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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	TSCA# X84-01-03-311(j)/2614
RALPH R. KERR, d/b/a	)	
NORTHWEST DUST CONTROL COMPANY, &	)	
NORTHWEST PETROLEUM RECYCLING CORP.	)	
	)	
Respondents	)	

Toxic Substances Control Act - Accelerated Decision - Where the answer filed in conjunction with a stipulation executed by the parties demonstrates that the Respondent admits the facts which comprise the violations alleged, an accelerated decision as to Respondent's liability should issue.

Toxic Substances Control Act - Where the Respondent demonstrates, by affidavit or other documentation, that his ability to pay the proposed penalty is severely impaired, a reduction of such penalty is warranted. This is true even though the demonstration does not strictly comply with that envisioned by the Agency's penalty policy.

Appearances:

David Dabroski, Esquire
U.S. Environmental Protection Agency
Seattle, Washington
(For Complainant)

William V. Deatherage, Esquire
Frohnmayer, Deatherage, deSchweinitz,
Pratt & Jamieson, P.C.
Medford, Oregon
(For Respondent)

INITIAL DECISION

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), instituted by a Complaint issued on June 4, 1984 by the Director of Air and Waste Management Division of Region X, U.S. Environmental Protection Agency against the Respondent herein for violations of the Act and the regulations issued thereunder.[1] The original Complaint cited the Respondent with four violations of the Act, as follows: (1) Violation of 40 C.F.R. § 761.40 for failure to mark PCB containers; (2) Violation of 40 C.F.R. § 761.180 for failure to keep records; (3) Violation of 40 C.F.R. § 761.65(b) for failing to properly store the PCB materials; and (4) Violation of 40 C.F.R. § 761.65(c)(8) for improper storage and failure to date the PCB containers. For these violations, the original Complaint suggested a penalty of $31,500.

In the original Complaint there also was cited a violation of the Clean Water Act for which a penalty of $5,000 was proposed. In an Order dated October 23, 1984, the undersigned severed the Clean Water Act violation from the TSCA violation on the basis that it was the Court's decision that the two matters were improperly joined and that separate and distinct Agency procedures applied to the Clean Water Act violation which are not consistent with the rules of practice associated with TSCA violations.

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[1] Section 16(a) of the Act, 15 U.S.C. 2615(a), provides in pertinent 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 subjection, 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 [15 U.S.C. 2605], or (c) any rule promulgated under section...6 or...(3) fail or refuse to establish or maintain records...as required by this Act or a rule promulgated thereunder;..."

Based on discussions and further investigations had between EPA and the Respondent concerning the number of barrels and tanks that contained PCB contaminated oil in an excess of 50 ppm, an Amended Complaint was issued on March 4, 1985. The Amended Complaint also included the Clean Water Act violation, which pursuant to its previous Order this decision will not address, and eliminated one of the TSCA violations. The Amended Complaint now charges the Respondent with the above-cited marking violation, the failure to keep records and monitor the stored materials, and the failure to date and maintain annual records regarding the 4,000 gallon tank which the Agency found to contain approximately 300 gallons of contaminated oil. The penalty associated with this Amended Complaint was now reduced to $19,000.

Associated with the request for leave to file an amended complaint, there was a stipulation between the parties which in essence admitted the facts alleged in the Amended Complaint which constitute the basis for the violations alleged therein. Based on this development, counsel for the Complainant filed a motion for the issuance of an accelerated decision on the issue of liability alleging that inasmuch as the Answer taken in conjunction with the stipulation essentially demonstrated that there were no material facts in issue as to the Respondent's liability and that therefore the Court should issue an order on that portion of the proceedings. Under date of December 17, 1985, the Court issued a brief accelerated decision declaring that the Respondent had violated the three counts in the Complaint and that the parties should confer and determine whether or not they wished to hold a hearing on the question of the amount of the penalty to be assessed or whether they would wish to do this by affidavit and briefs. Following discussions between counsel, it was determined that the parties would submit the issue of the appropriate penalty to be assessed to the Court based on

affidavits and supporting briefs. Consequently, a briefing schedule was established and that exercise has now been completed. The above-referenced stipulation will be attached to and made a part of this decision for purposes of providing a basis for the previously issued decision on liability.

