7/6/90

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROLLINS ENVIRONMENTAL SERVICES (NJ) INC.,	)	Docket No. II-TSCA-PCB-88-0116
	)	
	)	
Respondent	)	

Toxic Substances Control Act -- Civil Penalty -- Where the pertinent Regulations were unclear and Respondent's reading of them, though adjudged incorrect, had a definite plausibility, Respondent's civil penalty was reduced pursuant to the 1980 PCB Penalty Policy through considering the situation under "[s]uch other matters as justice may require."

Appearances

For Complainant:

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For Respondent:

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Before:

Thomas W. Hoya
Administrative Law Judge

INITIAL DECISION

This Initial Decision determines the civil penalty to be assessed in a case brought under the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. ("the Act") and regulations promulgated thereunder (40 C.F.R. Part 761) ("the Regulations"). Region II of the United States Environmental Protection Agency (hereinafter "Complainant") initiated this case by issuing a June 15, 1988 complaint against Respondent Rollins Environmental Services (NJ) Inc.

The complaint charged that Respondent had improperly disposed of polychlorinated biphenyls ("PCBs"). A July 13, 1989 Order found Respondent to have committed the violation as charged. Complainant argued that the civil penalty for this violation should be $25,000 (Transcript of June 13, 1990 Oral Argument (hereinafter "Transcript") 9); Respondent contended that it should be zero (id. 10).

Background

Respondent answered Complainant's June 15, 1988 complaint on July 28, 1988 by denying the charge. The factual background of this case ultimately became the subject of a joint stipulation between the parties filed on May 19, 1989. According to this stipulation, Respondent's disputed disposal of PCBs arose out of its closure in Logan Township, New Jersey, beginning in 1982, of a concrete basin containing about 35,000 gallons of PCB liquids and sludges. The PCB concentration of the liquids and sludges was 1,874.8 parts per million ("ppm").

The 35,000 gallons of liquids and sludges and the concrete basin's hypalon liner were, per the stipulation, disposed of in compliance with the Regulations. The parties' dispute centered on Respondent's disposal of a fuel oil rinse that was used to rinse the basin. This fuel oil rinse, together with rain water collected during the operation, constituted about 22,700 gallons of liquid. This rinse and rain water were tested and found to contain less than 50 ppm PCBs, and were then incinerated on-site. But Respondent's on-site incinerator was not a facility approved under the Regulations for the incineration of PCBs.

The issue dividing the parties was whether such incineration of the rinse violated the Regulations. Complainant claimed that it did, because Section 761.60(a)(1) of the Regulations requires that PCBs be disposed of in an incinerator approved under Section 761.70. Respondent contended that Section 761.60(a)(1), along with Section 761.79(a) under which the concrete basin was decontaminated, applies this approved incinerator requirement only to PCBs at concentrations of 50 ppm or greater. As noted, Respondent's rinse was tested before incineration and found to contain less than 50 ppm PCBs.

Complainant countered with Section 761.1(b) of the Regulations, which provides that "dilution" will not avoid the application of Regulations specifying a PCB concentration. Therefore, argued Complainant, the rinse was considered under the Regulations to contain 1,874.8 ppm PCBs, the concentration of the contents of the concrete basin that had been decontaminated.

By agreement between the parties, they briefed the issue of whether a violation had occurred and submitted the issue for decision to the then presiding officer of this case. His July 13, 1989 Order declared Respondent's incineration of the rinse to have violated Sections 761.60 and 761.70 of the Regulations.

Pursuant to the agreement under which they had submitted for decision the issue of whether a violation had occurred, the parties then tried between themselves to agree on the appropriate civil penalty. When that effort failed, the parties submitted this issue for decision to the undersigned, who by this time had been designated the presiding officer. The parties briefed the penalty issue and, upon request of Respondent, argued it orally on June 13, 1990 in Washington, D.C.

Arguments of the Parties

Complainant

Complainant supported its proposed $25,000 civil penalty through application of the PCB Penalty Policy published by the Environmental Protection Agency ("EPA") on September 10, 1980 (45 Fed. Reg. 59776). It was agreed by the parties that this case is subject to this 1980 PCB Penalty Policy, and not to the PCB Penalty Policy issued by EPA on April 9, 1990 (Summary of Telephone Conference, Statement of Orders (May 25, 1990)).

