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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of NORTH BRUNSWICK TOWNSHIP SCHOOL DISTRICT Respondent	Docket No. II-TSCA-ASB-85-0109

Toxic Substances Control Act - "Asbestos-in-Schools Rule":

Penalty of $1500 assessed for violation of notification and recordkeeping requirements is appropriate where, as here, the respondent had expended in excess of $175,000.00 for removal of asbestos-containing materials, and had complied with the regulations subsequent to the issuance of the complaint.

Thomas Lieber, Esquire, Assistant Regional Counsel, Waste and Toxic Substances Branch, Office of Regional Counsel; and James C. Woods, Esquire, Assistant Regional Counsel, Office of Regional Counsel, United States Environmental Protection Agency (Region II), 26 Federal Plaza, New York, New York 10278, for the complainant.

Anthony B. Vignuolo, Esquire, Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, 860 U. S. Highway 1, Route 1/ Route 130 Circle, Post Office Box 1973, North Brunswick, New Jersey 08902, for the respondent.

Before: J. F. Greene, Administrative Law Judge.

Decided December 31, 1985.

INITIAL DECISION

This matter arises under 15 U.S.C. 2615(a)(1), Section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. 2601 et seq., hereafter "the Act," and certain regulations relating to friable asbestos-containing materials in schools 1/ issued pursuant to authority contained therein 2/ at 40 CFR sections 763.100 through 763.119 (Subpart F). In this civil action, the United States Environmental Protection Agency, whose Director, Environmental Services Division, Region II, is the complainant herein, seeks assessment of civil penalties against the respondent pursuant to 15 U.S.C. 2615 (a)(1) and 2(B) for alleged violations of the Act and the Friable Asbestos-Containing Materials in Schools regulations (hereafter "the Rule").

Specifically the complaint alleges that the respondent school district violated certain recordkeeping and notification requirements contained in the Rule by failing to develop and maintain records in three schools, and by failing to warn employees in two schools of the location of friable asbestos-containing materials. The complaint further charged that parent-teacher associations had not been notified of the results of inspections, as required by the Rule. The penalty sought by the complainant for these violations is $13,300.00.

The facts in this matter are not in dispute. 3/ What is

1/ The "asbestos in schools rule".

2/ See Section 6(e)(1), 15 U.S.C. 2605(e)(1).

3/ See Court Exhibit 1, and TR p. 12.

disputed, and was the principal subject of the hearing, was the appropriateness of the penalty sought by the complainant for the alleged violations. After careful deliberation and review of all the evidence, it is concluded that the proposed penalty should be reduced substantially, owing to (a) the amount of money expended by the respondent to reduce or remove asbestos-containing friable materials from its schools; (b) good faith efforts of the respondent to comply with State and federal government regulations relating to friable asbestos-containing materials in the schools, and (c) the fact that, as of the date of the trial herein the violations charged had been abated. Although these factors are considered sufficient to reduce the penalty to the level assessed, some consideration was given to the respondent's not unreasonable reliance upon two contractor's reports as to the condition of the schools, although it is noted that reliance upon contractors does not constitute a defense to the violations charged.

It is undisputed that the respondent expended approximately $177,000 between 1977 and the date of the trial of this matter. 4/ $120,000 of this amount was spent between 1977 and 1979, before the effective date of the Rule but after the State of New Jersey had moved to inspect and attempt to control friable asbestos-containing materials in schools (R. Ex. 2, State of New Jersey Guidance Document for Eliminating Health Risks from Sprayed On Asbestos-Containing Material in Buildings; May, 1977). After the January,

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4/ Stipulation 2; TR p. 12.

1985, inspection by the U. S. E. P. A., the respondent contracted to remove or repair friable asbestos-containing materials from the areas in question at a cost of about $57,000.00. 5/ These expenditures were substantial, and demonstrate the respondent's willingness to undertake an expensive effort to remove the hazardous materials.

There is additional evidence of good faith on the part of the respondent. The 1979 removal of friable materials was followed by inspections by both the contractor and State officials (TR p. 62). A test to verify the quality of the air in the schools was conducted, as well, by another contractor (TR p. 62). In 1984, a contractor was retained "to look again" to be sure that the respondent was "still in compliance," (TR p. 64). All of the schools were thereupon re-examined. The contractor's report stated that asbestos-containing material was present, but that it was nonfriable. The respondent then undertook to determine what its obligations were regarding notification where asbestos-containing but nonfriable material was found. 6/ Additionally, it invited the New Jersey Department of Health to inspect the schools. This inspection resulted in

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5/ TR p. 67; the E.P.A.'s inspection noted friable materials in the insulation which covered a boiler (no longer in use) in the boiler room of one of the schools; friable materials in the hot water tapping of another school (also in a boiler room). That the friable materials contained asbestos was assumed, because the respondent's contractor had said that the materials contained asbestos. TR p. 36;

6/ Respondent's assistant superintendent testified that he had telephoned an E.P.A. inspector for guidance on notification requirements where non-friable asbestos-containing materials were found, and says he was told that notification under those circumstances was unnecessary. See generally TR p. 81 ff.

the discovery of friable materials in two locker rooms. The material was subsequently removed, TR p. 67. It should be noted also that when the U.S. E. P. A. inspectors arrived to inspect the buildings, the respondent provided to them a report made by respondent's contractor that enabled the inspectors to go directly to those areas pointed out by the contractor for their inspection.

Respondent urges the reduction of the penalty to zero or to a minimal level. However, it is admitted that violations of the notice and recordkeeping provisions of the Rule did occur; and it may also be observed that respondent's effort to determine the extent of its notification responsibilities in connection with non-friable materials (asbestos-containing) by telephoning an E.P.A. inspector were not sufficiently careful. The Rule may or may not be simple to locate and understand; but there is no question that it is written clearly enough for the regulated community to comprehend, with a small effort, the nature and extent of the responsibilities that arise under the Rule's provisions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent North Brunswick Township School District is a local education agency as defined at 40 CFR S763.103(e), and is subject to the Act and to the requirements of the Rule.

2. Respondent operates one high school, one middle school, and four elementary schools with a total enrollment of 3200 pupils; it has a total of 300 employees. C. Ex. 1.

3. As of January 9, 1985, the date of the U. S. E. P. A. inspections, respondent had not compiled and maintained records as required by 40 CFR S763.117(a)(3) with respect to the North Brunswick Township High School. As of the same date, with respect to the Linwood Middle School where friable asbestos-containing materials were found in a boiler room, respondent had failed to warn and notify as required by 40 CFR §763.111(a)(b)(c) and (d) and had failed to compile and maintain records as required by 40 CFR §763.114(a)(1), (2), (3), (4)(i), (4)(ii), (5) and (6). As of the same date, with respect to the Livingston Park Elementary School, where friable asbestos materials were located in a boiler room, the respondent had failed to warn and to notify as required by 40 CFR S763.111(a)(b)(c)and (d), and had failed to compile and maintain records as required by 40 CFR S763.114(a)(1), (2), (3), (4)(i), 4(ii), (5) and (6).

4. It is concluded that the respondent violated Section 15(1)(C) of the Act, 15 U.S.C. 2615, by failing to comply with the provisions of the Rule set out above.

5. It is concluded that a civil penalty of $1500.00 is appropriate in this matter, based upon the significant amounts the respondent has expended to remove friable asbestos-containing materials from its schools, based upon the location of the materials found by the U. S. E. P. A. inspectors, based upon good faith efforts of the respondent to comply with early State requirements and then with federal requirements, and based upon the fact (uncontroverted in the record) that the violations had

been abated as of the date of the trial of this matter. TR pp. 67-70.

ORDER

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. S2615(a)(1), a civil penalty of $1500 is hereby assessed against respondent North Brunswick Township School District for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed 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 United States of America. The check shall be mailed to:

EPA - Region 2
Regional Hearing Clerk
P. O. Box 360188M
Pittsburgh, PA 15251

J. F. GREENE
Administrative Law Judge

Washington, D. C.
December 31, 1985

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
Electric Service Company,	)	TSCA Appeal No. 82-2
	)	
Respondent	)	
	)	
TSCA Docket No. V-C-024	)	
	)	

FINAL DECISION

Respondent, Electric Service Company, appeals from a decision by Administrative Law Judge Marvin E. Jones in a proceeding brought by Complainant, Director of the Enforcement Division, Region V, U.S. Environmental Protection Agency, under the authority of §16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a). 1/ This proceeding was instituted by a complaint issued March 24, 1981, and amended on June 29,

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1/ TSCA §16(a)(1) provides as follows:

> "Civil. (1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15."

TSCA §15 provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . . (B) any requirement prescribed by § . . . 6, or (C) any rule promulgated under § . . . 6."

1981, [2/] in which Respondent is alleged to have violated the disposal, storage, marking and recordkeeping regulations for PCBs issued under §6(e) of TSCA. 40 CFR Part 761 (1978).

Complainant alleged that Respondent improperly disposed of PCBs, improperly stored PCBs, failed to mark PCB items and failed to keep records, all in violation of the regulations. A civil penalty of $35,000 was proposed in the complaint. A hearing was held on March 24 and 25, 1982, in Chicago, Illinois. In his initial decision, the presiding officer found that Respondent had failed to comply with the regulations as charged. He assessed a civil penalty of $47,500 instead of the $35,000 proposed in the complaint. [3/]

On appeal, Respondent asserts both procedural and substantive grounds for finding that in some cases it did not violate the PCB rules and in other cases, if it did fail to comply with the regulations, the violations were minor. [4/] Therefore, Respondent argues that the civil penalty should be reduced or eliminated.

2/ The June 29, 1981, amendment made no substantive changes in the complaint, but clarified that three distinct storage areas were the subject of the complaint.

3/ The presiding officer recommended that 50% of this penalty be remitted if Respondent demonstrated compliance with the regulations within a reasonable length of time. (See Initial Decision, p. 37).

4/ Respondent's brief on appeal is entitled "On Respondent's Request for a Hearing." However, there is no further discussion of this request in the brief. In any event, no issues have been raised on appeal which would require oral argument.

For the reasons stated below, the initial decision is reversed in part, modified in part and affirmed in part. I have reversed the presiding officer's conclusion that all of the samples taken from Respondent's property were representative samples. I have also set aside the presiding officer's finding regarding the basis for the admissibility of certain evidence. Finally, I have modified the civil penalty proposed by the presiding officer. Except as noted above, the initial decision is affirmed, and its findings of fact, conclusions of law and reasons therefor, are adopted and incorporated by reference in this final decision. 5/

Background

Respondent, Electric Service Company, has been in the business of selling and rebuilding transformers since 1929 and has been handling PCBs at its current location since 1951. Its facilities include an "old" building which contains a workpit area where PCBs are usually stored for disposal, a "new" building, apparently constructed during the spring of 1980, where PCBs are also stored for disposal, and eight bulk storage tanks (at least

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5/ That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United States v. Orr, 474 F.2d 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United States, 323 F. Supp. 1290 (W.D.N.C. 1971); In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 41 (Op. of the Judicial Officer, April 30, 1981).

14 years old) which, at the beginning of this action, were kept outside. Three of the bulk storage tanks (filled with PCB contaminated soil) have since been moved inside the new building; the rest remain outside.

Respondent's place of business was inspected on three occasions. At the time of the initial inspection on May 21, 1980, the EPA inspector observed an employee sweeping up debris in the workpit area in the "old" building. The drums of PCBs which were usually stored in this area had been temporarily removed to an area immediately adjacent to the workpit so that the workpit could be used to repair a large transformer. Although the individual drums were marked as PCB containers, neither the workpit area nor the area adjacent to the pit was marked as a PCB storage area. The employees who were working in these areas at the time of the first inspection, including the employee who was sweeping up the debris, were not wearing protective clothing. The inspector took a sample of the debris, which, after analysis, was found to contain concentrations of PCBs well over the regulatory limit. 6/ The inspector also spotted various

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6/ 40 CFR §761.1(b) provides in relevant part:

> [T]he terms PCB and PCBs are used in this rule to refer to any chemical substances . . . that contain 50 ppm (on a dry weight basis) or greater of PCBs . . . . Any chemical substances and combinations that contain less than 50 ppm PCBs because of dilution, shall be included as PCB and PCBs unless otherwise specifically provided. Substances that are regulated by this rule include . . . soils, materials contaminated as a result of spills . . . . (Emphasis added.)

oily pools in the outdoor storage area and took samples from these pools, which were later found to contain very high concentrations of PCBs. Complainant partially based its charge that Respondent disposed of PCBs in violation of the regulations on these samples. 7/ 40 CFR §761.10. The inspector also discovered that the storage area in the new building did not contain required curbing, that individual PCB containers, although marked, were not dated, and that an annual report had not been prepared, all in violation of the PCB regulations. 40 CFR §§§761.20, 761.42 and 761.45. See Ex. C-1, Report on Inspection to Determine Compliance.

A second inspection was conducted on August 8, 1980, at Complainant's request, but without a valid authorization, by an employee of the Ohio Environmental Protection Agency (OEPA). Samples were taken from the outdoor bulk storage tanks. The analyses of these samples showed that the tanks contained PCBs in high concentrations. The tanks were not marked or stored in accordance with the regulations. 40 CFR §§761.20(a)(1) and 761.42(b) and (c). Another sample taken from the soil near these tanks had a high concentration of PCBs. Complainant

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7/ 40 CFR §761.2(h) defines "disposal" to mean to:

> . . . intentionally or accidentally discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating or confining PCBs and PCB Items.

partially based its charge that Respondent violated the disposal regulations on this sample. 40 CFR §761.10. See Ex. C-1.

A third inspection was conducted on February 11, 1982, after the complaint had been filed, to determine if Respondent, nearly four years after the PCB regulations went into effect (and almost two years after the initial EPA inspection), had taken any corrective action to come into compliance with the regulations. The inspector found that although the storage areas had been marked, no secondary containment had been provided for the bulk storage tanks (some of which had been moved inside) and no records or annual documents had been prepared as required by the regulations. See Ex. C-11, Reinspection Report. In other words, although Respondent had taken some minimal action, such as marking the storage areas, it still ignored many of the requirements of the regulations. 8/

Admissibility of Evidence Obtained During the Second Inspection

As explained in the "Background" section, supra, the violations alleged in the complaint are based on the first two inspections: one conducted on May 21, 1980, by a U.S. EPA inspector, and one conducted on August 8, 1980, by an OEPA inspector. Respondent argues that the evidence gathered by the Ohio inspector was erroneously admitted into the record because the inspection was not carried out in accordance with

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8/ Respondent has not been charged with any violations based on this inspection.

the requirements of TSCA, namely, that the inspection be conducted by a "duly designated representative" of the U.S. EPA and that written notice of the inspection be given at the time of the inspection. 9/ The presiding officer, although finding that the Ohio inspector had not met the notice requirement of TSCA, admitted the evidence because he determined that the Ohio inspector was conducting an inspection pursuant to authority vested in him by Ohio law, which did not require written notice, and, therefore, the presiding officer reasoned, it was not necessary for the inspector to comply with the requirements of TSCA. 10/ Initial Decision, Finding of Fact 30, p. 16. I

9/ Section 11 of TSCA provides in pertinent part that:

> the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce. Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each such inspection, but notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner. (Emphasis added.)

10/ Chapter 6111 of the Ohio Revised Code (Water Pollution Control Statute) authorizes inspections by Ohio officials without written notice. Official notice was taken of Chapter 6111, T. 161. See also Initial Decision at 34.

disagree with this reasoning; however, as explained below, I nevertheless conclude that the evidence is admissible.

The evidence in the record establishes that the inspection did not satisfy the requirements of TSCA. The inspector admitted that he was not a duly designated representative of the U.S. EPA and that he did not provide the requisite written notice. 11/ T. 176-177. In fact, at the time of the inspection, Ohio inspectors were not even authorized to conduct inspections under TSCA. T. 176-177. More importantly, the evidence demonstrates that the Ohio inspector conducted his inspection at the request of the U.S. EPA. The inspection report, for example, states that "[t]he [US] EPA requested the assistance of the Ohio EPA to do additional sampling of the facility on August 8, 1980, to support the earlier investigation." Ex. C-1, Report on Inspection to Determine Compliance (prepared by U.S. EPA). T. 94-95. In other words, the Ohio inspector was not conducting a separate and wholly independent state investigation; he was acting as U.S. EPA's agent. Therefore, since he conducted the inspection on U.S. EPA's behalf, I conclude that the inspector should have been a "duly designated representative" of the Agency when the inspection was conducted, regardless of his authority under Ohio law, and he also should have given written notice to the Respondent at the time of the inspection. Because neither of these statutory requirements was met, Respondent's

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11/ See note 9, supra.

argument that this inspection was not authorized by TSCA is well taken. 12/

This conclusion, however, is not dispositive of the issue under discussion. Complainant established that Respondent in effect consented to the inspection by the Ohio inspector by failing to voice any objection to it. Mr. Mondron, the Respondent's sales manager, allowed the inspector to enter the premises without protest; in fact, he was helpful and gave assistance to the inspector. T. 262. These actions by Mr. Mondron operate as a waiver of any right to challenge the admissibility of the evidence on appeal, for consent has "traditionally been considered a waiver" of substantive or procedural limitations to searches. McCormick, On Evidence §175 (2d ed. 1975). Therefore, the evidence obtained by the Ohio inspector is admissible. 13/

12/ Respondent concludes that the evidence obtained as a result of an unauthorized inspection is not admissible. Although not explicitly stated, such an argument would be based on the protection afforded by the Fourth Amendment against unreasonable searches and seizures, and the judge-made exclusionary rule which prohibits the use of evidence obtained through such illegal searches or seizures. However, it is not clear from the case law that such protection is available in civil proceedings, or if it is, that the appropriate remedy would be to exclude the evidence. See Immigration and Naturalization Service v. Adan Lopez-Mendoza, 52 U.S.L.W. 5190 (U.S. July 5, 1984). It is unnecessary to decide this issue, however, because I find that Respondent consented to the inspection.

13/ Even if Respondent's consent to the inspection did not operate as a waiver of the TSCA notice requirements, the evidence gathered during the inspection is still admissible because Respondent did not raise a timely objection to its admission during the hearing. See Wainwright v. Sykes, 433 U.S. 72, 86 (1977)

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Representativeness of the Samples

Because the scope of the PCB regulations is generally limited to PCBs in concentration of 50 ppm or greater, it is Complainant's burden to prove that the PCBs in question exceeded the regulatory limit.[14/] As determined in previous cases, it is not always necessary to take samples to prove a violation; circumstantial evidence may be sufficient to prove that the PCBs in question were over the regulatory limit.[15/] In this case, the U.S. EPA and OEPA inspectors took samples to prove the concentrations of PCBs in the storage tanks, in the pools, in the soil, and in the debris. See "Background," at 4-6, supra. Respondent argued that these samples were not "representative of the medi[a] from which [they were] taken" and are, therefore, of no probative value. Appellate Brief at

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(Footnote No. 13 cont'd)

(failure to raise a contemporaneous objection to admission of a confession). See generally, McCormick, On Evidence §180 (2d ed. 1972). Complainant's Ex. C-3(b), which contains the results of the analyses performed on the samples taken during the August 8 inspection, was admitted in evidence without objection (T. 91) before Respondent raised an objection to Complainant's Ex. C-1, which also contained the results of the analyses, although in summary form. T. 202-203. Therefore, Respondent had not raised a timely objection.

14/ See note 6, supra, and In the Matter of Robert Ross & Sons, Inc., TSCA Appeal No. 82-4 at 8, n. 12 (Final Decision, April 4, 1984).

15/ See In re National Railroad Passenger Corporation (AMTRAK) TSCA Appeal No. 82-1, 101 ALC 168 (1982). In that case, labels identifying transformers as PCB transformers were sufficient to prove the requisite PCB concentration.

12. In support of its argument, Respondent cites two EPA documents which provide guidance on taking representative samples.[16/] Respondent argues that the procedures suggested in these manuals were mandatory and that the inspectors' failure to follow them means that the samples were not representative. According to the presiding officer, however, the guidance in the Agency manuals was "[merely] directory." He also found that the "samples . . . were representative of the contents of the pools and containers sampled."[17/] Conclusion of Law 1.

On appeal, Respondent argues that the presiding officer erred in concluding that the procedures in the manuals were not mandatory and that the samples were, in fact, representative.

16/ "TSCA Inspection Manual" and "Samples and Sampling Procedures for Hazardous Waste Streams," Respondent's Exhibits 4 and 5, respectively. Only pp. 3, 32 and 38 of "Sampling Procedures" were admitted in evidence. Respondent also alleges that none of the samples was bagged and taped closed with the Official Seal in accordance with the Agency's recommended chain of custody procedures and that this failure also fatally discredits the evidence. See TSCA manual, pp. 3-39, 3-40. However, as noted in the discussion in the text, the guidance in the manuals cited by Respondent is not binding on the Agency, and, therefore, this argument fails. Respondent introduced no other evidence to demonstrate that the samples were in fact tampered with or to otherwise question the integrity of the samples.

17/ The presiding officer did not make any specific findings on the representativeness of the debris and soil samples; nevertheless, he concluded that Respondent violated the disposal regulations based on these samples. See Initial Decision, Conclusions of Law 4b and c. Respondent attacks the representativeness of all the samples. Appellate Brief at 14 ("none of the samples at issue can be considered representative . . . .").

1. Failure to Follow Procedures in Agency Manuals

Respondent argues that the samples taken by the EPA and OEPA inspectors were not representative samples because the inspectors did not follow sample collection procedures "required" by U.S. EPA documents. See Appellate Brief at 13. I disagree.

First, it is clearly stated in the manuals that they provide general guidance; therefore, it is within an inspector's discretion, based on experience and the specific circumstances of the inspection site, to deviate from these procedures. For example, it is stated in the TSCA Inspection Manual that:

> Because it is impractical to sample everything that might contain PCBs, EPA has established sampling guidelines intended to assist the inspector in making sampling determinations.
>
> These guidelines set out general principles for sampling . . .
>
> The wide variety of field situations that will be encountered make it impossible to specify in advance exactly when samples should or should not be taken. This final judgment must be made by the inspector.

TSCA Inspection Manual, Vol. 2, Ch. 2, p. 57 (emphasis in original).

Second, although an Agency's properly promulgated rules and regulations are generally binding on it as well as on the public, [18/] it has been held in a variety of cases that

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18/ "[A]n agency is as much bound by its own properly promulgated rules as the persons affected by them." 3 Mezines, Stein & Gruff, Administrative Law, §13.03, 13-37-13-38 (1977). Although

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guidelines, such as the ones in issue, which have not been published in the Federal Register and have not been promulgated, are not "properly promulgated rules." Therefore, they do not have the force and effect of law and are not binding on either the public or the Agency. For example, "[i]t is hornbook law that informal publications all the way up to revenue rulings are simply guides to taxpayers, and a taxpayer relies on them at his peril." Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978). See also Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (Social Security Claims Manual "has no legal force, and it does not bind the SSA."); National Wildlife Federation v. U.S. Forest Service, ___ F. Supp. ___, [21 ERC 1225, 1229] (D. Or. April 3, 1984) (Forest Service guidelines "were merely recommendations" until explicitly mandated by legislation). In this case, the guidance was meant only for internal Agency use and was not binding on either party. See United States v. Armada Petroleum Corp., 562 F. Supp. 43, 51-52 (S.D.Tex. 1982) ("[a]s the [Department of Energy enforcement]

(Footnote No. 18 cont'd)

an agency's own rules and regulations are generally binding, there are several exceptions to that rule. For example, if rules or regulations only address the Agency's internal procedures and do not "confer procedural benefits upon individuals," it is within an agency's discretion to administer even its own procedural rules as it deems necessary. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970), cited in United States v. Fitch Oil Co., 676 F. 2d 673, 678 (Temp. Emer. Ct. App. 1982). See generally 3 Mezines, Stein & Gruff, Administrative Law, §13.03, 13-38 to 13-40 (1977); 2 Davis, Administrative Law Treatise, §7.21 (2d ed. 1978).

manual was an internal document and not an official regulation, it was not binding . . . ."). Therefore, any failure of the inspectors to follow the procedures in the manuals is, as the presiding officer found, "irrelevant" for purposes of this case. Initial Decision at 27.

2. Probative Value of the Samples

A representative sample is one which is considered to be representative of some larger body or mass such as the contents of a container or a defined area of soil. For example, rather than testing the entire contents of a drum, a sample can be taken which, if the proper procedures have been observed, should have the same composition as the drum's contents. In other words, this sample is "representative" of the drum's contents. A "grab" sample can also be taken from the drum; however, a grab sample is taken without following any specific procedures to ensure that the sample is representative. A grab sample does not reveal anything about the contents of the drum as a whole; it only provides information about itself. See In the Matter of Robert Ross, TSCA Appeal No. 82-4 at 9, Final Decision, April 4, 1984. In this case, both representative and grab samples were taken.

The OEPA inspector took samples from Respondent's outdoor bulk storage tanks, which contained various amounts of liquid. Each had a capacity of about 735 gallons and none was more than one quarter full. See "Background." One of the EPA guidance

manuals suggests that samples should be taken from the upper, middle, and lower portions of tanks and then combined into a composite sample, to obtain a representative sample. Respondent's Ex. 5. The inspector did not follow this procedure; nevertheless, it is apparent from his testimony that the samples which he took were in fact representative samples:

> "[T]he type of sampling I was doing with a glass tube simultaneously samples the top, middle and bottom portion as long as I can reach from the top of the tank all the way down to the bottom of the tank and I can touch the bottom of the tank with the bottom of the tube, then I have extracted a sample covering every layer of the tank. They were not individual samples taken and combined, there were a series of samples taken to provide me with an adequate sample volume. However, each time I took a sample, it was covering each of the levels." T. 180-181.

Therefore, the presiding officer correctly determined that these particular samples were representative and his conclusion is affirmed in that regard. However, the same cannot be said for the samples taken by the U.S. EPA inspector.

The U.S. EPA inspector took samples from "pools" of oil, soil, and debris. Sample SO_3 was taken from a small pool in Respondent's yard; Sample SO_4 was taken from some damp soil adjacent to the pool; Sample SO_5 was taken from some debris inside a building; and Sample SO_7 was taken from another little pool just below an exhaust pipe. Ms. Young, the U.S. EPA inspector, described how she took the samples:

> QUESTION: (Mr. Seltzer, for Respondent)
>
> Now, Ms. Young [EPA Inspector], could you describe how you took the samples of oil and debris?

ANSWER:

The oil samples [SO_3 and SO_7] were taken by using a glass pipette with a squeeze bulb. The samples were then put in glass vials.

The soil samples [SO_4] or debris samples [SO_5] are taken with a scoop and the material is then identified with the proper sample number.

QUESTION:

And could you specifically describe the sample you took from the cement floor in the front of the work pit?