Discussion

In regard to the violations associated with the Amended Complaint, the Complainant broke down the $19,000 total proposed violation as follows: (1) for the marking violation - $10,000; (2) for the record-keeping violation - $6,000; and (3) for the storage violation - $3,000.

The marking violation, which as indicated above, is based on the requirements of 40 C.F.R. § 761.40(a)(1) which requires that each PCB container be marked in accordance with the regulations after July 1, 1978. There was at the Respondent's facility one 4,000 gallon tank containing approximately 300 gallons of oil contaminated with PCBs which the Agency's laboratory analysis showed contained 43,200 ppm of PCBs. The tank failed to bear the required PCB label. By affidavit dated April 30, 1986, Mr. William M. Hedgebeth provided information to the Court on the basis and rationale concerning the Agency's calculation of the penalties associated with the Amended Complaint. As to the marking violation, Mr. Hedgebeth stated that he considered under the Penalty Policy that this was a major marking violation because there was no indication that PCBs were present. Major marking violations are defined on Page A-118 of the PCB Penalty Policy to be a Level 3 violation. He states that the exact weight in kilograms of PCBs in the bulk tank which is the subject of this violation were not known. It is known that the tank held approximately 300 gallons of oil which was contaminated. He directs the Court's attention to page A-114 of the PCB Penalty Policy which

states that for liquid PCBs of this concentration a twenty per cent reduction should take place to determine the "extent" level in the penalty matrix when gallonage is used to determine amount of PCB present. Using this formula, the affiant concluded that reducing 300 gallons by twenty per cent leaves 240 gallons to be considered in reference to the Penalty Policy. As defined on Page A-114 of the Policy this places the extent axis of the penalty matrix in the Significant Level. Reference therefore to the above-mentioned penalty matrix which appears on Page A-113 of the PCB Penalty Policy results in a suggested penalty of $10,000.

The record-keeping violation was then discussed, which under the Penalty Policy, was a major violation as defined in the Penalty Policy. There were no annual reports. Using the above-described method for calculating the extent aspect of the violation, the same gallonage calculations were made and when applying that to the matrix results in the extent portion of that being in the Significant Level. Reference to the penalty matrix of the Policy results in using a Level 4 determination and Significant violation would warrant a penalty of $6,000.

As to the storage violation, reference to the Penalty Policy suggests that this was a minor storage violation. There had been no batched records prepared for quantities of PCBs either being added to or taken out of the bulk tank. Minor storage violations, in this case failure to provide appropriate data, are described as Level 5 violations in the Policy. As to the extent aspect of the matrix, the witness states that he used once again the gallonage adjustments and determined that, on the extent axis of the matrix, this would represent a Significant violation. Comparing a Significant violation with a Level 5 as to

significance, he suggested that a penalty of $3,000 was appropriate. The witness also stated in his affidavit that he was unaware of any fact which would be cause for mitigation of the proposed penalties described above.

At this point, it would be appropriate to discuss briefly the nature of the Respondent's business and the facts given rise to the detection of the violations alleged in the Complaint. Mr. Ralph Kerr, the individual Respondent named in the Complaint, entered the oil recycling and road oiling business full-time in 1972. He began business under the name of Northwest Dust Control Company and later incorporated under the name of Northwest Petroleum Recycling Corporation. The Company first operated out of a site in Central Point, Oregon. However, following a divorce in 1981, Mr. Kerr moved the business to White City, Oregon, where the subject violations occurred. On or about December 25, 1983, a spill occurred on Mr. Kerr's White City premises resulting in the release of oil. On December 26, 1983, a Complaint was filed with the Oregon State Police by a neighbor who noticed an oil slick on the river near the premises. The Oregon State Police officer responding to the Complaint observed a substantial amount of oil running into the Rogue River. The oil slick covered approximately three-quarters of the river width with an oil film. The officer traced the sheen of oil up the Rogue River to Wet Stone Creek and from there to a small drainage ditch. The drainage ditch began at Kerr's premises at 1111 Avenue C. The State trooper contacted Mr. Kerr who informed him that he had parked a tank trailer at the rear of his lot approximately four months prior to the spill. Inspection of that trailer revealed a broken pipe on the bottom which had allowed oil to leak out. The trooper notified the Department of Environmental Quality of the State of Oregon.

