

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

RECEIVED
ADMINISTRATIVE SERVICES
HEARING CLERK
02 DEC 3
All: 17

In the Matter of)
N.O.C., Inc.,) Docket No. II-TSCA-PCB-81-0105
T/A Noble Oil Company,)
Respondent)

1. Toxic Substances Control Act - PCBs - Regulatory Limit - Because of definition of PCB or PCBs as any chemical substances or combinations of substances containing 50 ppm (on a dry weight basis) or greater PCBs (40 CFR 761.1(b)), sample drawn from top of tank of waste oil and shown to contain 76 ppm PCBs was sufficient to establish tank as a PCB container (40 CFR 761.2(v)) as a matter of law and representative sample in scientific sense was not required.
2. Toxic Substances Control Act - PCBs - Dilution - Testing Procedures - Provision of 40 CFR 761.1(b) that any chemical substances and combinations of substances that contain less than 50 ppm PCBs because of any dilution shall be included as PCBs can be reconciled with testing procedures in 40 CFR 761.10(g), which of necessity contemplate some dilution, by reading preamble (44 FR 31520-21, May 31, 1979) into cited section so that "batch testing" is only applicable to dielectric fluids or waste oils otherwise assumed to contain between 50 ppm and 500 ppm PCBs.
3. Toxic Substances Control Act - Rules of Practice - Burden of Proof - Although Complainant has burden of establishing all elements of violation charged by a preponderance of the evidence (40 CFR 22.24), where Complainant established that sample drawn from top of tank of waste oil contained PCBs at a concentration of 76 ppm, intra-liquid stratification theory advanced by Respondent was in the nature of an affirmative defense and burden was on Respondent to demonstrate that concentration of PCBs in top of tank was due to intra-liquid stratification of PCBs at concentrations below 50 ppm.
4. Toxic Substances Control Act - Rules of Practice - Burden of Proof - Determination of Penalty - Although under Section 22.24 of Rules of Practice Complainant has burden of demonstrating that proposed

penalty is appropriate, where complaint alleged that proposed penalty was based upon nature, circumstances, extent and gravity of violations alleged in complaint and upon Respondent's ability to pay and it appearing that the assessment was in accordance with previously issued Agency guidelines for the assessment of civil penalties under TSCA (45 FR, No. 177, September 10, 1980, at 59770) and Respondent having neither controverted these allegations in its answer or proffered any evidence relating thereto, proposed assessment would be presumed to be appropriate and would be imposed.

Appearances for Respondent:

William S. Greenberg
John B. Prior, Jr.
Greenberg, Kelley & Prior
Attorneys at Law
Trenton, New Jersey

Appearance for Complainant:

Gregory T. Halbert, Esq.
Enforcement Division
U.S.E.P.A., Region II
New York, New York

Initial Decision
by
Administrative Law Judge
Spencer T. Nissen

This is a civil penalty proceeding under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). The proceeding was commenced by a complaint, issued by the Director of the Enforcement Division, EPA Region II on January 19, 1981, charging Respondent^{1/} with violations of the regulations concerning polychlorinated biphenyls (PCBs), 40 CFR Part 761, specifically failure to mark a waste oil tank as a PCB container

^{1/} At the time the complaint was issued, Respondent operated under the name of Noble Automotive Chemical and Oil Company.

(40 CFR 761.20), failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan (40 CFR 761.42(c)(7)(ii)) and failure to maintain records showing the quantity and date, PCBs were added to the container (40 CFR 761.42(c)(8)). A penalty of \$15,000 for each of the first two violations and \$10,000 for the third violation for a total of \$40,000 was proposed to be assessed against Respondent. Respondent answered, admitting that the tank in question did not have a PCB mark, that Respondent did not have a SPCC Plan and did not maintain PCB batch records. Respondent, however, denied that the tank in question was a PCB container and denied that a SPCC Plan and PCB batch records were required, asserting that the PCB concentration of the tank in question did not exceed 25 parts per million (ppm), thus placing in issue the validity of the EPA sampling and test showing that the tank in question contained PCBs at a concentration of 76 ppm.

A hearing on this matter was held in Philadelphia, Pennsylvania during the period February 9-11, 1982.

Based on the entire record including proposed findings and conclusions of the parties,^{2/} I find that the following facts are established.

Findings of Fact

1. Respondent, N.O.C., Inc., trading as Noble Oil Company, operates a facility at Route 206, Vincentown, New Jersey, where it buys and sells waste oils. Waste oils handled by Respondent appear to be primarily motor oils.