ANSWER:

That was a debris sample, that was a debris sample, the employee was sweeping and I took a sample of the debris with another scoop and put it in the container and put a sample number on it.

QUESTION:

And how many soil samples did you take on that day?

ANSWER:

I took one soil, the one I call a soil sample is the one by the puddle that had 550 parts per million. The others I call debris samples, because they contain debris and dirt and a lot of other things.

Now, the first two samples only contained rock and what not that was in the storage area where the transformer was, because that was taken beneath two old transformers that were outside, stored outside.

QUESTION:

And so you took a single grab sample of soil, is that right, you said you took one sample of soil?

ANSWER:

Right.

T. 131-132.

This testimony establishes that the U.S. EPA inspector took only "grab" samples, not representative samples. Therefore, the presiding officer's conclusion that these samples were representative is set aside. However, even though these samples are not representative, they still have probative value.[19/]

As explained above, we use representative samples to show the quality or condition of a larger body from which the sample is taken. Thus, if proof of a violation depends on producing evidence that accurately describes some quality or condition of the larger body (for example, its PCB concentration level), a representative sample is essential, for no inferences about the larger body can be drawn from a mere grab sample. In the present case, however, proof of the disposal violations does not hinge on accurately describing the condition or quality of some larger body. Instead, it hinges on proof of an uncontrolled discharge of PCBs. Under such circumstances, the "sample" itself is the uncontrolled discharge, the improper disposal, or, so to speak, the corpus delicti. Therefore, the violations may be established by simply proving two things: (1) that the samples themselves contain PCBs in concentrations exceeding 50 ppm; and (2) that the PCBs were not disposed of properly, a conclusion which may be inferred from where the PCBs were found. The grab samples were taken from debris, soil and pools of liquid on Respon-

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19/ See, e.g., In the Matter of Robert Ross & Sons, Inc., TSCA Appeal No. 82-4 at 8, n. 12 (Final Decision, April 4, 1984) (concerning the application of the Agency's anti-dilution policy).

dent's property and are surely "evidence of uncontrolled discharges [improper disposals] at [Respondent's] facility." Initial Decision at 29. So long as the samples contained concentrations of PCBs over the regulatory limit, they are evidence which, if unrebutted, is sufficient to establish improper disposal. Therefore, although I am setting aside the presiding officer's conclusion that the samples taken by the U.S. EPA inspector were representative, I also find that no error resulted from relying on these samples to prove the disposal violations.

Proposed Civil Penalty

TSCA §16(a) authorizes civil penalties in the amount of $25,000 for each violation, and each day a violation continues is a separate violation. The nature, circumstances, gravity of the violation, ability to pay, prior violations and other such matters are to be considered in determining the penalty. 20/

A total penalty in the amount of $35,000 was proposed by Complainant, consisting of $5,000 for the alleged disposal violations, $5,000 for the alleged marking violations, $15,000 for the alleged storage violations and $10,000 for the alleged recordkeeping violations. According to Complainant, this penalty

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20/ Section 16(a)(2)(B) lists the following for consideration:

> ". . . 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 to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

was moderate and was requested because it expected Respondent to act quickly to come into compliance and because Respondent is a relatively small company. 21/ See Complainant's Brief, dated April 22, 1982, at 52. The presiding officer, however, increased the total penalty by $12,500 to $47,500, stating that "the penalties proposed are insufficient, and that an appropriate penalty to be assessed is $47,500." Initial Decision at 37. In conjunction with this increase, he also recommended that 50% of the increased penalty of $47,500 ($23,750) be remitted if Respondent:

1. prepared records and annual documents in accordance with §761.45;

2. reduced the concentration of PCBs which were the result of uncontrolled discharges [disposals] to "background levels"; and

3. dated and stored PCB Articles and Containers as required by §§761.20 and 761.42. 22/

21/ Complainant followed the Agency's penalty guidelines in determining the proposed penalties. See Complainant's Ex. C-2, PCB Penalty Policy. Penalties are determined in two stages. First, the "gravity" of the violation is determined and then adjustments are made to the "gravity" based penalty to reflect the other matters which may be considered in determining the penalty. See note 20, supra. The guidelines provide a range of penalties which may be assessed depending on the seriousness of the violation. See In the Matter of Bell & Howell Company, TSCA-V-C-033, 034, 035 (Final Decision, December 2, 1983), for a discussion of the penalty guidelines.

22/ Although §16(a) of TSCA authorizes the Administrator to "assess" a civil penalty" for violations of the PCB regulations, "[t]his is not meant to infer, however, that a final order . . . cannot address matters other than monetary penalties." See In the Matter of Chemical Waste Management, Inc., Order Granting Leave to Intervene, TSCA Appeal No. 84-3 at 12, n. 12 (May 23, 1984).

Respondent contends that the presiding officer erred in his penalty determination because he did not explain, as required by the regulations, his specific reasons for establishing a penalty different from the one proposed by Complainant. Respondent also objects to the penalty assessment on the grounds that the penalties proposed for the failure to mark the storage areas and failure to prepare annual reports are "disproportionate to the nature of the violation[s]." See Appellate Brief at 29 and 31. Finally, Respondent argues that the presiding officer erred because he did not consider various mitigating factors in making his civil penalty determination. For the following reasons, I am assessing a penalty of $35,000 as proposed by Complainant. 23/

The regulations governing this proceeding give the presiding officer the discretion "to assess a penalty different in amount from the penalty recommended to be assessed in the com-

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23/ The regulations give the presiding officer considerable discretion in setting a penalty. 40 CFR §22.27(b). Although he must "consider" any penalty guidelines, he is not bound by them. In Bell & Howell, note 21, supra, it was held that when a presiding officer changes the penalty proposed in the complaint but still assesses a penalty within the ranges provided in the penalty guidelines, "absent unusual or other compelling circumstances, it would be inappropriate on appeal to change the penalty . . . ." Bell & Howell at 19. Therefore, where no abuse of discretion is shown, I will not substitute my judgment for that of the presiding officer so long as the reasons for changing the penalty have been stated with specificity. In the instant case, however, it is not possible, as explained in the text, to determine the precise penalty assessed for each violation and to determine, therefore, if the penalty falls within the ranges recommended in the penalty guidelines.

plaint, [so long as he] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 CFR §22.27(b). Here, the presiding officer increased the penalty by $12,500 because, in his opinion, the record demonstrated Respondent's general disregard for the requirements of the PCB regulations. See Initial Decision at 35. Similarly, he provided for a 50% across-the-board reduction in the penalty if Respondent took action to come into compliance with the regulations. These reasons do not satisfy the specificity standards of 40 CFR §22.27(b), because in neither instance does the presiding officer explain how the increase or decrease should be allocated among the disposal, marking, storage and recordkeeping violations. This lack of specificity makes it nearly impossible to discern his reasons for changing the penalty recommended in the complaint. Although it might be reasonable to assume that the increase of $12,500 is to be allocated on a pro rata basis, the same assumption cannot be made for the decrease, because the presiding officer did not consider the differing costs of each remedial action. For example, to prepare the required annual documents and mark the containers should be relatively easy, inexpensive tasks; however, to clean up the contaminated soil to some "background" level could result in significant costs. Should the same credit be given for each act of compliance (or non-compliance)? The initial decision does not address this question. In addition, the presiding officer did not state

what concentration of PCBs would satisfy his cleanup to "background level" requirement.[24] Accordingly, because of the lack of specificity in the changed penalty and its possible prejudice to Respondent on appeal, I cannot adopt it.[25]

In addition to challenging the general increase in the penalty proposed by the presiding officer, Respondent also objected to the assessment of penalties for the marking and recordkeeping violations. Regarding the marking violations, Respondent contends that because the individual containers in the various storage areas were marked, it has "effectively complied with the marking requirements . . . ." Appellate Brief at 30. However, 40 CFR §761.20(a)(10) requires the storage area to be marked in addition to the individual containers. To adopt Respondent's argument would eliminate a clear requirement of the regulations. By marking the storage area itself in addition to the individual containers, personnel are warned before they enter the storage area so they may take

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24/ Complainant submitted a "Citation of an Additional Authority," received here on February 10, 1984, to support its position that Respondent should clean up its facility so that PCBs are below the 50 ppm level, the usual regulatory threshold. In the case cited, In the Matter of General Electric, Aircraft Engine Group, Docket No. TSCA-V-C-147 (January 27, 1984), Respondent was ordered to clean up spilled PCBs to the lowest level possible by normal clean up methods. Respondent, however, had no opportunity to present evidence on this issue during the course of the proceedings. Therefore, consideration of Complainant's submission would violate Respondent's right to due process.

25/ As explained in nn. 21 and 23, supra, the presiding officer has considerable discretion in fashioning penalties and remedies. Nothing in this decision should be read as limiting that discretion, if properly exercised.

appropriate precautions. Initial Decision at 32. The $5,000 penalty proposed by Complainant was based on the failure to mark several storage areas. Based on my review of the record, I have concluded that the penalty was appropriate.

Concerning the $10,000 penalty proposed by Complainant for the failure to maintain records and prepare annual documents for 1978, 1979, and 1980, Respondent argues that it did maintain adequate records and, therefore, the failure to prepare annual reports was merely a "technical" violation for which little or no penalty should be assessed. Respondent's so-called records are clearly inadequate, and it admits no annual reports were prepared. See Complainant's Ex. C-20 (Respondent's "records."). I have previously explained the importance of preparing accurate, contemporaneous records. See In re Briggs & Stratton Corp., 101 ALC 116, 119 (1982). Based on my review of the record, $10,000 is an appropriate penalty for the violations.

Complainant also proposed penalties of $15,000 for the storage violations and $5,000 for the disposal violations. In considering those as well as the other penalties proposed by Complainant, I have taken into account the various mitigating factors raised by Respondent as reasons for reducing the proposed penalties. Although Respondent has taken some actions to improve the storage of PCBs, it is evident from the record that Respondent was in violation of the regulations for at least two years. In addition, it cannot be ignored that there were several instances of unlawful disposal, even though they

may have been accidental. The penalties proposed by Complainant were moderate, significantly less than the maximum penalties which could have been assessed for the violations. Therefore, based on my review of the entire record and in consideration of the factors in the Act, I have determined that the penalty of $35,000 proposed by Complainant is appropriate.

FINAL ORDER

The Initial Decision of the presiding officer, insofar as he found that Respondent, Electric Service Company, violated the disposal, marking, storage and recordkeeping requirements for PCBs, 40 CFR Part 761 (1978), is adopted as the agency's final decision, with the following exceptions:

1. Conclusion of Law 1 is not adopted insofar as it states that samples taken "were representative of the pools . . . sampled."

2. Finding of Fact 30 stating that the August 8, 1980 inspection was conducted "under the authority of the Ohio Water Pollution Control Act" is not adopted.

A civil penalty of $10,000 is assessed for the recordkeeping violations, $5,000 is assessed for the marking violations, $15,000 is assessed for the storage violations, and $5,000 is assessed for the disposal violations. The total civil penalty assessed is therefore $35,000.

Payment of the full amount of the civil penalty ($35,000) shall be made within sixty (60) days of service of this final order, unless otherwise agreed to by the parties. A cashier's check or certified check payable to the Treasurer, United States

of America, for the full amount, shall be forwarded to the Regional Hearing Clerk. 26/

So ordered.

Paulette J Wilson for

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: JAN 7 1985

27/ Payment of the penalty shall not relieve Respondent of responsibility for complying with the regulations or otherwise preclude the Agency from taking further enforcement action for any failure to comply with the regulations.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision in the matter of Electric Service Company, TSCA Appeal No. 82-2, were delivered to each of the following persons, in the manner indicated:

By 1st Class Mail, postage prepaid:

Martin S. Seltzer
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By Hand Delivery:

Bessie Hammiel
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U.S. EPA Headquarters
401 M Street, S.W.
Washington, DC 20460

M. Gail Wingo

M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated: 1-7-85

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

85 JAN 17 A10:26

In the Matter of	)	
	)	
Transformer Service (Ohio), Inc.,	)	Docket No. TSCA-IX-84-0013
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - Accelerated Decisions - Evidence - Where affidavits and documentary evidence clearly established that Respondent had stored PCBs for disposal in February 1979 and failed to remove and properly dispose of the PCBs prior to January 1, 1984, as required by 40 CFR 761.65(a), an accelerated decision finding Respondent in violation of the cited regulation would be issued as there was no issue of material fact relating to said violation which required a hearing.

Toxic Substances Control Act - Rules of Practice - Accelerated Decisions - Determination of Penalty - Where appropriateness of proposed penalty for violation of the Act was in issue, Respondent was entitled to a hearing as to the amount of the penalty, notwithstanding Complainant's contention penalty had been determined in accordance with PCB Penalty Policy (45 FR 59770, September 10, 1980).

Counsel for Respondent:	Jeffrey J. Casto, Esq. Akron, Ohio
Counsel for Complainant:	David M. Jones, Esq. Office of Regional Counsel U.S. EPA, Region IX San Francisco, California

Accelerated Decision

The captioned proceeding was commenced by the issuance on April 16, 1984, of a complaint by the Director, Toxics and Waste Management Division, U.S. EPA, Region IX, charging Respondent, Transformer Service, Inc., with a violation of the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) and 40 CFR 761.65(a) in that PCBs stored for disposal at the BKK site, Beatty, Nevada, prior to January 1, 1983, had not been removed and disposed of prior to January 1, 1984. It was proposed to assess Respondent a penalty of $10,000 for this violation.

Respondent answered, denying that it presently or had ever maintained any PCB containers at the mentioned BKK site. Respondent alleged, inter alia, that the PCB containers stored at the BKK facility in Beatty, Nevada, were under the constructive control of Transformer Service (Ohio), Incorporated (TSO), an Ohio corporation, separate and distinct from Transformer Service, Incorporated (TSI), a New Hampshire corporation. It was further alleged that, but for the intentional and tortious interference by BKK, TSO would have removed and disposed of the PCB containers stored in Beatty, Nevada, prior to January 1, 1984.

In the prehearing exchange directed by the ALJ, Respondent furnished copies of certificates from the Secretaries of State of Ohio and New Hampshire certifying that TSI was a corporation of the State of New Hampshire in good standing as of September 27, 1983, and that TSO was a corporation of the State of Ohio in good standing as of August 6, 1984.

It was alleged that the corporations have no common officers, directors or shareholders. Included in the documents supplied was a copy of a purchase order, dated February 2, 1979, to BKK Company of Nevada whereby Transformer Service, Inc., 680 East Market Street, Akron, Ohio, called for the transportation from Hayward, California and the storage at the BKK facility, Beatty, Nevada, of approximately 125 gallons of PCB liquid waste. Also included was a copy of TSO Hazardous Waste Manifest No. 0463 reflecting the shipment on March 24, 1984, from the BKK facility in Beatty, Nevada, of 100 gallons of PCBs in two 55-gallon drums, two 55-gallon drums containing an unstated quantity of hazardous waste (apparently a combustible liquid), three empty 55-gallon drums, and five empty 5-gallon cans, which were apparently PCB contaminated. The manifest stated that the liquids were to be incinerated at Rollins, Deer Park, Texas,1/ while the solids were to be buried at SCA or other EPA approved landfill.

Respondent alleged that in December 1983, TSO had made arrangements with Rollins Environmental Services, Inc. to pick up all PCB materials it had generated, which were located at the BKK site in Beatty, Nevada, and that, notwithstanding the fact Respondent was current with all payments for storage, it was informed for the first time that the material could not be released without a payment in advance of $1,629.00 by certified check. Respondent stated that it had never agreed to this requirement and that it was not a part of any contract between the parties. Respondent further alleged that even if the material had been released, it would have

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1/ This is one of the few EPA approved sites for the incineration of PCBs and indicates that all liquids were or contained PCBs. The California Liquid Waste Hauler Record (enclosure to Complainant's proposed Exh 4), reflecting shipment of the material to the BKK Nevada site on February 12, 1979, indicates that the drums contain PCB waste in liquid and sludge form.

been impossible to properly dispose of the material prior to January 1, 1984, because all EPA approved incinerators were [operating] at full capacity.

Under date of September 28, 1984, Respondent filed a motion to dismiss upon the ground that Complainant had instituted action against the wrong party in that TSI, a New Hampshire entity, and TSO were separate corporations, that TSI did not engage in any activity or generate any wastes in Hayward, California or in Region IX which are the subject of this action, did not issue or direct the issuance of a purchase order from TSO to BKK for pick-up and storage of the PCB containers, did not pay for the storage of said containers nor have any role in the pick-up and disposal of said materials from BKK on March 24, 1984. Supporting the motion were the affidavits of Richard Casarano, operations manager for TSI and Marion O'Hear, office manager for TSO from April of 1982 through May of 1984.

Mr. Casarano's affidavit states that TSI is a New Hampshire corporation formed on November 20, 1952 and is currently in good standing and that TSI has never owned or controlled any PCB containers at the BKK site in Beatty, Nevada. The affidavit of Ms. O'Hear is to the effect that as office manager of TSO she had care, custody and control of corporate books and records, that in a review of such records she had found Purchase Order No. 3097, dated February 2, 1979, from TSO to BKK for the transfer of PCB items for storage, that these PCB items were from jobs performed by TSO and that TSI had no authority or control over the work which generated any of the PCB items, that all payments to BKK for storage charges were made by TSO, that attempts on December 29, 1983, to have

the PCB items picked up from BKK by Rollins Environmental Services were unsuccessful, because BKK demanded a certified check in the amount of $1,629.00 prior to release of the items and because BKK had no personnel on the site to release the items and that on March 24, 1984, TSO arranged for and effectuated the removal of the PCB items from the BKK site and their subsequent disposal in accordance with all applicable federal, state and local regulations.

Accompanying the motion to dismiss was a motion by Respondent to prohibit Complainant from introducing evidence not provided in the prehearing exchange report. The motion alleged that Complainant had not complied with the ALJ's directive that Complainant furnish names of expected witnesses and summaries of expected testimony to support the allegations in Paragraphs 1, 2 and 4 of the complaint, but had merely provided a group of documents without summarizing their relevance to the action or which paragraphs of the complaint they were deemed to support.

Complainant's response to the motion included a motion for an accelerated decision and a motion to amend the complaint to substitute TSO as the respondent in lieu of TSI. Supporting the motion for an accelerated decision was an affidavit of H. Laverne Rosse, of the Department of Conservation and Natural Resources, State of Nevada, whose inspection of the BKK facility on January 24, 1984, led to the institution of the present proceeding. Mr. Rosse states that on the above date he met at the BKK facility near Beatty, Nevada with Mr. Clarence Gieck, Technical Manager for BKK, for the purpose of inspecting the facility for compliance with the Toxic Substances Control Act. Mr. Rosse further states that BKK's storage inventory record which was made available to him, showed three entities storing

PCB liquid waste beyond the regulatory deadline and that one of these was identified as Transformer Service, Inc., P. O. Box 1077, Concord, New Hampshire.2/ A BKK customer list, attached to the affidavit, identifies a fourth entity as Transformer Service, 680 E. Market Street, Akron, Ohio. A notation on this list indicates that the last mentioned firm had seven drums and five empty 5-gallon cans in storage as of December 27, 1983.

Also attached to Mr. Rosse's affidavit is a copy of a letter, dated November 3, 1983, from BKK to Transformer Service, Inc., P. O. Box 1077, Concord, New Hampshire, Attention: Stephen Booth, General Manager, concerning the PCB containers and drums in storage at the BKK facility. The letter pointed out that it was very important that the addressee read the enclosed notice regarding the requirement for the removal and disposal of all PCB articles and containers placed in storage prior to January 1, 1984. The notice referenced EPA's regulations implementing the Toxic Substances Control Act, 40 CFR Part 761, and stated in pertinent part: "You, as generator and title holder of the PCBs which have been in our storage facility before January 1, 1983, must have them removed from storage and disposed of prior to January 1, 1984."

In further support of the motion for an accelerated decision, Complainant submitted the affidavit of Clarence W. Gieck, Technical Manager of BKK Corporation, mentioned previously. Mr. Gieck says that records at the BKK facility, Beatty, Nevada, reflect that PCB waste owned by Transformer Service, Inc. was placed in storage in February 1979, and removed from storage on March 24, 1984. Mr. Gieck also says that the

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2/ A notation under the name Transformer Service, Inc. indicates that Stephen Booth is General Manager and that Marian [Booth], Greg Booth and Jeff Casto, all with Akron, Ohio phone numbers are contact people.

BKK letter addressed to Transformer Service, Inc., Concord, New Hampshire, dated November 3, 1983, signed by him, was sent certified mail, return receipt requested and was sent to and acknowledged by the company known to BKK Corporation as the owner of the PCB items identified in the letter.

Without ruling on the motion for an accelerated decision or on Respondent's motion to prohibit Complainant from introducing evidence not provided pursuant to the prehearing exchange, the ALJ by an order, dated October 23, 1984, granted Complainant's motion to amend the complaint and allowed Respondent 20 days in which to file an answer. As indicated previously, the amended complaint substituted TSO as Respondent in lieu of TSI. The factual allegations, including the amount of the proposed penalty, were identical with the original complaint.

TSO answered under date of October 31, 1984, admitting that it was a corporation of the State of Ohio, whose principal place of business was formerly 680 E. Market Street, Akron, Ohio, and that it did own PCB containers at the BKK of Nevada site near Beatty, Nevada. TSO also admitted that it stored PCB containers at the mentioned BKK site on or about January 24, 1984, but denied that the containers were placed in storage for disposal and denied that the containers were subject to the requirements of 40 CFR 761.65(a). Respondent alleged that compliance with 40 CFR 761.65(a) was impossible, because the demand for disposal before January 1, 1984, exceeded the capacity for disposal at approved sites in an approved manner. TSO repeated its previous allegations concerning BKK's intentional and tortious inference with its efforts to remove the containers prior to January 1, 1984, but for whose actions the containers allegedly would have been removed and disposed of prior to said date.

Under date of November 7, 1984, Complainant filed a motion for a ruling on Respondent's motion to dismiss complaint. TSO has not responded to the motion. A fair reading of the motion indicates that it is a reiteration of Complainant's motion for an accelerated decision and it will be so treated.

The basic thrust of the motion is that TSO's denial in the answer to the amended complaint that the PCB items were placed in storage for disposal at the BKK site is contradicted by the affidavit of Marion O'Hear furnished in support of Respondent's motion to dismiss upon the ground Complainant had sued the wrong party. Emphasis is placed upon Paragraph 3 of Ms. O'Hear's affidavit which states that she had located PO No. 3097, dated February 2, 1979, which was forwarded to BKK for transfer of PCB items for storage. Complainant also emphasizes Paragraph 9 of Ms. O'Hear's affidavit which states, inter alia, that TSO has disposed of all of said items [PCB items in storage at BKK] in accordance with all applicable federal, state and local regulations. Complainant says this necessarily means the items were stored for disposal, that TSO's present denial is lacking in credibility and should be given no effect and that Respondent's answer raises no material issues of fact which require a hearing.

If the requested relief is granted, Complainant asks that the amount of the penalty be reviewed in accordance with § 22.27(b) of the Rules of Practice. Complainant says that the proposed penalty of $10,000 was based upon the PCB Penalty Policy (45 FR 59770 et seq., September 10, 1980) and that potential damage was based upon a quantity of 385 gallons of PCB

fluid (seven 55-gallon drums). In determining the amount of the penalty, Complainant says that the ALJ should consider the dilatory tactics engaged in by Respondent as to the identity of the responsible party and the contradictory statements referred to above in the answer to the amended complaint, which Complainant asserts were knowingly false. Complainant says that representations have been made that TSO is without funds to pay any penalty and that it has learned that Walter H. Booth is Treasurer of both TSI and TSO and that Stephen W. Booth, President of TSI, and Gregory A. Booth, President of TSO, are believed to be brothers. Complainant also notes that Jeffrey J. Casto, Respondent's attorney, is agent for both corporations in the State of Ohio. Complainant appears to be taking the position that this is a case warranting piercing of the corporate veil, so that any penalty levied against TSO may also be assessed against TSI.

Conclusions

1. The affidavits and documentary evidence referred to above, establish that Respondent, Transformer Service (Ohio), Inc., placed PCBs and PCB containers in storage for disposal at the BKK of Nevada, Inc. facility near Beatty, Nevada, in February 1979 and that these items were not removed from storage and disposed of prior to January 1, 1984.

2. Respondent has thus violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614)3/ and 40 CFR 761.65(a) and is liable for a civil penalty in accordance with § 16 of the Act.4/

3. Notwithstanding Complainant's assertion that the proposed penalty was determined in accordance with the PCB Penalty Policy (45 FR 59770 et seq.), Respondent, in accordance with § 22.15 of the Rules of Practice (40 CFR Part 22), is entitled to a hearing as to the amount of the penalty.

Discussion

The fact that TSO placed PCBs and PCB containers in storage for disposal in February 1979 and failed to remove and properly dispose of said PCBs prior to January 1, 1984, thus violating the Act and regulations, is considered to be clearly established and no further discussion in that regard is warranted.

Section 22.15(a) (40 CFR 22.15(a)) of the Rules of Practice provides in pertinent part: "Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty

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3/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part: "It shall be unlawful for any person to (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."

The rule involved here (40 CFR 761.65) was promulgated under § 6 of the Act.

4/ This necessarily disposes of Respondent's motion that Complainant be prohibited from introducing evidence allegedly not furnished in its prehearing report.

proposed in the complaint * * * is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk." While Respondent has not specifically contended that the amount of the proposed penalty is inappropriate, it has alleged that EPA's enforcement of the Act and regulations, under the circumstances present here is arbitrary and capricious. Accordingly, it is concluded that the appropriateness of the penalty has been placed in issue.

Complainant says that it has information that TSO is without funds to pay the penalty and it is noted that ability to pay is among the factors the Administrator is required to consider in determining the amount of the penalty (§ 16(a)(2)(B)). Moreover, while the alleged tortious inference by BKK with Respondent's efforts to remove the PCBs from storage and the unavailability of approved sites for disposal of PCBs may not be legal excuses for the violation here determined, they may, nevertheless, qualify as "other matters as justice may require" within the meaning of § 16(a)(2)(B) of the Act, and thus warrant a lower penalty. Of course, the alleged dilatory tactics engaged in by Respondent as to the identity of the responsible party and its alleged intentional falsification as to whether the PCBs were stored for disposal may also be matters for consideration in this respect. This merely buttresses the conclusion that determining the amount of a penalty on what is in effect a motion for summary judgment is seldom, if ever, appropriate.

Complainant's suggestion that the penalty assessed against TSO may also be levied against TSI depends upon a showing that the two corporations are in effect operated as one and for example, have common books, records, officers, offices and stockholders. If Complainant intends to press this position, it is clearly an additional reason why summary judgment as to the penalty is not appropriate.

