UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
JUN 19 1984
REGION VII

IN THE MATTER OF	)	Docket No. TSCA VII-83-T-121
	)	
KANSAS CITY STAR COMPANY,	)	
	)	
Respondent	)	

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1. Toxic Substances Control Act ("TSCA" or "the Act") - Records which Respondent was required to keep of, and subsequent to, a visual inspection, were "required records", having public aspects, required by law to be kept to provide suitable information of transactions and conditions which are the appropriate subject of government regulations.

2. TSCA - The proper designation by the regulatory agency of certain records to be kept necessarily implies an obligation to produce them and Respondent impliedly consented to keep and produce subject records as a condition of its being able to use polychlorinated biphenols ("PCBs"), the regulatory activity involved. Therefore, Respondent did not possess the right to be advised that it could refuse to permit said inspection and to produce records.

3. TSCA - The Act provides, 15 USC 2614(4), that it is and was unlawful to refuse to permit subject inspection as required by 15 USC 2610, and where the EPA inspector produced his credentials and gave Respondent actual as well as written notice of the character and extent of the inspection made, Respondent's rights were not violated by said inspection nor by the Agency's request for records Respondent was required to keep.

4. TSCA - The Act contemplates that inspection of Respondent's premises should be made where the Agency either has suspicions that a violation is occurring or seeks assurance that pertinent regulations are not being violated.

5. TSCA - Remedial legislation is broadly construed and liberally interpreted to effectuate its purposes and should here be strictly enforced to protect public health and the environment.

6. TSCA - The nature, circumstances, extent and gravity of a violation of the Act are considered in determining the amount appropriately to be assessed as a gravity-based civil penalty "(GBP"). Other factors, including the violator's culpability and history of compliance, may be considered to determine if the amount of the gravity-based penalty should be raised or lowered.

Appearances

For Respondent:

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For Complainant:

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INITIAL DECISION

On September 15, 1983, Complainant (hereinafter "EPA" or "the Agency") filed subject Complaint, which was served on the registered agent of Respondent, Kansas City Star Company (hereinafter "Respondent") on September 20, 1983, charging Respondent with violation of 761.30(a) 1/ in that an inspection by an EPA employee on July 19, 1983, revealed that three PCB transformers 2/ "had not been inspected" by Respondent prior to September 24, 1982, " . . . or following September 24, 1982" (and thus no records were developed maintaining information by said regulation required), which renders Respondent in violation of the Toxic Substances Control Act (hereinafter "TSCA" or the "Act"), Section 15(1), 15 USCA §2614(1). For said violation, Complainant proposes that a civil penalty be assessed in the amount of $17,000 pursuant to Section 16(a) of TSCA, 15 USCA §2615(a). Said Complaint further charges Respondent with violation of 40 CFR 761.180(a), which required and now requires Respondent, beginning July 2, 1978, to develop and maintain records on the disposition of PCBs and PCB items (as defined 40 CFR 761.3(x)) and to prepare an annual document each July 1, covering the previous calendar year, which must include information specified at said Section 761.180(a), subsections (1) through (3). It is proposed that an additional civil penalty be assessed in the amount of $8500 for Respondent's failures to comply with said regulation as in said Complaint set forth.

1/ Said section, effective September 24, 1982 (47 FR 37342 et seq., August 25, 1982), includes the provisions of a rule-related Court Order and enforcement notice published on March 10, 1981 (46 FR 16089-95), which provisions have been in effect since May 11, 1981.

2/ 40 CFR 761.3(y) defines "PCB transformer" as any transformer that contains 500 parts per million (ppm) PCB or greater.

In its Answer, filed September 27, 1983, Respondent denied the allegations that said PCB transformers had not been inspected in accordance with said regulations; and, in its First Amended Answer, filed on or about March 23, 1984, Respondent denies the allegation that it failed to develop records on the disposition of PCBs and PCB items; and it further denies that it failed to prepare annual documents for the calendar years 1978, 1979, 1980 and 1981.

A prehearing conference was held on January 26, 1984, and the parties agreed to continue to negotiate in an effort to arrive at a settlement of outstanding issues which included the amount of the civil penalties proposed to be assessed.

