

This matter arises under section 15 (15 U.S.C. § 2416) of the Toxic Substances Control Act, 15 U.S.C. 1300 et seq., and regulations issued pursuant thereto, specifically those regulations pertaining to the disposal, storage, and marking, and keeping records of, polychlorinated biphenyls ("PCBs"), which are a series of highly toxic and carcinogenic chemicals specifically regulated by Congress at 15 U.S.C. § 2605 (e).

The complaint charges Respondents Bunker Hill Mining Company (U. S.), Inc. (Bunker Hill) and Mining Corporation of Idaho, Inc. (MCI) with sixteen violations of the implementing regulations issued at 40 C.F.R. Part 761 pursuant to section 6(e) of the Act by the U. S. Environmental Protection Agency (EPA), based upon an inspection of Respondents' facility and records on September 29, 1988. Eight of the charges relate to "improper disposal"¹ of PCBs, based upon alleged leaks of PCBs of 50 or more parts per million (ppm) from transformers currently or previously used in connection with Respondents' zinc and lead mining activities at sites near Kellogg, Idaho. Four of the remaining counts charged improper storage of items (including five PCB transformers) known or assumed

¹ See "violation(s)" 1-8, at 3-4 of the complaint, ¶¶ 4-11. 40 C.F.R. § 761.3 defines "disposal" as "intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs or PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs"

to contain or to have been contaminated by PCBs.² The thirteenth charge recites that a transformer was not marked with a label of the size required by 40 C.F.R. § 761.40;³ the fourteenth count charges that various of Respondents' annual reports were inaccurate as to the numbers of PCB capacitors and transformers removed and remaining in service, in violation of 40 C.F.R. § 761.180(a);⁴ the fifteenth count charges that Respondents failed to dispose of PCB capacitors and containers within one year from the date placed in storage for disposal, in violation of 40 C.F.R. § 761.65(a);⁵ and the sixteenth count charged that the PCB transformers at Respondent's facility were not registered with a fire response agency by December 1, 1985, as required by 40 C.F.R. § 761.30(a)(1)(vi).⁶

Respondent MCI admitted the violations charged in counts 13, 15, and 16, but denied the other allegations. Respondent Bunker Hill denied all charges, admitting only that it owns the transformer referred to in count 12 of the complaint.⁷

² "Violations" 9, 10, 11, and 12 in the amended complaint, at 4-6, ¶¶ 12-16. The parties later stipulated that the charge recited in "violation" 10 should be dropped. Jt. Ex. 1, ¶ 39.

³ "Violation" 13, at 6-7 of the complaint.

⁴ "Violation" 14, at 7-9 of the complaint.

⁵ "Violation" 15, at 9-10 of the complaint.

⁶ "Violation" 16, at 10-11 of the complaint, ¶ 24.

⁷ See also Jt. Ex. 1, ¶ 21, at 3.

Charges 1-8: Alleged Improper Disposal of PCBs.

The parties reached extensive stipulations⁸ which are attached hereto and made a part hereof. Among these are stipulations that on September 29, 1988, the transformers which form the basis of charges 1-8 of the complaint (transformers numbered 13, 14, 15, 16, 65, 66, 67, and 68) were owned or operated by Respondent MCI (transformers 13 - 16), or by Bunker Hill (65 - 68);⁹ that they contained 500 parts per million (ppm) of PCBs;¹⁰ and that all had solidified material on their exteriors.¹¹ Complainant asserts that the solidified materials were PCBs which had leaked from seams or connections of the transformers, and urges that the materials can be assumed to contain PCBs in excess of 50 ppm based the agreed PCB content of the transformers and upon the observations of the trained EPA inspector. Respondent contests this vigorously, and urges that Complainant's burden of proof has not been met because none of the solidified material on the transformers was tested for PCB content, although the inspector "came equipped to do so."¹² Further, it is urged that the material could have gotten on the transformers in other ways, and, even if it contained PCBs, could have been there when the facility was acquired by Respondents.¹³

⁸ The stipulations were received as Joint Exhibit (Jt. Ex.) 1.

⁹ Jt. Ex. at 2-3, ¶¶13-20.

¹⁰ Id. ¶¶ 4-11, at 1-2.

¹¹ Id. at 3-4, ¶¶ 22-29.

¹² Respondents' brief, at 3.

¹³ Id. at 4.