Order

Respondent, Transformer Service (Ohio), Inc. having violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and 40 CFR 761.65 is liable for a civil penalty in accordance with § 16 of the Act (15 U.S.C. 2615). Complainant's motion for an accelerated decision as to the amount of the penalty is denied. The parties shall report on or before March 1, 1985, as to whether this matter has been or will be settled.

Dated this 16th day of January 1985.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this Accelerated Decision, dated January 16, 1985, in re: Transformer Service (Ohio), Inc., was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to each party in the proceeding as follows:

Jeffrey J. Casto, Esq.
Roetzel and Andress
75 East Market Street
Akron, Ohio 44308

David M. Jones, Esq.
Office of Regional Counsel
Environmental Protection Agency
Region IX
215 Fremont St.
San Francisco, California 94105

January 16, 1985

Helen F. Handon
Secretary

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In Re: CHEMICAL WASTE MANAGEMENT, INC., Respondent. PROCEEDINGS UNDER 15 U.S.C. §2615 42 U.S.C. §6928 and 40 C.F.R. §22	TSCA DOCKET NO. 84-H-03

'83 DEC 21 P1:21

CONSENT AGREEMENT AND ORDER

The parties herein, the United States Environmental Protection Agency and its Administrator ("EPA") as Complainant, the State of Alabama ("State") as Intervenor and Chemical Waste Management, Inc. ("CWM") as Respondent, having consented to entry of this Consent Agreement and Order ("Agreement"),

NOW THEREFORE, before the taking of any testimony, without any admission of violation or adjudication of any issues of fact or law herein, the parties agree to comply with the terms of this Agreement and the attached Order.

I. PRELIMINARY STATEMENT

A. EPA has personal jurisdiction over the parties consenting hereto and over the subject matter of actions pursuant to Section 16 of the Toxic Substances Control Act, 15

U.S.C. Section 2615 ("TSCA") and Section 3008 of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"). 42 U.S.C. §§6928(a)(1) and (g).

B. The objectives of this Agreement include, without limitation:

1. Assuring the disposal of the existing inventory of liquid PCBs currently in storage at CWM's Emelle, Alabama facility in conformance with the disposal schedule set forth in paragraph IV, below;

2. Resolving all civil claims or civil causes of action under any environmental law or regulation that the Complainant or the State may have with respect to the Emelle facility based upon facts known to the Complainant or the State on or before October 12, 1984;

3. Assuring that the environmental audit provisions set forth herein will be implemented in accordance with this Agreement to evaluate and modify, as may be appropriate, CWM's waste operation and environmental management systems, practices, and policies as they affect RCRA and TSCA compliance at the Emelle facility;

4. Authorizing and approving CWM's treatment, storage and disposal of PCBs at the Emelle facility under modified conditions which specify the requirements to be met by CWM by synthetically lining new PCB cells, shallow PCB well monitoring, and PCB leachate collection at the facility;

5. Assuring that provisions specified herein regarding groundwater monitoring, surface impoundments and facility records, and RCRA liquid waste solidification are implemented; and

6. Assuring that the waste impact/hydrogeological study as set forth herein will be implemented in accordance with this Agreement.

C. For purposes of this Agreement only and in order to avoid litigation and settle the civil claims which EPA or the State of Alabama may have against CWM as of October 12, 1984, Respondent consents to the entry of this Agreement. The parties agree that this Agreement does not constitute evidence or admission by CWM of any violation of law or regulation. For purposes of this Agreement only, CWM agrees that EPA or the State may properly bring an action to compel compliance with the terms and conditions contained herein in Federal District Court or before an Administrative Law Judge appointed pursuant to 40 C.F.R. §22. By signing this Agreement, CWM does not prejudice and specifically preserves any right, remedy or defense it may have with respect to any action related or unrelated to the subject matter of this document, provided however, that in any action brought by EPA or Alabama to compel compliance with the terms of this Agreement CWM shall be limited to the defenses of Force Majeure, compliance with this Agreement and physical impossibility. By signing this Agreement, EPA and the State agree to act reasonably in performing their obligations under this Agreement.

D. In part, it is the intent of this Agreement to resolve civil allegations of violations of TSCA and RCRA referred to in this Agreement. In implementing the provisions of this Agreement and except to the extent provided for herein, the parties are not authorizing violations of federal laws or regulations, or state and local laws not inconsistent with or preempted by federal requirements.

E. EPA will publish notice of this Agreement in the Federal Register.

II. PARTIES BOUND

A. The parties to this action are:

1. Complainant, the United States Environmental Protection Agency and its Administrator ("EPA");

2. Intervenor, State of Alabama, on behalf of all branches, agencies, departments, establishments, instrumentalities, bureaus, subsidiaries, boards or commissions and any other entity of the Government of the State of Alabama (the "State"); and

3. Respondent, Chemical Waste Management, Inc., ("CWM"), a corporation organized and existing under the laws of Delaware with its headquarters in Oak Brook, Illinois.

B. This Agreement shall apply to and be binding upon all parties to this Agreement, their directors, officers,

all persons or entities acting under or for them. Each signatory to this Agreement certifies that he/she is fully authorized by the party or parties whom he/she represents to enter into the terms and conditions of this Agreement, to execute the Agreement on behalf of the party represented and to legally bind such party.

III. FINDINGS OF FACT

A. CWM is a domestic corporation incorporated under the laws of the State of Delaware.

B. CWM is in the business of transportation, storage, and disposal of waste materials including PCBs and RCRA wastes.

C. CWM owns and operates a facility in Emelle, Alabama for inter alia, storage of waste materials including PCBs and RCRA wastes ("Emelle facility"). The Emelle facility is an existing hazardous waste management facility as defined in 40 C.F.R. §260.10, which treats, stores, or disposes of hazardous waste, as defined by section 1004(5) of RCRA, 42 U.S.C. §6903(5) and 40 C.F.R. Part 261.

D. EPA filed an administrative complaint on January 24, 1984, alleging that CWM had violated 40 C.F.R. §761.65(a) by the storage of PCBs beyond January 1, 1984 at the Emelle facility.

E. CWM filed an answer denying any violations and raising affirmative defenses.

F. CWM is the owner and operator of the "M/T Vulcanus I and II," two ships designed for the incineration of liquid materials, including liquid wastes such as PCBs.

G. EPA, under authority of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401 et seq., issued a research permit (HQ-81-002) to CWM which became effective on October 21, 1981.

H. Research permit, HQ-81-002, allowed CWM to use its ships and their incinerators in a number of test burns in order to determine whether PCBs could be disposed of by shipboard incinerators, and if so, under what conditions.

I. CWM entered into contracts to receive PCBs at the Emelle facility and to receive PCBs at other locations and to transport these materials to the Emelle facility for three test burns pursuant to the research permit referred to in Paragraph H.

J. Two test burns occurred during the periods December 22, 1981 - January 2, 1982 and August 15-23, 1982.

K. On September 15, 1982, EPA informed CWM that no further test burns would be necessary. The term of the research permit expired on October 12, 1982.

L. Following this research project, CWM still has PCB materials remaining in storage at the Emelle facility.

M. CWM applied for special operating permits for both the M/T Vulcanus I and II as incineration vessels in 1981.

N. Following October 12, 1982, CWM had committed to and stored additional PCBs at the Emelle facility prior to anticipated permit issuance.

O. 40 C.F.R. §761.65(a) states:

> Any PCB Article or PCB Container stored for disposal before January 1, 1983 shall be removed from storage and disposed of as required by this part before January 1, 1984. Any PCB Article or PCB Container stored for disposal after January 1, 1983, shall be removed from storage and disposed of as required by Subpart D within one year from the date when it was first placed into storage.

P. On July 2, 1983, Frank R. Krohn, Vice President of CWM, informed EPA that as of January 1, 1984 some PCBs might be in storage for more than one (1) year and, assuming that 40 C.F.R. §761.65(a) might apply to such storage, asked for a waiver of 40 C.F.R. §761.65(a).

Q. By letter of August 23, 1983, EPA notified CWM that waivers of 40 C.F.R. §761.65(a) were not available.

R. CWM has attempted to secure alternate disposal methods for its PCB inventory.

S. On January 1, 1984, some of the PCBs in storage at the Emelle facility had been in storage for more than one (1) year.

T. On March 23, 1984, EPA and CWM executed a proposed agreement to resolve the administrative enforcement action and submitted it for consideration by the EPA Judicial Officer.

U. The State moved to intervene in the administrative enforcement action.

V. On May 22, 1984, EPA denied CWM's applications for permits to utilize its incinerator ships for disposal of PCBs.

W. On May 23, 1984, EPA's Judicial Officer granted the motion of the State to intervene in the administrative enforcement action and referred the matter to an Administrative Law Judge for disposition.

X. On December 19, 1984, EPA filed an amended complaint alleging violations of the following regulations:

1) 40 C.F.R. §265.74; Availability Retention and Disposition of Records

2) 40 C.F.R. §265.314; Special Requirements on Liquid Wastes

3) 40 C.F.R. §265.90(c); Ground Water Monitoring Applicability

4) 40 C.F.R. §265.91(a)(2); Ground Water Monitoring System

5) 40 C.F.R. §265.15(d); General Inspection Requirements

Y. On December 19, 1984, CWM filed an answer to the amended complaint denying any violations and raising affirmative defenses.

Z. CWM has cooperated with EPA and the State in good faith in resolving the matters covered by this Agreement.

IV. DISPOSAL SCHEDULE

In order to dispose of the 2.8 million gallon inventory of liquid PCBs stored at the Emelle facility as of August 1, 1984 subject to this Agreement, CWM shall undertake the following actions:

A.1. The inventory of liquid PCBs shall be removed from the Emelle facility for shipment to EPA permitted incinerators no later than the following schedule:

Date	Cumulative Amount Shipped (gallons)
December 31, 1984	430,000
March 31, 1985	970,000
June 30, 1985	1,510,000
September 30, 1985	2,050,000
December 31, 1985	Entire Inventory of 2.8 Million Gallons Depleted

A.2. Notwithstanding the disposal schedule in Sub-paragraph IV.A.I. above, with respect to each PCB storage tank at the Emelle facility, the PCBs in each such tank shall not be removed for shipment unless the tank sampling and analysis pursuant to Appendix B below shows that no 2,3,7,8 tetrachlorodibenzo-p-dioxin (TCDD) is detected. For each tank in which 2,3,7,8 TCDD is not detected, the PCBs in that tank shall be removed for shipment promptly in accordance with the above schedule, provided, however, that each of the milestones contained in such schedule shall be extended for a period of time equal to the period from December 11, 1984 to the date negative analytical results required by Appendix B for respective quantities as shown in such schedule are received by CWM and EPA. For each tank in which 2,3,7,8 TCDD is detected, the PCBs in that tank shall remain in storage until EPA identifies in

writing to CWM a facility which has all necessary Federal and State authorizations for the disposal of such waste. When such a facility is identified, CWM shall make reasonable efforts to utilize such facility for disposal of the waste, but CWM shall not be obligated to violate any law by such utilization or be obligated to sustain unreasonable disposal costs. A schedule for such disposal shall be mutually agreed upon by EPA and CWM provided, however, that in the event of a dispute, any party may petition the Administrative Law Judge for an order resolving the dispute.

B. It is the intent of this Agreement that, except as set forth in Paragraph IV.C. below, each load of PCBs from the Emelle facility shall be incinerated within 90 days after receipt by the PCB incinerator. CWM agrees that, if the PCB incinerator is owned by CWM (or its parents, subsidiaries or affiliates), each load of PCBs from the Emelle facility shall be incinerated within 90 days after receipt. CWM will use its best efforts to require any contracting owners or operators to incinerate each load within 90 days after receipt and will monitor to determine whether this 90 day period has been met. CWM shall provide to EPA certificates of incineration for all PCBs disposed of in accordance with the terms of the disposal schedule contained in this paragraph.

C. With respect to any PCB material which may be stored in the approximately 150,000 gallon tank dedicated to the temporary storage of Emelle PCBs at ENSCO's El Dorado, Arkansas PCB incinerator facility, such PCBs shall be transferred to the

ENSCO PCB liquid feed system for incineration within 90 days of the receipt of the final shipment of PCBs from the Emelle facility.

D. The disposal schedule contained in paragraph IV.A above contemplates utilization of two currently permitted PCB incinerators. Circumstances beyond the control of CWM despite the exercise of all reasonable efforts may occur which impair or prevent the operation of these incinerators such that the disposal schedule of this Agreement is not achievable. Such circumstances shall result in the extension of the disposal schedule for necessary repairs to be made. Such extension shall be for a reasonable period of time as determined by EPA in consideration of the circumstances. In the event CWM fails to resume use of the incinerators within such time period, CWM will pursue all reasonably available disposal options taking into account impact on nationwide PCB storage or disposal capacity, market costs, and other factors bearing on the reasonableness of such alternatives.

V. RECEIPT OF PCBs

A. Except as provided in Paragraph V.B. below, as of the effective date of this Agreement, CWM shall not enter into new contracts for the receipt of shipments of bulk liquid or drummed liquid PCBs at the Emelle facility.

B. CWM may enter into new contracts for the receipt of bulk liquid or drummed liquid PCBs at the Emelle facility,

subject to 40 C.F.R. §761 and applicable requirements, if:

1. CWM is acting as a PCB disposal "broker";

"Broker" means any entity or person who:

a. disposes or arranges for the disposal of any PCBs at a facility owned by another person or entity not a parent, subsidiary or affiliate of CWM, or

b. stores or transports PCBs that have been removed from service prior to disposal at a facility owned by another person or entity not a parent, subsidiary or affiliate of CWM

or;

2. At the time such contract is entered CWM has the ability to dispose of such PCBs in compliance with disposal regulations and 40 CFR §761.65(a) and without commingling newly received PCBs with the existing PCBs subject to the disposal schedule in Section IV.A.; or

3. EPA has approved in writing of such receipt.

C. CWM may continue to enter into contracts for the disposal of capacitors and transformers containing PCBs and may honor existing contracts for the disposal of PCBs consistent with federal regulations.

D. By this Agreement, CWM is authorized to treat, store or dispose in accordance with 40 C.F.R. §761, PCBs specified in subparagraph 3 below, with the following modified requirements:

1. Groundwater Requirement

For the Emelle facility, EPA waives the requirement for landfill bottoms to be at least fifty (50) feet from

the historical high water table (40 C.F.R. § 761.75(b)(3)). The Regional Administrator of EPA Region IV may revoke the waiver of the fifty (50) foot separation requirement with respect to the construction of any future disposal cell, if there is evidence showing that the operation of such a cell will present an unreasonable risk of injury to health or the environment from PCBs, or, if the Regional Administrator finds that changes of law require revocation for future cells to be constructed after such findings.

2. New PCB Disposal Cells

New PCB disposal cells (PCB disposal cells only) will be designed in accordance with the plans and specifications as submitted to EPA on June 11, 1984, as amended on June 21, 1984, and as approved by EPA on July 12, 1984, together with such design requirements which may legally be required in the future. The design documents describe the type of liner to be used, the leachate collection and removal system, the cover system, and the run-on/run-off control measures. CWM also will provide three (3) feet of compacted chalk as a base on which to place the liner.

3. PCB Waste Types

The following categories of PCB waste may be disposed of in PCB disposal cells:

Solid PCBs (less than or greater than 500 ppm)

Incinerator ash

Drained and flushed transformers and small capacitors

Solidified liquid PCBs less than 500 ppm

Any other PCBs or PCB articles which under EPA regulations may be disposed of in PCB disposal cells.

4. Leachate Management

Leachate in lined cells will be measured, sampled, and pumped, as required, on a minimum 31 day basis. At no time shall the leachate in lined trenches exceed 30 cm above the rim of the leachate collection sump. Records will be maintained of the disposal of all leachate removed from the trenches. Records will be maintained on leachate depth measurements and said leachate samples will be monitored for quantity and detailed physical and chemical analysis of the characteristics of the leachate.

5. Amended Approval

The existing PCB approval under 40 C.F.R. §761.75 will be revised to be consistent with these requirements in coordination with the issuance of any RCRA permit(s) for the Emelle facility issued to the facility's operator.

6. Shallow Well Monitoring

EPA and the State will be consulted on all shallow (chalk monitoring wells) well locations and specifications to be installed pursuant to 40 C.F.R. §761.41. Prior to construction, CWM will consult with the State regarding well locations

and specifications and will obtain EPA approval in writing in accordance with EPA regulations.

7. EPA Findings

This waiver and authorization is based on findings of fact issued by the Regional Administrator of Region IV on November 6, 1984, pursuant to 40 C.F.R. §761.75. Such findings for this landfill approval are found in the docket for this case.

E. EPA has inspected the Emelle PCB storage facilities and at the time of such inspection found the Emelle PCB storage facilities to be in compliance with the applicable PCB storage requirements of 40 C.F.R. §761.65(b).

VI. INSPECTION AND ENVIRONMENTAL AUDIT PROGRAM

A.1 Within thirty (30) days of the effective date of this Agreement, CWM shall implement the Inspection Program for PCB liquid storage attached hereto as Appendix A.

2. CWM agrees to cooperate with EPA, upon proper notice but without warrant, during lawful inspections conducted to monitor compliance with this Agreement, provided, however, that during such inspections EPA shall not request or seek to obtain any environmental audit or internal compliance documents which are not required to be maintained by law or regulation and which are prepared pursuant to the environmental management program described and evaluated in Section VI of the Agreement.

3. If EPA requests the Audit report and documents prepared in connection with the Audit report by CWM's

Environmental Management Department after six months following the date of delivery of the Audit recommendations described in subsection B.3., CWM shall provide such documents. Any documents prepared by CWM in connection with the Audit report, excluding documents prepared by CWM's lawyers, shall be made available to EPA in accordance with the above. EPA agrees that such documents shall not be used to initiate a civil enforcement action or as direct evidence of a violation, but may be used as evidence of the existence of any violation which may remain uncorrected beyond six months after the delivery of the Audit report and as evidence of knowledge or duration of a violation provided; however, that CWM does not waive any legal rights it may have to object to the admissability of such evidence. It is intended that documents prepared for CWM pursuant to this Section VI and VII are not required by law or regulation.

B. ENVIRONMENTAL AUDIT

1. CWM shall propose to EPA's Office of Enforcement and Compliance Monitoring (OECM) through Barrett Benson within thirty (30) days of the effective date of this Agreement the scope of work for the services of a third party consultant, as well as its proposed consultant, who shall be expert in environmental auditing, environmental management systems and RCRA and TSCA waste management operations. This scope of work and consultant shall be agreed upon by EPA and CWM in writing, prior to the consultant commencing the performance

of the professional services as more fully set forth herein below. The consultant will be retained and the scope of work will be designed to review waste operation and environmental management systems at the Emelle facility and in the CWM corporate Environmental Management Department as they affect RCRA and TSCA compliance at the Emelle facility.

2. Within one hundred eighty (180) days after agreement upon the scope of work and the consultant, said third party consultant shall report in writing to CWM. This report shall:

a. Identify and describe the existing facility waste management operations and the Environmental Management Department environmental management systems, policies and prevailing practices as they affect RCRA and TSCA compliance at the Emelle facility.

b. Evaluate such operations and systems, practices and policies and identify and describe fully the perceived weaknesses in such operations and systems, practices and policies by comparing them, to the extent practicable, to:

i. their ability to promote compliance with applicable RCRA and TSCA requirements;

ii. the existing practices, programs and policies of other RCRA/TSCA waste management corporations operating within the continental United States;

iii. the history of Emelle operations in terms of its compliance programs, its compliance record

and its environmental management practices over the previous five years;

iv. the available literature and consultant's experience pertinent to regulatory compliance programs, practices and policies currently operative in the chemical and waste management industries in the continental United States.

The consultant shall apply its expertise and judgment to the foregoing data base utilizing such factors as the consultant believes to be relevant and appropriate (which factors shall be stated in the report).

c. Based on the evaluation required in paragraphs VI.2.a. and b. above, the consultant shall identify and describe fully with supporting rationales the perceived areas, if any, where CWM's waste management operations and environmental management systems, practices and policies may be improved as they affect Emelle regarding RCRA and TSCA compliance obligations, listing specific options for any improvements at Emelle in the following specific areas:

i. compliance and waste management operation, staffing, education and experience requirements.

ii. compliance management budget, lines of authority to CWM's corporate Environmental Management Department and relationship to the operating facility manager.

iii. personnel training for individual employee compliance obligations and emergency spill response.

iv. Operations and Maintenance (O&M) procedures for pollution prevention and waste management equipment.

v. preparation of self-monitoring reports required to be filed with the State and EPA.

vi. evaluation of waste management operations and pollution prevention equipment in terms of adequacy of design and compatibility with wastes being passed through said equipment.

vii. preparation of Quality Assurance (QA) and Quality Control (QC) programs for sampling and analysis and for environmental testing procedures, including Emelle laboratories and contract laboratories for Emelle.

viii. preparation and review of Incident Reports evaluating causes of pollution prevention and waste management equipment malfunctions, improper waste handling, and/or breakdowns, with specific recommendations for corrective steps and preventive O&M, along with reporting procedures for these recommendations to corporate headquarters.

3. CWM shall notify EPA upon receipt of such report and within ninety (90) days after receipt of a final report, CWM shall submit to EPA that portion of the report containing all of the recommendations of the consultant together with CWM's evaluation of each option it has selected for adoption and the reasons for rejecting other options. The report by CWM shall

set forth the specific actions the company shall take and a schedule for implementation of the recommendations adopted by CWM.

4. All documents submitted to EPA pursuant to Paragraph VI shall be kept confidential to the extent authorized by law.

VII. COMPLIANCE OFFICER PROGRAM

CWM shall not discontinue its compliance officer program at Emelle or modify the scope of its regulatory coverage or the reporting relationships of this CWM compliance official to the company's Environmental Management Department, without prior written notice to EPA detailing the modifications or the reasons for its discontinuance.

VIII. WASTE IMPACT/HYDROGEOLOGICAL STUDY

A.1. By means of one or more independent contractors agreed to by CWM and the Alabama Department of Environmental Management (ADEM) in consultation with EPA, CWM will perform the following chalk compatibility and permeability testing and analyses in accordance with ASTM-D 2434, with modifications to ASTM-D 2434 as approved by ADEM. Two intact chalk cores will be obtained by CWM with ADEM present from the unweathered zone at an elevation of approximately one hundred fifty (150) feet above mean sea level (msl). These core samples will be analyzed for permeability, mineralogy, specific gravity, total porosity,

and cation and anion exchange capacity before and after the test. Leachate samples will be obtained from PCB landfill cells utilized after November 19, 1980 and each sample characterized using EPA approved methodology for "priority pollutants" and metals. Leachate samples will also be obtained from each RCRA landfill cell utilized after November 19, 1980 and each sample characterized using EPA approved methodology for "priority pollutants" and metals. After analysis of the leachates, CWM will select one RCRA landfill leachate sample and one TSCA landfill leachate sample, or a composite of the RCRA leachate and a composite of the TSCA leachate (selection to be approved by ADEM in consultation with EPA) and test with the core samples as follows: Sufficient pore volumes of leachate sample will be passed through the core samples in order to provide adequate volume for analysis by EPA approved methodology for the same parameters found in the initial characterization.

2. Based on the above testing and analyses by the contractor, a report describing these test results will be produced by CWM and submitted to the State and OECM.

B.1. By means of one or more independent contractors agreed to by CWM and ADEM in consultation with EPA, CWM will perform a study of the chalk in the area of trenches 1, 3, 4, 5, 6, and 7. CWM, in agreement with ADEM, and in consultation with EPA, will develop a sampling and analytical program as described herein to characterize the study area. This program will consist

of a field investigation to determine the nature of the chalk, the depth of the zone of saturation, and groundwater sampling and analysis. The groundwater samples will be analyzed for priority pollutants and metals. Groundwater sampling and analysis will utilize five to ten groundwater monitoring wells installed for purposes of this study. Such wells will be located after consultation with ADEM and will be sampled upon completion and development, then quarterly for one year for a total of four samplings. CWM will not grout and seal these wells without the prior approval of ADEM in consultation with EPA.

2. Individual leachate samples from trenches 1, 3, 4, 5, 6 and 7 also will be individually analyzed by EPA approved methodology for "priority pollutants" and metals. Further, to the extent practicable based upon available records, CWM's contractor will describe the construction and historical operation of these trenches to include types of compounds and state of compounds.

3. The above study by the contractor and a report to be produced by CWM will be submitted to the State and OECM describing the results of the study regarding the integrity of the study area and effects, if any, of disposal on the area.

IX. RCRA COMPLIANCE REQUIREMENTS

With respect to interim status standards at the Emelle facility:

A. CWM shall record inspections in inspection logs as required by 40 C.F.R. §265.15(d), including but not

limited to, the daily recordation of accurate surface impoundment freeboard measurement levels recorded by rounding down to the next six inch level (e.g., between 2' and 2'6" is recorded as 2') from the top of the dike for each surface impoundment in operation.

B. CWM shall retain and furnish upon request, in accordance with 40 C.F.R. §265.74, all records required by 40 C.F.R. §265, and such records shall be made available at all reasonable times for inspections, by any officer, employee, or representative of EPA who is duly designated by the Administrator.

C. On October 11, 1984, EPA's Region IV and the State found CWM's groundwater assessment plan and analytical protocol acceptable to meet the requirements of 40 C.F.R. §265.93. CWM has begun and shall continue to implement said plan and protocol as follows:

1. All deep wells #1-8 shall be sampled and the samples analyzed for Appendix VIII constituents using the protocol proposed by the Environmental Testing and Certification Corporation and approved by EPA Region IV on October 11, 1984.

2. CWM will begin a workover (rescreening) of well #5 upon completion of the groundwater assessment and review of the analytical results by EPA and the State. Well #5, presently screened in the Lower Eutaw Formation will be recompleted by CWM in the sands of the Upper Eutaw Formation. Once the workover has been completed, water level measurements shall be made by CWM in wells #5-8 and the groundwater gradient shall be reevaluated for the Upper Eutaw Formation.

3. Upon completion of subparagraph 2 above, CWM shall present its gradient reevaluation to EPA Region IV and ADEM.

4. Depending on whether the gradient is determined to be due north or northeast, a new well will be constructed at one of the two locations which have been agreed to by EPA, ADEM, and CWM, and which have been physically marked by stakes at the Emelle facility.

5. Within fifteen days following the effective date of this Agreement, CWM shall produce and thereafter maintain a demonstration for a waiver of the groundwater monitoring requirements set out in 40 CFR §265.91(a)(2). The waiver demonstration shall document the low potential for migration of hazardous wastes or constituents from the facility via the uppermost aquifer to water supply wells or surface waters. The waiver demonstration must meet the requirements of 40 C.F.R. §265.90(c). The waiver demonstration shall also confirm the assumption that the time of travel for waste constituents to reach the Eutaw Formation or the nearest surface waters at the Emelle facility exceeds one thousand years.

