10/3/89

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

In the Matter of

LEONARD A. STRANDLEY,

Respondent

Docket No. 1084-10-12-2615P

Judge Greene

Toxic Substances Control Act, 15 U.S.C. §2614.

Under the particular circumstances of this case, a penalty of $103,500 is appropriate, with all but $5000 deferred permanently upon a showing, as provided in the Order, that the balance has been contributed to the cleanup of the site.

Appearances:

David Dabroski, Esquire, Associate Regional Counsel, United States Environmental Protection Agency, Region 10, Seattle, Washington, for the complainant.

Kenneth S. Kessler, Esquire, 543 Broadway, Tacoma, Washington 98402, for the respondent

Before: J. F. Greene, Administrative Law Judge

DECISION AND ORDER

By complaint filed originally on November 15, 1984, and amended by motion granted January 19, 1988, the United States Environmental Protection Agency (EPA) seeks an order finding the respondent in violation of section 15 of the Toxic Substances Control Act, 15 U.S.C. §2614 (TSCA), and applicable regulations promulgated thereunder, thereby incurring liability pursuant to section 16 of TSCA, 15 U.S.C. §2615(a).

Procedurally this case is ripe for decision, statements of facts, supporting exhibits, and applicable law having been filed by the parties and received on March 3, 1989.

Respondent operated a sole proprietorship starting around 1968. The business included metal reclaiming and the rebuilding of large equipment including forklifts (respondent's statement of facts, p. 1). As part of his business, respondent salvaged transformer oil (respondent's statement of facts, p. 3) from transformers which he purchased from various sources, including utilities and the United States government (respondent's exhibit F, attached to statement of facts). It is complainant's position that the site where respondent carried out his activities was highly contaminated, and consequently charged respondent with assorted violations of the polychlorinated biphenyls (PCBs) regulations, 40 CFR Part 761, issued pursuant to authority contained in

section 6 of TSCA, 15 U.S.C. §2605. Respondent replies that (1) the site was owned by others; (2) the others owned it long before respondent leased a portion for his business, and had the opportunity to contaminate the site before respondent came along; (3) the others conducted an auto wrecking business located physically at a higher elevation than respondent's; that business could also have contaminated respondent's area; (4) respondent did not have exclusive use of his area; and (5) one of the other persons, a lineman for a public utility, had access to transformer oil with which he regularly oiled certain roads at the site, some in the area of respondent's business, at the rate of about 150 gallons once or twice per month between 1977 and 1983 (see respondent's statement of facts, pp. 1-5, and attached exhibits A and H). Respondent further asserts that (1) the purchaser of the oil which he drained from the transformers customarily tested the oil; (2) the purchaser would not accept "problem" oil; (3) the purchaser never rejected any the oil purchased from respondent (respondent's statement of of facts, p. 4).

Respondent vigorously rejects complainant's conclusion that the violations alleged in the complaint are attributable to respondent's activities; resondent further opposes assessment of penalties in that even if "technical" violations occurred, the existence of numerous mitigating circumstances, including respon-

sibility of other individuals, should result in dismissal of the complaint. Complainant rebuts these arguments (p. 10, complainant's brief) and urges imposition of $103,500.00 in civil penalties although in the alternative it would reluctantly accept remission of all except $5000 of such penalty if the $98,500.00 balance were to be contributed to cleanup of the site.

CONCLUSIONS AND FINDINGS

The facts and arguments in this case are persuasive that respondent has violated TSCA and certain applicable regulations. Most of these violations have been determined by reference to respondent's own records, and some of them -- such as failure to maintain proper records -- are of a continuing nature. It is found that not only should respondent have known that PCBs were being handled, stored, shipped, and sold in a manner which did not conform to applicable regulations, but that these activities, including failure to keep records relating to PCB items and failure to have a spill prevention control/countermeasure plan, took place under his direct control, at a time and place where responsibility no longer could be completely fobbed off upon others who had access to, or were also using, or who contributed to the contamination at the site. Nor would the prior and joint culpability of others excuse this respondent. It will be found that respondent has violated TSCA and certain regulations promulgated thereunder.

1. Respondent is subject to TSCA and applicable regulations.

2. Respondent failed to use incineration, chemical landfill, or high efficiency boiler to dispose of PCBs in concentrations of 50-500 parts per million, in violation of 40 CFR §761.60(a).

3. Oil filled electrical equipment must be assumed to be contaminated with PCBs, 40 CFR §761.3. The fact that purchasers who tested the oil sold to them by respondent did not refuse to accept the oil does not constitute a defense under TSCA and applicable regulations. Lack of intention to violate TSCA and applicable regulations is not a defense to TSCA complaints.

4. Respondent sold oil containing PCBs at a level of 5600 parts per million to a recycler. This constitutes improper disposal, 40 CFR §761.60(b)(4).

