11/19/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| F.O. Day Bituminous Company, | ) | Docket No. TSCA-III-131 |
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Toxic Substances Control Act - PCB Penalty Policy - Credit For Removal and Disposal Costs - Where Respondent violated PCB rule by storing oil contaminated with PCBs at a concentration of 237.7 ppm in a fuel oil tank lacking an SPCC plan and lacking PCB ($M_L$) labels, and under the circumstances, Respondent's contention it had no reason to suspect presence of PCBs was reasonable and Respondent expended sums in excess of proposed penalty in having PCBs destroyed, situation was presented warranting partial credit for removal and mitigation costs within meaning of PCB Penalty Policy (45 FR 59775) and proposed penalty was substantially reduced.

Appearance for Complainant: Robert J. Smolski, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. III
Philadelphia, Pennsylvania

Appearance for Respondent: Peter I. J. Davis, Esq.
Shaffer & Davis, Chartered
Rockville, Maryland

## INITIAL DECISION

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced on October 21, 1985, by the issuance of a complaint charging Respondent, F.O. Day Bituminous Company (F.O. Day)1/ with violations of the Act and applicable regulations, 40 CFR Part 761.2/ Specifically, F.O. Day was charged with storing PCBs at a concentration greater than 50 ppm, to-wit: 237.7 ppm, without having developed a SPCC plan in violation of 40 CFR § 761.65(c)(7)(ii), failure to mark the tank with the quantities and dates PCBs were added thereto in violation of § 761.65(c)(8) and failure to mark the tank with the $M_L$ label illustrated in § 761.45(a) as required by § 761.40(a). For these alleged violations, it was proposed to assess F.O. Day a penalty of $15,000.

F.O. Day filed an answer, neither admitting nor denying the PCB contamination,3/ but alleging that it was unaware thereof and that it has expended approximately $40,000 in removing and disposing of the contaminated fuel and decontaminating the tank. Regarding itself as an innocent and

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1/ F.O. Day Bituminous Company is a partnership, consisting of Francis O. Day Company, Inc. and Brigham and Day Paving Company (Testimony of Peter Hitchen, Respondent's Treasurer.

2/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
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> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;
>
> * * *.

The instant rules were promulgated under § 6(e) of the Act.

3/ Complainant's motion for an accelerated decision was denied (Opinion and Order, April 30, 1986).

injured party, F.O. Day argued that no penalty was appropriate and requested a hearing.

A hearing on this matter was held in Washington, D.C. on July 8, 1986.

Based on the entire record including a stipulation of the parties (Tr. 6, 7) and a brief of Complainant,[4/] I find the following:

## Findings of Fact

1. F.O. Day operates a facility engaged in the manufacture of bituminous concrete in Rockville, Maryland.
2. On October 3, 1984, the mentioned facility was inspected by Mr. Stephen Markowski of the Maryland State Department of Health and Mental Hygiene for the purpose of determining compliance with the PCB Rule, 40 CFR Part 761.
3. Mr. Markowski drew samples from two tanks, one a 15,000-gallon above ground and two, a 20,000-gallon below ground tank, containing fuel oil used to operate the plant. The 15,000-gallon tank contained approximately 6,500 gallons of waste oil.
4. The samples referred to in the preceding finding were analyzed for the presence of PCBs by the Maryland Department of Health Laboratory. The sample from the 15,000-gallon tank contained PCBs at a concentration of 237.7 ppm. Respondent was telephonically notified of the contamination on October 22, 1984.
5. The 15,000-gallon tank was not marked with the $M_L$ label illustrated in 40 CFR § 761.45(a) on October 3, 1984. Appropriate $M_L$ labels were affixed to the tank by Mr. Wayne Gotsch of the Maryland Department of Health and Mental Hygiene on January 11, 1985.

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4/ F.O. Day contented itself with a closing statement and did not file a brief.

6. F.O. Day did not have a Spill Prevention Control and Countermeasures Plan for the 15,000-gallon tank on October 3, 1984, or at anytime thereafter while the tank contained PCB contaminated oil.

7. F.O. Day engaged Chemical Decontamination, Inc. to destroy the PCBs in the 15,000-gallon tank and decontaminate the tank. This was accomplished during the period July 22 through August 8, 1985, at a cost to F.O. Day of approximately $36,000.

8. During the period May 3, 1984, through October 3, 1984, the only vendor of reclaimed or waste oil to the 15,000-gallon tank was the Baumgardner Company of Fayetteville, Pennsylvania. There were two deliveries of Gulf No. 2 fuel oil (not reclaimed) to the mentioned tank during August of 1984. During February and March of 1984, a firm named Solvex delivered reclaimed or waste oil to the 15,000-gallon tank.

9. On January 14, 1985, the State of Maryland issued a site complaint against Baumgardner for the transportation of PCB contaminated oil without a Maryland manifest and for the disposal of such oil at an unpermitted facility. Baumgardner was ordered to manifest and remove the contaminated oil to a permitted facility and to decontaminate F.O. Day's tank. Baumgardner Company has denied responsibility for the PCB contamination, insisting that all oil shipped to F.O. Day had been analyzed for the presence of PCBs. F.O. Day has sued Baumgardner for damages in the Circuit Court of Montgomery County, Maryland.

