5/18/88

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Wofford College,	)	Docket No. TSCA-IV-86-0281
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Conditions of Use

Use of a Circumstances Level other than Level 2 contemplated by Penalty Policy (45 FR 59770) for all improper use violations was held to be justified where improper use at issue, storage of combustibles within five meters of a PCB transformer was not such when policy was issued, and under the circumstances shown by the evidence, there was a small likelihood that damage would result from the violation.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Environmentally Beneficial Expenditures

Where Respondent failed to show that it had either incurred or contractually obligated itself to incur expenses alleged to be environmentally beneficial, entitlement to credit against penalty for such expenditures was not established.

Appearance for Complainant: Angelia R. Souder, Esq.
Assistant Regional Counsel
U.S. EPA, Region IV
Atlanta, Georgia

Appearance for Respondent: James W. Potter, Esq.
Thompson, Mann & Hutson
Greenville, South Carolina

INITIAL DECISION

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). The proceeding was commenced by the issuance on June 30, 1987, of a complaint by the Director, Air, Pesticides & Toxics, U.S. EPA, Region IV, charging Respondent, Wofford College, with violations of the Act and applicable regulations concerning PCBs, 40 CFR Part 761.1/ Specifically, Respondent was charged (Count I) with maintaining, at the time of an inspection on June 27, 1986, five in-service PCB transformers which were not registered with local fire response personnel as required by 40 CFR § 761.30(a)(1)(vi); with storing (Count II) combustible materials, i.e. cardboard boxes, within five meters of a PCB transformer located in the library in violation of 40 CFR § 761.30(a)(1)(viii); with failing (Count III) to repair or replace a transformer located in Shipp Hall, having a leak in violation of 40 CFR § 761.30(a)(1)(x); and with failing (Count IV) to mark an access door to PCB transformers located in Dupre Hall with the M_L label illustrated in 40 CFR § 761.45(a) as required by § 761.40(j). For these alleged violations, it was proposed to assess Respondent a penalty totaling $29,500.

1/ Section 15, "Prohibited Acts," of the Act (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;
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> * * * *.

Respondent answered, denying the violation alleged in Count I,[2/] admitting the violations alleged in Counts II through IV, contesting the amount of the proposed penalty as inappropriate and excessive, and requesting a hearing in the county where Respondent is located.

A hearing on this matter was held in Spartanburg, South Carolina, on March 1, 1988.

Based on the entire record including the briefs and proposed findings of the parties, I make the following:

FINDINGS OF FACT

1. Wofford College is a four-year liberal arts college founded in 1854, affiliated with the Methodist Church, having an enrollment of approximately 1,100 students (Testimony of Edward E. Greene, Respondent's vice president for business, Tr. 84, 85; Inspection Report, Complainant's Exh 3). Respondent qualifies as a nonprofit institution under the Internal Revenue Code (Tr. 103, 115).
2. On June 27, 1986, Respondent's facility was inspected for compliance with PCB regulations by Consumer Safety Officer, Carlton D. Hailey, an employee of EPA (PCB Inspection Report, Complainant's Exh 3). A document entitled "TSCA Field Report" attached to the inspection report reflects

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2/ Although Complainant has dropped Count I and this alleged violation is no longer in issue, evidence of Respondent's actions relating thereto is relevant to the degree of culpability and thus to the amount of the penalty.

that Mr. Hailey interviewed Mr. Wallace Henderson, director of physical plant for Wofford College, Mr. Edward Hall, assistant director, and Mr. Bob Aldrich, plant engineer. Mr. Hailey reported that all PCB transformers were properly marked [with the M_L label illustrated in 40 CFR § 761.45(a)], but that the access door to the PCB vault in Dupre Hall was not so marked. He also reported that visual [inspection] and maintenance records were kept on all the PCB transformers and that a leak of a transformer in Shipp Hall reported on November 15, 1980, appeared to have been corrected. However, a leak from the base of the center transformer [in Shipp Hall], first reported on September 27, 1985, was not totally corrected. Additionally, Hailey reported that combustible materials were stored within five meters of a transformer located in the library.