Mr. Dennis Belsky of the Oregon agency responded and arrived at the site. He noted that the soil area affected was 24 feet by 100 feet on the premises and approximately two miles of drainage ditch and creek hence into the Rogue River. He advised Mr. Kerr that clean-up and containment were his responsibility and Mr. Kerr acknowledged this. In spite of a previous oil spill of 2,000 gallons in 1980, Mr. Kerr had no spill prevention and counter-measures plan as required under the Clean Water Act. At the time of the spill of concern in this matter, Mr. Kerr did not notify either the EPA or the State agency, nor did he begin a prompt clean-up. On December 27, 28 and 29, 1983, advice was given to Mr. Kerr as to how he needed to clean-up the site. He made numerous verbal commitments to clean-up, but made extremely limited actual efforts to clean-up. The actual results were unacceptable. From December 30, 1983, when the decision was made to call in the EPA to complete the clean-up, through January 9, 1984, which is the final date of the agency employee's report, Mr. Kerr was absent from the site. It was later learned that he had left the State of Oregon. Because PCBs, which are hazardous substances, were found in used oil on the premises, a CERCLA § 106 Order was issued on February 9, 1984 regarding removal of PCBs from the premises. A week later, Mr. Kerr through his attorney, assured EPA that he would comply with that Order. However, Mr. Kerr did nothing to comply with the § 106 Order. Consequently, EPA took response actions to remove the PCBs from the site beginning March 12, 1984.

At the time of the spill, the White City site contained 42 storage tanks (with a capacity of about 450,000 gallons), several hundred drums, and several tank trucks. The facility was enclosed by a single-strand barbed wire fence and an unlocked gate. It was on the basis of a January 1984 EPA site investigation that the TSCA penalties contained in the Complaint were calculated. The PCB

contaminated oil on the premises during 1983 weighed more than 45 killograms, but Mr. Kerr had not composed or kept records of any kind for calendar year 1983. Mr. Kerr did not make or keep any records showing what batches of oil had been placed in the PCB-contaminated tank, what the batch quantities were, nor the 1983 or 1984 dates on which additions or removals occurred. It was agreed between the parties that in March 1984, there was at least one tank of 4,000 gallonage capacity at Mr. Kerr's facility which contained approximately 300 gallons of oil sludge which was contaminated with PCBs to the level or extent of at least 18,100 ppm. EPA's own test results indicated that the sludge contained PCBs at the level of 43,200 ppm. In any event, the level of contamination is significantly high to bring the materials in the 4,000 gallon tank within the purview of the regulations promulgated by the Agency under TSCA. The information above set forth is based on information contained both in the affidavit of David Dabroski, Associate Regional Counsel of Region X, EPA, and the stipulation entered into between counsel for the parties.

As indicated above, the parties were directed to file briefs, with or without supporting affidavits, in support of their positions on the amount of the penalty. The Agency filed both an initial and reply briefs and had associated therewith several affidavits. The Respondent's counsel elected not to file any briefs, but relied entirely on the affidavit of his client, Mr. Kerr, as adequately setting forth the Respondent's position on the matter of the amount of the penalty to be assessed. The affidavit of Mr. Kerr, which is attached to an April 28, 1986 letter from Respondent's counsel, states that at the time of the alleged violation, the Respondent had assets of approximately $300,000 with liabilities of approximately $50,000. He states that at this time he has no assets except the remaining tanks not previously destroyed by the Complainant

having a value of approximately $1,500. The Respondent also lists several obligations currently still owing, such as: an IRS lien of over $23,000; a clean-up assessment by the U.S. Coast Guard for over $2,000; debt to the Oregon Department of Revenue for $6,000; and attorney fees. The Respondent, in essence, suggests that he has no funds with which to pay the proposed penalty.

