UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	TSCA-III-057
J F & M COMPANY, INC.	)	
	)	INITIAL DECISION
Respondent	)	

1. Toxic Substances Control Act - Motions for Accelerated Decision - Where the Respondent in his answer admits violation of all counts in the complaint, a motion for accelerated decision on the issue of liability properly granted.

2. Toxic Substances Control Act - Penalty Assessment - Where Respondent demonstrates inability to pay and/or adverse effect of penalty on ability to continue in business, the penalty must be adjusted in a manner consistent with the penalty policy.

3. Toxic Substances Control Act - Mitigation of Penalty - Where the Agency's primary concern is proper disposal of PCB items and clean-up, the penalty may be mitigated upon Respondent's completion of such activities.

Appearances:

James T. Meisel, Esquire
Huntington, West Virginia
For the Respondent

Martin Harrell, Esquire
U.S. Environmental Protection Agency
Philadephia, Pennsylvania
For the Complainant

INITIAL DECISION

Preliminary Statement

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 March 21, 1984 by the Director of the Hazardous Waste Management Division, Region III, United States Environmental Protection Agency (EPA or the Agency), against J F & M Company, Inc., (the Respondent), a sole proprietorship owned and operated by Robert Earl Johnson, Jr., located in Huntington, West Virginia. The complaint enumerated six (6) counts of alleged violations of the Act for which a proposed penalty in the amount of $83,000.00 was assessed. The Respondent filed an answer on April 19, 1984 in which it admitted the allegations in the complaint and asked for a hearing in the matter.

By letter dated September 13, 1984, the undersigned issued a pre-hearing letter which, among other things, directed the parties to file certain specified pre-hearing information by a date certain if the matter could not be informally settled prior to that time. By motion dated November 20, 1984, counsel for the Complainant sought a default order in this matter for failure of the Respondent to file the pre-hearing responses ordered by the above-mentioned letter. The Respondent had in fact failed to respond to the requirements of the pre-hearing letter. By an undated letter received in my office on December 6, 1984, the Respondent replied to the motion. The letter from Mr. Johnson, who at that time was appearing pro se, stated that he wished to contest the proposed penalty and that his failure to provide the pre-hearing

materials was based on his misunderstanding of the procedures in the that he thought a hearing was going to be held in either Huntington or Wheeling, West Virginia and, therefore, no further action was required of him prior to the hearing. Mr. Johnson reiterated his position that he did not deny any allegations in the complaint, but advised that he did not have the resources to dispose of the PCB items at the present time, but he might be able to dispose of small quantities of materials over an extended period of time. With the letter Mr. Johnson enclosed tax returns for the years 1980 to 1984, inclusive, and the original procurement contract between himself and Appalachian Power Company, the source of much of his PCB items.

By Order dated December 6, 1984, the undersigned advised counsel for the Complainant that he would treat the above-mentioned letter as a response to the motion and ordered that counsel for the Complainant examine the documents attached to the letter and advise, no later than January 4, 1985, as to how he wished to proceed in the matter and that the Court would defer ruling on the default motion. By letter dated December 14, 1984, counsel for the Complainant advised that he wished the Court to treat his heretofore filed motion for default as a motion for accelerated decision as to liability of the Respondent and further stated that he would be amenable to a hearing solely on the question of the amount of the penalty and suggested Wheeling, West Virginia as the location therefore. The Court ruled that the motion for accelerated decision as to liability would be granted. The hearing on the penalty would be held on February 12, 1985 in Charleston, West Virginia. A Hearing was held on that day in Charleston at which time the Respondent appeared, represented by James T. Meisel, attorney, Huntington, West Virginia.

Following the hearing, a briefing schedule was established and the parties have filed initial and reply briefs, proposed findings of fact and conclusions of law.

Findings of Fact

1. Respondent is a corporation which is incorporated and does business in the State of West Virginia.

2. Respondent constructs power centers for customers involved in mining and processing coal. The Respondent also engages in the repair and sale of electric transformers. Respondent's facility is located at 1632 8th Avenue, Huntington, West Virginia.