3. Mr. Greene, identified finding 1, testified that he received the EPA complaint in this matter on July 2, 1987 (Tr. 85). On that day or the next, he proceeded to the library and found there were 19 cardboard boxes stacked against the wall in the mechanical room (Tr. 92, 93, 113-14). The nearest box was located 11 1/2 feet from the transformer. The boxes contained metal shelving components. This is confirmed, at least in part, by photos of one of the boxes (Respondent's Exhs 3 & 4).

4. A photo taken at the time of Mr. Hailey's inspection, however, shows what appears to be a cardboard box labeled "Precisionaire air filters" (Complainant's Exh 4). The mentioned box is resting on a drum bearing the label "Sterokleen." A notation beneath the photo states "Library-Stored Combustibles Near Askarel Transformer." Mr. Greene pointed out the complaint referred to cardboard boxes and testified that he hadn't seen the described photo until the settlement conference in August. He stated that the fiber drum of Sterokleen was approximately the same distance [from the transformer] as the boxes of shelving (Tr. 94). He described Sterokleen as a water treatment material used to keep impurities out of the air conditioning system and stated that Sterokleen was not combustible or flammable (Tr. 95). He supported this statement by noting that there were no tags or markings on the drum indicating the presence of flammable materials. The "Precisionaire" filters were used in the air circulation system. Mr. Greene testified that the mentioned materials--he denied that the materials were combustible--were removed [from the vicinity of the transformers] on the afternoon of July 2 or the morning of July 3 (Tr. 95, 96).

5. Regarding the reported leak from a PCB transformer in Shipp Hall, a photo shows a small amount of a dark substance around the base of a transformer (Complainant's Exh 4). The notation beneath the photo reads: "Shipp Hall-Leak." Mr. Greene, accompanied by Mr. Edward Hall, identified finding 2, proceeded to Shipp Hall on July 2 or 3 (Tr. 88-90). There were three 100 KVA transformers on a concrete pad in the vault. Messrs. Greene and Hall were in the transformer vault for several minutes and Mr. Greene did not observe any leaking from the draincock [of the center transformer]. He placed an empty matchbook under the draincock and observed a gelatin-like substance on the matchbook when he returned a day or two later. Portions of the three transformers and the matchbook are shown in a photo (Respondent's Exh 1). In the foreground of the photo is a circular area outlined in white. Mr. Greene testified that this was a drain, presumably leading to a storm drain, which was sealed on the afternoon of the first of his mentioned visits (Tr. 90, 91). He described the floor of the vault as concave and stated that you could pour forty or fifty gallons of material in there before any of it could flow or leak out of the room.

6. Mr. Greene estimated the leak at the base of the transformer as encompassing three by six inches or so (Tr. 91). He didn't

think there was any substance to the leak. Because July 3 was a holiday, he had difficulty locating a contractor with the expertise to repair and cleanup the leak. He was referred to a firm named "Instel" which performed that type of work. He called Instel on Tuesday, July 7, and Instel performed the repair and cleanup on July 13. A letter from Instel, dated July 13, 1987, describes work accomplished at Wofford College on that date (Complainant's Exh 5). The source of the leak is indicated to be "weeping from a drain plug" and the leaked material as covering an area 8" by 2" on the concrete pad. The leak was not detectable during inspection and total amount of liquid loss was estimated at less than 1/2 pint. Complete cleanup was made of oil on pad and [concrete] surface and plug were patched with high strength epoxy. There was no evidence of leaking from the other transformers and no sign of [PCB] liquid migration beyond the area indicated above. The floor drain was found to be sealed.

7. Although there were M_L labels on all PCB transformers, Mr. Greene acknowledged that there was no such label on the access door to the transformer vault in Dupre Hall (Tr. 97). Apparently there were M_L labels on access doors to transformers in the library and Shipp Hall. Mr. Greene testified that these labels were hard to find and that it was several

days before they were able to obtain one and place a label on the door. The precise date this occurred is not shown by the record.