^{2/} Proposed findings not accepted are either rejected or considered to be unnecessary to the decision.

2. At the facility mentioned in finding 1, Respondent maintains six underground tanks for the storage of waste oil.
3. On July 15, 1980, representatives of Complainant, Mr. Stephen Ward and Dr. Arthur Gevirtz, conducted an inspection of Respondent's facility, drawing samples from each of the six tanks. Duplicates of these samples were left with Respondent's representative, Mr. Leonard Grungo, who identified himself as "owner."
4. The sample from Tank No. 4 was collected by simply opening the cover over the port and the inspector, Stephen Ward, inserting a 40 ml vial into the tank with a gloved hand, the oil in the tank being within a few inches of the top. Samples from the other five tanks were collected in a similar manner.
5. Mr. Grungo informed Mr. Ward that the capacity of Tank No. 4 was 10,000 gallons.
6. Prior to inserting the vial into Tank No. 4, a blue label was affixed to the vial on which Mr. Ward wrote "Noble 57970 PCB's 7/15/80."
7. After removing the vials from each tank, the vials were wiped clean with "chem whites," a material like kleenex.
8. Samples drawn from the six tanks were identified by sample numbers 57967 through 57972.
9. The vials were sealed with teflon caps and placed in plastic bags (three vials per bag), the bags being placed in a lined tool box, which was padlocked and placed in the trunk of the inspectors' car, which was also locked.

10. The samples were delivered to the EPA laboratory at Edison, New Jersey at 2:25 p.m. on July 15, 1980. The laboratory was requested to test the samples for PCBs.
11. The samples were analyzed for the presence of PCBs on July 22, 1980, the test of Sample 57970 from Tank No. 4 revealing PCBs at a concentration of 76 ppm.
12. Analysis of the samples referred to in the preceding findings was accomplished by Mr. George Karras, an EPA chemist, who used a silica gel cleanup procedure and a gas chromatograph with an electron capture detector to conduct the test.
13. Mr. William Ziegler, a chemist and an expert witness for Respondent,^{3/} testified that PCBs had a tendency to stratify. He further testified that in analyzing oil samples for PCBs he would prefer to use a gas chromatograph with Hall Electrolytic Conductivity Detector rather than an electron capture detector, because the former was halogen specific and would not respond to interferences as would the latter detector.
14. Respondent was notified of the results of the inspection by letter, dated September 16, 1980.
15. Respondent has conceded that Tank No. 4 did not bear the PCB mark (40 CFR 761.20), that Respondent did not have a Spill Prevention Control and Countermeasure (SPCC) Plan (40 CFR 761.42(c)(7)(ii)) and did not have or maintain records showing dates and quantities of PCBs added to the container (40 CFR 761.42(c)(8)).

^{3/} Although all testimony by Mr. Ziegler concerning a sample taken at Respondent's facility on January 22, 1982, and the testing thereof, was withdrawn, his testimony as an expert was unaffected thereby.

16. There is no evidence in the record of Respondent's financial condition or prior history of compliance with the Act.

Conclusions

1. Analysis of Sample No. 57970 drawn from Tank No. 4 at Respondent's facility on July 15, 1980, establish that it contained PCBs at a concentration of 76 ppm.
2. Tank No. 4 was a PCB container as defined in 40 CFR 761.2(v).^{4/}
3. Tank No. 4 not having a PCB mark as required by 40 CFR 761.20 on July 15, 1980, Respondent was in violation of the cited regulation.
4. Respondent's failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan in effect on July 15, 1980, constituted a violation of 40 CFR 761.42(c)(7)(ii).
5. Respondent's failure to maintain records showing dates and quantities of PCBs added to the container constituted a violation of 40 CFR 761.42(c)(8).
6. Respondent having violated 40 CFR 761.20, 761.42(c)(7)(ii) and 761.42(c)(8) is liable for a civil penalty, Section 16, TSCA (15 U.S.C. 2615).

