designated for disposal". Respondent denies that the capacitors were designated for disposal, but rather they were being stored for future use in the system.

The facts surrounding these devices are as follows. The capacitors were given to the city by one of the other cities in the co-op some fifteen years ago. Apparently they have lain on the concrete slab partially covered by weeds and debris for that entire period of time. (T. 74). Mr. Bennett, the City Manager, testified that there exists little or no use for the capacitors in their present system because they are no longer compatible with the system's newer equipment. Following the inspection, Mr. Vinson, the Respondent's electrical supervisor, inquired of the EPA inspector how one would go about disposing of the capacitors. Mr. Vinson inquired as to the notion of disposing of them in a city landfill some few miles away. He was advised that disposal

2/ §761.2(r) defines capacitors as "PCB articles".

should only be made in an EPA approved landfill. Subsequent to the inspection, but prior to the hearing, the city did place the leaking capacitor in an EPA approved sealed drum and stored it along with the other capacitors in a walled, roofed and properly curbed building.

Respondent seems to argue that absent some official act on the part of city council designating these capacitors for disposal, one must assume that they are being held for use. In light of the above-mentioned facts and the additional fact that the city was, prior to the inspection, unaware of the EPA requirements concerning the storing, disposal and marking of PCB materials, it is unlikely that any action by the city relative to the capacitors could reasonably have been expected. I would therefore conclude that the mere absence of any official record of what disposition to be made of the capacitors is not persuasive one way or the other as to their ultimate disposition.

One must therefore look to the historic and physical facts surrounding them in order to determine what their actual disposition was. Based upon the fact that the capacitors had lain outside for fifteen (15) years on a concrete slab overgrown by weeds and covered by dirt and other debris along with the statements made by Mr. Bennett as to their future utility in the city's system logically leads one to the conclusion that they were in fact discarded by the Respondent and were therefore constructively "designated for disposal".

Such activity is in violation of 40 C.F.R. 761.42 as constituting improper storage of PCBs as charged in the complaint.

C. Lack of Labels

It has been stipulated that, at the time of the inspection, none of the PCB articles either stored or in use by the Respondent were labeled as required by 40 C.F.R. §761.20, although at the time of the hearing the Respondent had

labeled essentially all of its PCB transformers and capacitors. In its defense the Respondent argues that they were unaware of such requirements prior to the inspection and that EPA should have sent them information setting forth such requirements prior to the inspection. Respondent also states that it is unsure as to whether or not the marking regulations apply to their equipment since it was not being manufactured by them, distributed in commerce or removed from use. Respondent is referring to the requirements of 40 C.F.R. §761.20(a)(1)(ii) and (iii) which refers to such items on or after July 1, 1978.

Respondent may not have read 40 C.F.R. 761.20(a)(3)(i) and (ii) which requires that all capacitors and transformers not marked pursuant to the requirements of 761.20(a)(1)(ii) or (iii), *supra*, must be marked as of January 1, 1979. Inasmuch as the inspection was done on August 8, 1979, all of Respondent's capacitors and transformers should have been marked regardless of their disposition. The argument that Respondent was unaware of those requirements is not relevant.

Accordingly, I find that the Respondent violated the marking requirements as charged in the complaint.

D. Failure to Keep Records

40 C.F.R. 761.45 requires that beginning on July 2, 1978, any owner or operator of a facility containing 45 kilograms (99.4 lbs.) or one or more PCB transformers or 50 or more PCB capacitors shall develop and maintain records on the disposition of PCBs. The section then continues in some detail as to precisely what must be contained in these records. The parties have stipulated that the Respondent, as of the date of the inspection, did not keep or maintain the records required by the above-cited regulation.

In its brief, Respondent argues that the record of this case does not show that the Respondent had at its facility sufficient quantities of PCBs or PCB capacitors to require it to keep the records referred to in the regulations.

The parties have stipulated that 42 PCB capacitors were on the concrete slab at the base facility. In addition, Mr. Bennett testified that the city has about 28 or more capacitors in service, the majority of which contain PCBs. (T. 89). Mr. Bennett also testified (T. 90) that the system contained several PCB transformers. In view of these facts, it is clear that the record keeping requirements cited above apply to the Respondent and that such requirements were not complied with. Accordingly, I find that a violation of failure to keep records as set forth in the complaint has been shown.

E. Appropriateness of the Proposed Penalty

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." 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.

As stated above, the first complaint was amended by lowering the proposed penalty from $28,000.00 to $9,000.00 in compliance with more recent penalty guidance policy issued by EPA headquarters. On September 10, 1980 civil penalty guidelines were published by the EPA (45 F.R. 59770) which, except for minor differences, are essentially identical to those used by the Complainant's employee, Mr. Mount, who testified at the hearing.

The complaint broke down the proposed penalty of $9,000.00 as follows:

Disposal	-	$5,000
Storage	-	$1,500
Marking	-	$1,500
Records	-	$1,000

Since I have determined that no violation of the disposal regulations has been shown, no discussion of that portion of the proposed penalty will be undertaken.

Mr. Mount testified that he considered culpability, history of prior violations, the nature, circumstances and gravity of the violations in calculating the proposed penalty assessed in the amended complaint. He did not consider ability of the violator to pay nor the effect on ability to continue to do business since he had no information on those items when he calculated the penalty. As to culpability and history of prior violations, he testified that he made no adjustments either up or down for those elements. Based upon the facts in this case, I find no reason to quarrel with that assessment.

As to the ability to pay or to stay in business, Respondent's witness, Mr. Bennett testified that although he understandably would not wish to write a check for $9,000.00, the city would suffer no particular setback or inability to serve the public if such a penalty was levied. (T. 99-100).

Following the issuance of the complaint, the record reflects that the city was very cooperative and apparently has taken care of the problems identified in the complaint.

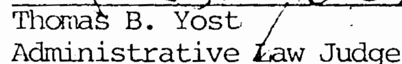
Since I have eliminated $5,000.00 of the $9,000.00 proposed penalty due to the finding of no disposal violation, the balance of $4,000.00 must be considered. Based upon the Respondent's lack of prior violations, its cooperative attitude and its good faith efforts to comply with the regulations subsequent to the violations found herein, I find that the $4,000.00 penalty should be reduced to $3,500.00.

The statements contained in the section of this opinion entitled Factual Background are adopted as findings of fact. 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*

Pursuant to section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $3,500.00 is hereby assessed against the Respondent Liberty Light and Power Company 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: April 7, 1981

* 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)).

IN THE MATTER OF : TSCA Docket VI-8C

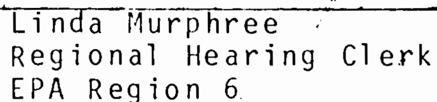
LIBERTY LIGHT & POWER

Respondent : CERTIFICATION OF SERVICE

In accordance with §22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, along with the entire record of this proceeding, was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by Certified Mail Return Receipt Requested; that a copy was hand-delivered to Counsel for Complainant, Mary Kale, Enforcement Division, EPA Region 6, 1201 Elm Street, Dallas, Texas 75270; that a copy was served by Certified Mail Return Receipt Requested on attorney for the Respondent, George R. Carlton, Jr., Maxwell, Bennett, Thomas, Carlton & Maxwell, 1200 Diamond Shamrock Tower, 717 N. Harwood Street, Dallas, Texas 75201.

If no appals are made (witin 20 days after service of this Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. §22.27(c) and §22.30).

Dated in Dallas, Texas, this 15th day of April 1981.



Linda Murphree
Regional Hearing Clerk
EPA Region 6

cc: Judge Yost