5. Respondent disposed of about 520 PCB-containing transformers received from Peninsula Light Co., Grays Harbor PUD, Seattle City Light, and General Metals, Inc., and the City of Centralia by means that violated the provisions of 40 CFR §761.60(b)(4).

6. By placing about 300 gallons of liquid containing 5600 parts per million PCBs in a 7000 gallon storage tank for more than 30 days, respondent did not adequately store PCBs, in violation of 40 CFR §761.65(b).

7. Respondent violated 40 CFR Part 112 by failing to have a spill prevention control and countermeasure plan as provided in that section for the 7000 gallon tank and other areas of his facility.

8. Respondent failed to mark the storage area containing the 7000 gallon tank and other areas of his facility, in violation of 40 CFR §761.40(a)(10).

9. Respondent failed to maintain "batch records" for the 7000 gallon storage tank for the years 1983-1984, as provided in 40 CFR §761.65(c)(8).

10. Respondent failed to maintain annual reports for PCB liquids in the 7000 gallon storage tank or for any other activity involving PCB items at his facility, as provided by 40 CFR §761.180(a).

PENALTY

Complainant clearly has the public interest as its chief concern in recommending structuring of the penalty which will most likely result in the fastest completion of the cleanup effort. Under the provisions of section 16 of TSCA, 15 U.S.C. §2615(a)(1)(C), the EPA Administrator may

> . . . .compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

Obviously a respondent willing to assist in cleanup of a site,

despite denials of responsibility for the environmental degradation, is preferable to a continued hostile relationship which may cause delay. Complainant's counsel must be commended for recommending an innovative solution. In these circumstances, it will be ordered that respondent pay $5000 in penalties forthwith, with $98,500 being remitted permanently provided that this amount is applied to cleanup of the site as set out below. Respondent must provide written proof within 90 days of the date of this order, of expenditure of $98,500 for the cleanup of the site. Failure of respondent to provide such proof of expenditure of $98,500 as provided will result in imposition of the entire penalty unless complainant files for leave to expand the time.

ORDER

IT IS HEREBY ORDERED that respondent shall pay to the EPA the amount of one hundred five thousand three hundred dollars ($105,300) as a civil penalty which is hereby assessed and imposed against it.

The total amount shall bear interest beginning thirty (30) days from the date of this Order at the rate of 9% per annum until the penalty is fully paid, or until the penalty plus interest thereon at the rate provided above is fully remitted and excused, as provided herein.

Respondent shall pay FIVE THOUSAND DOLLARS ($5000) of the imposed penalty no later than sixty (60) days from the date of this Order by cashier's or certified check or money order payable to the "Treasurer of the United States," and mailed to:

United States Environmental Protection Agency
Region 10
(Regional Hearing Clerk)
Post Office Box 360903M
Pittsburgh, Pennsylvania 15251

A copy of the check and of the transmittal letter shall be delivered or mailed to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk, Region 10
Office of Regional Counsel
United States Environmental Protection Agency
1200 Sixth Avenue, SO-125
Seattle, Washington 98101

The payment of the remaining portion of the imposed penalty is hereby suspended and deferred to one hundred and twenty (120) days from the date of this Order, at which time it shall be immediately due and payable together with all accrued interest without further proceedings, or notice, or order, except as otherwise provided in the following paragraph:

The suspended and deferred payment portion of the penalties imposed above shall be wholly remitted and excused automatically on the 120th day from the date of this Order together with all

accrued interest without further proceedings herein if the affirmative condition or event specified in the following paragraph occurs and occurs on time.

7. No later than sixty (90) days from the date of this Order, respondent shall submit to EPA an affidavit and accompanying attachments which verify that respondent has contributed to the cleanup effort at the site pursuant to the CERCLA Orders in the amount of ninety-eight thousand five hundred dollars ($98,500) by cash contributions or through his own services or efforts (with an explanation of how the value of these have been calculated); acceptance of such valuation of personal services or efforts shall be conditional upon EPA's determination that the method used for calculating this value is reasonable and adequately documented by supporting information. Upon completion of this condition, the payment of the deferred penalty of $98,500 will remain forever deferred; if not, the penalty, or portion thereof, will become payable together with interest as provided in paragraph 2 of this Order.

8. By deferring payment of the adjudged penalties, the burden of proving that payment of those penalties remains deferred and suspended is placed upon respondent.

9. No later than thirty (30) days after such affidavit has been filed by respondent, EPA shall either state and file in this

cause, or (expressly or by silence or failure to file a statement) waive, for civil purposes only of this administrative cause, a contention and the supporting reasoning that one or more conditions covered by or alluded to by the filed affidavit have not been met or have not been fulfilled. If EPA files any such disputing statement on time, then each party may proceed as otherwise permitted by law. If EPA files later any such statement or omits filing any statement, then for purposes of this Order the penalties which are suspended and deferred as provided in paragraphs 5-7 above shall be deemed permanently suspended, deferred, and remitted.

J. F. Greene
Administrative Law Judge

October 31, 1989
Washington, D. C.