Discussion

Respondent's first argument is that the decision of the Court of Appeals, Environmental Defense Fund v. EPA, 636 F. 2d 1267 (D.C. Cir., 1980), which invalidated, inter alia, the 50 ppm threshold for regulation of PCBs under Section 6(e) of the Act precludes prosecution of the instant

^{4/} A PCB container is defined as follows:

"(v) 'PCB Container' means any package, can, bottle, bag, barrel, drum, tank, or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs." (40 CFR 761.2(v)).

proceeding against Respondent.^{5/} This argument is patently without merit. In the first place, the petitioners' challenge in that case was to the so-called "ban regulations" (40 CFR 761.1(b), 1979) and not to the "disposal" and marking regulations here involved. 40 CFR 761, Subparts B, C, Annex III & V; 636 F. 2d at 1269, footnote 3. Secondly, the Court's invalidation of the 50 ppm threshold for regulation of PCBs was for the reason that there was no substantial evidence in the record to support such a cutoff and that absent such evidence, EPA had not justified such a limitation, the statute not containing any such threshold. In other words, the 50 ppm cutoff was invalidated not because it was too stringent, but because it was considered not to comport with Congressional intent that all commercial activities involving PCBs be included within the regulations in the absence of compelling evidence such inclusion was not feasible. Under such circumstances, it is not logical to argue that invalidation of the 50 ppm cutoff also operated to preclude enforcement of the regulations as to concentrations above the cutoff.

Thirdly, any doubts that the Court intended that the regulations involving PCBs in concentrations above 50 ppm were to remain in effect pending promulgation of revised regulations more fully in accord with Congressional intent or the presentation of reasons why more stringent regulations could not be adopted or that the benefits of regulation would be trivial, have been laid to rest by the stay of its mandate granted by the Court (46 FR 27615, May 20, 1981). An extension of the stay was granted on April 9, 1982.

^{5/} Post-Trial Memorandum at 13. Revised regulations responsive to the Court's decision were promulgated on October 12, 1982 (47 FR No. 204, at 46980, et seq., October 21, 1982).

Next, Respondent argues that the sample drawn on July 15, 1980 was not representative of the contents of Tank No. 4 and that Complainant has not proven its charge that the tank contained PCBs in excess of 50 ppm (Post-Trial Memorandum at 21, et seq.). Respondent argues that a representative sample is required by EPA's own regulations, citing 40 CFR 761.10(g)(2)(ii). Complainant contends that the cited section of the regulation is applicable to "batch testing," i.e., the commingling of mineral oil dielectric fluid or waste oil from several transformers or containers assumed to contain between 50 and 500 ppm PCBs and is solely intended to preclude the necessity for separate tests of oil from each container (Opening Brief at 13, et seq.). Complainant emphasizes that the prohibition against dilution has not changed (44 FR No. 106, at 31520-21, May 31, 1979).

The preamble to the regulation (40 CFR 761.10(g)) supports Complainant's position and provides in pertinent part:

"E. Batch Testing of Mineral Oil Dielectric Fluid

Testing of mineral oil dielectric fluid and waste oil from sources that are otherwise assumed to contain PCBs at a concentration between 50 ppm and 500 ppm can be performed on samples taken from collection tanks ("batch testing"). This is permitted so that oils from multiple sources can be collected and tested without requiring a separate test of each transformer each time a disposer wants to evaluate his disposal options.

The prohibition against dilution, however, has not changed. The new testing option does not permit the deliberate dilution of the collected oil (assumed to contain PCBs above 50 ppm) with PCB-free or low-PCB fluids to reduce the concentration of PCBs in the resultant mixture below 50 ppm. Further, the option does not permit the deliberate addition of PCB wastes with concentrations greater than 500 ppm to the tank in order to avoid the more stringent disposal

"requirements for high-concentration wastes. If such high-concentration wastes are added to the tank, then the entire tank contents must be disposed of in compliance with requirements for wastes containing 500 ppm PCBs or greater, even if a sample of the aggregate tank contents reveals a concentration below 500 ppm. In this circumstance, the tank contents cannot be used as dielectric fluid; the tank contents must be disposed of in a high temperature incinerator." (44 FR at 31520-21)

Viewed in the light of the quoted language from the preamble, the regulation on testing procedures (40 CFR 761.10(g)) is applicable only to mineral oil dielectric fluid or waste oil assumed to contain PCBs at a concentration between 50 ppm and 500 ppm. As applied to transformers, this assumption^{6/} and the emphasis in the preamble on deliberate dilution are certainly reasonable. The regulation does not contain any such presumption. It is, however, clear that 761.10(g)(1) is applicable only to mineral oil dielectric fluid transformers.

Respondent, of course, does not rely on 761.10(g)(1), but on 761.10(g)(2) which is applicable to waste oil. There does not appear to be any basis for an assumption that such oils contain PCBs at a concentration between 50 ppm and 500 ppm or at any other level. Complainant emphasizes that 761.10(g)(1) and (2) are applicable to batch testing. However, if it be assumed that the contents of Tank No. 4 were obtained from several sources and the nature of Respondent's business would seem to make this assumption reasonable,^{7/} then Respondent would appear to be within the ambit of 761.2(i) and (ii) provided no other chemical substances or mixtures or PCBs having a concentration of 500 ppm or greater were added

^{6/} See the discussion on transformers at 44 FR 517.