Under the 1980 PCB Penalty Policy, Complainant calculated a "gravity based penalty" by determining two variables: the "extent" and the "circumstances" of the violation. The extent, based on the quantity of rinse involved and its PCB concentration, was deter-

mined to be the highest of three alternative classifications, or "major." The circumstances were that Respondent's conduct was a disposal violation, which placed it in level one, the highest of six alternative levels. According to the 1980 PCB Penalty Policy, a violation of major extent and of level one circumstances warrants a gravity based penalty of $25,000.

The 1980 PCB Penalty Policy provides various criteria for increasing or decreasing a gravity based penalty. Complainant reviewed these criteria and found none that would change its proposed $25,000 penalty.

Complainant observed, however, that it thus benefited Respondent by declining to increase the gravity based penalty in either of two ways provided by the PCB Penalty Policy. First, the Act authorizes the imposition of a civil penalty for each day of a violation. Here, Complainant stated that it did not know how many days it took Respondent to dispose of the 22,700 gallons of rinse, so Complainant proposed its gravity based penalty for only one day.

Second, the PCB Penalty Policy lists several adjustment factors that may be used to increase or decrease a gravity based penalty. One of these factors is a history of prior violations; and Respondent entered into a 1984 Consent Agreement for an alleged improper disposition of PCBs. Under the PCB Penalty Policy, that prior history calls for increasing Respondent's gravity based penalty by 50%. But, Complainant noted, the Act authorizes a maximum civil penalty of $25,000 per day. Therefore, Respondent

was spared any upward adjustment of the $25,000 gravity based penalty that Complainant has proposed here.

Respondent

Respondent, in proposing a civil penalty of zero, approached the issue from a different direction. Respondent based its argument on a November 1989 internal EPA document--executed after the July 1989 Order in this case and thus unavailable for that decision--that disclosed a division of opinion within EPA on the legal issue involved in a case such as this one (Determination Regarding Disposal of PCB Container Rinsate (Less than 50 ppm), EPIP Issue Number 1 (Nov. 27, 1989) at 2-3, submitted by Respondent June 5, 1990).

One of two viewpoints advanced within EPA, per this internal EPA document, would have held Respondent's disposition of its rinse to have complied with the Regulations. Complainant subsequently submitted a publicly available version of this EPA document, which stated that "it appears that various EPA offices have been giving conflicting guidance regarding this issue" (Determination Regarding Disposal of PCB Container Rinsate (Less than 50 ppm) (undated), submitted by Complainant June 6, 1990).

Respondent argued essentially that, given the lack of clarity as to the correct meaning of the pertinent Regulations, as evidenced by these two EPA documents, no monetary sanction is warranted. Respondent contended that, in the unclear state of the Regulations, its actions were reasonable at least to the degree that its having been adjudged in violation is sanction enough, and

that an additional monetary penalty now would be excessive.

To rationalize a zero civil penalty under the 1980 PCB Penalty Policy, Respondent suggested use of one of the Policy's adjustment factors. That factor highlighted by Respondent is "Such other matters as justice may require" (45 Fed. Reg. 59777 (Sept. 30, 1980); also Section 16 of the Act, 15 U.S.C. § 2615(a)(2)(B)). Alternatively, Respondent suggested that this PCB Penalty Policy is simply inapplicable to a case such as this one, and the less specific Civil Penalty System for the whole Act (45 Fed. Reg. 59770 (Sept. 30, 1980)) should be used.

Other Arguments

Various other arguments were addressed by the parties. Although Respondent stressed the division of opinion within EPA as to the proper meaning of the pertinent Regulations, Respondent made no claim that it had relied on misleading advice from EPA. Respondent stated that it had not contacted EPA at all regarding the meaning of the Regulations at issue, explaining that it believed its interpretation of them was so logical that no clarification was needed.

Respondent is no newcomer to dealing with the Regulations; Respondent is in fact in the waste disposal business. For that reason, Respondent might be expected to be more knowledgeable in interpreting the Regulations. On the other hand, because it is in the waste disposal business, Respondent said that it has already sustained a significant sanction from this case through having been adjudged in violation. That record of violation will not only

enhance any sanction should Respondent again be found in violation of the Act, but also, Respondent claimed, this record creates problems at the state level when Respondent seeks permission to do business in new jurisdictions.

Respondent's 1984 Consent Agreement would have increased Complainant's proposed civil penalty for this case but, as noted, for the Act's $25,000 maximum for each day's violation. The incident involved in that Consent Agreement was also, as in this case, disposal of PCBs. That incident concerned provisions of the Regulations different from those governing this case, so that the resolution of that matter would not have instructed Respondent as to the correct meaning of the Regulations controlling this case. On the other hand, Complainant argued that this 1984 Consent Agreement should have heightened the care with which Respondent tried to comply with all the Regulations dealing with PCB disposal.