8. Mr. Greene stated he was shocked by receipt of the complaint, because Respondent had no prior knowledge of the violations (Tr. 97, 100-01). He explained that he first assumed the complaint was based on a recent EPA inspection and was surprised to learn that the inspection had occurred over a year ago (Tr. 85, 86). He further explained he would normally be notified of inspections of this kind, but had not been informed of the inspection conducted by Mr. Hailey. From this, he concluded that Mr. Henderson, director of physical plant and his assistant, Mr. Hall, did not consider the inspection of sufficient importance to inform him (Greene) thereof (Tr. 106). A review of all documents generated at the time of the inspection obtained by Mr. Greene from Mr. Hall--Notice of Inspection (Complainant's Exh 12), Declaration Of Confidential Business Information (Complainant's Exh 13), Receipt For Samples and Documents (Complainant's Exh 14), and TSCA Inspection Confidentiality Notice (Complainant's Exh 15)--similarly revealed no indication of the violations alleged in the complaint. Mr. Greene testified that at about the time of the EPA inspection, Respondent was in the process of obtaining a proposal from General Electric for removal

[and presumably replacement] of the five PCB transformers (Tr. 101). He indicated that the cost was in the $80,000 to $90,000 range. More recently, Respondent had obtained a proposal from Westinghouse to replace the transformers for approximately $67,000 to $68,000 (Tr. 102).

9. Mr. Hall, identified findings 2 and 8, described the inspection conducted by Mr. Hailey on June 27, 1986. He testified that he was introduced to Mr. Hailey by Mr. Henderson (finding 2), and that Henderson asked him (Hall) to give Mr. Hailey a familiarization tour of the equipment rooms (Tr. 118-20). Although Hall acknowledged that Mr. Hailey was identified as being from EPA, he denied that Hailey was introduced as any kind of inspector. He proceeded to show Hailey around the campus and in particular the mechanical rooms of several of the buildings. Mr. Hailey made suggestions, apparently referring to the transformer in the library, such as "you ought to move some of these things away from here" (Tr. 120). Hailey also suggested placing a sign [M_L label] on the door of the transformer vault [in Dupre Hall] (Tr. 121). Mr. Hailey did not have a camera and Mr. Hall allowed him to use a Polaroid owned by the College. Mr. Hailey took some of the photos in evidence and Mr. Hall took others. The Notice of Inspection and similar documents (Complainant's Exhs 12-15) were presented to and signed by Messrs. Hall and Henderson at the conclusion of the inspection (Tr. 126-28). Mr. Hall stated that if he had thought

Mr. Hailey was conducting an official EPA inspection, Mr. Greene would have been informed and they would not have allowed Hailey to use the College's camera.

10. Mr. William S. Jackson, president of Instel, Inc., the firm which repaired the transformer leak, qualified as an expert in servicing and testing of electrical equipment including PCB transformers (Tr. 138). He characterized the leak in the transformer as a weep, because the liquid was not actually flowing or running (Tr. 141). He testified that the purpose of the rule prohibiting flammable materials within five meters of a PCB transformer was to lessen the possibility of a fire and of PCBs being burned at such a temperature that furons and other highly toxic substances would be released. He characterized the flammables in this instance, cardboard boxes filled with metal shelving 11 1/2 feet away from the transformer, as a minor situation, explaining that such a box would have a real tough time burning at such a temperature as to effect the PCB liquid in a transformer carcass (Tr. 143-46). Mr. Jackson indicated that [draining and] retrofilling a transformer with non-PCB fluid was generally less expensive than replacing the transformer.