6. Forty-five (45) days after the effective date of this Agreement, CWM shall provide to EPA and to ADEM a Proposed Plan and Protocol the purpose of which is to confirm the assumption set out in Subsection 5 above. The Proposed Plan and Protocol must include the following:

a. Locations and numbers of monitoring wells to be completed at varying depths within the chalk and intersecting

known fractures and sited approximately but not more than twenty (20) feet from the top of the trench wall (where the trench wall location is known) and approximately but not more than fifty (50) feet from the trench wall (where the trench wall exact location is unknown), adjacent to the waste management boundary as defined by EPA. The proposal shall specify well location, design, construction methods and completion methods. For any existing well to be used to satisfy the requirements set out above, complete construction data must be submitted, e.g., all construction materials, depth of screened zone, type of sealant in annulus and method of well development used. It is anticipated that the plan will provide for approximately twenty (20) cored wells around the outside perimeter of the waste management area, completed to a depth below the bottom of the adjacent trenches, with a minimum of one (1) well adjacent to the outside wall for each perimeter trench and a minimum of two (2) background wells. In addition, it is anticipated that fifteen (15) more wells will be installed in areas along the perimeter to be determined on the basis of the core examination. The wells to be installed as a part of the Waste Impact/Hydrogeological Study set forth in Paragraph VIII of this Agreement may be used as part of this program. To the extent that existing wells are determined to be appropriate for this monitoring purpose, they may be proposed for approval in lieu of new wells.

b. The results of the hydrogeologic study of the chalk outlined in Paragraph VIII of this Agreement must also be

used in the analysis done to verify the aforementioned assumption.

c. Detailed well sampling, analysis and chain of custody procedures including identification of contract laboratories to be used. Prior to any sampling of these wells by CWM, the company shall give to EPA and ADEM at least fourteen (14) days notice of such sampling. EPA and ADEM shall have a right of access for the sampling and independent analysis of all wells subject to this Plan and Protocol. CWM shall have the right to split all such samples. Sampling and analysis required in Subparagraph five above shall include water elevation, TOC, TOX, specific conductance, pH, lead, chromium, cadmium, mercury, arsenic, barium, selenium, phenols, toluene, trichloroethane, ethyl benzene, napthalene, methylene chloride, 1,2-dichloroethane, 1,1,1,-trichloroethane, trichloroethylene, tetrachloroethylene and carbon tetrachloride.

7. Following receipt of the above Proposed Plan and Protocol, EPA and ADEM shall review such proposal and shall, within thirty (30) days, present to CWM comments on and recommended modifications to such proposal.

8. If CWM agrees to the recommended modifications, CWM shall submit to EPA and ADEM a Proposed Final Plan and Protocol which incorporates such modifications, and shall begin to implement such plan within twenty (20) days.

9. If CWM disagrees with one or more of the recommended modifications, Walter Barber (CWM), Barrett Benson (EPA), and

Buddy Cox (ADEM) shall meet for a period not to exceed thirty (30) days to attempt to resolve such disagreements. Upon resolution, CWM shall modify its plan as appropriate to begin to implement it within twenty (20) days. In the event the disagreement cannot be resolved as set forth above, any party may petition the Administrative Law Judge for an order resolving the dispute.

10. Following completion of each analysis required by the above plan, CWM shall report all results to EPA and ADEM.

11. If the sampling results and analysis of the wells required by this Plan or other hydrogeologic data demonstrate that the assumption used as the basis of the waiver is no longer valid, EPA may take appropriate legal action.

D. CWM shall solidify bulk or noncontainerized liquid waste or waste containing free liquids in accordance with the requirements of 40 C.F.R. §265.314 as follows:

1. CWM shall construct and operate its waste solidification operations for new trenches in accordance with the criteria set forth in Subparagraph 2 below. CWM shall submit an amendment to its Part A application not later than December 7, 1984, and EPA will approve such amendment provided it meets the criteria in Subparagraph 2 below.

2. CWM shall construct such waste solidification operations to meet the following criteria:

a. Mixing areas will be provided with a liner of three (3) feet of recompacted chalk and will be built up with additional layers of chalk as the landfill is utilized.

b. CWM will maintain a minimum of two (2) feet of freeboard in mixing areas and will compact mixing area dikes to minimize erosion and to preserve structural integrity.

c. Mixing areas will be closed as landfills in conformance with 40 C.F.R. Subpart G and 40 C.F.R. §265.310.

3. CWM is authorized to utilize the above described waste solidification process until May 8, 1985. Nothing in this paragraph shall be construed to waive, impair, release or affect the respective rights, obligations, responsibilities or available remedies of the parties with regard to the liquid in landfills provisions of the Hazardous and Solid Waste Amendment of 1984 after May 8, 1985.

X. NEW SOLIDIFICATION TECHNOLOGY

CWM voluntarily agrees to complete the construction of a new mechanical out-of-ground liquid waste solidification technology by December 31, 1985 and agrees to test, startup, shakedown, and, if feasible, commence operation of the technology by no later than July 1, 1986. Nothing in this paragraph shall limit CWM's obligation to comply with applicable waste solidification requirements.

XI. STATUS REPORTS

A. CWM will provide EPA and the State with monthly reports identifying all bulk liquid PCBs stored at the Emelle facility which are intended for incineration. Each report shall contain: (1) the quantities of PCBs in storage at the facility; (2) the amounts of PCBs that were removed from storage during the month and their destination; (3) the amounts, date of receipt, and customer identity of additional shipments of PCBs received during the month; (4) a description of any inspections required by the Inspection Program described in pagragraph VI.A that took place during the previous month; and (5) for the initial report, the storage capacity of the facility. The reports for each month are due thirty (30) days after the end of the reporting period and must be certified as true and correct by knowledge and belief and signed by a responsible CWM official.

B. CWM shall provide EPA with quarterly reports of the amounts of bulk liquid PCBs which are intended for incineration and which are stored by CWM at all of its facilities, including CWM's subsidiaries and joint ventures but excluding the Emelle facility, transfer facilities, and recently acquired SCA facilities. These reports shall contain: (1) the amount of PCBs at the facility; (2) the location of the facility; (3) a listing of all additional shipments of PCBs received during the quarter; (4) the name of the customer of CWM supplying the PCBs during the quarter; (5) the date the additional PCBs were

received by CWM; (6) the amount of the additional PCBs received by CWM; and (7) for PCBs removed from the facility, the destination of each shipment. If CWM is acting as a PCB disposal "broker", CWM also shall provide the date when the PCBs are to be delivered to the disposer and the name of the disposer.

C. With respect to Waste Management, Inc.'s recently acquired SCA facilities (excluding transfer facilities), CWM shall provide EPA with semi-annual reports of the amounts of bulk liquid PCBs which are intended for incineration and which are stored by CWM at such facilities. These reports shall contain: (1) the amount of PCBs at the facility; (2) the location of the facility; (3) a listing of all additional shipments of PCBs received during the reporting period; (4) the name of the customer of CWM supplying the PCBs received during the period; (5) the date the additional PCBs were received by CWM; (6) the amount of the additional PCBs received by CWM; and (7) for PCBs removed from the facility, the destination of each shipment. If CWM is acting as a PCB disposal "broker," CWM also shall provide the date when the PCBs are to be delivered to the disposer and the name of the disposer.

D. With respect to all CWM facilities which receive transformers (exluding transfer facilities), CWM shall provide EPA semi-annual reports which shall contain: (1) the number of transformers received during the reporting period; (2) the number of transformers in storage at the end of the reporting period;

(3) the name of the customer supplying the transformer during the period; (4) the date the transformer was received; and (5) the destination of transformer removed from the facility.

E.1 All reports shall be sent to:

Barrett Benson
National Enforcement Investigations Center
Building 53, Box 25227
Denver, CO 80225

2. Reports required by paragraph XI.A involving only the Emelle facility also shall be sent to;

Joe E. Broadwater, Director
Alabama Department of Environmental Management

F. CWM may claim the information contained in the reports as confidential business information, and EPA and the State shall keep such information confidential to the extent authorized by law. Nothing herein shall be construed as limiting Alabama's belief that hazardous waste manifests should be considered public documents.

G. The reports for paragraphs XI.B, C, and D are due ninety (90) days after the end of the reporting period.

XII. PENALTIES

A. Within thirty (30) days of the effective date of this Agreement, the CWM shall remit to EPA a check in the amount of four hundred and fifty thousand dollars ($450,000) ($300,000 of which is in settlement of civil TSCA claims and $150,000 of which is in settlement of civil RCRA claims alleged in the

complaint) and to the State of Alabama Attorney General a check for one hundred fifty thousand dollars ($150,000).

B.1 In the event EPA believes that CWM has failed to:

a. Comply with a milestone contained in paragraph IV.A;

b. Comply with the requirements of paragraph IV.B;

c. Provide the reports described in the status report requirements of paragraph XI.A, B, C and D;

d. Perform the groundwater monitoring of paragraph IX.C; and

e. Comply with the liquid solidification requirements of paragraph IX.D.

EPA shall notify CWM of the alleged failure and shall provide CWM fifteen (15) days in which to remedy the alleged failure.

2. If CWM has failed to remedy the alleged failure within said fifteen (15) day period and it is not in compliance with this Agreement, CWM shall pay stipulated penalties from the date of violation as follows:

a. $500.00 per day for failure to comply with a milestone contained in paragraph IV until CWM has reduced the inventory to the milestone level;

b. $500.00 per day for failure to incinerate PCBs within ninety (90) days of receipt at a CWM incinerator until such incineration occurs.

c. $100.00 per day for failure to provide the status reports described in paragraph XI.A, B, C and D;

d. $5000.00 for failure to perform any of the following subparagraphs: subparagraphs IX.C. 1, 2, 3, 4, 5 and 6.

e. $100.00 per day for failure to comply with the liquid solidification requirements of paragraph IX.D.

3. Excluding paragraphs IX.A. and B., the above stipulated penalties are the exclusive penalties which EPA or the State may obtain from CWM for failure to comply with the requirements of this Agreement.

Nothing in this subparagraph shall be construed as limiting the ability of EPA or the State to compel specific enforcement of this Agreement or to seek injunctive relief to abate a condition which may present an imminent and substantial endangerment, or to take action under the Section 7 imminent hazard provision of TSCA as referred to in Paragraph XIV.

XIII. FORCE MAJEURE

If CWM fails to comply with any performance date or other requirement of this Agreement and such failure is caused by persons or events beyond the control of CWM, despite the exercise of all reasonable efforts, such failure shall not be considered a violation of this Agreement. When circumstances are occurring or have occurred which may delay the completion of any requirement of this Agreement, CWM shall notify EPA and the state in writing of the reason(s) for and duration or expected duration of such delay, the measures to be taken by CWM to prevent or minimize the delay and the timetable by which those

measures will be implemented. Such notice shall be sent no later than thirty (30) business days excluding Saturdays, Sundays, and holidays following the date CWM's Environmental Management Department becomes aware of the occurrence. CWM's Environmental Management Department will be responsible for monitoring the implementation of all aspects of CWM's performance under this Agreement. CWM's failure to notify EPA and the State of the fact of the delay shall constitute a waiver of claims or defenses under this provision. EPA will notify CWM no later than thirty (30) business days excluding Saturdays, Sundays, and holidays of its objection of such excuse. Failure of EPA to notify CWM of such objection shall constitute a waiver of the Agency's objection to such excuse. Any disputes which may arise under this provision shall be resolved in accordance Paragraph I.C. However, in such proceeding, the burden of proof of such Force Majeure defense shall lie with CWM.

XIV. COVENANT NOT TO SUE

A. In consideration of CWM's consent to this Agreement, EPA and the State hereby covenant not to initiate or maintain any civil claim or civil cause of action against CWM, its parent, subsidiaries, or present or former employees thereof, with respect to the Emelle facility based on facts or circumstances known by EPA or the State or their agents, employees, or contractors as of October 12, 1984. EPA also covenants not to initiate or maintain any civil claim or civil cause of action against CWM, its parent, subsidiaries, or present or former employees thereof, based on the storage or disposal of 2, 3, 7, 8 TCDD identified pursuant to subparagraph IV. A. 2. and Appendix B.

B. Nothing in this Agreement shall be construed to limit the ability of the United States or the State of Alabama to initiate or maintain any criminal proceeding or take any action against any person to abate, prevent, or order the abatement of any condition which now or hereafter may present an imminent and substantial endangerment or to expend and thereafter recover any moneys in responding to any release or threat of release of any hazardous substance, or bring an action under the Section 7 imminent hazard provisions of TSCA.

C. Except as noted above, this Agreement shall not operate to release, waive, limit or impair in any way any claims, rights, remedies or defenses of the United States, the State of Alabama or CWM against any person or entity not a party hereto, provided, however, that for any violations of 40 C.F.R. §761.65(a) by customers of CWM relating to the PCBs subject to the disposal schedule contained in Paragraph IV, this Agreement represents a full resolution of such violations.

XV. FINAL IMPLEMENTATION

Except for paragraphs V.D. and IV.A.2., CWM's obligations under this Agreement shall end when the PCBs from the tanks in which 2,3,7,8 TCDD is not detected pursuant to Subparagraph IV.A.2. and Appendix B have been incinerated at EPA approved PCB incinerators, provided, however, that with respect to the Environmental Audit required by paragraph VI.B., the Waste Impact/Hydrogeological Study required by paragraph VIII, and the New Solidification Technology required

by paragraph X, CWM's obligations to complete such audit, such study and such solidification technology will end respectively when the audit report has been submitted to EPA, the study report has been submitted to EPA and the State, and the solidification technology has been constructed and commenced operation in accordance with paragraph X.

XVI. NOTIFICATION

Wherever this Agreement requires notice or submission of reports, information, or documents to EPA, such information shall be submitted to the Barrett Benson, National Enforcement Investigations Center, Building 53, Box 25227, Denver, Colorado, 80225. Any notice and submission of reports, information or documents under paragraphs IV.D. (Disposal Schedule), VII. (Compliance Officer Program), XII.B.1 (Stipulated Penalties, and XIII. (Force Majeure) shall also be sent to Richard H. Mays, Senior Enforcement Counsel, Office of Enforcement and Compliance Monitoring, U.S.E.P.A., 401 M Street, S.W., Washington, D.C., 20460.

XVII. MODIFICATION

This Agreement may be modified upon written approval of all parties hereto.

XVIII. EFFECTIVE DATE OF AGREEMENT

This Agreement shall be considered binding and in full effect upon approval by the Administrative Law Judge to whom this matter has been assigned.

XIX. SINGLE AGREEMENT

All of the terms and conditions of this Agreement together comprise one agreement. Each of the terms and conditions is consideration for all of the other terms and conditions. In the event that this Agreement (or one or more of its terms and conditions) is held invalid or is not executed by all of the signatory parties in identical form or is not approved in such identical form by the Administrative Law Judge to whom it has been assigned, then the entire Agreement shall be null and void.

XX. CWM'S ENVIRONMENTAL COMMITMENT

CWM's implementation of the Waste Impact/Hydrogeological Study (paragraph VIII), Environmental Inspection and Audit (paragraph VI), Compliance Officer Program (paragraph VII), Status Reports (paragraph XI), and New Solidification Technology (paragraph X) represent a combined environmental monetary commitment by CWM in excess of $1.5 million.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RICHARD H. MAYS
Senior Enforcement Counsel
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency DATED: 12/18/84

A. E. CONROY II
Director Compliance Monitoring Staff
U.S. Environmental Protection Agency DATED: 12/19/84

GENE A. LUCERO
Director Office of Waste Programs Enforcement
U.S. Environmental Protection Agency DATED: 12/18/84

CHARLES JETER
Regional Administrator, Region IV
U.S. Environmental Protection Agency DATED: 12/19/84

DOUGLAS GREENHAUS
Attorney-Advisor
Office of Enforcement and Compliance Monitoring - Waste
U.S. Environmental Protection Agency DATED: 12/18/84

ARTHUR WILEY RAY
Attorney-Advisor
OECM-Special Litigation Division
U.S. Environmental Protection Agency DATED: 12/18/84

STATE OF ALABAMA

By: Charles A Graddick
CHARLES GRADDICK
Attorney General
State of Alabama

DATED: Dec 9, 1984

R Craig Knezisel
R. CRAIG KNEZISEL
Assistant Attorney General
State of Alabama

DATED: Dec 19, 1984

CHEMICAL WASTE MANAGEMENT

By: Roger C Zehntner
ROGER C. ZEHNTNER
Senior Counsel
Chemical Waste Management, Inc.

DATED: 12/19/84

J. Brian Molloy
J. BRIAN MOLLOY
Wald, Harkrader and Ross
Counsel for Chemical Waste
Management, Inc.

DATED: 12/19/84

APPROVED

B. Yost
ADMINISTRATIVE LAW JUDGE

DATED: 12/19/84

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

1/23 P1:14

In the Matter of:	)	
	)	
Robert Ross & Sons, Inc.	)	TSCA Appeal No. 82-4
	)	
Respondent	)	
	)	
Docket No. TSCA-V-C-008	)	
	)	

ORDER DENYING APPEAL; ELECTION NOT TO REVIEW SUA SPONTE

This order denies EPA Region V's motion to file its appeal out of time from a decision of an Administrative Law Judge (presiding officer) awarding attorney's fees to Robert Ross & Sons, Inc. under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504. Section 504 of the EAJA provides that a party which has prevailed in an adversary adjudication conducted by a Federal agency is entitled to an appropriate award of attorney's fees and other expenses unless the position of the agency as a party to the proceeding was substantially justified. 1/ Robert Ross prevailed in an administrative enforcement proceeding brought against it by EPA Region V for allegedly disposing of PCBs (polychlorinated biphenyls) in violation of Section 16(a)

1/ Also, the EAJA provides that an award of attorney's fees would be inappropriate if "special circumstances" would make such an award unjust. The "special circumstances" exemption was intended to give government agencies latitude in bringing so-called test cases, so that an agency's willingness to bring such a case would not be chilled by the prospect of having to pay attorney's fees should the agency fail to prevail. The "special circumstances" exemption is mentioned here in passing; it is not in issue in this case.

of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a), and the Agency's implementing regulations, 40 CFR §761.10(a) (1979). [2/]

Having prevailed, Robert Ross applied for attorney's fees and other expenses under the EAJA. The Chief Judicial Officer referred Ross' application for attorney's fees to the presiding officer for his consideration. [3/] After reviewing Region V's evidence against Robert Ross, the presiding officer concluded that EPA was not substantially justified in bringing an enforcement action under TSCA and he awarded Robert Ross attorney's fees and expenses in the amount of $71,243.17. [4/]

2/ Robert Ross prevailed on the administrative trial level before the presiding officer (Initial Decision, Docket No. TSCA-V-C-008, February 1, 1982) and, it prevailed in the administrative appeal before the Administrator (Final Decision, TSCA Appeal No. 82-4, April 4, 1984).

3/ Ross erroneously applied to the Chief Judicial Officer for attorney's fees and expenses, rather than to the hearing officer who presided over the underlying action which gave rise to the claim for fees and expenses. See 40 CFR §17.21 (1984).

4/ This was $7,391.28 less than requested by Ross in its application. The total award requested was $78,634.85. Ross requested $52,143.75 for attorney's fees; $24,237 for expert witness fees; and $2,254.10 in miscellaneous fees and expenses. (The $78,634.85 total includes fees incurred in connection with bringing the EAJA suit. Expenses incurred in bringing a successful EAJA suit are clearly recoverable. Cianciarelli v. Reagan, 729 F.2d 80 (D.C. Cir. 1984).) The reduction by the presiding officer was based on his finding that the fees and expenses claimed for expert witnesses exceeded the $24.09/hour rate ceiling allowed for expert witnesses pursuant to 40 CFR §17.07(b)(1) (1983). The $52,143.75 requested for attorney's fees was not reduced.

Although the presiding officer's decision was appealable, Region V failed to file an appeal within the 20-day time limit specified in the rules. See 40 CFR §§17.27 and 22.30 (1984). Having missed the deadline by almost two full weeks, the Region made a motion to file its appeal out of time based upon the claim that its Counsel was "out of the office and unavailable to respond" when the presiding officer's decision was received. Left totally unexplained was why, and for how long, Counsel was "out of the office." No other reason was provided by the Region for its failure to file a timely appeal. In a timely response to Region V's motion, Robert Ross objected to the Region's request to file its appeal out of time. Since the Region has provided no legitimate excuse for it's failure to file its administrative appeal on time, 5/ Region V's motion to file an appeal out of time is denied.

5/ Section 22.07(b) of the Agency's Consolidated Rules of Practice (40 CFR Part 22), which applies to EAJA proceedings (See 40 CFR §17.27), states:

> "The motion [for extension of time] shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for an extension of time was the result of excusable neglect. (Emphasis added.)

The bare assertion by the Region, without additional explanation, that Counsel was "out of the office and unavailable to respond" hardly constitutes excusable neglect. See In re Four Season Securities Law Litigation, 493 F.2d 1288, 1290 (10th Cir., 1973); Magham v. Young, 154 F.2d 13 (1940); Citizens Protective League, Inc. v. Clark, 178 F.2d 703 (D.C. App., 1949); U.S. ex rel Robinson v. Bar Association of District of Columbia, 190 F.2d 664 (D.C. App., 1951).

In cases where there is no appeal, the presiding officer's initial decision automatically becomes the Agency's final order by operation of law unless the Administrator, or his delegatee, elects to review the presiding officer's decision sua sponte. 40 CFR §22.27(c) (1984).[6/] If the decision of the presiding officer (together with all the findings of fact and conclusions of law contained therein) appears to be correct there is no need for sua sponte review. In this case, the presiding officer's decision awarding Robert Ross fees and expenses, and each and every finding of fact and conclusion of law contained therein, appear to be correct. Accordingly, there is no need for sua sponte review and the presiding officer's decision awarding fees and expenses therefore constitutes the Agency's final order by operation of 40 CFR §22.27(c) (1984).[7/]

6/ In this instance the Agency's Part 22 Rules of Practice are applicable, 40 CFR Part 22 (1984). See 40 CFR §17.27 (1984). Under those Rules the Administrator has 45 days from the date the initial decision is served on the parties to decide whether to elect sua sponte review. In this case by order of the Chief Judicial Officer dated October 25, 1984, the 45 day sua sponte period was stayed pending review of the Region's motion to file its appeal out of time. As discussed above the Region's motion to file out of time has been denied; stay of the 45 day sua sponte period is hereby lifted.

7/ An initial determination by an ALJ on an application for attorney's fees is referred to as a "recommended" (rather than an "initial") decision in the Agency's EAJA regulations, 40 CFR

(next page)

Region V is hereby directed to immediately disburse $71,243.17 to Robert Ross & Sons, Inc.

So ordered.

Ronald L. McCallum
Chief Judicial Officer

Dated: January 28, 1985.

(Footnote No. 7 cont'd)

§17.26 (1984). The Administrative Procedure Act (APA), 5 U.S.C. §557, uses "recommended decision" as a term of art, and requires an agency review procedure for recommended decisions which is somewhat different than that prescribed by the APA for initial decisions. A presiding officer's initial decision can become the agency's final decision automatically without further proceedings by the agency. By contrast, where the presiding officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. For reasons too lengthy to fully explicate within the context of this short opinion, it appears that the term "recommended decision" contained in the Agency's EAJA regulations was not intended in the APA sense. Accordingly, the Agency need not reconsider and redetermine all issues already properly considered and determined by the presiding officer; rather the decision of the presiding officer automatically becomes final agency action as previously explained.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Order Denying Appeal; Election Not to Review Sua Sponte in the Matter of Robert Ross & Sons, Inc., TSCA Appeal No. 82-4, has been mailed or hand delivered to the following:

Honorable Spencer T. Nissen
Administrative Law Judge
EPA Headquarters (A-110)
401 M St., S.W.
Washington, DC 20460

Michael J. Walker, Esq.
Eric P. Dunham, Esq.
Office of Regional Counsel
EPA Region V
230 South Dearborn St.
Chicago, IL 60604

Richard D. Panza, Esq.
Marsha L. Nicoloff, Esq.
Wickens, Herzer & Panza Co., L.P.A.
1144 West Erie Avenue
Lorain, OH 44052

Mary Langer
Regional Hearing Clerk
EPA Region V
230 South Dearborn St.
Chicago, IL 60604

Bessie L. Hammiel
Hearing Clerk
EPA -Mail Code A-110
Washington, DC 20460

Helen O. Barnhardt for

M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated: 1/28/85

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Electric Utilities Company,	)	Docket No. TSCA-V-C-011
	)	
Respondent	)	

1. Toxic Substances Control Act - PCBs - A proceeding to assess civil penalties for violation of the PCB Ban Rule is not automatically stayed by Respondent's filing of a petition in bankruptcy, but falls within the exclusion provided by 11 U.S.C. 362(b)(4) and (b)(5).
2. Toxic Substances Control Act - PCBs - A proceeding to assess a civil penalty is not mooted by the filing of a Chapter XI bankruptcy petition by a corporate respondent, first, because the assessment of a civil penalty reduces the claim to a fixed amount, second, because the EPA is entitled to have the merits of its case resolved, and third, because the penalty may be relevant in assessing future penalties against the reorganized respondent.
3. Toxic Substances Control Act - PCBs - Penalty of $55,000 proposed in the complaint assessed against Respondent who has defaulted notwithstanding Respondent's intervening bankruptcy.

Appearances:

Eric Cohen, Esquire, United States Environmental Protection Agency, Region V, Chicago, IL, for Complainant.

Mr. Richard L. Hauser, President, Electric Utilities Co., 309 Anderson Avenue, Farmville, N.C., Respondent.

ORDER ON DEFAULT

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a) for the assessment of civil penalties for violations of the EPA's regulations governing the manufacturing, processing, distribution and use of polychlorinated biphenyls ("PCB Ban Rule"), 40 CFR Part 761. 1/ The proceeding was instituted by a complaint issued by the EPA, Region V, charging Respondent Electric Utilities Company with the improper storage and disposal of PCBs, and the failure to properly mark its PCBs. A penalty of $55,000 was requested. Respondent answered, admitting that some PCBs had not been stored in full requirements with the PCB Ban Rule, but asserting that in charging Respondent with the improper storage and disposal of other PCBs, the EPA was relying on samples which had been improperly collected and were contaminated. Respondent also denied the marking violation. Finally, Respondent contended that the proposed penalty was unreasonably large and that payment would adversely affect its ability to continue in business. The matter is before me on the question of whether to issue a default order as authorized by 40 CFR 22.17.

1/ TSCA, section 16(a) of the Act, provides as follows:

> (a) Civil. (1) Any person who violated a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.
>
> Section 15 of the Act, 15 U.S.C. 2614, provides in pertinent part that "It shall be unlawful for any person to ____ (1) fail or refuse to comply with . . . (c) any rule promulgated or order issued under section 6 . . . ." The PCB Ban Rule was issued under section 6(e) of the Act, 15 U.S.C. 2605(e).