As for the exact manner of Respondent's disposition of the rinse, Respondent burned it in an incinerator on-site in New Jersey. This incinerator, as noted, was not approved for incineration under the Act; but it was approved for incineration under the Resource Recovery and Conservation Act, 42 U.S.C. §§ 6928 et seq. ("RCRA") (Transcript 13-14). To incinerate the rinse in a facility approved under the Act, Respondent would normally have transported the rinse to such an incinerator that it has in Texas. Respondent's use of its incinerator on-site in New Jersey thus saved it the expense of the transportation to Texas, and also possibly the cost saving involved in using a less technologically

advanced incinerator (Transcript 30-31).

Discussion

The central element in this penalty assessment is the point made by the documents introduced into the record since the issuance of the July 13, 1989 Order. That point, made in each party's documentary submission, is the unclear state of the pertinent Regulations as recognized by EPA itself. It is plain from these documents that Respondent's reading of the Regulations had a definite plausibility.

That Respondent's reading had such plausibility is not the only conclusion that emerges from these EPA documents. An argument against Respondent's interpretation advanced in the internal EPA document is that such an interpretation would complicate the monitoring of compliance (Determination Regarding Disposal of PCB Container Rinsate (Less than 50 ppm), EPIP Issue Number 1 (Nov. 27, 1989) at 2-3, submitted by Respondent June 5, 1990). Nevertheless, that the Regulations in their present state can be read as Respondent did, with the plausibility recognized in these two EPA documents, is a strong mitigating factor for Respondent.

The force of this mitigating factor is reinforced by other aspects of this case. One is the manner in which Respondent conducted itself pursuant to its reading of the Regulations. After concluding that its rinse need not be disposed of in an incinerator approved under the Act, Respondent still proceeded with care, by burning the rinse in an incinerator approved under RCRA.

An additional aspect of relevance is the actual effect on the

environment from Respondent's action. Presumably no unacceptable pollution occurred, because Respondent's burning of the rinse in an incinerator approved under RCRA complied with the Regulations for disposing of a liquid with a PCB concentration of less than 50 ppm. And this absence of unacceptable pollution was not mere chance, since Respondent had tested the rinse to determine its PCB concentration.

Nor did Respondent's on-site incineration save it major expense, but simply the cost of transporting the 22,700 gallons of liquid from New Jersey to Texas and possibly some cost saving from using a less technologically advanced incinerator. Further, Respondent has sustained a sanction of consequence from this proceeding already through having been adjudged in violation, a judgment that will increase any future sanction under the Act, and that may cause problems with state regulatory agencies.

Within the framework of the 1980 PCB Penalty Policy, a gravity based penalty may be adjusted, as noted above, by considering "[s]uch other factors as justice may require." It is under this heading that the mitigating factors in this case may be accommodated. The basic factor is the unclear state of the pertinent Regulations that conferred a definite plausibility on Respondent's reading of them. To this basic mitigating factor may be added the reasonable care with which Respondent proceeded pursuant to its reading of the Regulations, and the cost to it from its having already been adjudged in violation.

To do justice to these mitigating factors, Respondent's civil

penalty is ruled to be zero. The imposition of no civil penalty at all is, of course, a drastic reduction of the gravity based penalty. But the lack of clarity in the pertinent Regulations here presents a highly unusual situation.

FINAL ORDER

The civil penalty assessed for Respondent's violation of Sections 761.60 and 761.70 of the Regulations is zero.[1]

Thomas W. Hoya
Administrative Law Judge

Dated: July 6, 1990

[1] Pursuant to Section 22.27(c) of EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22, which govern this proceeding, this Initial Decision "shall become the final order of the Administrator within forty-five (45) days after its service upon the parties and without further proceedings unless" it is appealed by a party to the Administrator or the Administrator elects, sua sponte, to review it. Under Section 22.30(a) of these Consolidated Rules, parties have twenty (20) days after service upon them of this Initial Decision to appeal it.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II
JACOB K. JAVITS FEDERAL BUILDING
NEW YORK, NEW YORK 10278

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CERTIFICATE OF SERVICE

I hereby certify that the Initial Decision by Administrative Law Judge Thomas W. Hoya in the matter of Rollins Environmental Services (NJ) Inc., Docket No. II TSCA-PCB-88-0116, was filed on July 11, 1990. I served copies of the Initial Decision to the parties as indicated below:

Certified Mail
Return Receipt Requested

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ited: July 12, 1990