

DECISION AND ORDER

The complaint in this matter arises under section 16(a) of the Toxic Substances Control Act [TSCA or "the Act"], 15 U.S.C. § 15(a). It charges respondent with violating federal regulations which relate to the manufacture, use, processing, distribution, disposal, storage, and marking of polychlorinated biphenyls [PCBs] as set forth at 40 CFR Part 761 (recodified May 8, 1982), promulgated pursuant to authority at section 6(e) of TSCA, 15 U.S.C. § 2605(e). Specifically, the complaint alleges that respondent improperly disposed of PCBs at a level of 110 parts per million [ppm] in violation of 40 CFR §761.60 (a) and (d), which provide that spills and other uncontrolled discharges of PCBs in excess of 50 ppm constitute improper "disposal" of these toxic substances.¹ Complainant seeks a civil penalty in the amount of \$34,000 for the alleged violation. [Complaint, p. 3]

Respondent's Answer to the complaint denies that federal regulations were violated [¶ 2, Answer] but admits that a spill took place early in 1987, from a particular transformer which had

¹40 CFR § 761.60(a) provides that PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70, with exceptions not relevant here.

40 CFR § 761.3 defines the term "disposal" 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."

40 CFR § 761.60(d) provides, in pertinent part, that "(S)pill and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs.

been obtained from the U. S. Department of Defense's Defense Reutilization and Marketing Service, Columbus (Ohio) Region.² The transformer in question had been represented to contain no contaminated oil. Respondent had incurred substantial costs in cleaning up the spill, which occurred as respondent's employees were draining the transformer. It was then determined that it contained PCBs.³

The parties agreed that the penalty in this matter would be determined upon submissions, including briefs and pretrial exchange.⁴ Respondent did not submit a brief.

Respondent's facility was inspected on August 21, 1989. During the inspection, eight oil samples and four soil samples were taken.⁵ Of these, only one sample (a soil sample) showed a PCB concentration greater than 50 ppm. That sample showed 110 ppm.⁶

Complainant points out, by way of defending its argument that \$34,000 is an appropriate penalty in this matter, that in 1987 respondent signed a consent agreement and paid a civil penalty of \$3000 for a violation of the Part 761 regulations, and agreed that it would "no longer sell mineral oil dielectric fuel to waste and

² Respondent's Exhibit 1 of pretrial exchange, Contract # 27-7087-116, consisting of six transformers from McConnell Air Force Base, Wichita, Kansas.

³ Respondent's Exhibit 2 of pretrial exchange.

⁴ Complainant's brief at 4.

⁵ Complainant's Exhibit 4 of pretrial exchange.

⁶ Id.

salvage companies or any other sources." ⁷ Complainant asserts that the violation here is therefore a "second violation" such that the TSCA civil penalty policy dictates an increase to \$34,000 from the usual penalty for this violation of \$17,000.⁸ It is noted that a Notice of Noncompliance (NON) to respondent dated January 25, 1989 (following an inspection conducted in August, 1988), states that a spill occurred in March, 1987 (it is assumed to be the same spill to which respondent's Answer and pretrial exchange refer).⁹ The violation was said to be uncontrolled discharge of untested oil, which constituted "improper disposal of PCBs as is cited at 40 C.F.R. Section 761.60(6)(d)." Second, the NON states that on the date of the 1988 inspection, "(T)he facility stored for disposal oil from untested electrical equipment in a container that is larger than containers specified by the Department of Transportation (DOT) requirements cited at 40 C.F.R. Section 761.65(c)(6). Owners of such storage containers must prepare and implement a Spill Prevention and Control and Countermeasure (SPCC) Plan as described in 40 C.F.R. Section 112. Respondent's facility failed to prepare and implement an SPCC Plan in violation of 40 C.F.R. Section 751.65(c)(7)."

The violation charged in the complaint here appears to have occurred in February, 1987, and should have been detected during

⁷ Consent Agreement and Final Order, TSCA Docket No. VII-86-T-633, Moses Thompson d/b/a/ Thompson Enterprises.

⁸ Respondent's brief at 6 speaks of a penalty of \$35,000. However, the complaint (at page 3) specified \$34,000.

⁹ Respondent's Exhibit 2, p. 1, a letter dated February 12, 1987, to the Defense Reutilization and Marketing Region, Columbus.

the August, 1988, inspection upon which the NON is based.

Section 16(a)(2)(B) of the Act [15 U.S.C. §2615(a)(2)(B)] provides that "(I)n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." Here, it is determined that a fine of \$34,000 is entirely excessive. While it is true that this is a "second offense," it is quite small in the sense that the concentration of PCBs was only 60 ppm above the limit specified in 40 CFR § 761.60(a) and, furthermore, was not detected during the inspection that followed its occurrence. Respondent's contemporaneous letters and various contacts with the Department of Defense's Defense Logistics Agency (see respondent's exhibits 1-6 in pretrial exchange) make clear that significant expense was incurred in dealing with the spill, which respondent attempted to recover from the Defense Reutilization and Marketing Service. The documents, which must be taken at face value at this point, show that respondent dealt with the spill at some length, and that the Department of Defense had represented that the transformers were not contaminated. While this is not a defense to the violation, and while respondent failed to test the transformer contents for PCB content as the regulations require -- it appears that respondent attempts to limit

its salvage operations to transformers which do not contain oil¹⁰ --, the extent of the violation here simply does not require that the penalty be fixed at the full amount set forth in the EPA penalty policy. Nevertheless, respondent should be aware at this point of the risks of spill in the business in which it is engaged, and must adhere closely in the future to the regulations, including the requirement for testing of any fluid not yet tested (not merely represented to be uncontaminated) before a spill occurs.

Accordingly, it is determined that an appropriate penalty here is \$8000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent operates a salvage facility at 3702 North Lawrence Road, Wichita, and is a "person" within the meaning of the Act. Respondent is subject to the Act and duly promulgated regulations at 40 CFR Part 761.

2. Respondent violated 40 CFR §761.60 (a) and (d), and, by virtue of that violation respondent also violated section 15(1) of TSCA, 15 U.S.C. § 2614(1), by disposing of PCBs in an unauthorized manner, *i. e.* a spill, which contained a concentration of PCBs of 110 ppm, 60 ppm greater than the limit specified by the regulations. Respondent cleaned up the spill, which was not detected during the August, 1988, inspection of respondent's facility.

3. Respondent is liable for a civil penalty in connection with this violation. The appropriate penalty is \$8000, despite the fact that respondent consented to an order in 1987 which recited a violation of Part 761 violations.

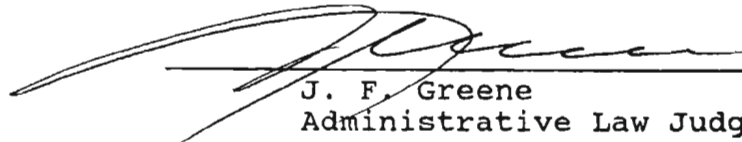
ORDER

Accordingly, respondent shall pay a civil penalty of \$8000 for violations determined herein, within sixty days from the date

¹⁰ See TSCA Inspection Report, made a part of the record as Complainant's pretrial exhibit 4.

of service of this Order, by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States of America which shall be mailed to:

U. S. Environmental Protection Agency
Regional Hearing Clerk
Region VII
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251



J. F. Greene
Administrative Law Judge

Washington, D.C.
October 30, 1992