An adjudicatory hearing was held in the Federal Courthouse, 811 Grand Avenue, Kansas City, Missouri, in Court Room 7 (Room 401) on Thursday, March 29, 1984. The parties have filed herein their proposed findings of fact, conclusions of law, briefs and arguments.

On the basis of the entire record, including said submissions by the parties, I have arrived at the following

Findings of Fact

1. Respondent, Kansas City Star Company, is a corporation engaged in the business of newspaper publishing, with two daily editions being published Monday through Friday and one edition being published on each Saturday and Sunday. Said company's publications require its operation 24 hours a day, seven days a week.

2. In order to operate said business, as aforesaid, Respondent maintains a series of electrical transformers to power its printing presses, machinery and equipment.

3. On July 19, 1983, EPA Inspector (Consumer Safety Officer) Morris conducted an inspection of Respondent's premises, including its

electrical transformers. Three of seven transformers inspected were found to be PCB transformers (Transcript ["Tr."] 4).

4. Inspector Morris presented his credentials to Charles Rothganger, agent in charge of Respondent's premises at or during said inspection, and gave him written notice of said inspection (Exhibit ["Ex."] Complainant ["C"]-1, Tr. 15; 15 USC §2610).

5. Subject three PCB transformers were located on Respondent's premises, one at the S substation and two at AC-3 air conditioning room (Tr. 20). Inspector Morris was told by Respondent's employee that said transformers were PCB transformers and the nameplates on said transformers further confirmed they were PCB transformers, as one contained Pyranol and the other two Askarel (Tr. 13; Ex. C-1).

6. Inspector Morris did not see employees or electricians working near or around subject transformers (Tr. 21).

7. Though Inspector Morris' notice of inspection was sufficiently extensive to include an inspection for "Sale of waste oils or PCB contaminated equipment," no such sales were found or noted and, therefore, no violations of this character were alleged in subject Complaint (Tr. 23, 25).

8. The PCB transformer in substation S contained 756 gallons of oil and its capacity was 1500 KVA. No leaks or evidence of prior leaks were observed by Inspector Morris (Tr. 32-33).

9. The two PCB transformers in AC-3 (air conditioning room) had capacities of 1000 KVA and 1650 KVA (Tr. 34). No leaks or evidence of prior leaks were found (Tr. 35).

10. Though Respondent had tests for acidity performed periodically on all its transformers (Ex. Respondent ["R"]-1; Tr. 118), it did not, prior to said inspection of July 19, 1983, perform quarterly inspections on said PCB transformers and maintain a record concerning any such inspections, in conformity with 40 CFR 761.30, nor did Respondent develop records, beginning in 1978, nor prepare annual documents on July 1 for the years 1978, 1979, 1980, or 1981, as required by 40 CFR 761.180(a) (Ex. C-1; Tr. 46-47).

11. On this record, there was an instance, in 1981, when one of the PCB transformers developed a leak (moist and dripping). The leak was promptly discovered, General Electric Company repairmen were called immediately to clean up leaking dielectric fluid and then promptly repair the leak. This was the only instance, in over 16 years, that witness Rothganger could recall that Respondent has experienced a leak from its said equipment (Tr. 71-72).

12. Though inspections were not made in conformity with pertinent regulations, and observations then made were not properly recorded, visual observations of the said PCB transformers were made on a daily basis by various personnel from among 13 electricians, seven engineers and 16 machinists employed full-time by Respondent who, along with 112 other employees, has the responsibility of the maintenance for building services and equipment which includes 45 press units and nine total presses (Tr. 61-62).

13. Since said inspection in July, 1983, Respondent has retained the services of PPM, Inc. in order to achieve compliance with EPA requirements and to furnish advice respecting safety and fire precautions; and has rehired Herb Lewis, formerly employed as Respondent's Assistant Project Director, to monitor compliance with EPA regulations (Tr. 82).

14. Further remedial measures instituted by Respondent, since subject inspection and following filing of subject Complaint, include the employment of a new safety director, purchase of CO_2 bottles and safety clothing, construction of a containment berm around subject transformers, installation of fire alarm and sprinkler systems, installation of an ADT system and an in-house Kidde System to monitor for heat and smoke build-up (Tr. 86-89), and an on-going program to inform its employees respecting precautionary measures and regarding compliance with EPA requirements (Tr. 93-96).