The allegation concerning EPA's destruction of his tanks is set forth in the EPA clean-up report which was one of the documents pre-filed in this matter in anticipation of hearing. Apparently, since Mr. Kerr did not elect to clean-up the facilities on his own, the Agency went in and having detected levels of PCB contamination in many of the tanks, proceeded to dismantle those tanks which they felt were contaminated and had the pieces disposed of as required by law and the contents thereof also properly disposed of. Since the tanks represented the primary business assets of the Respondent, he now states that the Federal Government has, in essence, destroyed his business and his only income is that derived from his wife, who is a registered nurse.

The Respondent also pleads total ignorance of the fact that the oil contained in his tanks contained any PCBs. In regard to the alleged destruction of his property by Federal agents, the Respondent has filed a $200,000 claim against EPA under the Federal Tort Claims Act. In support of his allegation of his lack of funds, the Respondent provided the Court with two pieces of evidence--one is a 1986 notice of levy from the IRS showing that the Respondent owes the Government over $23,000. The other piece of documentation is a copy of the Respondent's 1985 Income Tax Return wherein the only income noted is the $23,000 salary of his wife.

The Complainant's reply memorandum argues that "the information the Respondent has provided this Court does not demonstrate Respondent's inability to pay. Nor does it provide this Court with even the minimal information necessary to

calculate Respondent's ability to pay any penalty." In this regard, Complainant directs the Court's attention to the Penalty Policy referred to above which was published in the Federal Register July 7, 1980. The undersigned as well as other EPA judges have consistently accepted the above-mentioned Penalty Policy as being consistent with the Act and as providing a rational and logical basis for the calculation of penalties called for under the Act. This Court has consistently held that when both under this Act and other Acts administered by EPA, which call for civil penalties, the burden of showing an inability to pay a proposed penalty rests entirely upon the Respondent.

The Penalty Policy on Page A-71 states as to ability to pay that: "Essentially, however, a firm can pay up to the point where it can no longer do business. However, it is evident that Congress, by inserting these two factors into the Act, for most cases did not intend that TSCA civil penalties present so great a burden as to pose the threat of destroying, or even severely impairing, a firm's business." The Penalty Policy then goes on to discuss the complexity of attempting to measure a firm's ability to pay and ultimately suggests that sales income is a good benchmark against which to determine the Respondent's ability to pay. The Penalty Policy concludes that section by stating: "For purposes of calculating the ability to pay, sales figures for the current year and the prior three years should be averaged. Four per cent of the average sales will serve as the guideline for whether the company has the ability to pay." As shown above, the Respondent did not supply any sales information upon which the Court could make the calculations described in the Penalty Policy. Inasmuch as the Respondent has failed to produce any sales figures for the last four years, the Court is unable to made an assumption one way or the other as to what those figures might be. However, since the Respondent's affidavit suggests that the

value of the tanks prior to their destruction was approximately $12,000 and that he is alleging that the business was worth $200,000 in his suit against the Agency, one can surmise that the last four years' sales figures must have been more than minimal.

My review of the record indicates to me that the Agency properly utilized the Penalty Policy when applied to the facts in this case in calculating the proposed penalties appearing in the Amended Complaint. The Court's finding that the calculations were proper presents a prima facie case of their correctness and it then rests upon the Respondent to demonstrate why the calculations were improper. In this instance, the Respondent has made no attempt to attack the Agency's penalty calculations but merely relies on the Respondent's alleged inability to pay any penalty. Additionally, the documentary evidence supplied to the Court by the Respondent is inadequate for this Court to determine whether or not the individual Respondent and his corporations lack the ability to pay any penalty whatsoever. No corporate tax returns were presented to the Court. The record also suggests that the assessment of the penalty against this Respondent will not affect his ability to continue in business since he alleges that the Government destroyed his business. The plea of inability to pay has not been adequately demonstrated as specified in the Penalty Policy and, therefore, no reduction of the proposed penalty is, in my judgement, warranted under a strict reading thereof.

