

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re)
Allen Transformer Company,) TSCA Docket No. VI-7C
Respondent)

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA") Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violations of a rule promulgated under Section 6(e) of the Act, 15 U.S.C. 2605(e), governing the manufacturing, processing, distribution, and use of polychlorinated byphenyls ("PCB Rule"), 40 CFR Part 761.^{1/} The proceeding was instituted by a complaint issued on January 7, 1980, by the United States Environmental Protection Agency ("Complainant") charging Allen Transformer Company with violations of the disposal, storage, marking, processing and record keeping requirements of the PCB

1/ TSCA, Section 16(a)(1), 15 U.S.C. 2615(a)(1) provides as follows:

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 subsection, 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, or (c) any rule promulgated under section . . . 6" or to "(3) fail or refuse to (A) establish or maintain records. . . as required by this Act or a rule promulgated thereunder."

rule. Assessment of a penalty in the amount of \$100,800 was originally proposed, but by amended complaint issued on June 5, 1980, the proposed penalty was reduced to \$61,500 in accordance with the EPA's penalty policy for PCB rule violations issued under the guidelines for assessment of civil penalties under TSCA, Section 16, and made effective for administrative proceedings pending on or instituted after April 24, 1980.^{2/}

Allen Transformer answered, denied the violations and requested a hearing pursuant to the rules of practice governing these proceedings, 40 CFR Part 22.

A hearing was held in Fort Smith, Arkansas on January 28, 1981. Pursuant to stipulation of the parties, the only contested issue to be tried was the alleged violation of the disposal requirements of the PCB rule, 40 CFR 761.10. Allen Transformer conceded violations of the marking, storage and record keeping requirements, but Complainant waived any civil penalties because of Allen Transformer's financial condition. The stipulation also provided that Complainant withdraws without prejudice the complaint's allegations relating to the processing violations.^{3/}

Following the hearing, the parties submitted briefs on the legal and factual issues, and this decision is rendered on consideration of the entire record and the briefs submitted by the parties. No violation of the disposal requirements is found for the reasons hereafter stated. Since by stipulation this was the only violation for which a penalty was claimed, no penalty is assessed. All proposed findings of fact inconsistent with this decision are rejected.

^{2/} See 45 Fed. Reg. 59776, 59777 (Sept. 10, 1980).

^{3/} Transcript ("Tr") 4-5. The rules of practice, 40 CFR 22.14(e), provide that after an answer has been filed a complaint may be withdrawn only on motion granted by the Presiding Officer. The stipulation agreed to by the parties to withdraw without prejudice the complaint's allegations relating to the processing violations (Paragraphs 16-20) is treated as a motion to withdraw these allegations, and the motion is granted.

Findings of Fact

1. At all times relevant hereto Allen Transformer was engaged in the business of transformer repairs in Fort Smith, Arkansas. Stipulated, Tr.4.
2. On or about October 2 to 4, 1979, Allen Transformer was inspected by an EPA employee, pursuant to TSCA, Section 11, 15 U.S.C. 2610. Stipulated, Tr. 4.
3. A written notice of inspection was issued at the commencement of inspection. Stipulated, Tr. 4.
4. On the dates of the initial inspection, Allen Transformer was in possession of one PCB container (Sample No. 11E), which was not marked with the ML label and was not stored in a storage area meeting the requirements of 40 CFR 761.42. Stipulated, Tr. 4.
5. The PCB records obtained by the EPA inspector on the dates of the inspection were in error in that, (a) they were prepared for the wrong time period, i.e., should have covered the last half of calendar year 1978; (b) were not prepared as of July 1, 1979; and (c) did not cover the PCB container mentioned in Finding 4 above. Stipulated, Tr. 4-5.
6. In the course of his inspection, the EPA inspector took several samples of soil from the property where he had noticed the presence of oil spills. Tr. 11-12.
7. On being tested, PCBs were found to be present in several of these samples in concentrations of .50 ppm or greater. Tr. 14-15; Gov't. Ex. 1, tests 1E-6E; Gov't. Ex. 2, tests A201-208; Gov't. Ex. 4.

8. The PCBs were placed on Allen Transformer's property prior to the effective date of the PCB regulations. Stipulated, Tr. 3.
9. During the times of rainfall, the PCBs placed on Allen Transformer's property migrate from the site into the surrounding environment. Stipulated, Tr. 5.

