8/12/86

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
AUG 12 1986
REGION VII

IN THE MATTER OF: MID-MO ELECTRIC COMPANY, RESPONDENT	TSCA Docket Number VII-85-T-146

TOXIC SUBSTANCES CONTROL ACT

Where evidence shows that payment of an appropriate civil penalty plus the cost of cleanup and disposition of PCBs present on Respondent's premises contemplates an outlay of funds which Respondent is incapable of paying, and where it is determined that money will be better spent on remedial measures, it is proper to defer payment of a substantial portion of said penalty to afford Respondent the means, time and opportunity to accomplish such cleanup and disposition and to condition a subsequent remission of said amount on the completion of said cleanup and disposition in strict accordance with applicable regulations.

APPEARANCES

For Complainant: Rupert G. Thomas, Assistant
Regional Counsel
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent: Erwin L. Milne, Esquire
STOCKARD, ANDERECK, HAUCK,
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101 West McCarty Street
Post Office Box 1280
Jefferson City, Missouri 65102-1280

INITIAL DECISION

By Complaint filed November 1, 1985, Complainant, the Regional Administrator of the United States Environmental Protection Agency (hereinafter "EPA" or "the Agency"), Region VII, charges in three Counts that Respondent, Mid-Mo Electric Company (hereinafter "Mid-Mo" or "Respondent"), a Missouri corporation, violated federal regulations 40 C.F.R. Part 761 addressing the use, disposal and marking of polychlorinated biphenyls (hereinafter "PCB"s) and thereby violated Section 15 of the Toxic Substances Control Act (hereinafter "TSCA" or "the Act"), 15 U.S.C.A. Section 2614.

Count I of said Complaint charges that Mid-Mo violated 40 C.F.R. 761.40(a) for the reason that three (3) PCB large high or low voltage capacitors, located on Respondent's facility in the basement foundation of a burned building and in a tank storage area, were not marked "ML" (as illustrated in 40 C.F.R. 761.45[a]). For said violation, it is proposed that a civil penalty in the sum of $1500 should be assessed against Respondent.

Count II charges that said three PCB capacitors, described in Count I, were ruptured and leaking and, therefore, were in storage for disposal; that said capacitors were not stored in a storage facility complying with the requirements of 40 C.F.R. 761.65(b); that said capacitors were not dated to indicate the date when each and all of said capacitors were placed in storage, as required by 761.65(c)(8), and that Respondent's failure to so comply with said regulations renders Respondent in violation of Section 15(1) of the Act, for which an additional civil penalty totaling $1500 is proposed.

Count III charges that at the time of an inspection by EPA on April 11, 1985, PCBs were present in four described areas of Respondent's facility as a result of uncontrolled discharges, which constitute the disposal of PCBs; that said disposal did not comply with the disposal requirements of Section 761.60(a)(1) and renders Respondent in violation of the Act. For such violations, it is proposed that an additional penalty, totaling $25,000, should be assessed.

On November 20, 1985, Respondent's Answer, in letter form and dated November 18, 1985, was filed by Respondent's manager, Gregory H. Gunn, who requested an informal conference and a hearing; he stated that two of the three capacitors were located in the basement of a building which burned down in a fire that occurred on January 6, 1975, completely destroying the entire building, and that he and others connected with Respondent were of the opinion that said capacitors were "rendered harmless by the fire." As to the third capacitor which was found in the middle of a tank storage area on the south portion of subject facility, they concluded after inquiry that said capacitor was dumped on Respondent's premises by a person or persons unknown. Respondent admits that the two first-mentioned capacitors were ruptured, but its manager is of the opinion that the two said capacitors showed no signs of leaking; the third capacitor, it is admitted, had a broken bushing and was obviously leaking.

An adjudicatory hearing was convened in Room 2507 in the Federal Office Building at 911 Walnut Street in Kansas City, Missouri, on Tuesday, May 20, 1986, beginning at 9:30 a.m. At said hearing, Respondent, then represented by its president, Harold Gunn, and its manager, Gregory Gunn,

stipulated (Transcript [hereinafter "TR] 5) to the facts and findings of the report of EPA inspector, David Ramsey (Complainant [hereinafter "C"]) Exhibit (hereinafter ["EX"] 1, except it did not agree that it was responsible for the existence of a PCB capacitor found on the south side of Respondent's property in the tank storage area (TR 6). Respondent stipulated that all the soil samples taken were representative and that sampling and analysis thereof were proper and correct (TR 6) and further agreed that Complainant's Exhibits 1 through 5 might be offered in evidence; said exhibits were thereafter received without objection (TR 52).