Remaining to be determined, therefore, with regard to the charges of improper disposal is whether or not the solidified material observed on, and stipulated to be on, the exteriors of the PCB transformers owned by Respondents were leaks or other uncontrolled discharges from those transformers, or contained PCBs in concentrations of 50 ppm or greater. If so, the presence of such materials constitutes "disposal," 40 C.F.R. § 761.60(d), in violation of 40 C.F.R. § 761.60(a) and Section 15 of the Act (15 U.S.C. § 2614).

Respondents urge that there is "no reliable proof" (emphasis original) of unlawful disposal of PCBs.¹⁴ In these circumstances, however, "reliable proof," if what is meant by that term is evidence that is conclusive, is highly desirable but not strictly necessary.¹⁵ Here, the EPA inspector's testimony together with the stipulated PCB content of the transformers created an inference that the solidified materials did come from the transformers. This inference was sufficient to shift the burden of going forward to Respondents, to show that the material -- or some of it -- had come not from the transformers but from another source, and/or did not have a PCB content of at least 50 ppm. At the very least, a plausible explanation or alternative source of the material might

¹⁴ Id. Complainant's argument treats this critical matter rather briefly, asserting only that it is "reasonable to assume that material on the outside of a PCB transformer, especially when it appears on a seam or other connection, is PCBs." Complainant's Posthearing Brief at 2-3.

¹⁵ See In re Samsonite Corporation, TSCA Appeal No. 87-6 (December 26, 1989). Vol. 3 EAB Decisions, 53, at 55-56.

have sufficed to shift the burden of going forward back to Complainant.

The EPA inspector testified that with respect to each of the eight transformers, he had identified what appeared to be oil stains on, or oil drips or leaks from, the transformers. He testified further both from his notes of the inspection and from recollection of the areas where the transformers were located that he had "looked for the source of where it leaked from."¹⁶ In one case, "above (the oil) there was another fitting where it dripped out of that fitting." In each instance the inspector had located the apparent source of the oil, and in each instance that source appeared to be the transformer seams, fittings, or connections. Nothing else in the transformers themselves would account for the dripping and stains, and nothing else in the area where the transformers were situated could have dripped or spashed onto the transformers.¹⁷ The inspector could not find, and could not think of an alternative source of the oil (other than the transformers), above or elsewhere in the area.¹⁸ In the absence of information or evidence which would shift the burden back to Complainant, it must be held that the solidified material on the transformers was oil, and came from the transformers on which the materials were found. Since the transformers contained 500 ppm or more of PCBs, it is concluded that the oil stains and drips also contained 500 ppm

¹⁶ Transcript (TR) at 62.

¹⁷ Id.

¹⁸ Id. at 67.

PCBs. Such drips, stains, and leaks constitute "disposal" as defined by the implementing regulations, 40 C.F.R. § 761.60(d), and, as such, violate the requirement that PCBs may not be disposed of except in an incinerator, 40 C.F.R. § 761.60(a).¹⁹

Counts 9, 11, and 12 of the Complaint: Improper Storage.

In connection with these charges, the parties stipulated that on the date of the inspection, "an area in a room in the Zinc Plant" owned by Respondent MCI at the Kellogg facility "was used for temporary storage of PCBs or PCB containers that were designated for disposal"²⁰; the area contained twelve packages, cans, bottles, bags, barrels, drums, tanks or other devices that contained PCBs; all of these items were also owned by Respondent MCI; five of these contained PCBs or PCB articles, and the surfaces of five had been in direct contact with PCBs²¹. Some of the items were stored without a floor and curbing that provided the volume of containment required by 40 C.F.R. § 761.65(b). It was further stipulated that seven of the items were located in an area which did not contain continuous curbing with a minimum six-inch high curb, and did not have a floor and curbing that provided a containment volume at least two times the internal volume of the

¹⁹ Whether or not the leaks, stains, and drips took place before Respondents acquired the facility does not relieve Respondents of the responsibility to clean up such discharges, and the liability for failure to do so. The transformers, and the PCBs, became their property, and at that time the responsibility for unintended discharges became theirs as well.

²⁰ Jt. Ex. 1, ¶ 36.

²¹ Id. at 4, ¶ 35.

largest PCB Container stored there or 25 percent of the total internal volume of all PCB Articles or PCB Containers stored therein, whichever was greater.²²

The stipulations establish, therefore, that "at least five" of the twelve items referred to in paragraph 13 of the complaint ("violation nine") were "PCB containers" as defined at 40 C.F.R. § 761.3, in that they were "packages, cans, bottles, bags, barrels, drums, tanks, or other devices that contain PCBs and whose surfaces have been in direct contact with PCBs." Further, the parties stipulated that seven of the twelve items were located in an area that did not have continuous curbing with a minimum six-inch curb, and which did not have a floor and curbing that provided containment volume equal to at least two times the internal volume of the largest PCB Container stored in the area or 25 percent of the total internal volume of all PCB Articles or PCB Containers stored in the area, whichever was greater.