Respondent requested a hearing in its answer and the case was assigned to me by order of the Chief Administrative Law Judge on April 7, 1983. On April 15, 1983, I wrote the parties directing the filing of a prehearing exchange by June 6, 1983, unless the case were settled. At the request of both parties the time to make the prehearing exchange was extended first to September 6, 1983, and then to December 6, 1983, to allow settlement discussions to continue. On October 25, 1983, the EPA was notified that Respondent had filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act. By my letter of May 4, 1984, the parties were advised that I did not consider this matter automatically stayed by the bankruptcy proceeding. Several extensions, however, were thereafter granted to permit settlement negotiations to continue. These negotiations have been unsuccessful and have apparently reached a stage where it would serve no purpose to continue them. 2/ Complainant submitted its prehearing exchange on November 6, 1984. Respondent has made it plain that it has no intention of submitting its prehearing exchange although Respondent has been continually warned that failure to do so would subject it to a default order.

As to whether this proceeding is subject to the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. 362, it is clear that since this is a proceeding to assess a civil penalty for failure to comply with the environmental laws, it is not, but is excluded from the stay provisions by 11 U.S.C. 362(b)(4) and (b)(5). See Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d. 267 (3d Cir. 1984) (state proceeding to

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2/ See Complainant's letter of January 14, 1985

compel debtor to correct environmental damage not automatically stayed); NLRB v. Evan's Publishing Co., 639 F.2d 291 (5th Cir. 1981) (Unfair labor practice proceeding before NLRB against debtor for reinstatement of employees and for back pay not automatically stayed); In re. Tauscher, 7 Bankr. 918 (E.D. Wisc. 1981) (Proceeding to assess civil penalties against debtor for violation of Fair Labor Standards Acts not automatically stayed). In Kovacs v. Ohio, 717 F.2d 984, (6th Cir. 1983), aff'd, 53 U.S.L.W. 4068 (U.S. January 9, 1985), the court held that enforcement of what was in essence a money judgment for expenses in cleaning up a site was stayed but recognized that a proceeding to assess a penalty would not have been stayed. The court stated, 717 F.2d at 988,

> If Ohio had elected to have a money penalty assessed against Kovacs for the environmental damage he caused, we would have faced a different question. Proceedings to assess such a penalty would not have been subject to the automatic stay of § 362, although enforcement of the assessment would have been stayed.

This proceeding not being subject to an automatic stay, it remains to be considered whether there are any other reasons why it should not go forward.

It could, of course, be argued that the bankruptcy proceeding has for all practical purposes mooted these proceedings, in view of Respondent's statement in its letter of December 11, 1984, that Respondent "has very little money left" which is going to be distributed under the supervision of the plan approved by the bankruptcy court. There are several reasons, however, why this proceeding is not moot.

First, the assessment of a civil penalty does reduce the penalty to a fixed amount against Respondent for purposes of determining its treatment in the plan of reorganization. 3/

Second, the EPA is entitled to a resolution of the merits of its charges, see NLRB v. Autotronics, Inc., 434 F.2d 651 (8th Cir. 1979). This has special significance here since the bankruptcy is a Chapter XI proceeding which contemplates Respondent's continued operation in some reorganized form.

Finally, this proceeding may also have relevancy in the event that the reorganized company is cited again for a violation of TSCA, since in the assessment of a civil penalty account must be taken of a respondent's prior history of violations. 4/

Respondent's attorney in a letter of November 5, 1984, states that the bankruptcy judge has forbid Respondent to incur any more legal expense in defending this and other related environmental actions beyond November 1, 1984. Presumably that action lies within the discretion of the bankruptcy court. Since this proceeding has not been stayed, it is to be hoped that Respondent also made clear to the bankruptcy court the consequence of abandoning its defense, namely, subjecting Respondent to a default judgment.

3/ The EPA's claim was apparently listed on Respondent's schedule as a disputed, contingent or unliquidated claim. See letter of N. Hunter Wyche, Jr. to EPA Region V dated October 25, 1983. This proceeding, of course, reduces the claim for a civil penalty to a sum certain. Since the claim is against a corporation and not an individual debtor, it would appear that it is not a claim which is excepted from discharge under 11 U.S.C. 523. How the claim is entitled to be treated under a Chapter XI plan is not decided here.

4/ TSCA, section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B).

Accordingly, Respondent is found in default for failure to make the prehearing exchange directed in my letter of April 15, 1983. Respondent's default constitutes for purpose of this proceeding an admission of all facts alleged in the complaint and a waiver of Respondent's right to a hearing. The findings of fact set forth below, however, are based not only on the complaint but on admissions in Respondent's answer and on information contained in Complainant's prehearing exchange, which is incorprated into the record in this proceeding.

Findings of Fact

1. On or about October 22, 1979, Respondent was storing for disposal drums and a tank truck containing PCBs.
2. Said drums and tank truck were stored in an area which did not have adequate roof and walls to prevent rain water from reaching them as required by 40 CFR 761.65(b)(1)(i) (formerly 761.42(b)(1)(ii)), and which did not have adequate floor and curbing as required by 40 CFR 765 (b)(1)(ii) (formerly 761.42(b)(1)(ii)).
3. On or about October 22, 1979, Respondent maintained a sewage collection system containing sludge with an excess of 800 parts per million PCBs and water with 56 parts per million PCBs.
4. Said PCBs in Respondent's sewage collection system have been disposed of in a manner not authorized by 40 CFR 761.60 (formerly 761.10).
5. On or about October 22, 1979, the PCB drums and tank truck referred to in Finding No. 1 above, were not marked as required by 40 CFR 761.40 (formerly 761.20).

Conclusions of Law

1. Respondent has improperly stored PCBs for disposal in violation of 40 CFR 761.65, and TSCA, section 15, 15 U.S.C. 2614.
2. Respondent has improperly disposed of PCBs in violation of 40 CFR 761.60 and TSCA, section 15.
3. Respondent has improperly marked PCB containers in violation of 40 CFR 761.40, and TSCA, section 15.

The Penalty

Pursuant to 40 CFR 22.17(a), the penalty proposed in the complaint of $55,000 is the penalty assessed. It is recognized that TSCA does specify that in determining the appropriate penalty, account must be taken of Respondent's ability to pay. 5/ Respondent by its default, however, has waived its right to contest the penalty on this ground. 6/ Further, insofar as the penalty is dischargeable by virtue of its being included in a re-organization plan, a point which is not decided here, the question of Respondent's ability to pay would seem to be merged into the question before the Bankruptcy Court of how the claim is to be treated under the plan.

5/ TSCA, section 16(a)(2)(B).

6/ See 40 CFR 22.17(a).

ORDER 6/

Pursuant to section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of $55,000 is hereby assessed against Respondent, Electric Utilities Co., for violations of the Act found herein.

Payment of the full amount of the penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or a certified check payable to the United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Feb 13, 1985

6/ Pursuant to 40 CFR 22.17(b), this order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 CFR 22.30, or the Administrator elects review this decision on his own motion, this decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

'84 MAR 6 P3:46

In the Matter of:	)	
	)	
N.O.C., Inc., t/a Noble Oil Company	)	TSCA Appeal No. 84-2
	)	
	)	
Respondent	)	
	)	

FINAL DECISION

Respondent, Noble Oil Company, [1] appeals from a decision of Administrative Law Judge Spencer T. Nissen (presiding officer) in this civil penalty proceeding brought by Complainant, Director, Enforcement Division, Region II, United States Environmental Protection Agency, under the authority of §16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a). [2] In that decision, the presiding officer determined that Respondent failed to mark a PCB container, failed to

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1/ When the complaint was issued, Respondent operated under the name of Noble Automotive Chemical & Oil Company.

2/ TSCA §16(a)(1) provides as follows:

> "Civil. (1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15."

TSCA §15 provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . . (B) any requirement prescribed by § . . . 6, or (C) any rule promulgated under § . . . 6."

have a Spill Prevention Control and Countermeasure (SPCC) Plan, and failed to maintain records, all in violation of the PCB regulations, 40 CFR Part 761 (1980). The presiding officer recommended that the civil penalty of $40,000 requested by Complainant be assessed against Respondent. After the initial decision was issued, Respondent moved to reopen the proceeding so that it could introduce additional scientific evidence or, in the alternative, to introduce evidence concerning the civil penalty. See Motion to Reopen Hearing dated January 19, 1983. The presiding officer denied the motion and the instant appeal was filed.[3/] See Decision Denying Motion to Reopen the Hearing dated May 16, 1983 and Respondent's Brief and Appendix on Appeal to the Judicial Officer dated July 20, 1983.

On appeal Respondent argues that the presiding officer erred because he determined that the PCB regulations were enforceable;[4/] because he determined that Complainant's failure to a take representative sample was not fatal to its case;[5/] because he de-

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3/ Complainant filed a brief in opposition to the appeal. See "Complainant-Appellee's Brief to the Judicial Officer" dated September 1, 1983.

4/ Based on its argument that the PCB regulations were unenforceable, Respondent brought an action in district court to enjoin the presiding officer from issuing a decision. See Noble Automotive Chemical & Oil Co. v. EPA, ___ F. Supp. ___ [19 ERC 1044] (D.N.J. 1982). The court rejected Respondent's argument. Noble Automotive at 1046-1047.

5/ The conclusion reached by the presiding officer, namely, that it is not always necessary to take a representative sample to prove a violation of the PCB regulations, was also reached in two recently issued final decisions. See In re Electric Service Company, TSCA Appeal No. 82-2, Final Decision dated January 7, 1985; and In the Matter of Robert Ross & Sons, Inc., TSCA Appeal No. 82-4, Final Decision dated April 4, 1984.

termined that Complainant established the chain of custody of the sample; and because he determined that Complainant followed appropriate analytical techniques in analyzing the sample to determine its PCB concentration. Respondent also argues that the presiding officer's denial of its motion to reopen the hearing was an abuse of discretion.[6/] All the arguments raised by Respondent on appeal were raised below and were thoroughly considered and rejected by the presiding officer. I do not agree that the presiding officer erred in his determinations or that he abused his discretion in denying the motion to reopen. The initial decision is, therefore, affirmed. All findings of fact, conclusions of law and reasons therefor in the initial decision are adopted and incorporated by reference in this final decision.[7/]

6/ The presiding officer concluded that Respondent's evidence was "largely cumulative" and, therefore, "cannot support a motion to reopen the record." Decision Denying Motion at 26. See 40 CFR §22.28(a), Motion to Reopen Hearing. I would also emphasize that Respondent failed to "show good cause why such evidence was not adduced at the hearing" as required by the regulations governing this proceeding. See 40 CFR §22.28(a) and discussion in the Decision Denying Motion at 21-22.

7/ That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United States v. Orr, 474 F.2d 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United States, 323 F. Supp. 1290 (W.D.N.C. 1971); In re Electric Service Company, TSCA Appeal No. 82-4, Final Decision (January 7, 1985); In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 42 (Op. of the Judicial Officer, April 30, 1981).

Final Order

The initial decision of the presiding officer is adopted as the Agency's final decision. A civil penalty of $15,000 is assessed for failure to mark a PCB container, $15,000 for failure to have a Spill Prevention Control and Countermeasure (SPCC) Plan and $10,000 for failure to maintain records of each batch of PCBs added to the container. 40 CFR §§761.20(a)(1), 761.42(c)(7)(ii) and 761.42(c)(8). The total civil penalty assessed is therefore $40,000.

Payment of the full amount of the civil penalty ($40,000) shall be made within sixty (60) days of service of this final order, unless otherwise agreed to by the parties. A cashier's check or certified check payable to the Treasurer, United States of America, for the full amount, shall be forwarded to the Regional Hearing Clerk.

So ordered.

Paulette Wilson for

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: FEB 28 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision In the Matter of Noble Oil Company, TSCA Appeal No. 84-2, were sent to the following individuals in the manner indicated:

By 1st Class Mail, Postage Prepaid:

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Washington, DC 20460

Eileen D. Barnhardt for

M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated: FEB 28 1985

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

85 APR 8 P3:13

In the Matter of:	)	
	)	
Rocky Mountain Prestress, Inc., and AERR Co., Inc.,	)	TSCA Appeal No. 84-3
	)	
Respondents	)	
	)	
TSCA-PCB-83-017	)	
	)	

FINAL DECISION

Complainant, Director of the Enforcement Division, Region VIII, United States Environmental Protection Agency (EPA), issued a complaint against respondents, Rocky Mountain Prestress, Inc. (RMP) and AERR Co., Inc., under the authority of §16(a) of the Toxic Substances Control Act (TSCA) 15 U.S.C. §2615(a) [1/] for an alleged violation of the regulations implementing Section 6(e) of TSCA. [2/] Respondents denied the violation and a hearing

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1/ TSCA §16(a)(1) provides as follows:

> "Civil. (1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15."

TSCA §15 provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . . (B) any requirement prescribed by § . . . 6, or (C) any rule promulgated under § . . . 6."

2/ Section 6(e) of TSCA required the Administrator to promulgate rules regulating the manufacturing, processing, use, disposal and distribution in commerce of polychlorinated biphenyls (PCBs). Those regulations are in 40 CFR Part 761 (1983).

was held before Administrative Law Judge Thomas B. Yost (presiding officer). The presiding officer issued an initial decision in which he determined that respondents had violated the regulations and he assessed civil penalties against each. Both respondents appealed the initial decision, although on different grounds. The initial decision is affirmed, [3/] and all findings of fact, conclusions of law and reasons therefor in the initial decision are adopted and incorporated by reference in this final decision. [4/] Since the parties have not raised any new matters on appeal that are material to the outcome, the discussion below is provided only to emphasize certain significant aspects of the initial decision.

Background

Respondent Rocky Mountain Prestress (RMP) is a manufacturer of precast prestress concrete products. Unpaved roads on the plant grounds connect storage, fabrication and administrative areas. A state permit regulating the plant's air emissions requires that RMP oil its roads twice a year to control dust. To comply with this requirement, RMP hired respondent AERR to oil

---

3/ The Chief Judicial Officer, as the Administrator's delegatee, has the authority to issue final decisions in administrative civil penalty cases brought under TSCA. 40 CFR Part 22 (1983).

4/ That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United States v. Orr, 474 F.2d 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United States, 323 F. Supp. 1290 (W.D.N.C. 1971); In re Electric Service Company, TSCA Appeal No. 82-4, Final Decision (January 7, 1985); In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 42 (Op. of the Judicial Officer, April 30, 1981).

its roads on May 28, 1983.

In early May, an EPA inspector conducted a routine inspection of RMP's facility, checking for the presence of electrical equipment containing PCBs. No such equipment was found. However, during the inspection an RMP employee mentioned to the EPA inspector that RMP was going to have its roads oiled soon by AERR so that it would be in compliance with its state permit. On May 26, shortly before RMP's roads were to be oiled, an EPA inspector again visited RMP. This time the inspector took soil samples which were subsequently shown to have low concentrations of PCBs (5 ppm). On June 2, after the roads were oiled, more soil samples were taken. Tests of the soil sampled showed PCBs in concentrations of 37 ppm. Because "[t]he use of waste oil that contains any detectable concentration of PCB as a . . . dust control agent is prohibited," [5/] complainant charged respondents with violating the PCB regulations.

Discussion

On appeal, respondent AERR argues that the presiding officer erred because the record does not support his finding that the oil used by AERR contained PCBs; because he failed to grant AERR's motion for a mistrial; and because he admitted evidence that AERR had previously oiled RMP's property. [6/]

5/ 40 CFR §761.20(d).

6/ In its brief on appeal, respondent lists five issues as a basis for reversing the initial decision: (1) whether the record supports the "opinion" of Judge Yost that AERR Co.'s oil contained detectable limits of PCBs; (2) whether the record

(next page)

Therefore, respondent AERR requests that the Administrator review the presiding officer's opinion, or, in the alternative, provide "a new hearing before a different hearing officer. . . ." Brief on Appeal at 11.

The sole issue raised on appeal by respondent RMP is the scope of the term "use" in the PCB regulations. RMP argues that the applicator of the PCB contaminated oil, in this case AERR, is the "user" of PCBs; RMP argues that it is not a "user" within the meaning of the regulations. RMP concludes, therefore, that it has not violated the regulations. I briefly discuss the arguments raised by AERR and RMP below.

The first argument made by AERR is that complainant failed to prove that AERR oil contained PCBs and, therefore, the pre-

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(Footnote No. 6 cont'd)

supports the findings that the PCBs found at the RMP facility resulted from a single application by AERR Co. on May 28, 1983; (3) whether Judge Yost committed reversible error in denying AERR Co.'s motion for mistrial; (4) whether Judge Yost committed reversible error in his ruling on evidentiary issues; and (5) whether the record supports the findings and statements of Judge Yost that AERR Co. had not cooperated in the investigation. Brief on Appeal at 2. However, in the body of the brief, respondent only separated the issues into three categories. To avoid confusion, I have chosen to discuss the issues following the three category format respondent used in the body of its brief. As for the fifth issue, whether the record supports Judge Yost's statements that respondent did not cooperate in the investigation, respondent does not provide any support for this argument; indeed, in his initial decision, the presiding officer did not state that respondent did not cooperate in the investigation, but only that respondent had not participated in the cleanup of the property. See Initial Decision at 11. In any event, respondent in no way demonstrates how such a finding, even assuming the presiding officer had actually made such a finding, prejudiced it. Therefore, no further discussion of this issue is needed.

siding officer erred in finding that AERR violated the PCB regulations. I do not agree. The evidence in the record establishes that different concentrations of PCBs were found on respondent RMP's roads before and after oiling, i.e., 5 ppm before and 37 ppm after. Respondent AERR does not dispute these test results, but argues that because different PCBs or "Arochlors" [7/] were found on the two occasions, AERR's oil did not contain PCBs. This argument is not persuasive and was not supported by anything in the record. Mr. Topolski, an expert witness called by respondent RMP, explained that the higher concentration Arochlor could "mask" or hide the other Arochlors at lower concentrations. T.198. Mr. Topolski also mentioned other possible explanations, such as degradation or incomplete chemical reaction, which would account for this difference. T.195,204. Although the test results may be only "circumstantial" evidence, they are certainly sufficient to support the presiding officer's conclusion that AERR's oil contained PCBs, considering that the road contained minimal concentrations of PCBs before oiling and that the tests revealed a significant increase in the concentration of PCBs after oiling. [8/] This evidence is unrefuted.

7/ "Arochlor" is a Monsanto tradename for its PCB products. The Arochlors were numbered, i.e., 1242, 1254, 1260, to indicate the percentage of chlorine in the product. Monsanto developed various standards based on this classification against which unknown PCBs could be compared to identify the concentration of PCBs. The tests of the samples taken on May 26 indicated the presence of Arochlors 1242, 1254 and 1260; the test of the sample taken on June 2 indicated Arochlor 1254.

8/ See In re National Railroad Passenger Corporation (AMTRAK), TSCA Appeal No. 82-1, 101 ALC 168 (1982) (circumstantial evidence may be used to prove concentration of PCBs).

Next, respondent AERR argues that the presiding officer erred because he did not grant its motion for mistrial. During the course of the hearing, J. William Geise, witness for complainant, testified that he was aware that respondent AERR was the subject of a criminal investigation by complainant; he did not know the status of the investigation. T.104-107. Based on this testimony, respondent moved for a mistrial. T.107. The presiding officer denied the motion. T.109. The presiding officer assured respondent that he would not consider the information, and, contrary to respondent's contentions, there is no indication in the initial decision that he did. Moreover, the burden is on respondent to show that the information had an improper influence on the presiding officer, for "[t]he presiding officer is not a lay juror whose ability to be impartial is irreparably damaged from having given previous consideration to highly prejudicial material. The presiding officer is an experienced Administrative Law Judge and, until shown otherwise, is presumptively able to disregard prejudicial material . . . ." In the Matter of Bell & Howell Company, TSCA-V-033, 034, 035, Final Decision at 10-11, n.6, dated December 2, 1983 (regarding motion requesting disqualification of presiding officer). Respondent has not sustained its burden here.

Finally, respondent AERR argues that it was error for the presiding officer to admit evidence establishing that AERR had oiled Respondent RMP's roads on other occasions before the oiling in issue took place. Respondent AERR contends that this evidence "prejudiced the finder of fact with the unspoken impli-

cation that 'even if we cannot prove they [AERR] did it this time, they (AERR) must have done it in the past.'" Again, I find respondent's argument without merit. The rules governing this proceeding give the presiding officer broad discretion in admitting evidence. "The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, . . ." 40 CFR §22.22. It was clearly within the presiding officer's discretion to admit the evidence in question. It was introduced for the limited purposes of establishing the relationship between the respondents and to show how much oil had been applied during other oilings (T.151,161); it was not the basis of any violation alleged in the complaint nor does the fact that respondent AERR oiled RMP's roads on other occasions appear to have been given any weight in determining that respondent AERR committed the one violation with which it was charged. On the contrary, the presiding officer stated "that the record reveals that RMP has used AERR Co. in the past as a supplier of dust suppression oil without any apparent repercussions." Initial Decision at 10. Respondent has shown no error.

Concerning respondent RMP's argument "that it has <u>not</u> made any 'use' of PCB-contaminated waste oil within the meaning of the subject regulation," I do not find that argument persuasive. The PCB regulations apply "to all persons who manufacture, process, distribute in commerce, use or dispose of PCBs or PCB Items." 40 CFR §761.1(b). The particular section in the regulation that RMP violated states that "[t]he use of waste

oil that contains any detectable concentration of PCB as a sealant, coating or dust control agent is prohibited. Prohibited uses include but are not limited to road oiling, general dust control. . . ." 40 CFR §761.20(d). The term "use" is not defined in the statute nor in the regulations. RMP argues that "the term 'use' as employed in the PCB Ban Rule was intended to refer and apply only to those persons or entities who directly 'employ' or 'make use of' contaminated waste oil through direct application to a prohibited use, not to innocent third parties. . . ." Although RMP was not required to pay any monetary penalty, [9/] it is concerned that "its record should not be unfairly tarnished with an official violation due to the broad and loose construction of 'use' employed in the Initial Decision." RMP Reply Brief at 3.

The "broad" and "loose" construction of use adopted in the initial decision is supported by the definition of use, in a non-technical sense, found in Black's Law Dictionary: "The 'use' of a thing means that one is to enjoy, hold, occupy, or have some manner of benefit thereof." Black's Law Dictionary (5th Ed., 1979) at 1382. This broad interpretation of the term is consistent with the remedial purposes of the regulations. See In re Briggs & Stratton Corporation, 101 ALC 116 (TSCA Appeal No. 81-1, decided February 4, 1981). There can be no doubt that

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9/ In the initial decision, the presiding officer assessed a penalty of $5,000 against RMP; however, the penalty was reduced to zero because RMP cleaned up its property. See Initial Decision at 20 and Order dated November 9, 1984, reducing the penalty to zero.

respondent RMP was "using" the contaminated oil to control dust. The fact that the use was inadvertant is of no consequence. "Proof that a respondent knowing or willfully violated a regulation is not an element of the offense for purposes of assessing civil penalties." Amtrak at 170. Therefore, the presiding officer committed no error.

FINAL ORDER

A civil penalty of $8,990.00 is assessed against respondent AERR Co., Inc. for using waste oil which contained detectable concentrations of PCBs to oil roads. 40 CFR §761.20(d). Payment of the civil penalty ($8,990.00) shall be made within sixty (60) days of service of this final order, unless otherwise agreed to by the parties. A cashier's check or certified check payable to the Treasurer, United States of America, for the full amount, shall be forwarded to the Regional Hearing Clerk.

A civil penalty of $5,000.00 is assessed against respondent Rocky Mountain Prestress, Inc. for using waste oil which contained detectable amounts of PCBs to control dust. 40 CFR §761.20(d). However, pursuant to the presiding officer's order of November 9, 1984, the penalty is reduced to zero.

So ordered.

Paulette Wolfson for

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: APR - 8 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision In the Matter of Rocky Mountain Prestress, Inc., and AERR Co., Inc., TSCA Appeal No. 84-3, were sent to the following individuals in the manner indicated:

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Honorable Thomas B. Yost
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M. Gail Wingo

M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated: APR - 8 1985

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
Cotter Corporation	)	TSCA Appeal No. 84-1
(Schwartzwalder Uranium Mine),	)	
	)	
Respondent	)	
	)	
Docket No. TSCA 81-004	)	
	)	

85 APR 17 A8:59

FINAL DECISION

Complainant, Director of the Enforcement Division, Region VIII, United States Environmental Protection Agency (EPA), issued a complaint against respondent, Cotter Corporation (Schwartzwalder Uranium Mine), under the authority of §16(a) of the Toxic Substances Control Act (TSCA) 15 U.S.C. §2615(a) [1/] for alleged violations of the regulations imple-

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1/ TSCA §16(a)(1) provides as follows:

> "Civil. (1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15."

TSCA §15 provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . . (B) any requirement prescribed by § . . . 6, or (C) any rule promulgated under § . . . 6."

menting Section 6(e) of TSCA.[2/] A hearing was held before Chief Administrative Law Judge Edward B. Finch (presiding officer). The presiding officer issued an initial decision in which he found eight violations of the regulations. The total amount of the civil penalty assessed was $58,650.00.[3/] Respondent appeals the civil penalties assessed for three of the violations.

Respondent argues that the three penalties in question, i.e., those assessed for the two disposal violations ($17,000 each) and the recordkeeping violation ($10,000), were not assessed in accordance with the Agency's Civil Penalty Guidelines, 45 Fed. Reg. 59770 (1980), and should be reduced in accordance with the guidelines.[4/] Complainant, in its response to respondent's appeal, contends (1) that the guidelines are just that, guidelines,

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2/ Section 6(e) of TSCA directs the Administrator to promulgate rules regulating the manufacturing, processing, use, disposal and distribution in commerce of polychlorinated biphenyls (PCBs). Those regulations are in 40 CFR Part 761 (1980).

3/ The original complaint charged the respondent with fourteen (14) violations; two were dismissed by stipulation; four were dismissed by the presiding officer. The total penalty proposed by complainant in the complaint was $106,950.00; this was reduced to $69,000.00 because of the dismissed violations. The presiding officer reduced the penalty by an additional 15% to $58,650.00 because the record did not support complainant's adjustment upward of the penalty based on respondent's "bad attitude." See Initial Decision at 44.

4/ Under the PCB Penalty Guidelines, penalties are determined in two stages. First, the "gravity" of the violation is determined and then adjustments are made to the "gravity" based penalty to reflect the other matters which may be considered in determining

(next page)

and although the presiding officer must consider them in assessing a penalty, he is not bound by them and (2), in any event, the penalties assessed are consistent with the evidence of record and the penalty guidelines. I agree with complainant.