On the basis of the record, including the testimony elicited at the hearing, the facts stipulated to by the parties, the exhibits then and there offered and received in evidence, and upon consideration of the findings proposed by the parties, I make the following

FINDINGS OF FACT

1. Respondent is Mid-Mo Electric Company, Sedalia, Missouri, a corporation incorporated under the laws of the State of Missouri.

2. Respondent's stocks are owned by Harold Gunn, George Gunn and Gregory Gunn. Harold Gunn is president of the corporation, George Gunn, vice president and Gregory Gunn, secretary (TR 80-81).

3. Respondent has been in business at the same location since 1955 (TR 59).

4. Respondent is engaged in the business of purchasing, selling and repairing electric transformers and capacitors.

5. On or about April 11, 1985, an inspection of Respondent's facilities was conducted by David Ramsey, an enforcement officer for the EPA, pursuant to §11 of TSCA, 15 U.S.C. §2610.

6. Harold Gunn is semi-retired from the business. He visits the business on the average of once per week over the last two years, and his involvement is basically advisory (TR 68).

7. Harold Gunn has worked in the field of engineering or been associated with engineering firms for most of his working years, and has personally made many categories of inspections (TR 55).

8. Harold Gunn first became aware of the EPA regulation dealing with PCBs in the latter part of the 1970s (TR 64).

9. The property comprising Respondent's business is approximately six acres, three-fourths of which is utilized for activities dealing with transformers and capacitors (TR 16). A part of Respondent's property is utilized for a bait shop (TR 16).

10. Respondent's property is unfenced and has three driveways. Respondent is the only business in Sedalia and surrounding areas dealing in the sale and repair of capacitors and transformers (TR 67).

11. Seven to ten people are employed by Respondent (TR 67;83). The employees who pick up and deliver transformers or capacitors do not work set hours, but the hours they work depends on the needs of the customers (TR 68).

12. Respondent has received gifts of transformers, of which Respondent's employees pick up and deliver to Respondent's place of business (TR 66).

13. Respondent's property is used mostly to unload and store transformers (TR 63).

14. Oil from transformers is placed in tanks located on Respondent's property and, until a little more than a year ago, the oil was used by Respondent as fuel for its oven to bake transformer coils (TR 74).

15. Respondent had PCB oil in its tanks located on its premises from which David Ramsey, an EPA inspector, took samples (TR 61).

16. On occasion, the tanks were washed out with solvent and the residues disposed of by Respondent (TR 62).

17. Customers of the bait shop located on Respondent's property can use any of the three driveways located on said property (TR 88), and there is no fence separating the bait shop from the transformer-capacitor business operated by Respondent (TR 86).

18. Respondent is not sure how much of the subject six acres of its property is PCB-contaminated (TR 103).

19. Gregory Gunn was aware that PCB capacitors were required to be disposed of (TR 84). Gregory Gunn is the manager of Respondent's business (TR 83).

20. Gregory Gunn attended a seminar on PCBs several months prior to the date of the inspection conducted by David Ramsey (TR 88).

21. During the inspection of Mid-Mo Electric Company on April 11, 1985, David Ramsey, the EPA representative, observed three PCB large capacitors, as defined at 40 C.F.R. §761.3, which were not marked in accordance with 40 C.F.R. §761.40(a).

22. During the inspection of Respondent's facilities on April 11, 1985, two of the three PCB large capacitors were located in the basement foundation of a building which burned down in the 1970's; the third was in a tank storage area south of the Respondent's main shop, on the ground along with other materials such as transformers (TR 12-13).

23. During said inspection of Respondent's facilities on April 11, 1985, David Ramsey observed apparent PCB leaks and/or spills and obtained five

soil and oil samples from different areas which detected widely varying ranges of PCBs present (TR 12).

25. The third capacitor was located in a tank storage area some 125 feet south of the Respondent's main shop and near a driveway accessible to frequent customers' vehicle traffic; said third capacitor had a broken bushing and was leaking on the ground (TR 18; 22).

