1/13/85

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
General Motors Corporation,	)	Docket No. TSCA-V-C-384
	)	
Respondent	)	

Toxic Substances Control Act - Marking of PCB Transformers - the large PCB Mark M_L is mandatory on all PCB transformers and another form of label may not be substituted to accommodate a company's internal procedures.

Appearance for Complainant: Tamara A. Stewart, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Appearance for Respondent: William D. Brusstar, Jr., Esquire
General Motors Corporation
7057 New Center One
Detroit, MI 48202

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 alleged violations of a rule issued under Section 6(a) of the Act, 15 U.S.C. 2605(a), regulating the manufacturing, processing, distribution, use, disposal, storage and marking of polychlorinated byphenyls ("PCBs"), 40 C.F.R. Part 761. 1/ The complaint, issued by EPA Region V, alleged that Respondent General Motors Corporation, Central Foundry, Danville Plant, had failed to mark two PCB transformers as required by the PCB regulations, 40 C.F.R. 761.40(c)(1). A penalty of $7500 was requested. Respondent answered denying the violations and requesting a hearing.

The parties submitted a joint stipulation of facts and moved to dispense with the hearing and to decide the matter on the stipulated facts and record. This motion was granted by my order of December 2, 1985. Both parties have filed proposed findings of fact, conclusions of law and proposed order with supporting briefs. 2/ On consideration of the entire record and the submissions of the parties, and for the reasons

---

1/ TSCA, Section 16(a) provides in pertinent part as follows: "(1) 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 violation continues shall, for the purposes of this subsection, constitute a separate violation of Section 15."

TSCA, Section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under Section . . . 6."

2/ The following exhibits submitted with the prehearing exchange, being referred to in the stipulations of fact or briefs of the parties, are admitted into evidence: Complainant's Exhibit 1; Respondent's Exhibits 1-4. Complainant's Exhibit 2 in its prehearing exchange is a laboratory report,

(next page).

hereafter given, a penalty of $2,000 assessed.

Findings of Fact

1. Respondent General Motors Corporation, a Delaware Corporation, had on June 6, 1984, a place of business at I-74 and G Street, Danville, Illinois 61832, called General Motors Central Foundry Division, Danville Plant (Respondent's proposed finding, No. 1).

2. On that date the plant manufactured grey iron castings and had as part of its equipment three PCB transformers and 364 large, low-voltage PCB capacitors in service (Respondent's proposed finding, No. 2).

3. On June 6, 1984, two employees of EPA Region V inspected the plant for compliance with TSCA PCB regulatons (Respondent's proposed finding, No. 3).

4. During the inspection, the EPA inspectors observed two PCB transformers, Serial Nos. 20381-A2 and 20381-A1, containing in total about 1,768 gallons of PCB fluid, which were not marked with the M_L PCB label described in 40 C.F.R. 761.45(a). A third PCB transformer, Serial No. 93645-A1, was properly marked with the M_L PCB label. Complainant's Exh. 1, p. 3.

(Footnote No. 2 cont'd.)

and in view of the stipulations of fact, appears to be unnecessary. Complainant's Exhibit 3, the TSCA Civil Penalty Guidelines and PCB Penalty Policy, is published in the Federal Register, 45 Fed. Reg. 59770, and is a document of which I may take official notice so that it is not necessary to admit it into evidence.

5. Mark M_L, as described in 40 C.F.R. 761.45(a) reads as follows:

CAUTION
Contains
PCBS
(Polychlorinated Biphenyls)

A toxic environmental contaminant requiring special handling and disposal in accordance with U.S. Environmental Protection Agency Regulations 40 CFR 761--For Disposal Information Contact the nearest U.S. E.P.A. Office

In case of accident or spill, call toll free the U.S. Coast Guard National Response Center: 800:424-8802

Also Contact
Tel. No.

The words "Caution" and "PCBs" are in larger letters than the rest of the text. The mark is bordered by striping and the letters and striping must be on a white or yellow background. The mark must be at least 6 inches square and sufficiently durable to equal or exceed the life (including storage for disposal) of the PCB Article or Equipment. 3/

6. Respondent's two transformers had metal signs attached to them which read as follows:

3/ If the PCB Article or Equipment is too small to accommodate a mark 6 inches square, the mark may be reduced proportionately in size down to a minimum of 2 inches square. The transformers here were large enough to accommodate a 6 inch label.