Although it was stipulated that the area in question was used for "temporary storage of PCBs or PCB Containers that were designated for disposal,"²³ it was not stipulated that the PCB Containers mentioned in earlier stipulations or in the complaint were stored for disposal. There seems no question, however, that this was the case, and no argument was made that the items in question were not stored for disposal. It is clear, therefore, that five of the PCB Containers referred to in "violation nine" of

²² Id. at 5, ¶¶ 37-38.

²³ Id. at 4, ¶ 36.

the complaint and in stipulations 32-35 and 37-38 were stored for disposal in an area that did not meet the requirements set forth in 40 C.F.R. § 761.65(b)(1), *Storage for Disposal*. Accordingly, it will be found that Respondent MCI violated that section and, consequently, violated section 15 of the Act, 15 U.S.C. § 2614.²⁴

Regarding "violation eleven" of the complaint, it was stipulated that on the date of the inspection four transformers identified as Bunker Hill numbers 65, 66, 67, and 68 were owned by Respondent Bunker Hill, that they contained 500 ppm PCBs, and that they were

stored in an area that did not have a floor which had continuous curbing with a minimum six inch high curb that provided a containment volume equal to at least two times the internal volume of the largest PCB Article or PCB Container stored therein or 25 percent of the total internal volume of all PCB Articles or PCB Containers stored therein, whichever was greater.²⁵

It was stipulated further that they were located in a place that did not have floors and curbing constructed of continuous smooth and impervious materials.²⁶ Respondents assert that the four transformers were not stored for disposal, that they were not required to be stored as provided in 40 C.F.R. § 761.65(b), and that Complainant did not prove the four transformers were stored

²⁴ Respondent argues that in certain instances, the drums themselves constituted adequate containment, but this does not take into account the exact requirements of 40 C.F.R. § 761.65(b). That section leaves no doubt that, regardless of how well or how securely PCBs are stored, the area in which they are stored must meet the physical requirements outlined.

²⁵ Id. at 5, ¶ 41.

²⁶ Id. at 5-6, ¶ 42.

for disposal as alleged in the complaint. Complainant's brief does not address the issue of storage for disposal.²⁷ However, Complainant's witness testified that none of the four transformers were in use, that the wires leading to the "electrical poles . . . have been cut off and scrapped out," i. e. the coverings were "stripped . . . off to get the copper . . . for scrap value," that the bottoms were rusty from "sitting in corrosive conditions," and that an employee at Respondents' facility had said that the transformers "were not energized."²⁸ This evidence was not rebutted in a persuasive manner, and, accordingly, it is concluded that the transformers in question not only were not being used, they had not been used for some time and there was no intention to use them despite the fact that they remained in their service locations, ("just left in place from where they originally were used,") in a fenced area, out of doors, on a hillside on a wooden platform.²⁹ It is held that this treatment of PCB transformers constitutes constructive "storage for disposal" and evidences an intent not to use them again despite the fact that Respondents may not have made a specific, conscious decision to designate them for disposal or even have given any thought to "storage for disposal." PCB Articles that are not in service, are not in useable condition, and are not going to be or are unlikely to be used in future must

²⁷Complainant's Posthearing Brief at 6-7.

²⁸ Testimony of Mr. William Freutel, who conducted the September 29, 1988, inspection of Respondents' facility, at TR 76-79.

²⁹ Id., TR 76-77.

be stored in accordance with 40 C.F.R. § 761.65(b). It will be held that "storage for disposal" has been established here, and, consequently, that Respondents violated this provision of the regulations as well as section 15 of the Act.

"Violation twelve" of the complaint charges that the transformer identified as Bunker Hill 281 GE pyranol # 7336824 was stored for disposal in an area that did not meet the requirements of 40 C.F.R. § 761.65(b), in that there were no walls and roof, the floor was not impervious to PCBs, and secondary containment of the sort specified in the regulations was lacking. The parties stipulated that this transformer was owned by Respondent Bunker Hill, contained 500 ppm PCBs, and that the area where it was located did not conform to the requirements of 40 C.F.R. § 761.65(b). Again, Respondent asserts that the transformer in question was not stored for disposal, and was therefore not required to be stored in an area that met the requirements of storage of PCBs for disposal. Again, however, Complainant's witness testified that the transformer was corroded, and that "rust (was) flaking off."³⁰ Accordingly, it is held that Respondents violated the "storage for disposal" regulation, based upon the discussion pertaining to violation eleven of the complaint.