26. Respondent's president and manager both stated that they were unaware of the presence of the third capacitor and were without knowledge how it came to be located on said property. Harold Gunn, president of Respondent corporation, stated he had examined the area in question approximately one week before the EPA inspection and had not detected the presence of said third capacitor (TR 56).

27. In Ramsey's opinion, oil from said third capacitor had leaked onto the ground within the two years preceding his inspection (TR 20).

28. The oil content in the soil, from which David Ramsey took the samples, appeared to have been spilled or placed there at different times (TR 29).

29. In proposing a penalty against Respondent, EPA used a matrix provided by EPA guidelines, which takes into consideration the extent of the environmental harm and the circumstances of possible harm (TR 31).

30. Complainant proposes the assessment of civil penalty in the total sum of $28,000 against Respondent for three alleged violations of TSCA. TSCA provides for a maximum penalty of $25,000 per day for each violation of the Act (TR 31).

31. The penalty assessed against Respondent in Count III of the Complaint is based upon the area of PCB contamination of its property (TR 39).

32. The soil sample taken by David Ramsey from Respondent's property in the area of said third capacitor contained 64,000 parts per million (hereinafter "ppm"), 6.4 percent, which is extremely high in the soil. Ten ppm PCB, or higher, is considered significant (TR 46).

33. PCBs are much heavier than oil and water (TR 48). Once PCB oil comes into contact with the ground, PCB will cling to the soil if the oil evaporates (TR 49-50).

34. If PCBs are in the soil, when it rains the water passing through the soil will absorb the PCBs in the parts per billion range until they are gone. It could take a very long time for a significant amount of PCBs to be so absorbed (TR 50).

35. Respondent's manager, Gregory Gunn, stated that Respondent has always kept a card record of every transformer that comes in and goes out (TR 90). Respondent has, since the filing of subject Complaint, become familiar with the marking, dating and recordkeeping regulations (TR 91-92).

36. Since the filing of the Complaint, Respondent has shipped subject capacitors to "an ecology place" (TR 92). Respondent has not acted to "clean up" the land but has negotiated with three different people who have made proposals for formulating a detailed plan for the clean-up (TR 93).

37. Respondent is making an effort to contract for clean-up of its installation at a reasonable cost (TR 97).

38. Gross sales of Respondent's business, in a representative 12-month period, are $400,000 to $500,000 (TR 70, 79).

39. Respondent made its last distribution of profits in 1977 (TR 85). For at least the last two years, Respondent has experienced an operating loss (TR 79). Harold Gunn, Respondent's president, has not received a salary or

dividend for five years.

40. Of the three firms contacted by Respondent relative to a "clean up" of PCBs on its premises, National Electric quoted a price of $25,000 for a detailed plan "to clean up". Two other firms asked $1000 just to "come in and then start and go from there", and were vague about how much the final cost of the "clean up" would be (TR 93). Said three firms were included by EPA on a list of people available to do a "clean up" of PCBs (TR 95).

CONCLUSIONS OF LAW

1. In failing to mark said PCB capacitors at the time of their removal from use, Respondent violated 40 C.F.R. 761.40(a).

2. Subject PCB capacitors were in storage for disposal and, as such, were required by applicable regulations to be stored in a facility which complied with the requirements of 40 C.F.R. 761.65(b). By its failure to so store said capacitors, Respondent violated said Section 761.65(b).

3. By its failure to date said capacitors to indicate when each and all said capacitors were placed in storage, Respondent violated the provisions of 40 C.F.R. 761.65(c)(8).

4. Under the facts and circumstances evidenced by the record, PCBs found in the areas sampled by subject EPA inspection resulted from leaking of subject capacitors as a result of uncontrolled discharges, which leaking constitutes the disposal of PCBs (Section 761.13), which does not comply with and thus violates 40 C.F.R. 761.60(a)(1).

DISCUSSION

The Toxic Substances Control Act specifically recognizes that PCBs are hazardous chemical substances and comprehensively provides for their regulation (15 U.S.C. 2605[e]).

That Respondent is in violation of the Act, and regulations promulgated pursuant thereto, is unquestioned. The findings in the EPA inspection report (C EX 1) are not controverted by Respondent, but stipulated to be accurate. The analyses of the samples (C EX 4), on which the violations are grounded, are also stipulated to.