As I have previously stated, "[t]he regulations give the presiding officer considerable discretion in setting a penalty. 40 CFR §22.27(b). Although he must 'consider' any penalty guidelines, he is not bound by them." In re Electric Service Company, TSCA Appeal No. 82-2 at 20, n.23. (Final Decision dated January 7, 1985). In the initial decision, the presiding officer assessed the penalties proposed by complainant for these violations, save the adjustment made by complainant for respondent's "bad attitude." In accordance with the regulations, the presiding officer explained his reason for not adopting that adjustment. Initial Decision at 44. See 40 CFR §22.27(b). ("If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Pre-

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(Footnote No. 4 Cont'd)

the penalty. See TSCA Sec. 16(a)(2)(B). The guidelines provide a series of penalties which may be assessed depending on the seriousness ("minor," "significant," or "major") of the violation. See In the Matter of Bell & Howell Company, TSCA-V-C-033, 034, 035 (Final Decision, December 2, 1983), for a discussion of the penalty guidelines. In this case, each disposal violation was characterized as "significant" and assessed a $17,000 penalty; respondent argues they were "minor" and that it should be assessed only $5,000 for each violation. Regarding the recordkeeping violation, respondent argues that it should be categorized as a "significant" rather than a "major" violation and that the penalty should be reduced from $10,000 to $6,000.

siding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.") "Where no abuse of discretion is shown, I will not substitute my judgment for that of the presiding officer so long as the reasons for changing the penalty have been stated with specificity." Electric Service at 20, n.23. No abuse of discretion has been shown here. Therefore, the initial decision is affirmed, [5/] and all findings of fact, conclusions of law and reasons therefor in the initial decision are adopted and incorporated by reference in this final decision. [6/]

FINAL ORDER

The initial decision of the presiding officer is adopted as the Agency's Final Decision. A civil penalty of $58,650.00 is assessed against respondent in accordance with Section 16(a) of the Toxic Substances Control Act (TSCA). Payment of the entire amount of the civil penalty ($58,650.00) shall be made within sixty

---

5/ The Chief Judicial Officer, as the Administrator's delegatee, has the authority to issue final decisions in administrative civil penalty cases brought under TSCA. 40 CFR Part 22 (1983).

6/ That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United Staves v. Orr, 474 F.2d 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United States, 323 F.Supp. 1290 (W.D.NC. 1971); In re Electric Service Company, TSCA Appeal No. 82-4, Final Decision (January 7, 1985); In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 42 (Op. of the Judicial Officer, April 30, 1981).

(60) days of service of this final order, unless otherwise agreed to by the parties. A cashier's check or certified check payable to the Treasurer, United States of America, for the full amount, shall be forwarded to the Regional Hearing Clerk.

So ordered.

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: APR 16 1985

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Final Decision In the Matter of Cotter Corporation (Schwartzwalder Uranium Mine) TSCA Appeal No. 84-1, were sent to the following individuals in the manner indicated:

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By Hand Delivery:

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Chief Administrative Law Judge
Office of Administrative Law Judges (A-110)
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Bessie Hammiel
Hearing Clerk
U.S. EPA Headquarters
401 M Street, S.W.
Washington, DC 20460

M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated: APR 16 1985

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
	)	
Lamar and Frances Thumm	)	
and	)	Docket No. TSCA-V-C-222
Holtzman and Silverman Builders,	)	
	)	
	)	
Respondents	)	

Toxic Substances Control Act - Effective Date of Regulation - Disposal - Rules of Practice - Burden of Proof - Evidence -- Where evidence established that drums containing PCBs were placed in a disposal site several years prior to the April 18, 1978, effective date of the PCB disposal rule, such disposal was not a violation of the rule. Note at 40 CFR 761.60 (44 FR 31545, May 31, 1979) construed. Even if "disposal" as defined by the rule be interpreted as encompassing leaks or discharges from the drums, there was no evidence of such leaks or discharges from drums containing PCBs after the effective date of the rule and Complainant failed to carry its burden of proving the violation charged.

Toxic Substances Control Act - Effective Date of Regulation - Disposal - Rules of Practice - Burden of Proof - Inferences -- Where evidence failed to establish that PCB soil contamination at disposal site was attributable to discharges from drums containing PCBs and the most reasonable inference from

all the evidence was that the contamination was attributable to disposals of PCBs which occurred prior to the effective date of the regulation, Complainant failed to establish that the disposal was a violation of the rule notwithstanding the contention that a disposal prior to the effective date of the regulation was an affirmative defense the burden of proof of which was on Respondent. Electric Service Company, TSCA Appeal No. 82-2 (Final Decision, January 7, 1985) distinguished.

Toxic Substances Control Act - Rules of Practice - Burden of Proof -- Section 22.24 of the Rules of Practice (40 CFR Part 22.24) providing that following establishment of a prima facie case by Complainant, the Respondent shall have the burden of presenting and of going forward with any defense to allegations set forth in the complaint, is a rule as to the presentation of evidence and does not shift burden of proving violation charged, which remains on Complainant.

Appearance for Respondents - Lamar and Frances Thumm

Stephen D. Weyhing, Esq.
Miller, Canfield, Paddock and Stone
Lansing, Michigan

Appearance for Respondent - Holtzman and Silverman Builders

John W. Voelpel, Esq.
Elizabeth A. Lowery, Esq.
Honigman, Miller, Schwartz and Cohn
Detroit, Michigan

Appearance for Complainant - John Van Vranken, Esq.
Office of Regional Counsel
U.S. EPA, Region V
Chicago, Illinois

Initial Decision

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615). The proceeding was commenced by the issuance on March 24, 1984, of a complaint by the Director Waste Management Division, U.S. Environmental Protection Agency, Region V, Chicago, Illinois, charging Respondents, Lamar and Frances Thumm and Holtzman and Silverman Builders, with disposal of polychlorinated biphenyls (PCBs) in violation of § 2614 of the Act and regulations promulgated thereunder, 40 CFR Part 761.1/ It was proposed to assess Respondents a penalty of $25,000.

Lamar and Frances Thumm, hereinafter Thumms, answered denying knowledge of and responsibility for the alleged disposal for the reason that pursuant to a land contract, dated May 18, 1973, they had surrendered possession, control and rights to the property in question to Holtzman and Silverman Builders. Holtzman and Silverman (H&S) answered, denying responsibility for the alleged disposal and alleging, inter alia, that fee title to the property was in the Thumms and that any dumping on the property occurred prior to the time H&S assumed possession thereof. A hearing on this matter was held in Lansing, Michigan on November 13, 14 and 15, 1984.

1/ Sec. 15 of the Act entitled "Prohibited Acts" provides in part:

> It shall be unlawful for any person to--
>
> (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;
>
> * * *

The instant rules were promulgated under § 6.

Based on the entire record including the proposed findings and conclusions of the parties, I find that the following facts are established:

Findings of Fact

1. The property in question, containing approximately 62 acres is described as the west 1019.04 feet of the Northwest 1/4 of Section 25, Township 3 South (Ypsilanti), Range 7 East, Washtenaw County, Michigan (Land Contract, H&S Exh 9). The property is known as the Textile Road property or site, being bounded on the north by Textile Road, on the west by Bunton Road and on the east by a Ford Motor Company Plant. The property was purchased by Lamar and Frances Thumm in August of 1947 (Warranty Deed, H&S Exh 31).
2. From the time the Thumms purchased the property until they entered into a land contract with H&S in May of 1973, the property was in continuous use as a source for the extraction of sand, gravel and aggregate (Tr. 497-99). The excavation, together with the naturally high water table, resulted in approximately two-thirds of the property being covered by artificial ponds (Atwell-Hicks, Inc. Report, dated May 1, 1973, H&S Exh 7). The principal pond, sometimes referred to as a lake, occupied the eastern and southern portion of the property (photos, H&S Exhs 10-14).
3. As a source of material to fill excavated areas, Mr. Thumm allowed dumping on the property (Tr. 505). Most of the dumping was accomplished by one Harold Handley, who had a contract to haul fly ash and cinders from the General Motors Willow Run Plant (Tr. 505-535).

Mr. Thumm estimated that Handley hauled fly ash and cinders to the site for 15 years, until he lost the contract. He, Thumm, also allowed broken concrete and dirt to be dumped on the property (Tr. 514-15, 544). The previously mentioned Atwell-Hicks Report (H&S Exh 7) reflects that the front 500 to 600 feet of the property, that adjoining Textile Road, was covered to a depth of seven to ten feet with artificial cinder fill, including trash, wood, bricks and soil in an uncompacted state.

4. Mr. Thumm insisted that he did not allow rubbish and tin cans to be unloaded on the property, stating that he sent people with that kind of material to the public dump (Tr. 506). He acknowledged, however, that he was not on the site at all times, that Mr. Handley had access to the site and hauled thereto seven days a week, that fill material, other than fly ash and cinders, was being delivered to the property until the closing [of the land contract] and that he did not generally inspect material delivered by Handley or others (527, 534-35, 537-38, 544-45, 560-61). Wooden block, apparently flooring, from the adjacent Ford Motor Company plant was also delivered to the site, Mr. Thumm using some as fuel in the stove in his shop and selling the balance (Tr. 506, 541, 546-47).

5. Mr. Vaughn Williams was an employee of Lamar Thumm from March 1, 1955 until October 31, 1973 (Tr. 567, 569-70). Although he performed other tasks such as operating a front-end loader and repairing equipment, his principal function was as a crane or dragline operator, excavating sand and gravel. Mr. Williams described the Textile Road site when

he arrived in 1955 as "just bare property" partially dug out. He stated that you couldn't dig without hitting water, that the site was not heavily vegetated and that he did not recall a single tree being on it at the time. He testified that the property was still quite bare when he left at the end of September 1973, with a few poplar trees along the bank close to the Ford Motor Company property line. This testimony is substantially supported by aerial photos of the property taken in June of 1973 (H&S Exhs 10-14).

6. Vehicle entrance to the Thumm property is from Textile Road from which a road, referred to as the north-south road, extends southward to the gravel-wash plant. In early 1973, Mr. Williams constructed a rough road or trail, sometimes referred to as a two-track, east of the north-south road and north of the principal pond (Tr. 571). Mr. Thumm stated that the two-track was constructed in the spring of 1972 or 1973 (Tr. 512). This roadway extended east to the Ford boundary and then south along the pond. Mr. Williams explained that his reason for constructing the two-track was so that a truck could get in there and 50 to 100 feet of original earth along the Ford boundary could be removed prior to sale [of the property]. He testified that the area where the two-track was constructed was visible from the north-south road. He confirmed Mr. Thumm's testimony relative to dumping on the property, stating that Mr. Handley stopped hauling fly ash in late 1972, that only dirt or broken concrete was brought in thereafter and that he would check loads [of material to be dumped], if he saw a strange truck (Tr. 602-03). He

did not, however, remember any concrete piles or peculiar odors on the property (Tr. 597, 601).

7. Under date of April 7, 1973, the Thumms entered into an agreement for the sale of the Textile Road Property to Holtzman and Silverman (Offer to Purchase Real Estate, H&S Exh 7). The agreement provided, inter alia, that the buyer would have 30 days to enter the premises for the purpose of taking soil borings to determine suitability of land for the purchasers intended use. If the property was determined to be unsuitable, the purchasers could by written notice withdraw the offer and obtain a refund of the deposit. The agreement further provided that dumping shall continue as is until buyer notifies seller of intent to close, then dumping shall cease, that the seller would have until September 1, 1973, for removal of approximately 7,000 yards of processed material (fill, sharp and masonry sand) and seller was to have use of garage and storage building until September 1, 1973.

8. H&S engaged Atwell-Hicks, Inc., an engineering and surveying firm, to perform the soil exploration work envisaged by the offer to purchase (Work Order, dated April 9, 1973, H&S Exh 18). This resulted in the report previously mentioned (findings 2 and 3) and soil boring drawings (H&S Exhs 8, 19). The report apparently indicated that soil conditions were satisfactory for H&S's intended use and under date of May 18, 1973, the Thumms and H&S entered into a land contract for the sale of the Textile Road site (H&S Exh 9). The contract provided that after a down payment the purchase price would be paid in equal instalments ~~in~~ not more than ten years. The contract further provided that

the sellers surrendered possession immediately, except that they would have the use and occupancy of the garage and storage building and surrounding area without payment of rent until September 1, 1973, and the right until the same date to remove approximately 7,000 cubic yards of previously processed sand. At the time the contract was executed, the Thumms also executed a warranty deed to the property, which was held in escrow by the title company (Tr. 515). The Thumms vacated the property on September 30, 1973, having been granted a one month extension of the occupancy period by H&S (Tr. 531).

9. On March 22, 1983, Mr. Gene Hall of the Michigan Department of Natural Resources (MDNR) accompanied by a Robert Colburn of the Washtenaw County Health Department, inspected the Textile Road property (Tr. 9, 10; Pollution Investigation Report, EPA Exh 3). They were allowed on the property by a Mr. Kenneth Mangus, identified as a caretaker. The inspection was conducted in response to a telephonic report of drums being deposited near a gravel pit. Material in the drums appeared to be old machine oil. Mr. Mangus reportedly told Mr. Hall that the drums had been there as long as he had worked there, 12 years or more (Tr. 32, 92; EPA Exh 3). The drums were in an area north of the pond and east of the north-south road (Sketch, EPA Exh 2). Because of a heavy snow cover, no samples were taken on this inspection.

10. Mr. Hall, accompanied by a Mr. Bob LaMere also of the MDNR, and Mr. Colburn of the Washtenaw County Health Department, made a second inspection of the Textile Road property on April 12, 1983. The snow had disappeared and 40 drums were lying in a disorderly state in an

area of approximately 1500 sq. ft. (Tr. 11, 68). Several piles of wooden blocks of the type typically used for factory flooring were observed (Tr. 18). The drums were in a state of disrepair, some were rusting, some having open tops, some having open bungs and some having what appeared to be bullet holes. Some of the drums were protruding from sludge piles (Tr. 18, 29, 30 and 68). Although there is some confusion in the record as to the precise number of samples taken, it appears that five samples were taken from drums and in addition, two soil samples and two water samples were collected (Tr. 12, 13, 34, 78, 79; EPA Exhs 2 and 3). Scans conducted by a gas chromatograph revealed the presence of PCBs (Aroclor 1254) in two of the drum samples (Drum Nos. 3 and 5, Lab Nos. 27889 and 27891) of 61 ppm and 210 ppm, respectively, and in the two soil samples (Nos. 7 & 8, Lab Nos. 27893 and 27894) of 500 ppm and 160 ppm, respectively (Tr. 150; Environmental Laboratory Analysis, EPA Exh 1 and Lab Log No. 1998, EPA Exh 8). The soil samples were taken in an area of stained soil to the west of where the drums were located (Sketch, EPA Exh 2).

11. A third inspection of the Textile Road property was conducted on June 29, 1983 (Tr. 170; PCB Compliance Inspection Report, EPA Exh 10). This additional inspection was conducted by representatives of the MDNR (Mr. Gene Hall and Ms. Margaret Fields) as a result of a meeting held at the Washtenaw County Health Department on June 23, 1983, attended by representatives of the MDNR, Washtenaw County Health Department, Mr. Lewis Thumm, an attorney and son of the Thumms, and Messrs. Gilbert Silverman and Dan Baumhardt of Holtzman and Silverman

and H&S's attorney, John W. Voelpel, wherein it was agreed that additional samples would be taken (Tr. 220; EPA Exh 13). Additional soil and sediment samples, a water sample and a wood shaving sample were taken (Transmittal of Evidence and Laboratory Analysis, Thumm Exh 3). The locations where the samples were taken is shown on a sketch drawn by Ms. Fields (Tr. 177, 179-80, EPA Exh 11). Ms. Fields took the wood shaving sample (from a pile of wooden blocks 200 feet west of the drum site), because she had prior experience with high PCB concentrations in wooden block floorings (Tr. 199-200). Piles of broken concrete piles and wooden blocks were observed to the right and left of the two track (Tr. 174; Sketch). A roughly triangular shaped area to the west of the drum area on the sketch is the area of stained soil. One of the photos taken by Ms. Fields (EPA Exh 4, Photo 5) appears to show wooden blocks scattered around the stained-soil area. Ms. Fields testified that because of the lack of vegetation in the stained-soil area, it was not possible to determine where the two-track ended (Tr. 223-24). Her sketch, however, shows the two-track extending in a direction through the area of dump piles and where at least two of the drums were located. The drum area, oblong in shape and estimated by Ms. Fields to be 90 feet in length, had been enclosed by a snow fence since the first inspection.

12. The samples were delivered to the Environmental Research Group (ERG) laboratory on July 6, 1983, and tested for PCBs (Aroclor 1254) with the result that two of the samples, Lab Nos. 92258 and 92259, showed concentrations of 100 and 360 ppm, respectively (Analytical Report, EPA Exh 5

and Extraction Sheet, EPA Exh 6). These laboratory sample numbers correspond to Sample Nos. 81012C and 81012D and were taken from sediments at the pond edge (southwest corner of drum area) and from surface soil at a point approximately 35 feet west of the fence surrounding the drum area. The nearest drum was approximately 30 feet from the location where Sample No. 81012C was taken (Tr. 198). A sample of what was described as "black material" taken between two drums (No. 81012E) showed a PCB concentration of 4.5 ppm (EPA Exh 10). A soil boring sample (No. 81012J) taken in the drum area at a depth of eight feet, which was the depth of the water table, revealed a PCB concentration of 22 ppm. The sample from the wooden block showed a PCB concentration of 11 ppm.

13. Mr. Gilbert Silverman, partner in H&S, testified that the Thumms complied with the condition of the offer to purchase that dumping was to cease as soon as the buyer notified seller of intent to close (Tr. 282, 323). He further testified that since the date of closing, neither he nor any other agent or employee of H&S had authorized any dumping on the property (Tr. 301). While he acknowledged that he had inspected the Textile Road property once or twice prior to execution of the offer to purchase and at least once thereafter, he denied seeing any drums on the property until June of 1983 (Tr. 319-20, 340). He explained that he had driven along the north-south road and looked at the lake, but that foliage along either side of the route would have made it impossible to see the drums. According to Mr. Williams (finding 5), however, he observed Mr. Silverman's car, a white Mercedes-Benz, proceed along the two-track north of the lake, the area where the drums were found, at least three times in the

spring of 1973 (Tr. 576-77, 584, 587-88). He acknowledged that Mr. Silverman had identified himself only on the third occasion and that he could not be certain his prior observations of the Mercedes were visits by Mr. Silverman.

14. Mr. Kenneth Mangus, identified as a caretaker (finding 9), testified that there were barrels interspersed with sludge piles and rags and creosote blocks in the area immediately north of the lake when he first visited the Textile Road property in 1969 (Tr. 417, 421-22). He was on the property because he was told there was "good fishing" in the lake. Thereafter, he visited the property for the purpose of fishing six to ten times a year until 1973 when he had a back operation and was unable to work (Tr. 416, 419, 423-24). In 1974 and 1975, while recovering from his back operation, he was on the property as frequently as four or five days a week (Tr. 424, 433). He testified that prior to the time the drums were removed there had been no change in the sludge piles (Tr. 423). In 1980, he made a deal with Mr. Silverman to look after the property and clean up trash in exchange for hunting and fishing rights (Tr. 420, 432). This is the reason he had a key to the gate at the Textile Road entrance to the property, which he still possessed at the time of the hearing. He testified that the gate was installed in 1974 or 1975 (Tr. 439). He described the trash dumped on the property as consisting of household and commercial, including roofing debris and "different things of that nature" (Tr. 420). He said the dumped material was spread or piled past the buildings at the entrance and

back to the road (Tr. 421). The piles ranged in size from one garbage bag to as many as 15. He denied ever working on the property and denied making the statement attributed to him in the Pollution Investigation Report (finding 9) that the drums had been there as long as he had worked there (Tr. 441). He didn't tell Mr. Silverman or anyone else from H&S about the drums, because he assumed H&S was aware of their presence (Tr. 444).

15. Mr. James Kovalak hauled sand and gravel from the Textile Road property from the mid-1960s until the pit was closed (Tr. 449-50). He estimated that he was on the property 10 to 20 times a year during that period. From November 7, 1973, until March 31, 1976, H&S leased the property to Emery Garlick (Tr. 325-26; H&S Exh 15). Mr. Garlick used the property for the storage of earth moving equipment (Tr. 294, 452-53). In 1973, Mr. Kovalak was employed as a master mechanic by E. W. Garlick Company (Tr. 452). He reported for work at the Textile Road property where a cement block building close to the Textile Road entrance was used as a shop (Tr. 453, 455). He testified that he walked around the site the first day he was there as an employee of E. W. Garlick and observed between 30 and 50 55-gallon drums, piles of creosoted flooring blocks and concrete in the area immediately north of the lake (Tr. 455-56). He didn't recall the precise date, but asserted that it was cold out (Tr. 462). He examined two or three of the drums to determine if they contained anything salvageable, finding that some contained an oily substance and some a liquified tar that had hardened (Tr. 457). He testified that the drums were basically

on the surface and that there was no indication of spills from the drums (Tr. 463). He did not recall any dump piles and did not know whether the drums were still there when he was last on the property in 1976 (Tr. 456, 458). He denied that there was any dumping on the property, while the Garlick equipment was there, but acknowledged that neither he nor any other employee of E. W. Garlick was there at all times (Tr. 456, 461-62).

16. Dr. Lynn S. Fichter, presently an Associate Professor of Geology at James Madison University, Harrisonburg, Virginia, was employed as an assistant driller and rodman by Atwell-Hicks during the first half of 1973 (470-72). As an employee of Atwell-Hicks, he participated in the site exploration work on the Textile Road property performed by Atwell-Hicks for H&S in April of 1973 (Tr. 474-75; Map, H&S Exh 20). Dr. Fichter's time card (H&S Exh 23) reflects that he was at the site on April 10, 17, 19 and 20, 1973. The map drawn by Dr. Fichter at the time (H&S Exh 20) bears a date of April 10, 1973 and shows dump piles in an area to the east of the north-south road and immediately north of the lake. Immediately to the north of this notation is a notation to the effect that "man on job said this area largely filled with cinders to about 8' deep." The area east of the lake, adjoining the Ford Motor Company property, contained the notation "area freshly filled." Dr. Fichter did not recall talking to the individual identified as "man on job" (Tr. 478). He remembered a strong chemical odor coming from the dump pile area, that there were bundles of rags in that area and wooden blocks scattered around, but did not recall

whether or not he saw any drums (Tr. 479-80, 487). He did not recall any indication of chemical spills and attributed the dark soil and lac of vegetation in the area to the presence of cinders (Tr. 490). The Atwell-Hicks Report (H&S Exh 7) does not mention the presence of drums and Mr. Silverman acknowledged that Atwell-Hicks did not report the presence of any barrels (Tr. 339). Dr. Fichter did see drums in the dump piles when he returned to the site in 1983 at the request of counsel for H&S (Tr. 482, 486-87). He asserted that the dump piles di not appear to have changed from the way they were in 1973 (Tr. 480). On his 1983 visit, he was impressed by the amount of vegetation on the site in contrast to the situation in 1973 when "we had a pretty clear view of just about all of the property" (Tr. 489).

17. As indicated previously (finding 8), the Thumms vacated the property on September 30, 1973. Mr. Thumm testified that there were no drums in the area north of the lake at the time (Tr. 519). He didn't recall any sludge piles, rags or chemical odors being in that area when he left (Tr. 520). Mr. Williams confirmed Mr. Thumm's testimony that there were no drums or barrels on the property when the property was vacated, asserting that the only drums he ever saw on the property were containers of crankcase oil for the machinery (Tr. 581). He stated that when a barrel was empty, it was returned to the oil company.

18. Dr. Charles Olson, a Professor of Natural Resources at the University of Michigan, qualified as an expert in photo interpretation (Tr. 371-75; Curriculum Vitae, H&S Exh 24). Testifying with reference to a

map of the property (H&S Exh 25) he made from aerial photographs taken in April of 1972 (H&S Exh 26) and June of 1973 (H&S Exh 10), Dr. Olson identified 15 cylindrical objects in an area immediately north of the northeast corner of the lake, identified as Nos. 3 and 3A, on a plastic overlay of the property (Tr. 376, 378-81, 383, 391, 392-93, 395, 397-98; H&S Exh 29). He testified that the dimensions of the objects were three feet in length and two feet in diameter, plus or minus six inches, approximating the dimensions of a 55-gallon drum, which he determined to be 35 and 1/2 inches in length and 22 and 1/2 inches in diameter (Tr. 398-99). He further testified that there could have been more such objects, hidden under vegetation, other objects or by shadows. He indicated that the barrel-like objects did not appear on the April 1972 photograph, H&S Exh 26 (Tr. 389, 413). Dr. Olson described the area bounded by a dotted line surrounding the number 3 on the map (H&S Exh 25) as an area of very dark tone, almost black on the April 1972 photograph (Tr. 386). He visited the site in late October 1984 and was asked whether he saw anything that might have produced the dark area. He replied that there were several things such as piles of old rags, papers, some oily material that looked like solidified asphalt and that the ground seemed to be stained or soaked with this similar material, giving an overall dark toned impression. The dark ground is shown on one of the photographs he took during his October 1984 visit (H&S Exh 27, photo H).

19. Under cross-examination, Dr. Olson acknowledged that he could not testify that the cylindrical objects were in fact 55-gallon drums,

but only that they were of the size to be 55-gallon drums (Tr. 408). Mr. Thumm and Mr. Williams testified that the cylindrical objects described by Dr. Olson could have been piles of dirt (Tr. 549, 600). Mr. Williams explained that a small, five-cubic-yard load of dirt would settle and wash-out so as to be of the approximate dimensions of the objects noted by Dr. Olson. Dr. Olson indicated that the only change he observed in the terrain on his October 1984 visit in the area north of the lake identified by the number 3 on H&S Exh 25 from that in the April 1972 and June 1973 photographs (H&S Exhs 26 and 10) appeared to be reshaping of the dump piles, which may have resulted from removal of the barrels (Tr. 400).

20. There was one payment remaining to be made under the land contract with the Thumms, when the drums were discovered. H&S refused to make this payment and by letter, dated October 22, 1983 (H&S Exh 16), informed the Thumms that its recent investigation disclosed that the toxic substances were present on the property prior to the closing date of the land contract. The letter stated that because of the presence of these toxic substances H&S would not be in a position to develop this property for its intended purpose,2/ that H&S regarded the contract as rescinded and enclosed a quit-claim deed conveying H&S's interest in the property to the Thumms. The Thumms refused to accept this conveyance and by letter to H&S, dated

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2/ Mr. Silverman testified that the property was not developed, because Farmer Jack's Supermarket would not rent a store at that location (Tr. 341).

November 15, 1983 (Thumm Exh 6), counsel for the Thumms returned the quit-claim deed marked "VOID." The letter stated that the Thumms did not consider the contract rescinded and that they would not take any action to rescind the contract or foreclose on the property.

