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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of

VILLANOVA UNIVERSITY

Respondent

Docket No. TSCA-III-159

Toxic Substances Control Act, 40 CFR §761.65(b)(1)(ii) and (iv): curbing constructed of a Neoprene gasket and a steel I-beam bolted to a cement floor does not comply with the storage for disposal requirements set forth in the regulations.

Toxic Substances Control Act, 40 CFR §761.60(d)(1): a three to four inch shiny, dark spot beneath a drain valve of a transformer could not be held to be an improper disposal of PCBs in excess of 50 or more parts per million, in the particular circumstances of this record, in the absence of more convincing evidence that the spot came from the transformer and contained at least 50 parts per million PCBs.

Appearances:

Henry H. Sprague, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, Region III, 841 Chestnut Street, Philadelphia, Pennsylvania, for complainant;

Raymond T. Cullen, Esquire, Morgan, Lewis & Bockius, 2000 One Logan Square, Philadelphia, Pennsylvania, for respondent.

Before: J. F. Greene, Administrative Law Judge

Decided: May 12, 1988

This matter arose under Section 16 of the Toxic Substances Control Act, ("the Act"), 15 U.S.C. §2615, and regulations promulgated pursuant to authority contained in the Act (see Section 6, 15 U.S.C. §2605).

One count of the original complaint herein was the subject of an "accelerated decision" 1/ in favor of the complainant. A civil penalty of $6000 was assessed against the respondent for the violations found. 2/ Later, the recordkeeping charges of Count I of the amended complaint were the subject of an accelerated decision in favor of the complainant, 3/ but a determination as to what penalty would be imposed was withheld in order to give the parties a further opportunity to address that issue. Accordingly, at issue in the trial of this matter were (1) violations of the Act and regulations alleged in Counts II and III of the amended complaint; (2) the amount of civil penalty to be assessed for the violations already found in connection with Count I; and (3) PCB inspection violations alleged in Count I that were not included in complainant's motion for accelerated decision.

1/ The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR Part 22, provide, at §22.20, provide that the ". . . Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence . . . as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

2/ Respondent was found to have violated 40 CFR §761.180(a), and, consequently, to have violated Section 15(1)(c) of the Act, 15 U.S.C. §2614(1)(C), in connection with its failure to maintain "annual documents" relating to required periodic inspections of PCB items, including transformers, 40 CFR §761.180(a).

3/ It was found that respondent did not have quarterly inspection records for its PCB transformers before the second quarter of 1983. Failure to prepare and maintain records of quarterly PCB inspections is a violation of 40 CFR §761.30 (a)(1)(xii).

Counts II and III of the amended complaint charge respondent with disposing of polychlorinated biphenyls (PCBs) in a manner not permitted by appplicable regulations, and with storing PCBs in an area that did not conform to requirements for PCB storage areas. The remaining portion of Count I alleges that respondent did not inspect its PCB transformers on a quarterly basis, as required by the regulations. Respondent asserts that it complied with applicable regulations, although perhaps not in exactly the manner thought necessary by the complainant. Civil penalties proposed for the violations alleged in Count II (disposal) and Count III (storage) are $5000 and $10,000 respectively. The amount proposed for all the violations alleged in Count I (record keeping and inspections) is $13,000.

Respondent, a non-profit corporation incorporated in the Commonwealth of Pennsylvania, operates Villanova University, a private institution of higher learning located in Villanova, Pennsylvania. At all relevant times for matters described herein, respondent had transformers containing PCB dielectric fluid on its premises. 4/

Count II of the complaint. The applicable regulations provide that PCBs in concentrations of 50 or more parts per million may be disposed of only by means of an incinerator that conforms to requirements set out elsewhere in the regulations, with certain exceptions not relevant here. 5/ Spills and "other

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4/ TR 27, 152-153; CX 1.