3. EPA personnel inspected Respondent's facility August 23, 1983. At that time, the Respondent's facility contained one PCB transformer. Additionally, the Respondent was storing approximately 900 large, high voltage PCB capacitors.

4. Pursuant to 40 C.F.R. § 761.40(c)(2), the Respondent was required to mark the 900 PCB large, high voltage capacitors placed into storage for disposal. The inspection revealed that the Respondent had failed to mark these capacitors with the appropriate PCB identification mark specified in 40 C.F.R. § 761.45.

5. Pursuant to 40 C.F.R. § 761.40(a)(10), the Respondent was required to mark the storage area containing the 900 large, high voltage PCB capacitors with the appropriate identification mark specified in 40 C.F.R. § 761.45. The inspection revealed that the Respondent had failed to properly mark the storage for disposal area.

6. Pursuant to 40 C.F.R. § 761.40(c)(1), the Respondent was required to mark its transformer as being a PCB transformer. The inspection revealed that the Respondent had failed to properly mark the transformer with the appropriate identification mark required by 40 C.F.R. § 761.45.

7. Pursuant to 40 C.F.R. § 761.60(d), any spill or uncontrolled discharge of PCB fluid constitutes disposal of PCBs. The EPA inspector discovered that PCB fluid had leaked from some of the PCB capacitors onto the floor of the storage area. The EPA inspector took a sample of the PCB fluid which had leaked onto the floor and had it analyzed for PCB concentration. Test results showed that the sample contained 170,000 ppm PCB. Pursuant to 40 C.F.R. § 761.60(a), the Respondent was required to dispose of the PCB fluid in an incinerator which met the requirements of 40 C.F.R. § 761.70.

8. Pursuant to 40 C.F.R. § 761.30(a)(1)(ii), the Respondent was required to inspect PCB transformers stored for reuse at least once every three months. The inspection revealed that the Respondent was storing one PCB transformer for reuse. This transformer contained at least 250 gallons of PCB fluid. The Respondent failed to inspect this transformer as required by 40 C.F.R. § 761.30(a)(1)(ii).

9. Under 40 C.F.R. § 761.65(b)(1), an owner or operator of a facility used to store PCBs or PCB items designated for disposal must provide a storage area with walls, roof and an impervious floor which has continuous curbing at least six inches high.

10. The inspection revealed that the Respondent has stored for disposal 900 large, high voltage capacitors in a building which lacked a roof and which lacked continuous curbing.

11. Pursuant to 40 C.F.R. § 761.65(c)(5), all PCB articles in storage for disposal must be checked at least once every 30 days for leaks. The inspection revealed that the Respondent had not checked the 900 PCB capacitors stored for disposal at least once every 30 days.

12. Pursuant to 40 C.F.R. § 761.65(c)(8), PCB articles must be dated when they are placed into storage for disposal. The inspection revealed that the Respondent had not dated the 900 PCB capacitors when they were placed into storage for disposal.

13. Under 40 C.F.R. § 761.180(a), each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB container(s) or one or more PCB transformers, or 50 or more PCB large high or low voltage capacitors must maintain records on the disposition of PCBs and PCB items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year.

14. The inspection revealed that the Respondent had failed to prepare annual documents for the 1978, 1979, 1980, 1981 and 1982 calendar years.

15. EPA contractors sampled fluid which had leaked from PCB large, high voltage capacitors in the storage area in September 1983, and had the samples analyzed for PCB contamination. Laboratory analysis revealed PCB concentrations in spilled fluid of up to 170,000 parts per million (ppm) PCB. Laboratory analysis of soil samples taken outside the facility showed PCB concentrations of 700 and 660 ppm respectively.

16. EPA contractors took soil samples in July 1984 from locations near the facility's main entrance. Laboratory analysis of these samples revelaed PCB concentrations of 1,300 ppm and 140,000 ppm.

Discussion

As indicated above, the Respondent admittted all of the allegations in the complaint and pursuant to my previous Order had been adjudged to have violated the counts described in the complaint. The Hearing held in West Virginia was for the sole purpose of determining the appropriate civil penalty to be assessed in this case.