Discussion and Conclusion

The only violation disputed by Allen Transformer is the charge that the migration of PCBs from Allen Transformer's property into the surrounding environment contravenes the disposal requirements of the PCB rule. The record in this case shows that there are spots on the Allen Transformer property with high concentrations of PCBs in the soil. It is stipulated that these PCBs were put there prior to the effective date of the PCB regulations, or earlier than April 18, 1978.^{4/} Actually, I find on the basis of the record that the PCBs were placed

^{4/} The first regulation of PCBs was the disposal and marking rule published in February 17, 1978, with an effective date of April 18, 1978 (hereafter referred to as the "1978 PCB Rule"). See 43 Fed. Reg. 7150. This rule was superseded by the final PCB rule, 40 CFR Part 761, which became effective July 2, 1979. See 44 Fed. Reg. 31514 (May 31, 1979).

there by spills occurring prior to February 17, 1978, the date when the first PCB regulations were published.^{5/} The "disposal" questioned by Complainant is not the spills themselves, but the subsequent migration of PCBs from these spills into the surrounding environment after the effective date of the regulations.

The Migration of PCBs

As to the migration of the PCBs, tests have disclosed the presence of PCBs in varying concentrations in a man-made ditch which is on adjoining property and runs alongside the west border of Allen Transformer's property.^{6/} Traces of PCBs have also been detected along the edge of

5/ See supra n. 4. Mr. Allen identified two spills, one occurring sometime in 1968 and the other in February 1978. Tr. 93-95, 98. While the record is not entirely clear as to when precisely the spill in February 1978 occurred, see Tr. 98, 104, 131, I find that it actually happened prior to February 17, 1978, since the Complainant does not really appear to contend otherwise. As noted below at 9, n. 13, the date could be significant.

6/ Tr. 21. Soil samples taken from various places in the ditch showed the presence of PCBs in concentrations ranging from 19 ppm to 50 ppm. Gov't Ex. 1, samples Nos. 12E(A), 13E, 14E, 15E and 16E; Gov't Ex. 4. Two samples were also taken of oily water at one location in the ditch. Gov't Ex. 1, sample No. 12E(B); Gov't Ex. 2, sample No. A210; Gov't Ex. 4. The first (sample No. 12E(B)) showed PCBs present in concentrations of 790 ppm, and the second (No. A210) taken a month later, had PCBs present in a concentration of 14.6 ppm. Gov't Exs. 1 and 2.

a creek known as Spivey Creek at a point off of Allen Transformer's property about 200 feet north of the ditch.^{7/} On the basis of the stipulation of the parties and the evidence of record, I find that the presence of PCBs can be accounted for by the leaching or runoff from Allen Transformer's property of PCBs that were spilled prior to February 17, 1978, and that this migration of PCBs is continuing at the present time.

Allen Transformer, while not denying that PCBs migrate from its property, contends that the magnitude of environmental exposure to PCB is unknown. The disposal requirements apply, however, to the disposal of any substance in which PCBs are present in concentrations of 50 ppm or greater.^{8/} It would appear that what Complainant is attacking is the migration of PCBs from those places on Allen Transformer's

^{7/} Tr. 46; Gov't Ex. 1, sample No. 18E; Gov't Ex. 3, Photograph 3.4. The test result for sample No. 18E was reported as showing less than 50 ppm PCBs. The EPA inspector described the test as disclosing the presence of "between zero and 50 ppm" PCBs. Tr. 46. Complainant contends that PCBs enter the creek from the ditch. There was no evidence that water flowed directly from the ditch into Spivey Creek. Instead, the ditch seems to have ended about 200 feet short of the creek. Tr. 21. The only evidence to support Complainant's position would appear to be the testimony of the EPA inspector that water in the ditch disappears into the ground and the flow of the ditch is toward Spivey Creek. Tr. 21, 42-44. Such evidence at best indicates the possibility of PCBs moving through the ground from the ditch to Spivey Creek. Before any finding could be made that such movement actually occurs, more would have to be known about the chemical and physical properties of PCBs and the geology of the area.