5/ 40 CFR §761.60(a)(1) provides that "(E)xcept as provided in paragraphs (a)(2), (3), (4), and (5) of this section, PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with §761.70."

uncontrolled discharges" of PCBs at a concentration of 50 or more parts per million constitute "disposal". 6/

The record discloses that during the EPA's inspection of respondent's facilities, the inspector observed a shiny dark spot, three to four inches in diameter, that looked like oil, on the cement floor under the bottom drain valve of a 750 KVA transformer which had been drained and was being stored. The inspector testified that he assumed the spot contained PCBs in excess of 50 parts per million because respondent's maintenance personnel had said that this transformer was a PCB transformer, and because the PCB content of the dielectric fluid in such transformers ranges between 500 and 600,000-800,000 parts per million. 7/ Accordingly, although the spot was not sampled for testing, the report of the inspection concluded that this spot "appear(ed) to constitute an improper disposal," i. e. a violation of 40 CFR §761.60(d)(1). 8/ Respondent's witness pointed out that the transformer in question was not shown in its inspection records as a PCB transformer, and that the nameplate on the transformer did not indicate

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6/ 40 CFR §761.60(d)(1). "Disposal" is defined at 40 CFR §761.3 as "intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items."

7/ TR 25-34, 58, 157-158; CX 1. The fluid from this transformer and another one was stored in drums and cans inside a bermed area. This fluid was not sampled, because the drums and cans were not leaking, TR 33-34.

8/ CX 1 (report of inspection). The fluid from a leaking transformer inside the bermed area was sampled for testing by the EPA inspector because no identifying label could be seen to determine whether or not it might contain PCBs. The test showed no detectable level of PCBs, TR 33, 65.

what the fluid filling was. 9/ His testimony does not contain a specific denial that the EPA inspector was told that the transformer contained PCBs. However, respondent had decided to treat all transformers as though they contained PCBs. Only two transformers on the premises were actually tested by respondent, TR 152.

It is concluded that the evidence regarding this spot is insufficient to establish that respondent improperly disposed of PCBs at a level of 50 or greater parts per million. While respondent's staff may have said the transformer was a PCB transformer, absent a test or some additional evidence, that statement, even as an admission, does not take us far enough. It would be necessary to find not only that the transformer had been PCB-filled, based upon an admission that may been made but which may or may not have been accurate 10/, but that the spot was in fact oil, and that it came from the transformer, and that it contained PCBs at a level of 50 or greater parts per million. It is noted that this transformer had been drained of its fluid. There is some doubt that the spot was actually oil, although it "looked to be oil."11/ There is some doubt that it did in fact come from the transformer, 12/ because vehicles and other equipment were also stored

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9/ TR 140-141; CX 1. Testimony at line 23, TR 140, refers to "the one [transformer] that caused the violation by leaking," i. e. the spot alleged in Count II. Fluid from another transformer was tested by EPA. See note 8, page 4, supra.

10/ Respondent had not tested the fluid in this transformer or any others in the storage area. The EPA inspector did not see a manufacturer's label, TR 31-32 (such labels often show a trade name that indicates whether the fluid contains tains PCBs, TR 21-23). While there may have been a PCB "M/L" mark on this transformer, as required by the regulations, it was respondent's policy to mark all transformers in this manner, TR 53, 150-151, whether PCB or not.

11/ TR 30.

12/ TR 145. The distance of the spot from the drain valve is not known. If the spot were, for instance, one quarter inch from the spot, the impression that the spot came from that transformer would have been stronger. However, the problem with the questionable PCB content would remain.

in the vicinity. And, because it is not known whether the unit was flushed after being drained, 13/ even if it was a PCB transformer the fluid (if it came from the transformer) that made the spot may have been diluted to less than 50 parts per million PCBs. Clearer evidence than has appeared here is needed to support a civil penalty for improper disposal of PCBs.