21. From April 1976 to sometime in 1977, the Textile Road site was leased to one Robert Forrester, who ran a portable welding operation and maintained equipment on the property (Tr. 296-97, 440). Between 1979 and 1981, the property was used by Village Green Management Company, a H&S unit, for the storage of construction trailers and equipment (Tr. 297-98). In April of 1984, H&S arranged for the removal of the drums from the Textile Road Property and for their proper disposal at a cost of $5,235.00 (Recovery Specialists, Inc.'s invoice, dated April 23, 1984, H&S Exh 17). The invoice reflects the removal of 49 drums.

22. When asked whether any of the drums he observed on his April 12, 1983, inspection of the Textile Road site were leaking, Mr. Hall answered in the affirmative, stating that some of the drums had visible leaks (Tr. 11). On cross-examination, however, he could not recall whether there was any liquid on the outside of any of the drums sampled and denied seeing any actual flowing or discharging from any of the drums (Tr. 60-62, 106). He stated that a sludge appeared to have run out of one or two of the drums and solidified and as to an undetermined number of drums, material appeared to have flowed out of the drums at an unknown prior time (Tr. 106-07). The soil around the drums was discolored (Tr. 64).

23. Ms. Fields testified that the drums were surrounded by what she referred to as metal filings (Tr. 175). She defined leaking as a fluid material dripping and having evident motion and stated that she could not say [any such motion] was present. She could not remember whether she saw any liquid on the outside of the drums previously sampled by Mr. Hall and could not identify any drums having leaks or discharges (Tr. 205). She indicated that some drums were corroded to the extent that material was in contact with the ground, but did not recall whether it was in liquid form or a form she thought would likely contain PCBs (Tr. 198-99).

24. Mr. Mangus initially answered in the affirmative the question of whether any of the drums he saw on the Textile Road site in 1983 were leaking their contents on the ground (Tr. 444). Under further questioning, however, he denied remembering that he saw any liquid flowing or discharging from the drums in 1983 and could not positively state that he ever saw any liquid flowing or discharging from any of the drums (Tr. 447).

25. Dr. Sheldon Simon, coordinator of the EPA Region V PCB Program, testified as to the calculation of the proposed penalty (Tr. 243-44; Concurrence Request For Administrative Action, EPA Exh 16). He testified that the penalty was calculated in accordance with the PCB Penalty Policy, 45 FR 59770 et seq., September 10, 1980 (Tr. 246). He explained that because of the potential for impact on the environment this was considered a Level 1 or the most severe type of violation (Tr. 247). This determination was based on the fact that PCBs at concentrations in excess of 50 ppm were found at two

locations on the property (EPA Exh 11). He further explained that because of the potential for impact on the environment and on groundwater, the extent of the violation was considered major (Tr. 248). He stated that this determination was based in part on the fact PCBs at a concentration of 22 ppm were found at a depth of eight feet, groundwater level, indicating the possibility of percolation and contamination. He considered that the entire area of stained soil shown on the sketch (EPA Exh 11) was contaminated, asserting that it was well over 760 square feet and in the major extent category of the matrix system (Tr. 248). He acknowledged that if the PCBs had been placed in the soil at the site prior to 1978, no penalty would be appropriate (Tr. 256). He further acknowledged that he did not consider the amount or volume of PCBs in the drums in determining the penalty (Tr. 260-61, 272-73). He had no information as to the ability of the Thumms or H&S to pay and his only knowledge of the culpability of the Thumms was based on ownership of the property (Tr. 268-69). Dr. Simon stated that because of the limited solubility of PCBs in water he wouldn't expect to find more than 50 ppm PCBs in water samples.

Conclusions

1. The evidence establishes that the drums were placed on the Textile Road property sometime prior to execution of the land contract on May 18, 1973.

2. The evidence will not support a finding that PCB soil contamination at the site is attributable to leaks or discharges from the drums.

3. Although it is clear that H&S did not authorize any dumping on the property after execution of the land contract, household trash and commercial type waste were deposited on the property at various times after the Thumms vacated the site on September 30, 1973. This dumping appears to have been chiefly household type trash, does not appear to have involved PCBs and does not appear to have extended to the area north of the pond at issue here. In any event, there is no evidence to the contrary and under the circumstances, all authorized dumping having ceased on or before execution of the land contract on May 18, 1973, the most reasonable inference is that the dumping resulting in the soil contamination occurred prior to that date.

4. A placement or disposal of PCBs which took place prior to the effective date of the regulations is not a disposal for which responsibility under the Act attaches.

5. Notwithstanding that the contention a disposal or disposals of PCBs occurring prior to the effective date of the regulations is in the nature of an affirmative defense, the burden of proof of which is on the Respondents, under § 22.24 of the Rules of Practice (40 CFR Part 22) the burden of persuasion that the violation occurred as charged in the complaint remains with Complainant. Under the circumstances present here, Complainant has not discharged that burden.

6. Complainant has not established the violations alleged iplaint and the complaint will be dismissed.

Discussion

Although Mr. Mangus testified that the drums were on theRoad property the first time he was at the site to fish in 1969, iluded that he is mistaken as to the date. This is because the direthe two-track as shown on the sketch drawn by Ms. Fields (EPA Exhnds through the area where the dump piles and at least two of there found. This is rather persuasive evidence that the dump pilams were deposited after construction of the two-track. Accordir Mr. Williams, he constructed the two-track in early 1973, whiumm recalled that this road was constructed in the spring of 1972 The April 1972 aerial photograph (H&S Exh 26) doesn't appear he two-track and it is concluded that this roadway was construct this photograph was taken. Some support for this conclusion led by Dr. Olson's testimony to the effect that the April 1972 phdoes not reflect the presence of any cylindrical, barrel-like obje

Dr. Fichter, who as an employee of Atwell-Hicks was at t several times during the period April 10 to April 20, 1973, as engaged in soil exploration work in close proximity to the lnere the drums were later discovered, did not recall the presence ums. The map drawn by Dr. Fichter (H&S Exh 20) reflects the presemp piles in the drum location area and he recalled chemical odoring

piles or bundles of rags and wooden blocks scattered around. Moreover, he had a "pretty clear view of just about all of the property" (finding 16). Under these circumstances, the fact that he did not recall their presence would seem to be persuasive evidence that the drums were not there. More significant, however, is Dr. Fichter's testimony that the dump piles did not appear to have changed between April of 1973 and the time of his August 1983 visit. This testimony is supported in part by Mr. Mangus, who stated that there was no change in the sludge or dump piles until the drums were removed. It is therefore concluded that the drums were on the property at the time of Dr. Fichter's April 1973 soil exploration work. This conclusion is consistent with the cylindrical, barrel-like objects Dr. Olson observed in the June 1973 aerial photograph (H&S Exh 10) and, of course, is consistent with Mr. Kovalak's testimony that he saw the drums on the Textile Road site sometime in the fall of 1973.3/

According to Mr. Kovalak, who observed the drums on the site in the fall of 1973, there was no indication of any spills from the drums. All witnesses, who observed the drums on the site and who indicated that they may have seen some active leakage or discharges, recanted this testimony on further examination (findings 22-24). Moreover, there was no testimony or evidence as to leakage from the two drums, samples from which showed PCB concentrations in excess of 50 ppm. While there was evidence of discharges from several of the drums at undetermined prior times, the sample

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3/ Mr. Thumm and Mr. Williams are found to be credible, but mistaken witnesses, who may simply have attached no significance to the drums and thus did not recall their presence. The same may well be true of Mr. Silverman who visited the site at least once prior to April 7, 1973 and at least once thereafter and appears to have driven his car in the precise area where the drums were discovered, but who denied seeing any drums on the site until June of 1983.

of a "black material" taken from between two drums which may have resulted from a discharge therefrom, showed a PCB concentration of only 4.5 ppm. No drum was nearer than 30 feet from the point where soil and sediment samples, showing PCB concentrations in excess of 50 ppm, were taken. Thus, the evidence does not support a finding that PCB contamination at the site is attributable to discharges from the drums.

The record shows that permissible or authorized drumping on the property ceased no later than the date of the execution of the land contract, May 18, 1973. The record also shows that there were instances of unauthorized dumping after September 30, 1973, when H&S assumed possession of the property. Although this dumping involved some commercial type waste, it appears to have been chiefly household type trash and does not appear to have involved waste of the type containing PCBs here concerned. Moreover, this dumping does not appear to have extended to the stained-soil area immediately north of the pond. In any event, there is no evidence to the contrary and the most reasonable inference is that the dumping resulting in the soil contamination occurred on or before the execution of the land contract on May 18, 1973. Ms. Fields had prior experience with high PCB concentrations in wooden block factory flooring and the evidence is clear that such flooring from the adjacent Ford Motor Company plant was deposited on the property prior to May 18, 1973. Although the wood shavings sample collected by Ms. Fields was taken from a pile of wooden blocks some 200' west of the drum site and shows a PCB concentration of only 11 ppm, it is of some significance that one of the photos she took shows wooden blocks scattered around the stained-soil area. Moreover, the photo of a portion

of the stained-soil area taken by Dr. Olson in October 1984 (H&S Exh 27, Photo H) shows a wooden block or a fragment thereof. If it be regarded as tenuous to infer from these facts that the disposals resulting in the soil contamination occurred prior to May 18, 1973, it would be sheer speculation[4/] to infer that such disposals occurred after the effective date of the rule. Moreover, as pointed out infra at 31-35, the burden of establishing the violation charged remains with Complainant and if the inference that the disposals resulting in the soil contamination occurred prior to the effective date of the rule be regarded as equally probable as the inference that the disposals occurred subsequent to that date, the decision, of necessity, would be adverse to Complainant.[5/]

The note at 40 CFR 761, Subpart D (1984) provides in pertinent part:

> "Note--This Subpart does not require removal of PCBs and PCB Items from service and disposal earlier than would normally be the case. However, when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) and PCB Items which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this Subpart. This Subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they"

4/ It is well settled that inferences necessary to support a verdict or judgment may not rest on mere surmise and conjecture. Kent Lumber Co., Ltd. v. Illinois Central R. Co., 65 F.2d 663 (5th Cir. 1933).

5/ See Ft. Smith Gas Co. v. Cloud, 75 F.2d 413 (8th Cir. 1935) (Where proved facts give equal support to each two inconsistent inferences, judgment must go against party upon whom rests the burden of sustaining one of these inferences as against the other).

> "must be disposed of in accordance with this Subpart. Other Subparts are directed to the manufacture, processing, distribution in commerce, and use of PCBs and may result in some cases in disposal at an earlier date than would otherwise occur."

(See 44 FR No. 106, May 31, 1979, at 31545).

Neither the note in the initial PCB rule (43 FR No. 34, February 17, 1978, § 761.10, at 7157), nor the explanation thereof[6/] specifically provided that PCBs disposed of prior to effective date of the regulations (April 18, 1978) were considered to be in service. This omission was supplied by an Addendum to the Preamble (43 FR No. 149, August 2, 1978, at 33918-19) providing as follows:

6/ The explanation at 43 FR 7151-52 provides in part:

> Changes In § 761.10 Disposal of PCB's
>
> A new section 761.10(b)(3) has been added to the final rule to allow the use of chemical waste landfills for disposal of soil and debris contaminated with PCB's as a result of a spill or from placement of PCB's in a disposal site prior to the effective date of these regulations. Under the proposed rules, incineration would have been required. This change was made to permit the use of a more practical disposal method for the large volumes of soil and debris, such as trash, trees, lumber, and other rubbish, that may be involved in a spill clean-up operation or in removal or excavation of materials from an old disposal site, such as a pit, pond lagoon, dump, or landfill. This provision does not apply to PCB liquids, slurries, industrial sludges, damaged PCB articles, or any production wastes related to PCB processing or manufacturing; such items must be disposed of in accordance with Section 761.10(b)(1) or (2).

This explanation is subject to the interpretation that disposal in accordance with the PCB rule was only required when PCBs were removed from the disposal site.

> "Section 761.10(b)(3) states: "Soil and debris which have been contaminated with PCB's as a result of a spill or as a result of placement of PCB's in a disposal site prior to the publication date of these regulations shall be disposed of (i) in an incinerator which complies with annex I, or (ii) in a chemical waste landfill." This requirement as others, is qualified by the general Note which appears at the beginning of § 761.10. This Note specifically states that these" regulations do not require the removal of any PCB's from service earlier than would otherwise be the case. However, when they are removed from service and disposed of, disposal must be in accordance with the regulation.
>
> PCB-containing soil and debris which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of the Note discussed in the last paragraph. Therefore, § 761.10 (b)(3) does not require PCB-contaminated soil or debris landfilled prior to February 17, 1978 to be removed for disposal. However, if such soil or debris is removed from the disposal site, it must be disposed of in accordance with the regulation."

The 1979 version of the Note made it clear that the Note applied to PCBs and PCB items in addition to contaminated soil and debris. In Allen Transformer Company, TSCA Appeal No. 81-3 (Final Decision, March 23, 1982), it was held that runoff or leachate from soil contaminated with PCBs as a result of a spill which occurred prior to the effective date of PCB rule was not a disposal which violates the requirements of the rule. Complainant argues that the Note, properly interpreted equates "disposal sites" with "landfills" and that it is only PCBs and PCB items landfilled prior to February 17, 1978, that do not have to be removed for proper disposition (emphasis supplied) (Posthearing Brief at 7). Complainant asserts that the PCBs involved here were not landfilled, that accordingly, the Note does not apply and that Respondents are responsible for proper disposition of PCBs at the Textile Road site irrespective of the time of placement.

Complainant further argues that Allen Transformer, supra, did not directly decide whether the term "disposal site" in the Note is meant to be broader than "landfill" and urges that to the extent dicta in that decision suggests otherwise, it be disregarded (Id. at 8). Complainant says that even if the Note be interpreted to exclude from the PCB disposal regulations soil contaminated with PCBs as a result of a disposal which occurred prior to the effective date of the regulations, the drums are fundamentally different. It is argued that to allow drums such as those at the Textile Road site to be excluded from the PCB disposal regulations (assuming they were placed on the site prior to the effective date of the regulations) would remove large quantities of PCBs from regulatory control.

Complainant acknowledges that the Note uses the terms "disposal site" and "landfill" interchangeably, and the attempt to limit the scope of "disposal site" to "landfill"[7/] is rejected. The Note simply does not distinguish between the two terms and because, as previously pointed out, the Note itself was amplified to clarify an ambiguity as to the intent of the regulations, any such distinction surely would have been clearly set forth, if intended. In Allen Transformer, supra, the Judicial Officer rejected Complainant's argument that the broad definition of disposal in

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7/ While the regulations define the term "chemical waste landfill," 40 CFR 761.2(e) (43 FR at 7157) and 40 CFR 761.3 (1984) (44 FR, May 31, 1979, at 31543), they do not define the term "landfill." A landfill is defined as "a disposal of trash or garbage by burying it under layers of earth in low ground." Webster's New International Dictionary, 3rd Ed. 1967.

the regulation,8/ which includes uncontrolled discharges, covered leaching or runoff from spills occurring prior to the February 17, 1978, publication date of the regulations in the following language: "However, this argument cannot be reconciled with the Agency's intention as expressed in the Note, discussed supra, where the Agency grants a blanket exemption from the disposal requirements for PCBs which were placed in a "disposal site" or "landfill" prior to February 17, 1978." (Slip Opinion at 4). This language is not consistent with the limitation of disposal site advocated by Complainant herein and even if I disagreed with the Judicial Officer's reading of the Note, which I do not, I would not be free to reach a contrary conclusion.

In view of the foregoing, soil contaminated with PCBs as a result of a disposal occurring prior to the effective date of the PCB rule is outside the coverage of the regulation and not a violation thereof. Notwithstanding Complainant's contention that the drums are fundamentally different, the same ruling is applicable. It is recognized, of course, that the drums being regarded as in service, discharges or leaks therefrom can be regarded

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8/ Disposal is defined in the regulation (40 CFR 761.3, 1984) as follows:

> "Disposal" means 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.

as disposals[9/] for the purpose of the PCB rule. This contention, however, no less than the leaching or runoff involved in Allen Transformer, supra, is simply inconsistent with the blanket exemption in the Note for PCBs placed in a landfill or disposal site prior to February 17, 1978. Even if this conclusion were otherwise, it should be emphasized that the drums have been on the site since at least May 18, 1973, that there is no evidence soil contamination at the site is attributable to leaks or discharges from the drums, no evidence of when the leaks or discharges from any of the drums occurred, and no evidence of leaks or discharges from drums containing PCBs at concentrations in excess of 50 ppm.

Complainant, relying heavily on Electric Service Company, TSCA-V-C-024 (Initial Decision, August 10, 1982), Final Decision, TSCA Appeal No. 82-2 (January 10, 1985), asserts that the contention PCBs were placed on the site prior to the effective date of the regulations is an affirmative defense, which must be proved by Respondent (Posthearing Brief at 6, 7). Complainant also relies on the general rule that where a matter is peculiarly within the knowledge or control of a party, the burden is upon him to prove it (Id. at 9). Electric Service Company, supra, is, however, clearly distinguishable and does not control here. This is because

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9/ The definition of disposal did not include leaks until September 24, 1982. See 47 FR No. 165, August 25, 1982, at 37342 et seq. and Liberty Light and Power, TSCA Appeal No. 81-4 (Final Decision, October 27, 1981).

Respondent in that case had handled transformer oil at its facility since 1951 and discharges of oil containing PCBs were recent to the date of inspection, clearly occurring long after the effective date of the regulation, as evidenced by the fact the oil had not percolated into the soil. Here, by contrast, there is no evidence of regular handling of PCBs and no evidence of recent discharges of PCBs on the property.

Complainant takes the position that it established a prima facie case by showing the disposition of PCBs (soil contamination) in excess of the 50 ppm regulatory limit. Complainant asserts that in accordance with § 22.24 of the Rules of Practice, Electric Service Company, supra, and the rule that where a matter is peculiarly within the knowledge of one of the parties, the burden is on him to prove it, Respondents have failed to discharge their burden of proving that the disposals occurred prior to the effective date of the regulation. If it be conceded that Complainant has made out a prima facie case, it is, nevertheless, concluded that the violation charged has not been established. Section 22.24 of the Rules of Practice (40 CFR Part 22) provides:

> "§ 22.24 Burden of presentation; burden of persuasion
>
> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

It is significant that the quoted rule uses the term "proving" in connection with the establishment of the violation charged, but not with respect to the Respondent's presentation of a defense. It is therefore concluded that this section is a rule as to the presentation of evidence after Complainant's establishment of prima facie case and does not change the burden of proof which remains on Complainant at all times. While Electric Service Company is susceptible of a contrary interpretation, the facts in that case, as we have seen, are clearly distinguishable.

There remains for consideration the often stated rule that where a matter is peculiarly within the knowledge of one of the parties the burden is on him to prove it.10/ This, however, is considered to be loose lanaguage and that what is actually meant is the burden of production. See, e.g. United States v. Bull Steamship Line, 146 F.Supp 210 (S.D. N.Y.),11/ affirmed 274 F.2d 877 (2nd Cir. 1960); Merriam v. Venida Blouse Corporation, et al., 23 F.Supp 659 (S.D. N.Y. 1938);12/ Wigmore on Evidence, 3rd Ed.

10/ One of the earliest statements of the purported rule is Selma, Rome and Dalton R. Co. v. United States, 139 US 560, 35 L.Ed 266 (1891) where the Court stated as follows: "Burden of proof lies on the person who wishes to support his case by a particular fact which lies more particularly within his knowledge or of which he is supposed to be cognizant." The fact at issue in that case, however, was whether plaintiff had been paid for delivery of mail for which suit was brought by the Confederate government, a fact essential to its case and obviously within plaintiff's knowledge or presumed knowledge.

11/ The Court stated: "It is often a controlling factor in deciding where to throw the burden of producing evidence--and obviously it ought to be--that the proper party to charge is he alone who could discover the truth." (emphasis supplied) (146 F.Supp at 213).

12/ "The party who is in the best position to know the facts bears the burden of explanation." 23 F.Supp. at 661.

§ 2485 and 31A C.J.S. Evidence, §§ 103 and 110. Cf. Texas Department of Community Affairs v. Burdine, 450 US 248 (1981) (burden of explanation after plaintiff has established a prima facie case in a Civil Rights Act case). Moreover, the duty of production, or of going forward with evidence, does not change or shift the burden of proof, sometimes referred to as the burden of persuasion, which remains with the plaintiff (Complainant herein) at all times.13/

Here, as indicated previously, the evidence establishes that the drums were on the site several years prior to the effective date of the regulation and there is no showing that PCB soil contamination at the site is attributab to leaks or discharges from the drums. On the contrary, the most reasonable inference is that the soil contamination is attributable to PCB disposals occurring prior to the effective date of the regulation. It follows that Complainant has failed to establish a violation of the rule as charged and the complaint will be dismissed.

13/ See 29 Am. Jur. 2d Evidence, § 131 which provides in part: "In other words, where the evidence is entirely within the possession of one of the parties to a case or where a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, it is his duty to produce it or to come forward with the proof. * * * This rule, some times referred to as the rule of convenience, is merely one as to the procedure at the trial, and does not change the burden of proof or free the plaintiff from the rule that he cannot invoke the consideration of the jury [fact finder] unless there is some substantial evidence upon which to base the essential findings in his favor."

Conclusion

The complaint is dismissed.14/

Dated this 26th day of April 1985.

Spencer T. Nissen
Administrative Law Judge

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	TSCA-III-057
J F & M COMPANY, INC.	)	
	)	INITIAL DECISION
Respondent	)	

1. Toxic Substances Control Act - Motions for Accelerated Decision - Where the Respondent in his answer admits violation of all counts in the complaint, a motion for accelerated decision on the issue of liability properly granted.
2. Toxic Substances Control Act - Penalty Assessment - Where Respondent demonstrates inability to pay and/or adverse effect of penalty on ability to continue in business, the penalty must be adjusted in a manner consistent with the penalty policy.
3. Toxic Substances Control Act - Mitigation of Penalty - Where the Agency's primary concern is proper disposal of PCB items and clean-up, the penalty may be mitigated upon Respondent's completion of such activities.

Appearances:

James T. Meisel, Esquire
Huntington, West Virginia
For the Respondent

Martin Harrell, Esquire
U.S. Environmental Protection Agency
Philadephia, Pennsylvania
For the Complainant

INITIAL DECISION

Preliminary Statement

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), instituted by a complaint issued on March 21, 1984 by the Director of the Hazardous Waste Management Division, Region III, United States Environmental Protection Agency (EPA or the Agency), against J F & M Company, Inc., (the Respondent), a sole proprietorship owned and operated by Robert Earl Johnson, Jr., located in Huntington, West Virginia. The complaint enumerated six (6) counts of alleged violations of the Act for which a proposed penalty in the amount of $83,000.00 was assessed. The Respondent filed an answer on April 19, 1984 in which it admitted the allegations in the complaint and asked for a hearing in the matter.

By letter dated September 13, 1984, the undersigned issued a pre-hearing letter which, among other things, directed the parties to file certain specified pre-hearing information by a date certain if the matter could not be informally settled prior to that time. By motion dated November 20, 1984, counsel for the Complainant sought a default order in this matter for failure of the Respondent to file the pre-hearing responses ordered by the above-mentioned letter. The Respondent had in fact failed to respond to the requirements of the pre-hearing letter. By an undated letter received in my office on December 6, 1984, the Respondent replied to the motion. The letter from Mr. Johnson, who at that time was appearing pro se, stated that he wished to contest the proposed penalty and that his failure to provide the pre-hearing

materials was based on his misunderstanding of the procedures in the that he thought a hearing was going to be held in either Huntington or Wheeling, West Virginia and, therefore, no further action was required of him prior to the hearing. Mr. Johnson reiterated his position that he did not deny any allegations in the complaint, but advised that he did not have the resources to dispose of the PCB items at the present time, but he might be able to dispose of small quantities of materials over an extended period of time. With the letter Mr. Johnson enclosed tax returns for the years 1980 to 1984, inclusive, and the original procurement contract between himself and Appalachian Power Company, the source of much of his PCB items.

By Order dated December 6, 1984, the undersigned advised counsel for the Complainant that he would treat the above-mentioned letter as a response to the motion and ordered that counsel for the Complainant examine the documents attached to the letter and advise, no later than January 4, 1985, as to how he wished to proceed in the matter and that the Court would defer ruling on the default motion. By letter dated December 14, 1984, counsel for the Complainant advised that he wished the Court to treat his heretofore filed motion for default as a motion for accelerated decision as to liability of the Respondent and further stated that he would be amenable to a hearing solely on the question of the amount of the penalty and suggested Wheeling, West Virginia as the location therefore. The Court ruled that the motion for accelerated decision as to liability would be granted. The hearing on the penalty would be held on February 12, 1985 in Charleston, West Virginia. A Hearing was held on that day in Charleston at which time the Respondent appeared, represented by James T. Meisel, attorney, Huntington, West Virginia.

Following the hearing, a briefing schedule was established and the parties have filed initial and reply briefs, proposed findings of fact and conclusions of law.

Findings of Fact

1. Respondent is a corporation which is incorporated and does business in the State of West Virginia.

2. Respondent constructs power centers for customers involved in mining and processing coal. The Respondent also engages in the repair and sale of electric transformers. Respondent's facility is located at 1632 8th Avenue, Huntington, West Virginia.

3. EPA personnel inspected Respondent's facility August 23, 1983. At that time, the Respondent's facility contained one PCB transformer. Additionally, the Respondent was storing approximately 900 large, high voltage PCB capacitors.

4. Pursuant to 40 C.F.R. § 761.40(c)(2), the Respondent was required to mark the 900 PCB large, high voltage capacitors placed into storage for disposal. The inspection revealed that the Respondent had failed to mark these capacitors with the appropriate PCB identification mark specified in 40 C.F.R. § 761.45.

5. Pursuant to 40 C.F.R. § 761.40(a)(10), the Respondent was required to mark the storage area containing the 900 large, high voltage PCB capacitors with the appropriate identification mark specified in 40 C.F.R. § 761.45. The inspection revealed that the Respondent had failed to properly mark the storage for disposal area.

6. Pursuant to 40 C.F.R. § 761.40(c)(1), the Respondent was required to mark its transformer as being a PCB transformer. The inspection revealed that the Respondent had failed to properly mark the transformer with the appropriate identification mark required by 40 C.F.R. § 761.45.

7. Pursuant to 40 C.F.R. § 761.60(d), any spill or uncontrolled discharge of PCB fluid constitutes disposal of PCBs. The EPA inspector discovered that PCB fluid had leaked from some of the PCB capacitors onto the floor of the storage area. The EPA inspector took a sample of the PCB fluid which had leaked onto the floor and had it analyzed for PCB concentration. Test results showed that the sample contained 170,000 ppm PCB. Pursuant to 40 C.F.R. § 761.60(a), the Respondent was required to dispose of the PCB fluid in an incinerator which met the requirements of 40 C.F.R. § 761.70.