10. The proposed penalty of $15,000 was calculated in accordance with the PCB Penalty Policy (45 FR 59770, September 10, 1980). Because of the

quantity of PCBs involved,[5/] the extent of potential damage was determined to be major and the circumstances (probability of damages) determined to be Level 3, resulting in a penalty of $15,000 for each of the two violations, major storage and major marking. See 45 FR at 59778. Failure to mark the tank with dates and quantities of PCBs added thereto was included in the storage violation. Ms. Marilyn Bacarella, an EPA Environmental Protection Specialist, who calculated the penalty, testified that the penalty was halved in recognition of the fact F.O. Day was a small company and not solely responsible for the PCBs.

## CONCLUSIONS

1. F.O. Day's actions in storing oil contaminated with PCBs at a concentration of 237.7 ppm in a fuel tank lacking an SPCC plan and lacking $M_L$ labels illustrated in 40 CFR § 761.45(a) constitute violations of § 15 of the Act and 40 CFR §§ 761.65(c)(7)(ii) and 761.40(a).
2. F.O. Day's contention it had no reason to suspect the presence of PCBs is reasonable under the circumstances.
3. In accordance with the PCB Penalty Policy (45 FR at 59775), Respondent is entitled to a partial credit for costs incurred in removing and disposing of PCBs.
4. An appropriate penalty is the sum of $5,000.

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5/ Although the quantity used in the penalty calculation (8,126 gallons) exceeds the contents of the tank on October 3, 1984, as found herein (6,500 gallons), the amount of the penalty is not thereby effected as either quantity is in excess of 1100 gallons, the dividing line between significant and major extent violations in the the Penalty Policy.

## DISCUSSION

The violations having been stipulated, the only question is the amount, if any, of an appropriate penalty. F.O. Day argues that, because it was unaware of the presence of PCBs and because of the substantial sums expended to destroy the PCBs, it is in effect being penalized twice and accordingly, no penalty should be imposed. Respondent further argues that because the violations were inadvertent and unknowing, there is no necessity or public purpose in assessing a penalty.6/ The PCB Penalty Policy, while stating that sums expended in cleanup and mitigation are costs of the violation and normally should not reduce the penalty, recognizes that there may be instances where such costs plus the penalty are excessive and that some credit for cleanup expenditures should be allowed (45 FR at 59775). Because the cost of destroying the PCBs7/ plus the proposed penalty exceed $50,000, it is considered that this is such an instance. This is especially true where, as here, Respondent's contention it had no reason to suspect the presence of PCBs has been found to be reasonable.8/ It is concluded that a partial credit against the penalty for costs incurred in destroying PCBs to the sum of $5,000 should be allowed.

As an explanation for the fact it did not immediately prepare an SPCC plan and place PCB warning labels on the tank once it was notified of the

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6/ The purpose of a penalty being to deter rather than to punish, this argument might well be accepted, if Respondent's conduct after being notified of the presence of PCBs had been exemplary.

7/ Sums paid to the disposal firm, Chemical Decontamination, Inc., total approximately $36,000 and Respondent alleges that other costs incurred in connection with the destruction of PCBs bring the total to approximately $40,000.

8/ Documentation to support the assertion Respondent requested and received a chemical analysis before purchasing fuel from Baumgardner would have been helpful.

presence of PCBs, F.O. Day points out that the State of Maryland issued a site complaint against Baumgardner for unpermitted transportation and disposal of PCB contaminated oil and that Baumgardner was ordered to remove the contaminated oil to a permitted disposal facility. While it may well be that Respondent's failure to immediately develop an SPCC plan can be rationalized, if not excused, as long as there was a reasonable probability Baumgardner would remove the contaminated oil, its explanation for failing to place PCB labels on the tank is less convincing. This explanation is simply that the State of Maryland did not make the labels available and can hardly excuse failure to label the tank for approximately three months after Respondent was aware of the presence of PCBs. Under the circumstances, a penalty of $5,000 will be assessed against F.O. Day.9/

## ORDER 10/

F.O. Day Bituminous Company having violated the Act and regulations as charged in the complaint, a penalty of $5,000 is assessed against it in accordance with § 16(a) of the Act (15 U.S.C. 2615(a)). Payment of the penalty will be made by mailing a certified or cashier's check in the amount of $5,000 payable to the Treasurer of the United States to the following address within 60 days of the receipt of this order:

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9/ F.O. Day has candidly admitted that payment of the penalty as proposed by Complainant is within its capability.

10/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22), or unless the Administrator elects sua sponte to review the same as therein provided, this decision will become the final order of the Administrator in accordance with Rule 22.27(c).

(Regional Hearing Clerk)
U.S. EPA, Region III
P.O. Box 360515M
Pittsburgh, Pennsylvania 15251

Dated this 17th day of November 1986.

Spencer T. Nissen
Administrative Law Judge