Count III of the complaint. Respondent was charged with storing dielectric fluid having 50 parts per million or more in an area that did not conform to the regulations for storage of such fluid, 40 CFR §761.30(a)(2)(vi); §761.65(b)(ii), (iii). The fluid in question had been drained from two transformers that were being treated as though they were PCB transformers, and which, according to the EPA inspection report (CX 1) were PCB transformers. One was the 750 KVA unit (serial number 7470-60) that had a dark spot beneath the drain valve (see page 5, supra, and note 10). The record does not disclose whether the fluid from the two units contained PCBs. The record contains little evidence about the second unit from which fluid had been drained and stored; it may have been the 500 KVA (serial number 7622-60) taken to storage from Mendel Hall with the 750 KVA, TR 139, but that is not clear. Since respondent was charged with storage of PCB fluid, and since the only evidence relating to the second transformer is that respondent said it contained PCBs, it is concluded that its fluid contained 50 or more parts parts per million. Unlike the matter of the spot, where the record casts significant doubt upon the PCB content as well as upon the origin, here there is no doubt that the fluid came in part from the second transformer, which was said to contain PCBs.

Respondent's maintenance personnel caused a containment area to be con-

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13/ TR 158.

structed to store transformers (TR 159). Before doing so, they read 40 CFR §761.65(b)(1)(ii) and (iii) of the regulations, and determined that steel I-beams and Neoprene gasket bolted to the concrete floor would satify the requirements. The regulations provide as follows:

> The facilities [for storage of dielectric fluid containing 50 parts per million or greater PCB used for servicing transformers, 40 CFR §761.30(a)(2)(vi)] shall meet the following criteria:
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> . . . .(ii) An adequate floor which has continuous curbing with a minimum six inch high curb. . . .
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> . . . . (iii) Floors and curbing constructed of continuous smooth and impervious materials, such as Portland cement concrete or steel, to prevent or minimize penetration of PCBs. . . .

The curbing laid down to surround the storage area consisted of a steel I-beam, about four inches in width, welded at the corner joints, on top of a Neoprene gasket 14/ about five inches wide (cut to about the same lengths as the I-beams) that was overlapped and compressed at the corners. This combination was bolted to the concrete floor through the outside edges of the beams, with the gasket material lying on the floor. Although the storage curbing was never tested, respondent's maintenance supervisor was confident that the viscous PCB fluid could not escape through the curb, particularly in view of the weight of the beams -- perhaps 18-25 pounds per foot. The materials mentioned in the regulation were not used because the steel/Neoprene curb could be unbolted from the floor and removed when necessary to move heavy equipment in and out, whereas

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14/ The gasket material was described as stiff, something like the consistency of a rubber tire laid out flat, TR 161.

if the curb had been Portland cement, everything placed in storage would have to have been lifted over the curb. 15/

It is concluded that the curb did not meet the requirements of 40 CFR §761.65(b)(1)(ii) and (iii), in that there was a seam between the gasket and the steel beam. Moreover, there were seams in the gasket at the corners. While it is true that the beams were heavy, that the gasket materials overlapped and and were compressed to some degree, and while dielectric fluid ordinarily has high viscosity, the regulation is intended to cover all spill or escape situations. It is possible to envision a situation in which escaped fluid could be at higher temperatures and would be much less viscous. Further, in an area where there is dirt and sawdust from other activities, great care would have to be taken that nothing impeded a tight fit between the gasket and the cement floor each time the curb was repositioned and rebolted into place. On this record, moreover, there is no information as to the degree of contact with PCBs the gasket material could withstand. In any case, it is clear that curbing that is in effect a "sandwich" is not within the intent of a regulation which specifies "floors and curbing constructed of continuous smooth . . . materials." It is not necessary to decide, in reaching this conclusion, whether the word "continuous" must be interpreted to mean that the floor and the curbing have to be all one piece. The curbing here had seams because it was pieced together; it was intended to be unbolted and moved about. However secure such a curb may have been under most circumstances, it does not meet the requirements of 40 CFR §761.65(b)(1)(ii) and (iii).