Conclusions of Law

1. 15 USC Section 2610 (Section 11) of the Act provides that Inspector Morris, as the duly authorized representative of the U.S. EPA Administrator, had authority to inspect Respondent's premises and its PCB transformers containing 500 ppm PCBs or greater (40 CFR 761.3(x)). Failure to permit subject inspection would have violated 15 USC §2614(4) and would have therefore been unlawful.

2. The records sought by such inspection were not protected by either the 4th or 5th Amendment of the U.S. Constitution from compelled disclosure for the reasons that (1) the privilege against self incrimination protects only individuals and not a corporation; and (2) said records were "required records", i.e., records having "public aspects" and required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation; therefore, a warrantless search was not unreasonable (In re Grand Jury Proceedings, 601 F.2d 162, l.c. 168(7-10), and cases there cited; Camara v. Municipal Ct., 87 S.Ct. 1727, 387 U.S. 523, l.c. 534-535(10); Cochran v. U.S., (1961), 291 F.2d 633).

3. Subject inspection was made upon the presentation by the inspector to Respondent's agent and employee, Charles E. Rothganger, of appropriate credentials (Ex. C-1, C-2; Tr. 15).

4. Respondent's said employee was advised, on presentation of said credentials, that EPA Inspector Morris "was there to do a routine PCB inspection" and that Morris wanted to see Respondent's PCB equipment, if any, and any records maintained concerning PCB material (Tr. 15). By said statement from Inspector Morris, Respondent received actual notice of the extent and purpose of said inspection.

5. Respondent's agent and employee, in addition to said actual notice, received and acknowledged receipt of a copy of a written notice of said inspection entitled "TSCA Inspection - Summary of Observations" (Ex. C-2).

6. Tests made to determine acidity of transformer dielectric cooling fluids, in an effort to prevent "arcing", which will cause damage to said transformers, did not conform to the requirments of 40 CFR 761.30, which requires quarterly inspection of said PCB transformers "for leaks" and the further requirement of said §761.30(a)(1)(iv) and subparts thereof, requiring that Respondent prepare and maintain records and maintenance history which shall be available for inspection by the Agency for at least three years after the date the subject transformer is disposed of.

7. Remedial legislation should be broadly construed and liberally interpreted to effectuate its purposes, and to achieve Congressional intent.

8. On this record, Respondent violated 40 CFR 761.30(a) by failing to make visual inspections and to maintain records of inspection and maintenance history as by said section required, and an appropriate civil penalty should be assessed for said violation.

9. On this record, Respondent violated 40 CFR 761.180(a) in failing to develop and maintain records and to prepare annual documents for the calendar years 1978-1981, as by said regulation required, and an appropriate civil penalty should be assessed for said violation.

Discussion

Respondent's suggestion that the subject inspection conducted by EPA Inspector Morris violated the provision of 15 USC §2610 which provides that "such inspection can only be made upon the presentation of appropriate credentials of a written notice to the owner" is hereby rejected. Presentation of proper credentials was made (see Finding 3, supra) and Respondent's employee in charge was then advised of the nature and extent of the inspection to be made. Therefore, actual notice was given and received. There was no objection then made, but said employee freely consented to the inspection and subsequently gave a signed statement (Ex. C-1) concerning the PCB transformers which were the subject of the inspection and also signed a receipt for a "TSCA Summary of Observations." (Ex. C-2) upon completion of said inspection some two to three hours following the inspector's arrival at Respondent's premises. It is clear on this record that the records required to be prepared and maintained pursuant to 40 CFR 761.30 had not been so kept and maintained because no

inspections had been made by Respondent which conformed to that required by the regulations. It must be recognized that we are here considering remedial legislation which the Courts have repeatedly held should be broadly construed and liberally interpreted to effectuate its purposes and to achieve Congressional intent. The purposes of subject regulations and the statute are to protect the public health and the environment. (See Tcherepin v. Knight, 389 US 332, 88 SCt.548 (1967); Cattlemen's Inv. Co. v. Fears, 343 FS 1248, 1251 (1972)).