^{7/} Mr. Grungo testified that Respondent purchased oil from distributors and waste oil collectors, including gasoline stations and automobile dealers (Tr. 293).

to the tank. It would seem to be anomalous indeed that Respondent can use 761.10(g)(2) for the purpose of testing waste oil for compliance with regulatory requirements, but that Complainant is under no similar obligation for enforcement purposes. This anomaly disappears if 761.10(g) is, as Complainant contends, applicable only to dielectric fluid or waste oils assumed to contain PCBs having a concentration between 50 ppm and 500 ppm.

Complainant cites and relies on Yaffe Iron and Metal Company, TSCA Docket No. VI-IC, Initial Decision (March 27, 1981), Final Decision, TSCA Appeal No. 81-2 (August 9, 1982).^{8/} In Yaffe it was held that where tests on a sample revealed PCBs in concentrations in excess of 500 ppm, the definition of a PCB mixture (40 CFR 761.2(w), 1978) made the barrel from which the sample was drawn a PCB container (40 CFR 761.2(u)) as a matter of law and that arguments as to whether the sample was representative and whether the fact that a diluent of the sample, in that case water, had leaked from the sample container made the test results unreliable were not relevant. Respondent points out that the definition of a PCB mixture held to be controlling in Yaffe is not contained in the regulations pertinent here (40 CFR 761 (1980), 44 FR 31542, May 31, 1979) and that, in any event, Yaffe is distinguishable because in that case the container was open and subject to dilution by, inter alia, rainwater, while in the present case the tank is underground, no such dilution was possible and

^{8/} The final decision in Yaffe was issued after the close of the briefing period herein.

there is no other evidence of dilution.^{9/} Deletion of "PCB mixture" from the regulation does not have the significance attributed to it by Respondent, because the oils here involved are chemical substances or combinations thereof as defined in 40 CFR 761.1(b).

Respondent asserts that the concept of dilution should not be confused with intra-liquid stratification of waste oil by its own chemical properties (Reply Memorandum at 6). This argument might well carry the day or at the very least provide compelling reasons for reducing the penalty, if there was evidence to support it. It is true that Respondent's expert, Mr. Ziegler, testified that PCBs had a tendency to stratify (finding 13). However, in answer to a specific question as to where he would expect to find PCBs in a tank of oil, Mr. Ziegler replied that it would depend on a lot of factors, whether the oil was homogeneous and at what part of the oil the contamination may be and further "(I) could not answer that question specifically; its a hard thing to predict and there

^{9/} Reply Memorandum at 1, et seq. In Robert Ross and Sons, Inc., TSCA-V-C-008, Initial Decision, 101 ALC 151 (1982), appeal pending, the lack of a representative sample was held to be fatal to Complainant's case and the provisions of 40 CFR 761.1(b), making subject to the regulation chemical substances containing less than 50 ppm PCBs because of any dilution and 761.10(g)(ii) providing that if PCBs in excess of 500 ppm have been added to the container, the entire container contents must be presumed to contain PCBs at a concentration of 500 ppm or greater, were held to be inapplicable in the absence of evidence of [deliberate] dilution. While no reason was given for the latter conclusion, it must stem from the fact that multiple sources would be highly unlikely to contain identical concentrations of PCBs, making it clear that 761.10(g) of necessity contemplates some dilution. Ross, however, did not consider that 761.10(g) cannot have the significance attributed to it, if the gloss of the preamble (44 FR 31520-21, quoted in the text) is read into the regulation and 761.10(g) is applicable only to dielectric fluids and waste oils otherwise assumed to contain between 50 ppm and 500 ppm PCBs. In any event, Complainant in Ross did not argue that a representative sample in a scientific sense was not required as a matter of law, but only that it had taken such a sample.

are various factors involved when you start talking about one organic species and another organic species" (Tr. 286). Accordingly, any conclusion that PCBs found in the top of Tank No. 4 at a concentration of 76 ppm were due to intra-liquid stratification of PCBs in concentrations below 50 ppm would be pure speculation. Because this is in the nature of an affirmative defense, requiring Respondent to prove the applicability of its intra-liquid stratification theory does not violate the rule that Complainant must prove the violation charged by a preponderance of the evidence (Rules of Practice, 40 CFR 22.24).