The complaint broke down the proposed penalties as follows: Count I-violation of marking requirements, $15,000.00; Count II-violation of marking requirements, $10,000.00; Count III-violation of disposal requirements, $5,000.00; Count IV-violation of use requirements, $13,000.00; Count V-violation of storage requirement, $15,000.00; and Count VI-violation of recordkeeping requirements, $25,000.00.

In response to my pre-hearing letter, the Complainant filed a statement describing in general terms how the penalties were determined and stated that the penalty was calculated using the penalty matrix contained in the PCB penalty policy. Since the threat exists that direct human contact with the PCBs could occur and that there already has been some migration of PCBs, EPA believed that the nature, circumstances, extent and gravity of these violations were very significant. The Respondent is storing a considerable amount of PCB items on his property and there has been significant contamination of the buildings, with limited contamination outside the facility.

The Complainant's pre-hearing filing stated:

"EPA did not adjust the proposed penalty in the complaint based on the Respondent's ability to pay, the effect on his ability to stay in business, history of prior violations, the degress of culpability and other matters as justice may require. However, as I have indicated previously, EPA's primary concern is securing the disposal of the PCB

items and clean-up of the property. EPA is willing to mitigate the penalty in exchange for disposal and clean-up. However, Mr. Johnson has indicated that he can not pay for such remedial action. EPA is willing to reduce the penalty based upon a showing of the effect the payment will have upon the Respondent including his ability to comply with the PCB regulations and to obtain disposal and clean-up."

At the Hearing only two witnesses testified, one for each party. The witness for the Complainant was Marilyn Bacarella, an EPA employee, who calculated the proposed penalty set forth in the complaint. Ms. Bacarella's testimony consisted of her going through the various counts of the complaint and describing how she arrived at the proposed penalties for each of such counts using the above-mentioned PCB penalty policy. Her testimony indicated that the initial proposal that she made to the Office of Regional Counsel differs somewhat from the breakdown described in the complaint but that the total amount is the same as she originally had proposed. The main difference between the witness' proposal and what the complaint ultimately suggested was in the area of failure of the Respondent to prepare annual documents for the years 1978, 1979, 1980, 1981 and 1982. The witness originally proposed a penalty of $10,000.00 for each of the four years involved and arrived at a penalty of $40,000.00 for the recordkeeping violation. She then added 1983 to this total, adding another $10,000.00 making the recordkeeping penalty $50,000.00. However, to mitigate the impact of such a high recordkeeping penalty, the Agency decided to reduce this penalty to $25,000.00. The other change was for the storage for disposal violation and originally that figure was somewhat lower and upon re-evaluation of this violation and considering that there were 900 capacitors involved, the penalty was determined to be $15,000.00.

I have no particular quarrel with the way in which the Agency calculated the proposed penalty as it appears in the complaint, however, as indicated above, the Agency did not consider the Respondent's ability to pay or the effect of the penalty on its ability to stay in business. The income tax returns provided by the Respondent indicate that its gross sales for the years in question are as follows: 1980 - $116,734.00; 1981 - $179,530.00; 1982 - $193,864.00; and 1983 - $60,133.00. The penalty policy suggests that when there is a claim of inability to pay, proffered by the Respondent, coupled with documentary evidence to support such claim, the total sales for the last four years be averaged and multiplied by four per cent thus arriving at a figure which the policy indicates, represents a penalty with which the Respondent should be able to pay. In this case, the gross annual sales total $550,261.00. When divided by 4 this equals $137,565.00 as an average and when this is multiplied by four per cent, we arrive at a figure of $5,502.00.

A thorough discussion of this portion of the penalty policy appears in the case of Rocky Mountain Prestress, Inc., and AERR.CO., Inc., TSCA Decision PCB-83-017, issued on August 23, 1984, at pages 17, 18, and 19.