11. Consumer Safety Officer, Byron George, testified as to the calculation of the proposed penalties. For this purpose, he

utilized the PCB Penalty Policy (45 FR 59770 et seq., September 10, 1980) (Tr. 10-12). He used Table I at 59777 of the policy which has a horizontal axis--major, significant, minor--for measuring extent of potential damage and six levels for probability of damages on the vertical axis. The policy indicates at 59777 that PCB quantities ranging from 220 gallons to less than 1100 gallons are in the significant category. Because the inspection report reflects the transformer in the library contains 361 gallons of PCB liquids, Mr. George placed the violation for having combustibles within five meters of a PCB transformer (Count II of the complaint) in the significant category. This is a "use" violation and the policy at 59781 places all such violations in Circumstances Level 2. This resulted in a proposed penalty of $13,000 (Tr. 14, 15). According to Mr. George, the leaking transformer in Shipp Hall had an estimated capacity of 44 gallons, placing this in the "minor" extent of potential damage category (Tr. 16, 17). This again is a "use" violation, resulting in a Circumstances Level 2 and a proposed penalty of $3,000. Regarding the failure to mark the door to the transformer vault in Dupre Hall with the M_L label, the extent category was minor, because the transformer contained only 143 gallons of oil and because the transformer was labeled, this was a Level 5 "minor marking violation," resulting in a proposed penalty of $500

(Tr. 18). No adjustments for lack of culpability or other factors were made in the penalties so determined (Tr. 21).

12. At some point in efforts to settle this matter, Respondent raised the issue of environmentally beneficial expenditures. The penalty policy at 59775 discusses such expenditures under the heading of the statutory factor (§ 16(a)(2)(B)) "other factors as justice may require." The policy makes clear that the expenditures must be for beneficial purposes above and beyond those required by law. The regulation (40 CFR § 761. 30(a)(1)(ii)) prohibits use, as of October 1, 1990, of network PCB transformers with secondary voltages equal to or greater than 480 volts, including 480/277 volt systems, in or near commercial buildings. Assuming that Respondent's transformers qualify as "network" transformers and are in or near "commercial" buildings and equal or exceed the mentioned secondary voltages, the regulation allows reclassification of the transformers to PCB contaminated, i.e. less than 500 ppm PCBs. Nevertheless, Ms. Constance Jones, compliance unit leader for the toxic's section of EPA, insisted that replacement of all PCB transformers prior to the October 1, 1990, deadline as distinguished from reclassifying the transformers, i.e. draining and refilling the transformers with non-PCB fluids, would not entitle Respondent to any credit against the penalty for environmentally beneficial expenditures (Tr. 54-58, 73, 74).

C O N C L U S I O N

For the violations of the regulation found above, an appropriate penalty is the sum of $4,500.

D I S C U S S I O N

Although the EPA policy statements,3/ which do not recognize any time value of money, i.e. replacement of PCB transformers at an earlier date than required or as distinguished from reclassification to PCB contaminated, are considered neither good logic nor good law, Respondent has not demonstrated that any environmentally beneficial expenditures were made or contracted

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3/ The Civil Penalty Policy, dated April 11, 1978 (Complainant's Exh 9) provides that interim controls and expeditious compliance required by law are not appropriate for [environmentally beneficial expenditure] credit (Id. at 19). The New Civil Penalty Policy, February 16, 1984 (Complainant's Exh 11) provides that all the following conditions must be present before alternative payments [for environmentally beneficial expenditures] may be accepted: [footnote omitted]

> No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).
>
> The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.
>
> The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.
>
> EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.

(Id. at 25, 26).

to be made and, accordingly, has not shown entitlement to any such credit.

It is apparent that the principal amount of the proposed penalty ($13,000) is attributable to Count II of the complaint, that is having combustible materials within five meters of the transformer in the library. The combustibles in this instance--cardboard boxes containing metal shelving components, a fiber drum containing a nonflammable water treatment chemical, and a box of furnace-type air filters--do not, prima facie, present a high or even a moderate risk of fire. Mr. Jackson characterized the risk as minor (finding 10). There is no evidence either of EPA's witnesses disagree with this assessment. Rather, Mr. George felt bound by the penalty policy, which, as we have seen, places all improper use violations in Level 2 as to the probability of damage.