15/ See generally TR 33-37, 67, 142-143, 156-162.

Since the date of the inspection, respondent has disposed of all PCBs on its premises; PCB transformers have been flushed and retrofilled with fluid certified to contain less than 50 parts per million. The stored transformers were removed within a month of EPA's inspection. In view of the total costs respondent has incurred, approximately a quarter of a million dollars, and because a variety of efforts were made to comply with the regulations both before and immediately after the inspection (well before the issuance of the complaint), it is concluded that a penalty of $2000 is reasonable and appropriate for this violation. 16/ As of December, 1986, all PCBs had been removed from the premises and disposed of properly. 17/

Penalty in connection with Count I of the amended complaint. Count I of the amended complaint, which was the subject of an accelerated decision in complainant's favor for failure to have PCB transformer inspection records 18/, also charged respondent with failure to inspect its PCB transformers on a quarterly basis as required by 40 CFR §761.30(a)(1)(ix). 19/

Respondent admitted that no specific PCB transformer inspections, as distinct from its usual maintenance routine, were made before the spring of 1983. At that time, the maintenance supervisor testified, he attended a conference on

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16/ TR 148-150, 155, 159, 163. (Stored transformers were removed within a month, TR 150). The spot and the transformer leak were treated as PCB spills, although it was learned that the fluid from the leak contained no detectable level of PCBs, TR 33, 147.

17/ TR 163-164.

18/ See note 3, supra.

19/ See note 22, infra, which sets out the regulation.

high voltage electrical distribution sponsored by an association of physical plant supervisors at the University of Cincinnati, where for the first time he learned of the existence of the regulations, realized their application to respondent, and understood that certain measures had to be taken. Thereafter, the curbing was installed for the stored transformers and other materials. PCB inspections were undertaken and records maintained for at least a year before the EPA inspection took place. 20/ For many years before 1983, respondent conducted weekly or biweekly maintenance inspections, checking transformers, generators, and switching gears for leaks, carbon tracking, fuse discoloration, or any other evidence of system failure. These were "basically complete evaluations of the electrical distribution system and the vault areas." Respondent believes that any PCB leak would have been quickly detected; they were "looking for oil leaks," according to respondent's maintenance supervisor. 21/ Under all these circumstances, and particularly since respondent's supervisor gave credible and persuasive testimony as to the frequency and quality of the pre-1983 routine maintenance inspections, it is concluded that $1500 is a reasonable and appropriate penalty for failure to conduct PCB transformer inspections, and that $2000 is a reasonable and appropriate penalty for failure to prepare and maintain records of quarterly inspections before May 17, 1983.

20/ See TR 136-139, 142-145, 152. It is noted also that, before the spring of 1983, no one told the maintenance staff about the PCB regulations. Perhaps they were expected to read the Federal Register themselves as a matter of routine. Fortunately, the maintenance supervisor attended a professional association meeting, where he learned about the PCB regulations. Also cf. TR 144, where it is stated that a lot of information was received from EPA about fuels and sulphur content, in connection with the university's boiler operations.

21/ TR 137-139. Written records of PCB transformer inspections apparently began on May 17, 1983, CX 1, attachments.

At the same time, no consideration can be given to a lower amount because of the importance of compliance with the regulations, the importance of knowledgable, specific inspections for PCB leaks, and the importance of documentation of of the locations of PCB equipment and any leaks and cleanup efforts. Although respondent made even more frequent maintenance inspections than the regulations require, 22/ because of the lack of records for the period before May, 1983, it

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22/ 40 CFR §761.30(a)(1)(ix) and (xii)) provide, inter alia, that