Count 13 of the Complaint: Labelling.

The transformer identified in count 13 of the complaint as not

³⁰ Id., at TR 78.

having been marked in accordance with the regulations ("Bunker Hill # 24") contained 500 ppm PCBs or greater, was owned by Respondent MCI on the date of the inspection, and was not properly marked on that date, although Respondent asserts that it was properly marked soon thereafter.³¹ Accordingly, it is determined that Respondent MCI violated 40 C.F.R. § 761.40, as charged in the complaint.

Count 14 of the Complaint: Alleged Inaccurate Annual Reports.

The complaint alleges that Respondents' annual reports for 1984-1989 showed discrepancies in PCB equipment listed. For instance, the 1985 report showed that eleven PCB capacitors were in service at Respondents' facility at the end of 1985. Later reports showed that two such capacitors were stored for disposal during 1986, but the total reported to be in service continued at eleven.³²

Accordingly, it is clear that Respondents' useage and storage of PCBs was large enough (at least 45 kilograms) on the date of the inspection to require preparation of annual reports. Since it has been demonstrated that the reports contained unexplained inconsistencies, which must be considered as inaccuracies, it will be found that Respondents violated the regulations as charged in the complaint.

³¹ Jt. Ex. 1: ¶ 48 at 6; ¶ 49 at 6; ¶ 50 at 7; and see Respondent's brief at 7.

³² Jt. Ex. 1 at 7-8, ¶¶ 52-60.

Count 15 of the Complaint.

Respondent MCI admitted in its answer to the complaint that PCB capacitors and containers had not been disposed of within one year from the date they were placed in storage for disposal. Accordingly, it is determined that Respondent MCI violated 40 C.F.R. § 761.65(a), as alleged in the complaint.

Count 16 of the Complaint.

Inasmuch as Respondent MCI admitted, and the parties have stipulated, that PCB transformers at the facility were not registered with fire response personnel having primary jurisdiction for responding to a fire at Respondents' facility, it is determined that 40 C.F.R. § 761.30(a)(1)(vi) was violated as charged, although they were properly registered within six weeks of Respondents' being informed of the violation.

Penalty.

On brief, Complainant seeks penalties of \$40,000 for improper disposal (charges one through eight), i. e. \$5000 per violation. The other proposals are as follows: improper storage for disposal of PCBs and PCB Containers, \$1500; for charges eleven and twelve of the complaint (improper storage for disposal), a total of \$1500; for failure to mark a transformer with a label as required by the rules, \$10,000; for annual reports inaccuracies, \$1500; for violation of time limits on storage for disposal, \$1000; and for failure to register transformers with local fire response personnel a penalty of "only" \$1000 was proposed, in view of the fact that

Respondent registered the equipment only six weeks late. The total sought, therefore, is \$55,000. With the exception of the amount proposed for charges one through eight, Complainant's proposals are reasonable and in accordance with TSCA and applicable policy statements.

The amount proposed for the improper disposal violations must be adjusted. Respondent is persuasive on the point that the leaks were not running off the equipment onto the ground, and, consequently, posed less threat to the environment than \$5000 per transformer suggests. This is not to say that such violations can be tolerated. The Act requires, however, that "such other matters as justice may require," 15 U.S.C. § 2615(1)(B), should be taken into account in setting the penalty. Here, \$40,000 has the appearance of unfairness, and, particularly in view of the rather small showing of net worth of both Respondents taken together, will be lowered to \$1500 per violation, or \$12,000 for the eight "improper disposal" violations recited in the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents are subject to the Act and regulations promulgated pursuant to authority contained therein. Respondents' premises was the subject of an investigation for compliance with the Act and regulations on September 29, 1988.

2. The solidified material observed during the inspection of Respondents' facility on transformers numbered 13-16 and 65-68 were oil leaks from those transformers. These transformers contained

PCBs of at least 500 ppm, and leaks from such transformers constitute "uncontrolled discharges" pursuant to 40 C.F.R. § 761.20(d). Accordingly, Respondents violated 40 C.F.R. § 761.60(a) and Section 15 of the Act (15 U.S.C. § 2614) as alleged in the complaint by disposing of PCBs having a concentration of 50 ppm or more in a manner inconsistent with the regulations.