CAUTION

The fluid in this tank
contains Polychlorinated
Byphenyls And Must Be
Disposed Of By Special
Methods. Contact Material
Control For Shipping
Instructions To An Approved
Disposal Company. Do Not
Allow Any Of This Fluid To
Get Into Our Landfill Or
Sewers. Report Spills To
Plant Engineering.

The signs were 36 by 18 inches in size, and had black letters on a yellow background, except that the word CAUTION was yellow on black. Stipulation of Facts and Respondent's Exhs. 1 and 2.

7. At the time of the inspection, Respondent had in effect a spill prevention control and countermeasure plan. This plan provided that upon discovery and initial action regarding a pollutant spill, information about the spill such as its location, the type of material spilled, estimated quantity spilled, and measures taken to confine the spill and prevent further spillage, must be given to "Plant Protection", who would then notify certain persons in the plant. In the event of an accidental discharge or spill to the Vermillion River or to any possible tributary on or near the property (west storm sewer outfall, settling basin), the appropriate State and Federal agencies were to be notified. Sole authority for this notification was with the Manager of Plant Engineering and Maintenance or in his absence the Superintendent of Plant Engineering or the Superintendent of Maintenance. Stipulation of facts No. 3; Respondent's Exh. 4, pp. 9, 12.

Discussion, Conclusions and Penalty

Respondent argues that the use of its own label was justified by its internal procedures for having designated departments contact the EPA on disposal problems and the Coast Guard on accidents or spills rather than the viewer of the sign. 4/ While such procedure may serve the company's purposes, it is not at all clear that it is the equivalent of the instructions on the M_L Mark insofar as giving prompt notification to the Coast Guard or the EPA. For example, having the observer of the accident or spill contact the proper department who would then call the Coast Guard could delay the notification to that Agency. Moreover, the Mark M_L label gives a specific telephone number for the Coast Guard and was designed to also provide a specific telephone number for the person to contact in the company. The notification on Respondent's label is inferior in this respect. While it gives the name of the designated department, it gives neither the department's plant location nor a telephone number, presumably on the assumption that whoever views the acident or spill will be cognizant of this information. The possibility that this may not always be the case in a plant of Respondent's size is indicated by the fact that in its procedures for internal notification of a

---

4/ Respondent's Brief at 2, 7, 9.

spill, Respondent gives both the company telephone extension and the home phone of the persons who are to be notified. 5/

Complainant argues that the use of the word "shall" in 40 C.F.R. 761.45 in prescribing the marking format shows that the drafters of the regulation intended the use of the M_L Mark to be mandatory. 6/ Respondent counters that the history of the rule shows that it was the information imparted by the label that was important and not the format. Referring to the statement from the preamble of the proposed rule that the label was designated to contain enough information to alert someone to the presence of PCBs, provide a reference concerning disposal of PCBs and provide a reporting point in the event of an accident or spill, 42 Fed. Reg. 26569 (May 24, 1977), Respondent says, that since its label accomplished these objectives and meets the size, durability and color specifications, the label is an acceptable marking under the regulations for its PCB transformers. 7/

5/ See Respondent's Exhibit 4, at 9-10. Respondent contends that time would be saved by its procedure because Plant Engineering, the Department to be notified in the event of a spill or accident, was in a position to make the most knowledgeable notification, and that this would eliminate the step of having the Coast Guard call Plant Engineering to obtain the information when someone else called the Coast Guard first. Brief at 8-9. There could, however, still be a delay in notifying the Coast Guard, who may be interested in being notified as soon as possible. In any event, Respondent seems to have overlooked that the M_L Mark provides for designating the phone number of someone in the company to contact. The company contact on being notified can call the Coast Guard. Presumably, this would obviate the need of having the Coast Guard first call plant management to find out whom to contact when it is called by someone other than the designated contact, which Respondent argues is a step that would have been taken under the Mark M_L format of notification.

6 / Complainant's proposed findings of fact, conclusions of law and brief at 14.

7/ Respondent's brief at 5-9.

The final rule contained a change in the marking requirement which should have warned Respondent that its interpretation was suspect. The format of the M_L Mark in the proposed rule provided only for notifying the Coast Guard in case of an accident or spill. 8/ The final rule provided also for contacting some other person. In explaining the change, the Agency stated:

> Numerous utilities and other industries suggested that their own telephone numbers be placed on the marking label as the contact in case of a spill. EPA believes such an addition to the label would improve responses to spills, and hence that suggestion has been accepted. 9/

What is significant is that the change did not permit the company telephone number to be a substitute for the Coast Guard number but added it as an additional contact, with the instructions to call the Coast Guard still being retained. When one turns to the support document for the final marking and disposal regulations, the intention of the EPA to have one uniform M_L Mark is made even clearer. There it is stated in pertinent part as follows:

Section 761.44 Marking Formats

* * *

> Numberous utilities and other industries, however, urged that their own telephone number be placed on the marking label as the person to contact in case of a spill. This would be either in addition to or in place of the Coast Guard emergency

---

8/ 42 Fed. Reg. 26576 (May 24, 1977).