^{8/} See 40 CFR 761.1(b). The 1978 Rule, applied only where PCBs were present in concentrations of 500 ppm or greater. See 43 Fed. Reg. 7151.

property where PCBs were found to be present in concentrations of 50 ppm or greater. It is not necessary, however, to consider this point further, since for the reasons stated, it is concluded that the migration of PCBs from spills occurring prior to February 17, 1978, is not a "disposal" of PCBs within the meaning of the PCB Rule.^{9/}

The Migration of PCBs From Allen Transformer's Property Was Not a Disposal of PCBs Within the Meaning of the PCB Rule

PCBs are defined in the PCB Rule as including not only the group of related chlorinated hydrocarbons known as PCBs, but also any combination of substances which contains PCBs.^{10/} The PCB Rule requires that all PCBs must be disposed of in an approved incinerator, except that certain substances containing PCBs may also be disposed of in an approved chemical waste landfill.^{11/}

^{9/} EPA's General Counsel, in an opinion attached to the EPA's brief, seems to have taken a somewhat different position on what constitutes an allegedly illegal disposal than the EPA's Enforcement Division, which is the Complainant in this proceeding. It appears to be the General Counsel's theory that migration by leaching or otherwise of PCBs from Allen Transformer's property in concentrations of 50 ppm or greater (or 500 ppm or greater between April 19, 1978 and July 2, 1979) is an unlawful disposal. Even under this position, there would be a violation of the disposal requirements if they applied, since in two instances concentrations of 50 ppm or greater PCBs were found in the ditch, and in one of these instances the concentration was 790 ppm. Gov't. Ex. 1, sample Nos. 12E(B) and 14E.

^{10/} 40 CFR 761.2(s).

^{11/} 40 CFR 761.10. PCB-contaminated soil may be disposed of either in an approved incinerator or in an approved chemical waste landfill. 40 CFR 761.10(a)(4).

"Disposal" is defined in the PCB Rule, 40 CFR 761.2(h), as follows:

"Disposal" means to intentionally or accidentally discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.

Also pertinent is the following provision relating to spills under the disposal requirements, 40 CFR 761.10(d):

Spills. (1) Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs.

(2) PCBs resulting from spill cleanup and removal operations shall be stored and disposed of in accordance with paragraph (a) of this section. . . .

Simply stated, Complainant's position is that the migration of PCBs is an "uncontrolled discharge" of PCBs and, hence, a "disposal" of PCBs governed by the disposal requirements of the PCB Rule. Consequently, Allen Transformer must stop any migration of PCBs from its property, either by containing them in some way, or, if this is not possible, by removing all PCB-contaminated soil and disposing of it in an approved incinerator or an approved chemical waste landfill.

Allen Transformer, on the other hand, denies that the migration of PCBs is covered by the PCB Rule, asserting that "disposal" as used in the rule means actions which complete or terminate the useful life of PCBs, and the useful life of the PCBs was completed or terminated when they were spilled prior to the effective date of the PCB regulations. ^{12/}

^{12/} Allen Transformer also contends that it would be impermissible retroactive action to hold it responsible for the migration of PCBs which were placed on its property prior to the effective date of the PCB Rule. It is not necessary to reach this question, since it is held that the rule does not cover the migration of PCBs in such circumstances. It would appear, however, that there would be no constitutional objection to regulating PCBs spilled or dumped prior to the effective date of the PCB regulations so as to control their dispersion into the environment after that date. See Queenside Hills Co., Inc. v. Saxl, 328 U.S. 80(1945)

Reading both provisions together, it is reasonable to construe the reference to "spills and other uncontrollable discharges" as relating to some event which results in completing or terminating the useful life of PCBs. But the language is broad enough to be susceptible to more than one meaning so that the answer to the question is really to be found in the following note which precedes the disposal requirements:

Note. -- This subpart /Disposal of PCBs and PCB Items/ does not require removal of PCBs and PCB Items from service and disposal earlier than would normally be the case. However, when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) and PCB Items which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this Subpart. This Subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978, to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they ^{13/} must be disposed of in accordance with this Subpart. . . .

The language indicates that the disposal requirements were not intended to require the clean-up or containment of PCBs in place prior to the effective date of the regulations. This reading is confirmed by the legislative history of the disposal requirements and of the above note.