3. PCB transformers that are not energised, are rusting, and whose wires have been cut off and stripped for the scrap value of the copper are "stored for disposal," and must be stored in an area that conforms to the requirements of 40 C.F.R. § 761.65(b). Respondents' failure to do so constitutes a violation of that provision, as charged in the complaint.

4. Respondent stored for disposal PCBs and PCB Containers in an area which did not meet the requirements set forth at 40 C.F.R. § 761.65(b). Respondent stored transformers containing at least 500 ppm PCBs in an area which did not meet the requirements of 40 C.F.R. § 761.65(b). Transformers which have been disconnected and are rusting, the wires of which have been cut and are subject to salvage are constructively "stored for disposal." The area in which they are stored must meet the requirements of 40 C.F.R. § 761.65(b).

5. Respondent MCI had not properly marked Bunker Hill transformer number 24 at the time of the inspection (September 29, 1988, and, accordingly, violated 40 C.F.R. § 761.40 as charged in the complaint. However, the transformer was properly marked shortly thereafter.

6. Respondent MCI failed to dispose of PCB capacitors and containers within one year from the date they were placed in storage for disposal. Accordingly, it is determined that Respondent MCI violated 40 C.F.R. § 761.65(a) as alleged in the complaint.

7. Respondents' annual reports on the disposition of PCBs and PCB Items, which were required to be prepared owing to the presence of PCBs at Respondents' premises in amounts of at least 45 kilograms (99.4 pounds), show that certain information relating to PCB equipment was inaccurately reported. Accordingly, Respondents violated 40 C.F.R. § 761.180(a) as charged in the complaint.

8. Respondents' PCB transformers had not been registered, on the date of the inspection, with fire response personnel having primary jurisdiction in the event of a fire involving Respondents' transformers. Accordingly, violated 40 C.F.R. § 761.30(a)(1)(vi) as alleged in the complaint.

9. The appropriate penalty for the violations found here is \$28,500.

10. It is appropriate that Respondents be made jointly and severally liable for the penalty herein, inasmuch as some of the violations involve Bunker Hill equipment located in a facility owned by Respondent MCI. However, several of the violations are attributable to Respondent MCI alone, where, for instance, the facility and the equipment that was the subject of the charges were Respondent MCI's responsibility.

11. As of the date of the post-trial briefs, Respondent Bunker Hill had filed for bankruptcy and was no longer in operation. Respondent MCI showed a net worth at that time of about \$600,000. No additional information was supplied during the pendency of this matter to support assertions that Respondents cannot afford to pay. Accordingly, the penalty will be set based upon materials submitted at that time.

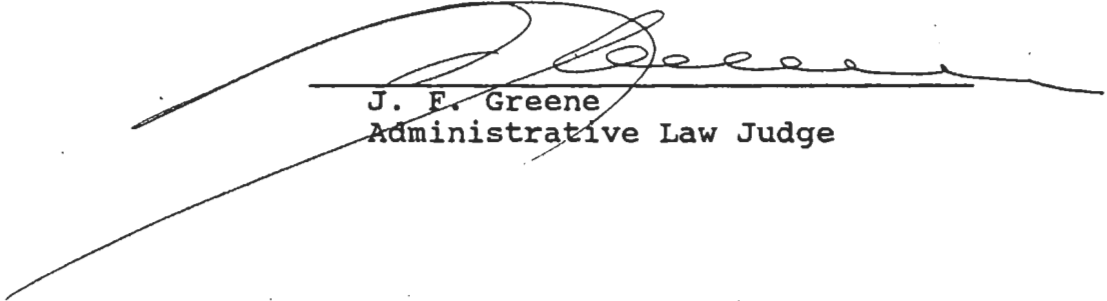
ORDER

It is hereby ordered that:

1. "Violation ten" of the complaint is dismissed.
2. Transcript corrections as shown in Complainant's post-trial brief are hereby adopted.
3. The parties shall have twenty-one days in which to seek reconsideration of any issue.
4. Respondents shall be, and they are hereby assessed a penalty of \$28,500 for violations of the Act and regulations found. Respondents shall be jointly and severally liable for the payment of the penalty.
5. The penalty amount shall be paid within ninety (90) days of the date of service of this Decision and Order. Payment shall be made by certified check or cashier's

check and shall be sent to:

U. S. Environmental Protection Agency
Region 10
P. O. Box 360903M
Pittsburgh, PA 15251



J. F. Greene
Administrative Law Judge

Washington, D. C.
June 12, 1996