In re: Grand Jury Proceedings (Grand Jury), 601 F.2d 162 (1979) discusses, in principle, the obligation which is here applicable to Respondent. Even the protection of the 5th Amendment (applicable only to individuals, l.c. 167(4-6)) does not extend to "required records" - required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation, and the enforcement of restrictions validly established; and the "required records doctrine" includes records required by Administrative regulations (see Grand Jury, l.c. 168 (11, 12)). Said case also addresses the erroneous suggestion by Respondent that it had the "right to refuse" such inspection and should have been so advised, apparently characterizing said inspection as an "unreasonable search" under the 4th Amendment of the U.S. Constitution. 3/ Grand Jury states, l.c. 171 (21, 22):

3/ Any Constitutional objection, if such was intended, was not timely raised and thus waived (Cantrell v. City of Caruthersville, DC MO 1955), 128 FS 637, 222 F.2d 428).

> " . . . The proper designation by (the government) of certain records to be kept . . . necessarily implies an obligation to produce them . . . These obligations to keep and produce the records are in a sense consented to as a condition of being able to carry on the regulated activity involved . . . " (Emphasis supplied.)

The information sought by subject inspection was clearly relevant to its investigative authority and such investigations are justified where an agency has suspicions that a violation is occurring or where it seeks assurance that pertinent regulations are not being violated - US v. Morton Salt Co., 70 SCt. 357, 338 US 632; DeMasters v. Arend, CA ORE, 313 F.2d 79, 88 (12-14).

More importantly, 15 USC §2614(4) provides that it is unlawful for Respondent to fail or refuse to permit . . . inspection as required by §2610.

In its brief, Respondent admits it failed to maintain quarterly records as required by 40 CFR 761.30(a) (Conclusion of Law 8, page 12); but submits that the method and frequency of inspection conducted by Respondent substantially complied. The submission is apparently a reference to the fact (Finding No. 12, page 6 hereof) that over 100 persons, under Mr. Rothganger's supervision, many of whom possess necessary expertise to perform the required inspection, pass the point where said transformers are located and presumably would observe any leak, if such existed. The weakness of Respondent's position is best expressed by the old adage that "what is everybody's business is nobody's business." The further provision at 761.30(a)(1)(iv) that "records of inspection and maintenance history" shall be maintained, and the information required to be included in such records connotes the practical requirements of said section that Respondent assign to some employee the duty to perform said visual inspection and

then and there note and maintain any findings made. In addition to providing a systematic means of protection to all who frequent the locations, the records contemplated and required are a reminder to Respondent of its duty with respect to the PCB 4/ equipment and a means by which the EPA can be assured that preventive measures are being used at all times and that incidents have not occurred, or are not likely to occur, which might endanger the public or the environment.

Regulatory measures and remedial legislation must be strictly enforced. Any failure to apply sanctions where the Act - and the regulations promulgated pursuant thereto - are violated will invite violations in increasing numbers. Increasing indifference to regulatory provisions will frustrate, if not defeat, the scheme of regulation which the Act contemplates (Wickard v. Filburn, 317 US 111, 63 SCt. 82). For this reason, such violations are not considered trivial but, rather, of a serious nature. The same reasoning applies to the importance of preparing annual documents for the years 1978 through 1981.

Civil Penalty

The statutory criteria for assessing penalties under TSCA, Section 16(a), are listed in Section 16(a)(2)(B), 15 USC 2615(a)(2)(B), which provides as follows:

4/ 47 FR 37342, l.c. 37346 (Preamble, August 25, 1982), further points out, "An inspection program also keeps company personnel informed and alert to the potential impact of PCBs discharged from electrical equipment."

> 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 the ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

To provide guidance to the assessment of penalties under Section 16, the EPA enforcement staff has issued guidelines setting forth the general policies it will follow and has supplemented these guidelines with a specific policy for assessing penalties for violations relating to polychlorinated biphenols ("PCBs") and other toxic substances. 5/

The procedural rules for these proceedings require that I consider the guidelines and PCB penalty policy in determining the appropriate penalty, and that if I assess a penalty different in amount from that proposed in the Complaint, I must give my reasons therefore. 6/

The PCB penalty policy uses a matrix to establish an initial penalty based upon the nature, extent, circumstances and gravity of the violation. The initial penalty can then be adjusted upwards or downwards depending upon consideration of the other statutory factors, i.e., culpability, history of such violations, ability to pay, ability to continue in business and such other matters as justice may require. 7/

5/ See 45 FR 59770-59783 (September 10, 1980) referred to as the PCB Penalty Policy, providing Internal Procedural Guidelines. They are not regulations (l.c. 59770, col. 1).