In Ketchikan Pulp Company, Docket No. TSCA-X-86-01-14-2615 (Initial Decision, December 8, 1986), it was held to be appropriate and in accordance with the penalty policy to determine the penalty by the risk of environmental damage and to use a Circumstance Level, other than Level 2 apparently contemplated for all improper use, where the penalty policy was promulgated prior to the time certain requirements for proper use of PCB transformers were established, and thus precise violations, inspection and record keeping in that case, were not contemplated by the policy. Because the prohibition on combustibles within five meters of a transformer (§ 761.30(a)(1)(viii)) was not effective until

December 1, 1985, the precise violation at issue here was not contemplated by the policy and the same principle should be applicable.

The penalty policy indicates that Circumstances Levels 1 and 2 are for instances where the violation is "likely to cause damage" and Levels 3 and 4 are instances where there is "a significant chance damage will result from the violation" (Id. at 59772). Levels 5 and 6 are instances where "there is a small likelihood that damage will result from the violation." It is my conclusion that there was and is a small likelihood that damage would result from the combustibles within five meters of the transformer shown here and that Level 5 is an appropriate measure of that probability. The quality of PCBs, 361 gallons, indicates that the extent was properly characterized as "significant" making the penalty for Count II, $3,000.4/

Regarding the leak of the transformer in Shipp Hall, the small quantity of PCBs in the transformer, estimated at 44 gallons, makes the extent of potential damage in the minor category and the penalty was set at $3,000, solely because the policy regards all

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4/ In Ketchikan Pulp Company, supra, it was held that Respondent's failure to conduct quarterly inspections of a PCB transformer as required by 40 CFR § 761.30(a)(1)(ix) and to maintain records of such inspections as required by § 761.30(a)(1)(xii) constituted one violation, namely, improper use, and that, consequently, only one penalty could be assessed. While arguably this holding cuts against the thought that different circumstances levels for improper use would have been provided by the policy had the particular instance of improper use shown here been effective when the policy was issued, the explanation for the circumstances levels, quoted in the text, supports the instant result.

use violations as Level 2. Because there was an unsealed floor drain leading to a storm drain at the time of inspection, it is my conclusion that Level 4 is appropriate for the violation in Count III, making an appropriate penalty $1,000.5/

Regarding Count IV, the failure to mark the access door to the transformer vault in Dupre Hall was properly regarded as a minor marking violation (penalty policy at 59780) and the Circumstances Level determined to be 5, making an appropriate penalty $500. The total penalty for the violations found is thus $4,500. No further adjustments in the penalty are warranted.6/

In Samsonite Corporation, Docket No. TSCA-PCB-VIII-86-036 (Initial Decision, November 16, 1987), cited by Respondent, the de minimis nature of certain leaks from PCB transformers together with the fact that Respondent conducted a clean and orderly operation and acted promptly to clean up the leaks once discovered were held to warrant placing the extent of potential damage in the minor category and the probability of damage in the low range, resulting in a penalty of $200 for each of the leaks from three separate transformers. While that decision has been appealed and Complainant is arguing, inter alia, that the ALJ abused his discretion in reducing the penalty so substantially, Samsonite is supportive of the thrust of the instant decision.

5/ Although Counts II and III involve one category of violation, improper use, the transformers are in separate buildings and thus multiple penalties are appropriate (policy at 59782).

6/ According to Mr. Greene, the College made a conscious decision not to claim inability to pay as a reason for reducing the penalty (Tr. 115).

O-R-D-E-R 7/

Respondent, Wofford College, having violated the Act and regulations as determined herein, a penalty of $4,500 is assessed it in accordance with § 16(a) of the Act (15 U.S.C. 2615(a)). Payment of the full amount of the penalty shall be made by sending a cashier's or certified check in the amount of $4,500 payable to the Treasurer of the United States to the following address within 60 days of the receipt of this order:

Regional Hearing Clerk
U.S. EPA, Region IV
P.O. Box 100142
Atlanta, Georgia 30384

Dated this 18th day of May 1988.

Spencer T. Nissen
Administrative Law Judge

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