^{13/} See note to Subpart B, immediately preceding 40 CFR 761.10. The General Counsel, in its opinion attached to Complainant's brief, would consider a site where a PCB spill occurred as a "substandard disposal site," so as to consider the PCBs "in service" within the meaning of this provision. If the PCBs here are also to be considered as "landfilled" so as to make the publication date of February 17, 1978, apply in this proceeding, rather than the effective date of April 18, 1978, the spills involved have been found to have all occurred prior to February 17, 1978.

The 1978 PCB Rule contained the following provision with regard to the disposal of "PCB mixtures":

- (3) Soil and debris which have been contaminated with PCBs as a result of a spill or as a result of placement of PCBs in a disposal site prior to the publication date of these regulations shall be disposed of
- (i) In an incinerator which complies with Annex I,
 - or ^{14/}
 - (ii) In a chemical waste landfill.

In explaining this provision, the EPA in the preamble to the 1978 PCB Rule stated:

A new section 761.10(b)(3) has been added to the final rule to allow the use of chemical waste landfills for disposal of soil and debris contaminated with PCBs as a result of a spill or from placement of PCBs in a disposal site prior to the effective date of these regulations. Under the proposed rules, incineration would have been required. This change was made to permit the use of a more practical disposal method for the large volumes of soil and debris, such as trash, trees, lumber, and other rubbish, that may be involved in a spill clean-up operation or in removal or excavation of materials from an old disposal site, such as pit, pond, lagoon, dump, or landfill. ^{15/}

^{14/} Section 761.10(b)(3), 43 Fed. Reg. 7158. The 1978 Rule also similar to 40 CFR 761.10(d), provided that "spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs." See Section 761.10(e), 43 Fed. Reg. 7158.

^{15/} 43 Fed. Reg. 7151-52. Arguably, the rule could be read as referring to a spill prior to the effective date of the regulations, but the more sensible reading is that the provision was to apply to spills occurring after the effective date of the regulation, and that the words "prior to the effective date of the regulation" were to be read only in conjunction with the placement of PCBs in a disposal site.

There appears to have been some confusion about what this provision meant with respect to PCBs placed in a disposal site prior to the publication of the regulations, since an addendum to the preamble was published about six months later to clarify an "ambiguity" in the 1978 PCB Rule, which in pertinent part read as follows:

Section 761.10(b)(3) states: "soil and debris which have been contaminated with PCBs as a result of a spill or as a result of placement of PCBs in a disposal site prior to the publication date of these regulations shall be disposed of (i) in an incinerator which complies with annex I, or (ii) in a chemical waste landfill." This requirement as others, is qualified by the general Note which appears at the beginning of §761.10. This Note specifically states that these regulations do not require the removal of any PCBs from service earlier than would otherwise be the case. However, when they are removed from service and disposed of, disposal must be in accordance with the regulation.

PCB-containing soil and debris which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of the Note discussed in the last paragraph. Therefore, §761.10(b)(3) does not require PCB-contaminated soil or debris landfilled prior to February 17, 1978 to be removed for disposal. However, if such soil or debris is removed from the disposal site, it must be disposed of in accordance with the regulation. 16/

When read together with the addendum, the reasonable construction of the provision as it relates to PCBs placed in a disposal site prior to the effective date of the regulations is that it was intended to deal with situations where the contaminated soil was removed by excavation or some other action by the disposer. It would be giving a strained meaning to the word "remove" to construe it as applying also to the migration of PCBs by leaching or runoff.^{17/}

^{17/} Such an interpretation would also explain the statement in the preamble to the 1978 PCB Rule that the proposed rule would have required incineration of contaminated soil in place prior to the effective date of the regulation. The proposed rule would appear to have required incineration of PCB-contaminated soil after July 1, 1979. The proposed rule also contained a provision with regard to "spills" which was similar to that in the final 1978 PCB Rule and final PCB rule. See Sections 761.10(a), (b), and (f) of the proposed rule, 42 Fed. Reg. 26572. The preamble to the proposed rule contained the following statement (42 Fed. Reg. 26565):

Some mixtures that may contain more than 500 parts per million PCB chemical substances will not be affected by these regulations until their use is altered. For example, this regulation would not require that bottom sediments in rivers and harbors be removed from the watercourses. If they are removed for any reason such as dredging or excavation, the disposal of these sediments would have to meet the disposal provisions of this regulation. Similar considerations apply to contaminated soils.