Next, Respondent argues that the method of analysis of the sample used by EPA was scientifically inadequate and cannot support the violation charged (Post-Trial Memorandum at 28). The equipment used to conduct the test on Sample 57970 from Tank No. 4 at Respondent's facility was a gas chromatograph with an electron capture detector (finding 12). Cleanup procedure used was silica gel (Gov't's Exh 8). The purpose of the cleanup procedure is to separate PCBs from hydrocarbon present in the oil (Tr. 185). Mr. Ziegler, Respondent's expert, did testify that he would prefer to use a gas chromatograph with a Hall Electrolytic Conductivity Detector rather than an electron capture detector, because the former was halogen specific and would not respond to interferences (Tr. 286-88). He further testified that even with proper cleanup procedure, it was very important when using the GCEC to run tests with spiked samples to demonstrate proper recovery of PCBs and that no interferences are present (Tr. 289). He stated that it was critical to prepare internal standards to quantify retention times and use as a standard for identification

of PCB peaks. Mr. Karras, EPA chemist who conducted the test on Sample 57970, testified, however, that he conducted tests on standard PCBs and compared the standards with previous chromatograms to assure that the gas chromatograph was in good working order (Tr. 196-97). It is concluded that Respondent's attack on the adequacy of the EPA test has not been proven and that the evidence supports a finding that the EPA test, showing PCBs at a concentration of 76 ppm, was properly conducted.

Turning to the penalty, Complainant proposes to assess Respondent \$15,000 for the failure of Tank No. 4 to have the PCB mark as required by 40 CFR 761.20 and \$15,000 for the failure to have a SPCC Plan in effect as required by 40 CFR 761.42(c)(7)(ii). An additional \$10,000 is proposed to be assessed for the failure to maintain records showing quantities and dates PCBs were added to the container. Although not specifically referred to in the complaint, it is clear that the proposed penalty was calculated in accordance with Agency guidelines for the assessment of civil penalties under TSCA effective March 10 and April 24, 1980 (45 FR, No. 177, September 10, 1980, at 59770). The marking violation was determined to call for a Circumstance Level 3 assessment (major marking violation) because of the volume of PCB contaminated oil (45 FR at 59777-78). A similar determination was made for the failure to have a SPCC Plan (Level 3, major storage violation). The failure to maintain records showing quantities and dates PCBs were added to the container was determined to be a major record-keeping violation (Circumstance Level 4). Although in response to a prehearing inquiry from the ALJ (letter, dated March 4, 1981), counsel asserted that Respondent was a

small, family run corporation with limited assets and marginal profitability and that imposition of the proposed penalty would preclude Respondent remaining in business (letter, dated April 17, 1981), no evidence to support these assertions was proffered or introduced at the hearing. There is also no evidence by which any of the other statutory factors required to be considered in determining the amount of the penalty^{10/} might be applied to reduce the penalty proposed by Complainant,^{11/} which, as we have seen, was calculated in accordance with applicable guidelines. Accordingly, the penalty proposed by Complainant of \$40,000 will be assessed against Respondent.

Order^{12/}

The violations of Section 15 of the Toxic Substances Control Act (15 U.S.C. 2614) charged in the complaint having been established, a civil penalty of \$40,000 is assessed against Respondent N.O.C., Inc.,

^{10/} Sec. 16 of the Act is entitled "Penalties" and subsection (a) "Civil" provides in pertinent part:

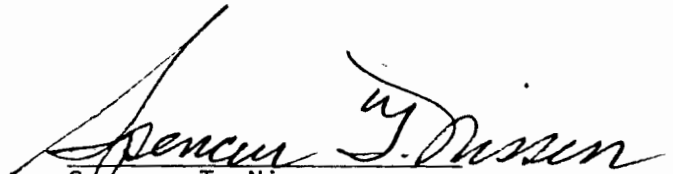
"(2)(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

^{11/} For example, evidence of good faith would bear on the degree of culpability and might afford a basis for reducing the proposed penalty.

^{12/} Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision shall become the final order of the Administrator in accordance with 40 CFR 22.27(c).

T/A Noble Oil Company, in accordance with Section 16 of the Act (15 U.S.C. 2615). Respondent is hereby ordered to pay the same by mailing or delivering a certified check payable to the Treasurer of the United States in the amount of \$40,000 to the Regional Hearing Clerk within 60 days of the date of this order.

Dated this 3rd day of December 1982.


Spencer T. Nissen
Administrative Law Judge