However, the evidence produced by the Respondent does show that his sole source of income was his oil recycling and dust supression business. The record also demonstrates that this business no longer exists due to the dismantling of his storage tanks, which form the primary basis of the business, by the Federal Government. That portion of the Penalty Policy which suggests that using the

last four years of gross sales as an indicator of a Respondent's ability to pay, in my opinion, envisions a situation involving an ongoing enterprise. Not one which has no future income. The Agency apparently felt that, absent some unforeseen factors, a business would, on the average, generate similar sales income in the future that it had in the past. Such is not the case here. Since the Court is not bound by the language of the Agency Penalty Policy (see 40 C.F.R. § 22.27(b)), it is free to assess a penalty based upon the specific facts in each case.

Although the Respondent herein is not entitled to any reduction of the proposed penalty based on his adherence to the requirements of TSCA or its regulations (actually the record reflects disregard therefore), it is not the Agency's policy to assess a penalty clearly beyond a Respondent's ability to pay.

Accordingly, I am of the opinion that a penalty of $4,000 is appropriate.

ORDER[2]

Pursuant to § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $4,000 is hereby assessed against Respondents, Ralph R. Kerr, Northwest Dust Control Company, and Northwest Petroleum Recycling Corporation, for the violations of the Act found herein.

Respondent shall pay the full amount of the penalty by sending a cashier's or certified check payable to the Treasurer of the United States to the following address within sixty (60) days of the receipt of this Order:

EPA -Region 10
(Regional Hearing Clerk)
P. O. Box 360903M
Pittsburgh, PA 15251

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[2] Unless an appeal is taken pursuant to Section 22.30 of the 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 § 22.27(c)).

The Agency may, if it deems it appropriate, allow the penalty to be paid in installments or consider a delayed payment schedule.

DATED: July 31, 1986

Thomas B. Yost
Administrative Law Judge

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
EPA REGION 10, 1200 SIXTH AVENUE
Seattle, Washington, 98101

In the Matter of: U.S. ENVIRONMENTAL PROTECTION AGENCY, Complainant, vs. RALPH R. KERR, d/b/a Northwest Dust Control Co. and Northwest Petroleum Recycling, Respondent.	Cause NO. X84-01-03-311j/2614 STIPULATION OF FACTS RE LIABILITY

STIPULATION

The parties above-named through their respective attorneys of record herein, by the signature of such attorneys appearing below, hereby stipulate and agree that for the purposes of this administrative proceeding only (and not as to third parties), the following matters are established as material facts herein based upon substantial evidence:

1. There was, as alleged in the complaint, one tank at the Respondent's facility having a volume of 4,000 gallons, which

tank contained approximately 300 gallons of oil sludge which was contaminated with PCBs, viz. arachlor 1254, to the extent of at least 18,100 parts per million, and that tank did not bear a PCB label of any kind.

2. The PCB contaminated oil mentioned in #1 above weighed more than 45 kilograms (99.4 pounds); but Respondent had not made nor kept records of any kind for the calendar year 1983 showing any receipt, storage, or disposal of PCBs or PCB items at or in connection with the Respondent's said facility. The tank had oily sludge (metal-grease-dirt, etc.) remaining after several years of use as a waste oil container.

3. For the tank mentioned in #1 above, Respondent had not made nor kept any records of any kind showing (A) what batches of oil had been placed in that tank or removed from that tank, (B) what the quantities of such batches were, or (C) the dates on which additions or removals occurred.

Dated: November 27, 1985.

By _____
Of Attorneys for EPA

Dated: November 15, 1985.

By _____
Of Attorneys for Respondent