> (ix): a visual inspection of each PCB Transformer (as defined in . . . §761.3) in use or stored for reuse shall be performed at least once every 3 months. These inspections may take place any time during the 3-month periods: January -March, April-June, July-September, and October-December as long as there is a minimum of 30 days between inspections. The visual inspections must include investigation for any leak of dielectric fluid on or around the transformer. The extent of the visual inspections will depend upon the physical construction of each transformer installation and should not require . . . shutdown . . . .
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> (xii): Records of inspection and maintenance history shall be maintained at least 3 years after disposing of the transformer and shall be made available for inspection upon request by EPA. Such records shall contain the following information for each PCB Transformer:
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> (A) Its location.
> (B) The date of each visual inspection and the date that leak was discovered, if different from the inspection date.
> (C) The person performing the inspection
> (D) The Location of any leak(s).
> (E) An estimate of the amount of dielectric fluid released from any leak.
> (F) The date of any cleanup, containment, repair, or replacement.
> (G) A description of any cleanup, containment, or repair performed.
> (H) The results of any containment and daily inspection required for uncorrected active leaks.

known, for example, whether there may have been PCB leaks and what the quality, safety, and completeness of cleanup may have been. On this record, however, there is no reliable evidence of a PCB leak or spill.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a "person" within the meaning of 40 CFR §761.3, and is subject to the Act and implementing regulations.

At all relevant times until a date in December, 1986, respondent had PCB transformers in service.

The evidence on this record is insufficient to establish that a three to four inch spot beneath the drain valve of serial number 7470-60 (750 KVA) transformer in respondent's stadium storage area came from that transformer and contained 50 or greater parts per million PCBs. Consequently, it is found that the spot did not contain 50 or greater parts per million PCBs and was not a spill or other uncontrolled discharge in violation of 40 CFR §761.60 (d)(1).

Respondent constructed a curbing to surround a transformer storage area, within which dielectric fluid containing 50 or greater parts per million PCBs was being stored on November 8, 1984, the date of EPA's inspection. The curbing consisted of a Neoprene gasket five inches in width laid under a four inch steel I-beam weighing 18 to 25 pounds per foot. The curbing was bolted to the concrete floor of the storage area. The curbing did not meet the requirements of 40 CFR §761.65(b)(1)(ii), (iv) for "floors and curbing constructed of continuous smooth and impervious materials such as Portland cement concrete or steel

to prevent or minimize penetration of PCBs." It is concluded that a civil penalty of $2000 is reasonable and appropriate under the circumstances presented, which include (1) respondent's efforts to comply without delay after learning of the PCB regulations, around May, 1983, eighteen months before the EPA inspection took place on November 8, 1984; (2) the expenditure of about one quarter of a million dollars in the effort to comply and in removing PCBs from its facilities and premises; (3) removal of the stored transformers and fluid within one month of EPA's inspection (November 8, 1984), log before the date on which the complaint issued (January 17, 1986); (4) treatment of the leaking transformer 23/ and the spot beneath serial number 7470-60 (750 KVA) as PCB spills.

$2000 is a reasonable and appropriate penalty for the violation found previously (Decision of July 27, 1987) in connection with the failure to maintain records of quarterly PCB inspections. $1500 is a reasonable and appropriate penalty for respondent's failure to conduct specific PCB transformer inspections. These amounts are based upon the circumstances outlined above; in connection with the failure to inspect, the penalty amount is also based upon the added factor of respondent's weekly or biweekly maintenance inspections of the electrical distribution system before PCB inspections as such began.

ORDER

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. §2615(a)(1), a civil penalty of $5500 is hereby assessed against respondent Villanova University for violations of the Act found herein and in the

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23/ See note 8, page 4, supra.

July 27, 1987 decision in Villanova University, Docket No. TSCA-III-159.

Payment of $5500 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 Environmental Protection Agency, and sent to the United States Environmental Protection Agency, Region 3 (Regional Hearing Clerk), Post Office Box 360515M, Pittsburgh, Pennsylvania 15251.

J. F. Greene
Administrative Law Judge

May 12, 1988
Washington, D. C.