The two capacitors in the basement of a burned building were ruptured and the soil and ash were sampled by EPA (Sample -01, C EX 4). Even though the fire occurred in the mid-1970s (TR 13), the PCBs, spilled from the capacitors, still were present in the soil and ash at the time of the EPA inspection in April, 1985.

Clearly, the charges in all three Counts are amply supported on this record.

Respondent's manager stated that they were of the opinion that the capacitors were rendered harmless (Respondent's Answer [letter], dated November 18, 1985). However, Harold Gunn, Respondent's president, was knowledgeable in this area and acknowledged (TR 72) that most old capacitors "had PCB oil in them." It was the duty of Respondent to determine whether said capacitors contained PCBs and, absent a determination that they did not contain PCBs, their disposal is required to comply with applicable regulations pertaining to the disposal of capacitors (Section 761.60[b][2][i]). The burned capacitors were obviously "disposed of", as their useful life was terminated (Section 761.3). It is pertinent here to point out that "disposal" is defined to include spills, leaks and other uncontrolled discharges of PCBs. The Complaint does not address Respondent's failure to dispose of said capacitors prior to January 1, 1984, as required by Section 761.65(a). Count II of the Complaint charges its failure to store them in compliance

with Section 761.65(b) and its failure to date them as required by Section 761.65(c)(8). The charge that said capacitors were not marked is not controverted, and the requirement that the "storage area" be marked is not addressed (Section 761.40[a][10]).

By reason of the foregoing, a civil penalty should be and is hereinbelow assessed as provided by the Act and regulations.

CIVIL PENALTY

Section 16(a)(1) of the Act, 15 U.S.C.A. 2615(a)(1), provides that any person who violates Section 15 (i.e., fails to comply with promulgated regulatory rules) shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

Section 16(a)(2)(B) provides that:

> " . . . in determining the amount of a civil penalty (I) shall take into account the nature, circumstances, extent and gravity of the violation(s) and with respect to the violator, ability to pay, effect on ability to continue in business, and history of prior violations, the degree of culpability, and such other matters as justice may require."

40 C.F.R. 22.27(b) provides that I shall determine the dollar amount of the recommended civil penalty to be here assessed in accordance with any criteria set forth in the Act and that I must consider any civil penalty guidelines issued under the Act.

The purpose of the guidelines is to assure that TSCA civil penalties be assessed in a fair and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated,and that the exaction of a penalty will effectively deter further violations (See 45 FR No. 177, page 59770, dated September 10, 1980). On this record, upon consideration of the matrix

provided in the guidelines (45 FR, page 59771), the nature of the violations is indicated by the circumstances (probability of damage) and the extent of extent of potential damage. I find that an appropriate penalty to be assessed for the violation charged by Count III is $20,000. The contamination extends extends over an area of two to three acres and such area is frequented by employees of Respondent and members of the public (Findings 10 through 13).

Respondent's failure to mark subject capacitors (Count I) warrants the assessment of a $1500 civil penalty, as proposed by Complainant. The extent is minor but the circumstances (probability of damages) is in the mid range. On this record, the circumstances present a much greater threat or probability of damage to the public health and the environment where Respondent did not recognize its duty and obligation to determine whether said capacitors contained PCBs and wrongly assumed that the fire in January, 1975, had "destroyed" the PCBs. Respondent's president acknowledged (TR 72) that (most) capacitors built in the 1970s contained PCBs, and the assumption that the PCBs did not exist after said fire where, in fact, they were present, heightens the probability of damage. The hazardous character of PCBs is recognized by the statute (Section 6[e] of the Act, 15 U.S.C.A. §2605[e]).

The only issue raised by Respondent is that it was unaware of the presence of said third capacitor found in the tank storage area which Harold Gunn believed was thrown there by persons unknown (TR 56-57). The EPA inspector acknowledged Mr. Gunn's apparent surprise (TR 13) at finding said capacitor in that area, but estimated from the appearance of the soil that said spill had been present at the site for a period of approximately two years (TR 20; Finding 27). Even if Respondent's contention should be found credible, the area of contamination otherwise existing is extensive

and significant, and the civil penalty hereinabove assessed is appropriate. I have also considered the financial condition of "the violator."