Thus, it would appear that the proposed rule intended to deal only with the subsequent removal of contaminated soils by actions such as dredging or excavation after the effective date of the rule.

Section 761.10(b)(3) of the 1978 PCB Rule was deleted from the final PCB Rule, and in its place the Note preceding Section 761.10 was issued to include the language in the addendum to the 1978 PCB Rule quoted above.^{18/}

In the General Counsel's opinion attached to Complainant's brief as part of Complainant's argument in support of its position, it is stated that the purport of the language in the PCB Rule and the preceding 1978 PCB Rule relating to PCBs disposed of prior to February 17, 1978, was to give individuals and disposers subject to the regulation the option of either digging up PCBs disposed of prior to February 17, 1978, and redispersing them pursuant to the requirements of the regulation, or leaving them in place. The General Counsel's opinion then goes on to say that if the PCBs are left in place, the leaching of the PCBs into a medium such as soil or water would constitute an "uncontrolled discharge" of PCBs within the meaning of the current disposal requirements.

It is not at all clear that this is what was intended by Section 761.10(d)(1), in view of the legislative history of the rule discussed above. Moreover, the EPA has taken the position in this case that the

^{18/} The preamble to final PCB Rule did not specifically comment on the disposal of soil or other materials contaminated with PCBs prior to February 17, 1978, except to state that the option to dispose of contaminated soils and other solids recovered from spills or removed from old disposal sites in chemical waste landfills was being extended to other nonliquid PCBs. See 44 Fed. Reg. 31514, 31520-521 (May 31, 1979).

leaching or runoff can be stopped only by Allen Transformer's removing the PCB-contaminated soils from its property and disposing of it in an approved incinerator or chemical waste landfill.^{19/} Thus, the effect of Complainant's position seems to be that in providing an exception for PCBs put in place prior to the effective date of the rule, the EPA was talking only about PCBs in sites where the PCBs did not leach or runoff. If the EPA did have such a qualification in mind, it would seem that it would have said so in more direct language in addressing this particular problem. It will be noted that no reference was made to leaching or runoff or involuntary discharges in the wording of the exception or in the Agency's explanation of it, and the construction placed on it by Complainant must be inferred from the language defining disposal as including an involuntary discharge.^{20/}

19/ The spills date as far back as 1968, and the extent to which Allen Transformer's property has become contaminated is probably unknown. Consequently, removing the contaminated soil and transporting it to an approved incinerator or chemical waste landfill could be an expensive undertaking beyond the financial capability of Allen Transformer to carry out. See Tr. 117-21; Respondent's Ex. 2.

Allen Transformer, on learning of the PCB problem, did start to construct a concrete wall on the west side of its property adjacent to the ditch where PCBs were discovered, but stopped the construction when he was informed that this might not be acceptable to the EPA. Tr. 121-22, 135.

20/ The EPA, in framing its rule, of course, was aware that PCBs can be dispersed by leaching or runoff. Indeed, the specific requirements governing storage for disposal and chemical waste landfills appear to have been intended to protect against leaching or runoff occurring. See preamble to proposed 1978 PCB Rule, 42 Fed. Reg. 26569.

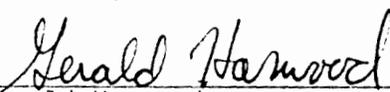
I find, therefore, that the migration off of Allen Transformer's property into adjoining property of PCBs put in place prior to the effective date of the PCB regulations is not a violation of the disposal requirements of the PCB rule.

Conclusion

It is concluded, therefore, that Allen Transformer has violated the marking, storage, and recordkeeping requirements of the PCB Rule. No penalty is assessed for these violations, the penalty having been waived by Complainant based on Allen Transformer's financial condition.^{21/} It is further concluded that Allen Transformer has not violated the disposal requirements and that charge in the Complaint is dismissed.

ORDER

In this proceedings under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), Respondent Allen Transformer Company is found to have violated the marking, storage, and recordkeeping requirements of the Polychlorinated Biphenyls Manufacturing, Processing, Distribution In Commerce and Use Prohibitions Rule, 40 CFR 761.20, 761.42, 761.45. No civil penalty is assessed for these violations, such penalty having been waived by Complainant on the basis of Respondent's financial condition.



Gerald Harwood
Administrative Law Judge

May 27, 1981

21/ Tr. 5