In his post-hearing briefs, counsel for the Respondent argued that his client made a good-faith effort to comply with the regulations and ,in fact, had spent $8,000.00 or $9,000.00 in an effort to comply with certain portions of the regulations subsequent to the issuance of the complaint. This expenditure had to do with placing a roof over the area where the PCB materials were stored and laying down a wooden barrier in association with approved absorbent materials in an attempt to contain any spilled PCBs that the inspector found to be present on the Respondent's

property. I am not particularly impressed with the Respondent's efforts to comply with the regulations since he had obtained these materials in 1974 and although he admitted in his testimony that he knew that there were certain restrictions on the use and handling of the PCB containing materials, he made no effort to determine from any reliable source exactly what these requirements were. He instead merely relied on some vague conversations he had with representatives of the power company from whom he obtained most of the articles in question. He made no effort to obtain any of the regulations relative to the storage, handling or use of PCB articles prior to the inspection by EPA. The regulations as they apply to PCBs were published in the Federal Register and such publication constitutes legal notice to the world at large of the requirements contained therein and the Respondent is charged with the constructive notification and knowledge of the requirements of said regulations. The fact that he waited until the violations were brought to his attention by the EPA inspector prior to taking protective measures, does not in my judgement demonstrate the presence of good faith or due care in the handling of what everyone now recognizes to be a dangerous and toxic material. Under the circumstances I see no rationale for adjusting the proposed penalty based on good faith efforts on the part of the Respondent. As a matter of fact, one could argue that his cavalier attitude toward the handling of these toxic materials should result in an increase in the proposed penalty, rather than a decrease.

Further discussion of the proposed penalty in regard to an individual assessment of each of the violations would in my judgement be a useless

enterprise given the clear mandate of the penalty policy as it applies to the ability to pay on the part of a given Respondent. My position in this regard is set forth in the Rocky Mountain case, supra, on page 19 of the decision where it is stated that:

"Although the court is not absolutely bound by any published penalty policy of the Agency in assessing an appropriate penalty in these cases, should the court deviate from the terms thereof it must explain the reasons for such differences. In this particular case, I am unable to establish a creditable argument for increasing the assessed penalty against AERR.CO. given the clear language of the penalty policy and the absence of any other factors which would argue against its application in this case. Unlike most of the numbers suggested by this penalty policy, which involve a great deal of subjective evaluation, the 'ability to pay' portion of the policy is totally objective in that it requires only the application of arithmetic to arrive at a given figure. Since I have no reason to suspect the figures provided by AERR.CO. in response to the court's post-hearing order and the clear, unequivocable language of the penalty policy applicable to these proceedings, I must reduce the assessed penalty applicable to AERR.CO. from $20,000.00 to $8,990.00, based on its inability to pay."

Based upon the above discussion, I have no alternative but to reduce the proposed penalty of $83,000.00 to $5,502.00.

In arriving at this conclusion, I have carefully considered the entire record in this case, consisting of the transcript, the exhibits and the briefs of all the parties. All contentions of the parties presented have been considered, and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

ORDER[1/]

Pursuant to 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $5,502.00 is hereby assessed against Respondent, J F & M Company, Inc., for the violations of the Act found herein.

Given the Complainant's willingness to mitigate the proposed penalty in exchange for securing disposal of the PCB items and clean-up of the property, it is further ordered that the penalty herein assessed may be reduced to zero if the Respondent will clean-up the subject site and properly dispose of the PCB items in accordance with a protocol to be prepared by the Agency consistent with the requirements of the Act and the regulations promulgated pursuant thereto. Such clean-up and disposal shall be commenced within sixty days of the date of the preparation of the protocol and certified to by the Complainant. Failure to accomplish such clean-up and disposal shall result in the assessment of the full $5,502.00 penalty herein estabished against said Respondent. Should the Respondent fail to comply with the conditions set forth herein within the time periods established, payment of the full amount of the civil penalty assessed shall be made within sixty days of service of the final order upon Respondent by forwarding to the Regional Hearing Clerk, a cashiers' check or certified check payable to the United States of America.

Thomas B. Yost
Administrative Law Judge

DATED: May 20, 1985

1/ Unless an appeal is taken pursuant to § 22.30 of the interim rules of practice, or the Administrator elects to review this decision on his own motion, the Initial Decison shall become the final order of the Administrator. (See § 22.27(c)).