It appears that since the 1975 fire, Respondent's profits have declined and the business has experienced an operating loss in recent years. Respondent has recognized the necessity and its obligation to "clean up" the PCBs present on subject premises, and to thereafter mark and date all PCB articles coming into and leaving their premises - and to properly store and inspect same in order to detect and prevent discharges of PCBs into the environment. On this record, I find that payment of the total penalties penalty hereinabove assessed ($23,000), along with the cleanup of Respondent's premises and the disposition of said materials, present an outlay of funds which, if not beyond Respondent's financial capability, present a threat to, or will impair, its continued operation as a viable business entity. The costs of the cleanup are considered a part of Respondent's cost of its violation and it would here appear that the cost of cleanup will exceed any economic benefits to Respondent resulting from subject violations.

In George B. Huth, d/b/a Huth Oil Co., et al., TSCA-V-C-196 (1986), it was determined that a reduction in the appropriate penalty would serve to decrease the incentive to properly dispose of PCBs as required by applicable regulations. However, because the evidence there indicated that payment of the said civil penalty plus the cost of proper disposition of subject PCBs were beyond Respondent's financial capabilities, it was found that remission of said penalty, on the condition that a timely and satisfactory disposition occur, was the only means of facilitating such disposition of the hazard presented. Huth cites O'Leary vs. Moyers Landfill, Inc., 523 FS 642 (DC Pa 1981) where civil penalties under the Clean Water Act and RCRA were

not imposed when the Court determined the money would be better spent on remedial measures.

In the premises, I find it appropriate to provide that $20,000 of the civil penalty, hereinabove found to be appropriate, be deferred on the condition that Respondent undertake and complete the cleanup and disposition of subject PCBs on the subject six acres, in accordance with applicable regulations, on or before January 1, 1987. The Respondent shall be ordered to pay the remaining sum of $3000 within 30 days from and after the date hereof. If, on January 1, 1987, said cleanup and disposition has been accomplished to the satisfaction of Complainant, then and in that event said $20,000 of the penalty herein assessed will be remitted. Should Respondent fail or refuse to accomplish said cleanup and disposition in the manner and time hereinabove provided, then and in that event, said remaining $20,000 shall be due and payable.

Upon consideration of the post-hearing submissions of the parties, the conclusions reached and in accordance with the criteria set forth in the Act and regulations, I recommend the following

FINAL ORDER 1/

For violation of Section 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations promulgated thereunder (40 C.F.R. Part 761) as charged by Counts I, II and II of the Complaint, a civil penalty in the total sum of $23,000 is assessed against Respondent Mid-Mo Electric Company, a Missouri corporation, in accordance with Section 16(a) of the Act (15 U.S.C. 2615[a]).

1/ 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 become the Final Order of the Administrator (see 40 C.F.R. 22.27[c]).

1. It is Ordered that payment of $3,000 of said civil penalty shall be made within 30 days of Service of the Final Order upon Respondent by forwarding a Certified or Cashier's check in said amount, payable to the Treasurer of the United States of America at the address hereinbelow more fully set forth.

2. It is further Ordered that payment of $20,000 of said civil penalty is hereby deferred until January 1, 1987.

3. It is further Ordered that said $20,000 civil penalty shall be fully and finally remitted provided, and on the condition that, Respondent shall, on or before January 1, 1987, undertake and complete the cleanup and disposition of all PCBs heretofore discharged on its subject premises in accordance with applicable regulations and to the satisfaction of Complainant herein.

4. Payments of said civil penalty in the amounts and at the times hereinabove provided shall be made by forwarding a Certified or Cashier's check, payable to the Treasurer of the United States, to

Mellon Bank
U.S. EPA - Region VII
Regional Hearing Clerk
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251.

It is so ORDERED.

DATED: August 11, 1986

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, 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 said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: August 11, 1986

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

IN THE MATTER OF

MID-MO ELECTRIC COMPANY

Respondent.

TSCA Docket No. VII-85-T-146

CERTIFICATION OF SERVICE

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by the Honorable Marvin E. Jones, along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Rupert G. Thomas, Office of Regional Counsel, Environmental Protection Agency, Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101; that a copy was served by certified mail, return receipt requested on Respondent's attorney, Erwin L. Milne, Stockard, Andereck, Hauck, Sharp and Evans, 101 West McCarty Street, P. O. Box 1280, Jefferson City, Missouri 65101.

If no appeals are made (within 20 days after service of this Decision) and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 12th day of August 1986.

Diana G. Reid
Regional Hearing Clerk

cc: The Honorable Marvin E. Jones
Administrative Law Judge
U. S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101