6/ 40 CFR 22.27(b).

7/ 45 Federal Register 59777 (September 10, 1980).

The regulations violated by Respondent are both characterized by the Agency (45 FR 59771, col. 3; September 10, 1980), as "control-associated data gathering requirements" which enable the Agency to evaluate the effectiveness of the regulation, and to monitor compliance. As indicated on the matrix, three other factors other than "nature", relating to the violation, must be determined, namely, circumstances, extent and gravity. These four factors yield a Gravity Based Penalty (GBP) to which adjustment factors can be applied where appropriate. The quantity of dielectric fluid - 1500 to 2000 gallons (Findings 8 and 9) - is the principal basis for determining "extent" of potential harm as "major." 8/ "Circumstances" is used to reflect on the probability of the assigned level of extent of harm actually occurring. The principal circumstance to be here considered is the effect of each of subject violations on the EPA's ability to implement or enforce the Act. I find, in this record, that the 761.30 violation should be considered Medium range and the 761.180 violation is in a Low range on the matrix.

By determining the above factors (nature, extent and circumstances), we have determined the overall seriousness (or gravity) of the violations. On this record, I find that a consideration of culpability and history are mitigating factors that warrant a downward adjustment of the GBP otherwise called for under the guidelines. Respondent's action to avoid "arcing" resulted in

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8/ See discussion 45 FR 59772, col. 2. The theory is that violators should be penalized for their violative conduct; and the "good" or "bad" luck of whether the proscribed conduct actually caused harm should not be an overriding factor. Because of the quantity of PCBs here involved, the "extent" of potential damage will be considered "major."

the procurement of professional testing for acidity - the efficient cause of such hazard. Historically, Respondent's concern has been directed to avoiding damage to the transformers, but such concern would, of necessity, involve visual inspection to some extent with some regularity. Such extent and regularity are only approximated in this record and such inspections would obviously not conform to regulatory standards. As to the record keeping (concerning only the tests for acidity), it is not at all helpful to EPA's responsibility to "implement or enforce the Act", i.e., to "evaluate the effectiveness" of the pertinent regulations, and to monitor compliance. As pointed out hereinabove, EPA's failure to strictly enforce the regulations will invite increasing violations of this character which could eventually frustrate - even defeat - the scheme of regulation critically important to maintain the measure of control of PCBs needed for protection of the public and the environment. Historically, on this record, Respondent has, in over 16 years, experienced but one "leak", which was repaired and cleaned up expeditiously by General Electric Co. (see Finding 11, supra). Respondent's handling of this incident indicates an understanding of the hazard involved and its general concern for safety. Remedial measures taken by Respondent since subject inspection, and which are recounted in part hereinabove (Findings 13 and 14), are commendable and should and will be considered.

Turning to the second violation (of 40 CFR 761.180), it is clear that Respondent did not develop and maintain records on the disposition of PCBs and PCB items and (from such data) prepare annual documents. This violation continued for four years.

In the premises, I find that an appropriate GBP to be assessed for the violation of Section 761.30 is $10,000 and that, because of findings hereinabove set forth, an adjustment of 20% is warranted and I therefore find the assessment of $8,000 appropriate. I further find that a GBP of $3,500 should appropriately be assessed for the said violation of Section 761.180. On the basis of the findings hereinabove, including the institution by Respondent of remedial measures which will be adhered to in the future, I find that said amount should be adjusted to $2,800.

ORDER 9/

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 USC 2615(a)), a civil penalty in the total sum of $10,800 is hereby assessed against Respondent, Kansas City Star Company, for the violations of the Act found herein.

Payment of the full amount of the civil penalty shall be made within 60 days of the Service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, U.S. EPA, Region VII, a cashier's check or certified check payable to the Treasurer, United States of America.

DATE: June 19, 1984

Marvin E. Jones

Marvin E. Jones
Administrative Law Judge

9/ Unless an appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review the Decision on his own Motion, this Initial Decision shall become the Final Order of the Administrator (40 CFR 22.27(c)).

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: June 19, 1984

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