9/ 43 Fed. Reg. 7153 (February 17, 1978).

> number required by the present regulations. Some comments suggested further that alternative labels be accepted in place of the uniform national marking requirements . . . .
>
> The suggestion for placing the utility's telephone number on the label has been accepted, and the standard label format has been reworked to include a space for that number. However, the idea of accepting other label formats has been rejected. A single national label for PCB articles has regulatory advantages since it will alert whoever sees the article to the presence of PCBs in it more efficiently than company-by-company labeling will. 10/

It is clear from the legislative history that the use of the M_L Mark is mandatory, and that companies may not, as Respondent contends, substitute their own formats to accommodate their own procedures.

Finally, it must be noted that Respondent's own Spill Prevention Control & Countermeasure Plan requires that all PCB material and equipment be marked with the M_L label. 11/ Indeed, Respondent offers no explanation as to why it considered it necessary to leave the M_L Mark off of two of the transformers but not off the third transformer. Thus, Respondent's argument that the substition of its own label for the M_L Mark was necessitated by Respondent's procedures is unpersuasive. What is really indicated is that the M_L Marks were missing from the two transformers because Respondent had neglected to make sure that they were on there.

10/ PCB Marking and Disposal Regulations, Final Action - Support Document at 36. This document is referred to in the preamble to the final disposal and marking rule, 43 Fed. Reg. 7150 (February 17, 1978). It is, accordingly, a document of which I may take official notice.

11/ Respondent's Exhibit 4, Appendix H, p. 6.

It is concluded, therefore, that Respondent has violated TSCA, Section 15, 15 U.S.C. Section 2614, and 40 C.F.R. 761.40(c)(1) by failing to mark properly two PCB transformers.

The Penalty

Complainant has classified the penalty as a level 5 major violation in the penalty matrix for the PCB Penalty Policy, which calls for a penalty of $5,000. 12/ Complainant would adjust this initially determined penalty upwardly by 50 percent because of what it contends are numerous other prior violations of TSCA, two of them assertedly being marking violations. 13/ The total penalty proposed is $7,500.

The violation, however, is the kind which would seem to fall more appropriately among the minor violations in level six. The transformers are located on company property and in a location which is likely to be accessible only to employees, except possibly in cases of emergency such as a fire or when some plant work in the area has to be done by an outside person. 14/ Respondent's label does more than simply notify someone unfamiliar with the situation that PCBs are present and enable them to identify the PCB items, which notification is sufficient to place a

---

12/ 45 Fed. Reg. 59777 (Sept. 10, 1980).

13/ Upward adjustments of 50% are specified for two or more previous violations of TSCA and of 100% if there have been two or more prior violations which are the same or closely related to the violation currently under consideration. 45 Fed. Reg. 59774.

14/ Stipulation of Facts; Respondent's Exhibit 3.

violation in level five. Here the label identified the appropriate plant personnel to be notified, and also contains some precautionary handling instructions. The nature of the violation is not so much a concern with the adequacy of the notification, although as previously noted it is deficient in some minor respects, as in the EPA's concern that there be one national, uniform label.

The Complainant also contends that the initially determined penalty should be increased by 50% because of prior TSCA violations by Respondent. As Respondent points out, the stipulation of facts refers only to the issuance of six prior TSCA complaints against Respondent. It is silent on whether the complaints went to a hearing resulting in a formal determination of liability, the nature of the orders issued, and whether the settlement amounts were allocated to any particular allegation of the complaint. In short, it is impossible to tell from the record whether the prior violations were such that an upward adjustment should be made in order to deter future violations of the kind involved here. 15/

Accordingly, I find that the appropriate penalty to be assessed is $2,000.

15/ See 45 Fed. Reg. 59773.

ORDER 16/

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), and for the reasons stated above, a civil penalty of $2,000 is hereby assessed against General Motors Corporation.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of American and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Gerald Harwood
Administrative Law Judge

DATED: January 13, 1986
Washington, D.C.

16/ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall be come the final order of the Administrator. See 40 CD.F.R. 22.27(c).