8. Pursuant to 40 C.F.R. § 761.30(a)(1)(ii), the Respondent was required to inspect PCB transformers stored for reuse at least once every three months. The inspection revealed that the Respondent was storing one PCB transformer for reuse. This transformer contained at least 250 gallons of PCB fluid. The Respondent failed to inspect this transformer as required by 40 C.F.R. § 761.30(a)(1)(ii).

9. Under 40 C.F.R. § 761.65(b)(1), an owner or operator of a facility used to store PCBs or PCB items designated for disposal must provide a storage area with walls, roof and an impervious floor which has continuous curbing at least six inches high.

10. The inspection revealed that the Respondent has stored for disposal 900 large, high voltage capacitors in a building which lacked a roof and which lacked continuous curbing.

11. Pursuant to 40 C.F.R. § 761.65(c)(5), all PCB articles in storage for disposal must be checked at least once every 30 days for leaks. The inspection revealed that the Respondent had not checked the 900 PCB capacitors stored for disposal at least once every 30 days.

12. Pursuant to 40 C.F.R. § 761.65(c)(8), PCB articles must be dated when they are placed into storage for disposal. The inspection revealed that the Respondent had not dated the 900 PCB capacitors when they were placed into storage for disposal.

13. Under 40 C.F.R. § 761.180(a), each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB container(s) or one or more PCB transformers, or 50 or more PCB large high or low voltage capacitors must maintain records on the disposition of PCBs and PCB items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year.

14. The inspection revealed that the Respondent had failed to prepare annual documents for the 1978, 1979, 1980, 1981 and 1982 calendar years.

15. EPA contractors sampled fluid which had leaked from PCB large, high voltage capacitors in the storage area in September 1983, and had the samples analyzed for PCB contamination. Laboratory analysis revealed PCB concentrations in spilled fluid of up to 170,000 parts per million (ppm) PCB. Laboratory analysis of soil samples taken outside the facility showed PCB concentrations of 700 and 660 ppm respectively.

16. EPA contractors took soil samples in July 1984 from locations near the facility's main entrance. Laboratory analysis of these samples revelaed PCB concentrations of 1,300 ppm and 140,000 ppm.

Discussion

As indicated above, the Respondent admittted all of the allegations in the complaint and pursuant to my previous Order had been adjudged to have violated the counts described in the complaint. The Hearing held in West Virginia was for the sole purpose of determining the appropriate civil penalty to be assessed in this case.

The complaint broke down the proposed penalties as follows: Count I-violation of marking requirements, $15,000.00; Count II-violation of marking requirements, $10,000.00; Count III-violation of disposal requirements, $5,000.00; Count IV-violation of use requirements, $13,000.00; Count V-violation of storage requirement, $15,000.00; and Count VI-violation of recordkeeping requirements, $25,000.00.

In response to my pre-hearing letter, the Complainant filed a statement describing in general terms how the penalties were determined and stated that the penalty was calculated using the penalty matrix contained in the PCB penalty policy. Since the threat exists that direct human contact with the PCBs could occur and that there already has been some migration of PCBs, EPA believed that the nature, circumstances, extent and gravity of these violations were very significant. The Respondent is storing a considerable amount of PCB items on his property and there has been significant contamination of the buildings, with limited contamination outside the facility.

The Complainant's pre-hearing filing stated:

"EPA did not adjust the proposed penalty in the complaint based on the Respondent's ability to pay, the effect on his ability to stay in business, history of prior violations, the degress of culpability and other matters as justice may require. However, as I have indicated previously, EPA's primary concern is securing the disposal of the PCB

items and clean-up of the property. EPA is willing to mitigate the penalty in exchange for disposal and clean-up. However, Mr. Johnson has indicated that he can not pay for such remedial action. EPA is willing to reduce the penalty based upon a showing of the effect the payment will have upon the Respondent including his ability to comply with the PCB regulations and to obtain disposal and clean-up."

At the Hearing only two witnesses testified, one for each party. The witness for the Complainant was Marilyn Bacarella, an EPA employee, who calculated the proposed penalty set forth in the complaint. Ms. Bacarella's testimony consisted of her going through the various counts of the complaint and describing how she arrived at the proposed penalties for each of such counts using the above-mentioned PCB penalty policy. Her testimony indicated that the initial proposal that she made to the Office of Regional Counsel differs somewhat from the breakdown described in the complaint but that the total amount is the same as she originally had proposed. The main difference between the witness' proposal and what the complaint ultimately suggested was in the area of failure of the Respondent to prepare annual documents for the years 1978, 1979, 1980, 1981 and 1982. The witness originally proposed a penalty of $10,000.00 for each of the four years involved and arrived at a penalty of $40,000.00 for the recordkeeping violation. She then added 1983 to this total, adding another $10,000.00 making the recordkeeping penalty $50,000.00. However, to mitigate the impact of such a high recordkeeping penalty, the Agency decided to reduce this penalty to $25,000.00. The other change was for the storage for disposal violation and originally that figure was somewhat lower and upon re-evaluation of this violation and considering that there were 900 capacitors involved, the penalty was determined to be $15,000.00.

I have no particular quarrel with the way in which the Agency calculated the proposed penalty as it appears in the complaint, however, as indicated above, the Agency did not consider the Respondent's ability to pay or the effect of the penalty on its ability to stay in business. The income tax returns provided by the Respondent indicate that its gross sales for the years in question are as follows: 1980 - $116,734.00; 1981 - $179,530.00; 1982 - $193,864.00; and 1983 - $60,133.00. The penalty policy suggests that when there is a claim of inability to pay, proffered by the Respondent, coupled with documentary evidence to support such claim, the total sales for the last four years be averaged and multiplied by four per cent thus arriving at a figure which the policy indicates, represents a penalty with which the Respondent should be able to pay. In this case, the gross annual sales total $550,261.00. When divided by 4 this equals $137,565.00 as an average and when this is multiplied by four per cent, we arrive at a figure of $5,502.00.

A thorough discussion of this portion of the penalty policy appears in the case of Rocky Mountain Prestress, Inc., and AERR.CO., Inc., TSCA Decision PCB-83-017, issued on August 23, 1984, at pages 17, 18, and 19.

In his post-hearing briefs, counsel for the Respondent argued that his client made a good-faith effort to comply with the regulations and ,in fact, had spent $8,000.00 or $9,000.00 in an effort to comply with certain portions of the regulations subsequent to the issuance of the complaint. This expenditure had to do with placing a roof over the area where the PCB materials were stored and laying down a wooden barrier in association with approved absorbent materials in an attempt to contain any spilled PCBs that the inspector found to be present on the Respondent's

property. I am not particularly impressed with the Respondent's efforts to comply with the regulations since he had obtained these materials in 1974 and although he admitted in his testimony that he knew that there were certain restrictions on the use and handling of the PCB containing materials, he made no effort to determine from any reliable source exactly what these requirements were. He instead merely relied on some vague conversations he had with representatives of the power company from whom he obtained most of the articles in question. He made no effort to obtain any of the regulations relative to the storage, handling or use of PCB articles prior to the inspection by EPA. The regulations as they apply to PCBs were published in the Federal Register and such publication constitutes legal notice to the world at large of the requirements contained therein and the Respondent is charged with the constructive notification and knowledge of the requirements of said regulations. The fact that he waited until the violations were brought to his attention by the EPA inspector prior to taking protective measures, does not in my judgement demonstrate the presence of good faith or due care in the handling of what everyone now recognizes to be a dangerous and toxic material. Under the circumstances I see no rationale for adjusting the proposed penalty based on good faith efforts on the part of the Respondent. As a matter of fact, one could argue that his cavalier attitude toward the handling of these toxic materials should result in an increase in the proposed penalty, rather than a decrease.

Further discussion of the proposed penalty in regard to an individual assessment of each of the violations would in my judgement be a useless

enterprise given the clear mandate of the penalty policy as it applies to the ability to pay on the part of a given Respondent. My position in this regard is set forth in the Rocky Mountain case, supra, on page 19 of the decision where it is stated that:

"Although the court is not absolutely bound by any published penalty policy of the Agency in assessing an appropriate penalty in these cases, should the court deviate from the terms thereof it must explain the reasons for such differences. In this particular case, I am unable to establish a creditable argument for increasing the assessed penalty against AERR.CO. given the clear language of the penalty policy and the absence of any other factors which would argue against its application in this case. Unlike most of the numbers suggested by this penalty policy, which involve a great deal of subjective evaluation, the 'ability to pay' portion of the policy is totally objective in that it requires only the application of arithmetic to arrive at a given figure. Since I have no reason to suspect the figures provided by AERR.CO. in response to the court's post-hearing order and the clear, unequivocable language of the penalty policy applicable to these proceedings, I must reduce the assessed penalty applicable to AERR.CO. from $20,000.00 to $8,990.00, based on its inability to pay."

Based upon the above discussion, I have no alternative but to reduce the proposed penalty of $83,000.00 to $5,502.00.

In arriving at this conclusion, I have carefully considered the entire record in this case, consisting of the transcript, the exhibits and the briefs of all the parties. All contentions of the parties presented have been considered, and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

ORDER[1/]

Pursuant to 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $5,502.00 is hereby assessed against Respondent, J F & M Company, Inc., for the violations of the Act found herein.

Given the Complainant's willingness to mitigate the proposed penalty in exchange for securing disposal of the PCB items and clean-up of the property, it is further ordered that the penalty herein assessed may be reduced to zero if the Respondent will clean-up the subject site and properly dispose of the PCB items in accordance with a protocol to be prepared by the Agency consistent with the requirements of the Act and the regulations promulgated pursuant thereto. Such clean-up and disposal shall be commenced within sixty days of the date of the preparation of the protocol and certified to by the Complainant. Failure to accomplish such clean-up and disposal shall result in the assessment of the full $5,502.00 penalty herein estabished against said Respondent. Should the Respondent fail to comply with the conditions set forth herein within the time periods established, payment of the full amount of the civil penalty assessed shall be made within sixty days of service of the final order upon Respondent by forwarding to the Regional Hearing Clerk, a cashiers' check or certified check payable to the United States of America.

Thomas B. Yost
Administrative Law Judge

DATED: May 20, 1985

1/ Unless an appeal is taken pursuant to § 22.30 of the interim rules of practice, or the Administrator elects to review this decision on his own motion, the Initial Decison shall become the final order of the Administrator. (See § 22.27(c)).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Weed Heights Development Co.,	)	Application for Attorneys' Fees
	)	and Expenses Under the Equal
Docket No. TSCA-09-84-0010	)	Access to Justice Act.
	)	

Equal Access To Justice Act. Failure to provide net worth documentation required by 40 C.F.R. 17.12 pursuant to Order provides justification for entry of a Default Order resulting in dismissal of application for attorneys' fees.

Appearances:

Patrick V. Fagan, Esquire
Mike Soumbeniotis, Esquire
Allison, Brunetti, MacKenzie, Hartman,
Soumbeniotis & Russell, Ltd.
P. O. Box 646
Carson City, NV 89702

Counsel For Respondent

David M. Jones, Esquire
Office of Regional Counsel
U. S. EPA, Region IX
211 Fremont Street
San Francisco, CA 94105

Counsel For Complainant

DEFAULT ORDER*

This proceeding arises from an application by Weed Heights Development Company (Weed Heights or Applicant) for attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), (5 U.S.C. 504) and the Environmental Protection Agency's (EPA) implementing regulations, 40 C.F.R. Part 17.

The application results from a Complaint issued by EPA on January 30, 1984, charging Weed Heights with violations of the Toxic Substances Control Act (15 U.S.C. 2601, et seq.) involving inspection/use conditions, inadequate marking, improper storage and inadequate recordkeeping of PCB transformers. Weed Heights answered, denying liablity in that the six transformers referenced in the investigative report were never owned by Weed Heights. Exhibits attached to the Answer provided evidence that the said transformers had been sold or transferred by Anaconda Minerals Company, the former owner of the Weed Heights property and the transformers, prior to Weed Heights' acquisition of the property in December 1982.

Thereafter, on June 6, 1984, Complainant EPA filed Motion For Leave To File First Amended Complaint. The motion was granted and, in effect, added two additional Respondents, Mesaba Service and Supply Co., and Martin Electric Co. Again, in its Answer, Weed Heights asserted the same defense of nonownership.

Subsequently, Weed Heights filed Motion To Dismiss And/or For Accelerated Decision citing lack of ownership or interest in the transformers and referencing documentary proof thereof.

* This Default Order shall constitute the Initial Decision in this Proceeding. 40 C.F.R. 22.17(b)

Complainant's Response to said Motion To Dismiss was dated June 22, 1984. Rule 22.16(b) of the Consolidated Rules of Practice require that a party's response to any written motion must be filed within ten (10) days after service of motion. Failure of Complainant to comply with this Rule formed one of the bases upon which the Motion To Dismiss was granted.

Sec. 22.20 of the Rules of Practice provides that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Respondent Weed Heights provided documentary proof that it does not own or have any interest in the transformers which are the subject of this Complaint.

Complainant's response to said motions states that the inspection report filed by the EPA field investigators records no disclaimer of title to the transformers or responsibility for same by Mr. Darrell W. Johnson on behalf of his employer or principal, Weed Heights Development Company. And that this, among other things, leads to the assumption that title was still in Weed Heights. The documentary evidence submitted by Respondents nullifies this assumption.

Complainant states that the purpose of the First Amended Complaint was to determine "just who is the owner of this personalty and where does the responsibility for compliance with TSCA repose." The Order Granting the Motion to Dismiss states that the forum for that determination is by means of a more thorough investigation and not in a formal hearing.

And further, the fact that the transformers were located on the premises of Weed Heights does not place liability upon Weed Heights, especially in view of the arrangements made between Mesaba Service and Supply Co. and Martin Electric Company, the subsequent owners of the transformers, to remove them from that location. Complainant did not appeal the Order Granting Motion To Dismiss.

Complainant filed a Motion To Dismiss the application for attorneys' fees stating in part, as follows:

"Section 17.12, Net Worth Exhibit, provides in pertinent part as follows:

> (a) Each applicant. . .must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. . . The exhibit may be in any form that provides full disclosure of assets and liabilities of the applicant and any affiliates and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). . . ."

The application submitted by Weed Heights Development Company contains references to the affidavits of Don H. and Joy Tibbals which are apparently intended to satisfy the provisions of Section 17.12(a) cited above. The affidavits attached to the application make reference only to the net worth of Weed Heights Development Company at the time the proceedings were initiated and there is no "detailed exhibit" which will meet the requirements of the regulation cited above.

The Court agreed and in Order dated March 5, 1985, advised Respondent:

> The information provided in the application and affidavits is not sufficient to determine the qualification of Weed Heights for an award. In order to give consideration to this

application, the provisions of 40 CFR 17.12 must be fulfilled. This information shall be filed with the Regional Hearing Clerk no later than March 27, 1985.

No response having been received from Respondent to this Order an Order To Show Cause Why Default Order Should Not Be Issued was filed May 2, 1985, requiring the parties to file responses thereto no later than May 21, 1985. Respondent did not submit a response.

It is therefore ordered that the application for attorneys' fees and expenses under the Equal Access To Justice Act filed by Respondent in this proceeding is dismissed with prejudice for failure to submit the net worth documentation required by 40 C.F.R. 17.12 pursuant to Order.

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

Dated: June 3, 1985
Washington, D. C.

CERTIFICATION

I hereby certify that the original of this Default Order was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region IX, for dissemination pursuant to 40 C. F. R. 22.27(a).

Leanne B. Boisvert
Legal Staff Assistant

Dated: June 3, 1985

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

'83 JUN 26 P4:08

In the Matter of	)	
	)	
Fremont City Schools,	)	Docket No. TSCA-V-C-264
	)	
Respondent	)	

Toxic Substances Control Act - Friable Asbestos - Containing Materials in Schools - Substantial Compliance - Determination of Penalty - Where evidence indicated that purpose of asbestos-in-schools rule (40 CFR Part 763, Subpart F) had been substantially served, penalty determined in accordance with TSCA Civil Penalty System (45 FR 59770) and guidance thereunder was determined to be inappropriate and independent determination of penalty was made.

Appearance for Complainant: James M. Thunder, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Chicago, Illinois

Appearance for Respondent: Thomas G. Dent, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois

Initial Decision

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced by the issuance on September 11, 1984, of a complaint by the Director, Waste Management Division, U.S. EPA, Region V, Chicago, Illinois, charging Respondent, Fremont City Schools, Fremont, Ohio with violations of § 15 of the Act (15 U.S.C. 2614) and regulations promulgated thereunder, 40 CFR Part 763, Subpart F.[1/] Specifically, Respondent was charged with failure to maintain records required by 40 CFR § 763.117(a)(3) and § 763.114, and failure to comply with the warning and notification provisions of § 763.111(a) and (d). A penalty of $1,300 for each of five separate counts was proposed for a total of $6,500.

Respondent answered, alleging, inter alia, that "we" considered Respondent was in full compliance with the regulations because of a workshop conducted by the Ohio Department of Education and EPA personnel, that the term "administrative office" in the regulations was interpreted as the school

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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--

(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;

* * *.

The rules here concerned were promulgated under Section 6.

system's Central Office and that when these matters were brought to its attention by the inspection, Respondent immediately proceeded to comply prior to receipt of the complaint (letter with enclosures from Kent R. Watkins, Superintendent of Schools, dated September 27, 1984). Respondent requested that the proposed penalty be waived as that sum would be helpful in the purchase of textbooks and other necessary educational supplies.

By letter, dated January 25, 1985, counsel for Respondent informed the ALJ that the parties were unable to resolve the matter and that Respondent admitted there were technical reporting violations of the Act. The letter stated, however, that these violations were due to misinformation or insufficient information received by Respondent's representative at a state-run seminar and argued that the steps Fremont had taken were equivalent to those technically required and amounted to substantial compliance with the Act. Counsel stated that Respondent considered the fine proposed in the complaint and in Complainant's final settlement offer excessive and that Respondent wished to contest it. The letter requested that the review (decision) be based upon documention and written memoranda as Respondent was without available funds to pursue this matter at a hearing.

By letter, dated March 5, 1985, the ALJ allowed the parties until April 5, 1985, to submit any additional evidence, such as affidavits or other documents, which they contended should be considered in determining the amount of the penalty and any arguments the parties wished to make in that regard. Complainant submitted documents and argument under date of April 4, 1985, while counsel for Respondent confined itself to argument

(letter, dated April 10, 1985). Complainant availed itself of the right to file a reply memorandum (letter, dated April 17, 1985), but Respondent has elected to stand on the arguments and documents previously submitted.

Based on the entire record including the arguments of the parties, I find that the following facts are established:

Findings of Fact

1. Respondent, Fremont City Schools, Fremont, Ohio, is a Local Education Agency (LEA) as defined in 40 CFR § 763.103(e).
2. On July 18, 1984, Respondent's facilities were inspected by an authorized representative of the U.S. EPA to determine compliance with regulations concerning Friable Asbestos-Containing Materials in Schools (40 CFR Part 763, Subpart F). The LEA presented EPA Form 7730-1 "Inspection for Friable Asbestos-Containing Materials," signed by its Supervisor of Buildings and Grounds on June 15, 1983, as a summary of its compliance efforts. This document reflects, inter alia, that nine schools have been inspected for friable materials in accordance with 40 CFR § 763.105, and that two schools have friable asbestos materials totaling 100,300 square feet.
3. The inspection revealed that at Fremont Junior High and Stamm Elementary Schools, Respondent did not have on file at each school a certified statement indicating the absence of friable asbestos materials as required by 40 CFR § 763.117(a)(3) (Inspection Report, Complainant's Exh 1).

4. At Atkinson Elementary, Fremont Ross High and Washington Elementary Schools, LEA records indicated the presence of friable materials. The friable materials at Atkinson Elementary School contained less than 1% asbestos and were not asbestos-containing materials as defined by 40 CFR § 763.103(c). The inspection revealed that laboratory reports of analyses of these materials, including, inter alia, an estimate of the percent of asbestos content, and a diagram, blueprint or written description identifying the locations and approximate areas in square feet of friable materials and other records were not maintained at Ross High and Washington Elementary Schools as required by 40 CFR § 763.114(a)(1)-(6).

5. The inspection further revealed that Respondent had failed to post in the primary administrative and custodial offices and faculty common rooms at Fremont Ross High School and Washington Elementary School the "Notice to School Employees" (EPA Form 7730-3) as required by 40 CFR § 763.111(a). Respondent had also failed to directly notify parents of its pupils of the results of inspections and analyses of friable absestos materials at Fremont Ross High School as required by 40 CFR § 763.111(d).

6. A newspaper, the Fremont News Messenger, published articles concerning the presence of asbestos in Fremont schools on September 9, 1980, April 29, 1981 and September 2, 1982 (Exhs G, Y-1 and Y-2). At Fremont Ross High and Washington Elementary Schools a "Notice to Employees

and Parent-Teacher Associations" of the presence of asbestos, dated June 16, 1983, and a "Guide for Reducing Asbestos Exposure" (EPA Form 7730-2) were distributed to employees with paychecks on June 17, 1983 (Exhs M and N). There is no parent-teacher association (PTA) at Fremont Ross High School. A school calendar indicating the presence of asbestos was distributed to every family having students in Fremont Ross High School at a date not certain from the record (Exh H). A "Notice to School Employees" (EPA Form 7730-3) was posted in the entrance to this school at the time of the inspection. A November 1984 Ross High School newsletter (Exh BB) informed students and parents that all ceilings at this school, except the gym, industrial arts, ag shop and kitchen are constructed of material containing 35% asbestos fibers.

7. At the Washington Elementary School, the parent-teachers association (PTA) was notified in writing of the presence and location of friable asbestos-containing materials on June 21, 1983 (Exh W). Memoranda from Respondent's Supervisor of Buildings and Grounds (Exhs Z and AA) reflect that he was of the opinion the deadline for compliance with the EPA asbestos in schools regulation was June 27 or 28, 1983.2/ A "Notice to School Employees" (EPA Form 7730-3) was posted in the lobby at the time of the inspection (Inspection Report at 4).

2/ The regulation was issued on May 27, 1982 (47 FR 23360) and required compliance with all portions of the rule by May 27, 1983. It is noted, however, that the guidance on penalties, "Assessing An Administrative Penalty" (Complainant's Exh 3), refers to a deduction from the amount of the penalty for expenditures in abating or controlling friable asbestos materials and states in pertinent part: The deduction should not exceed 80% of the penalty if the LEA has not notified the PTA (or parents) and school staff of any asbestos hazard remaining in the school after June 28, 1983. (An SWC could allow remission of the remaining 20% when the proper persons are notified.)

8. Following the inspection, Respondent proceeded immediately to file certificates to the effect that Fremont Junior High and Stamm Elementary Schools had been inspected and did not have any friable materials containing 2% or greater asbestos.3/

9. The undated certificate for Atkinson Elementary School is to the effect that this school has friable materials containing less than 1% asbestos (Exh C-1). Samples and analyses upon which this determination is based were taken and conducted in June 1983 (Exhs D-2-D-4). Following the EPA inspection, Respondent filed in the administrative office of this school a sketch showing the extent of and percent of friable materials (Exh D-1) and an undated certificate to the effect that the requirements of the regulation relative to "Asbestos Containing Materials in Schools Identification and Notification" had been satisfied at this school (Exh E).

10. Samples taken from the reading room and a classroom at Washington Elementary School and from Classroom Nos. 18 and 74 and the center hallway ne the cafeteria at Fremont Ross High School revealed 35% asbestos (Microb

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3/ Respondent's undated Exhibits A-1 and A-2, B-1 and B-2. While the certificates indicate the schools do not have any friable materials containi 2% or greater asbestos, the regulation defines "asbestos-containing material as any material which contains more than 1 percent asbestos by weight (40 CF § 763.103(c)). A memorandum from Respondent's Supervisor of Buildings and Grounds, dated June 13, 1983, indicates that he was informed at a workshop conducted by the Ohio Department of Education in Toledo on May 26 not to wor about EPA regulations if laboratory results show under 2% asbestos (Exh AA). The Interim Method of the Determination Of Asbestos In Bulk Samples (Polari Light Microscopy) (40 CFR 763, Subpart F, Appendix A) indicates that no data for measuring accuracy and precision are currently available and that in det mining percent asbestos "values reported should be round to the nearest perc

Laboratories' Certificate of Analysis, dated June 20, 1983). The undated certificate for Fremont Ross High School (Exh J-1) indicates that friable asbestos is in ceilings at all areas except industrial arts, gymnasium and agriculture shop. Following the EPA inspection, Respondent proceeded to post the Notice to School Employees (EPA Form 7730-3), which previously had been posted only in the lobbies or entrance of these schools, in the administrative offices, faculty lounges, custodial offices and boiler rooms at Fremont Ross High and Washington Elementary Schools.

11. Following the EPA inspection, Respondent proceeded to file in the administrative offices at Fremont Ross High and Washington Elementary Schools sketches showing extent and percent of friable asbestos materials (Exhs J-3 and S). Respondent also proceeded to establish and maintain in the administrative offices at these schools "A Guide for Reducing Asbestos Exposure" (EPA Form 7730-2), a copy of "Asbestos-Containing Materials in School Buildings," Parts 1 and 2 (EPA No. 000090) and statements that the requirements of the rule have been satisfied (Exhs N, O, V, W and X)

12. It appears that the Sandusky County Health Department made a survey of Ross High School for the presence of asbestos on July 17, 1980 (memorandum, dated September 10, 1982, Exh Z) and that Respondent made additional inspections of other buildings in July and August of 1980. These surveys resulted in a finding of asbestos in the South Wing of Atkinson School, in the reading room and one classroom at Washington School and in all

areas of Ross High School except industrial arts, gymnasium and agriculture shop. Additional samples were taken from Atkinson and Washington Elementary Schools and Fremont Ross High School on June 20, 1983, resulting in the asbestos content determinations previously mentioned (finding 10). Respondent appears to have had a program for the prompt repair of damaged areas containing asbestos since the summer of 1980.4/ Respondent also appears to have been informed by the State Department of Education and the local Board of Health that "(s)o long as no damage [to areas containing asbestos] occurs, no harm from asbestos fiber can occur" (Exhs Z and AA). The latter exhibit indicates that in addition to the information previously described as having been imparted at the workshop in Toledo conducted by the Ohio Department of Education (note 3, supra) attendees were instructed that "the only action we must take to comply with EPA regulations is to identify buildings having friable building materials. (Friable means - 'easily

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4/ Memoranda, dated September 10, 1982 and June 13, 1983, Exhs Z and AA. The former exhibit states that two restroom ceilings in the Atkinson School were replaced in the summer of 1980 and that a portion of the south hallway ceiling was repainted in 1978. The memorandum further states that all asbestos ceilings at Ross High were repainted in 1977 and that these buildings are inspected each summer and damaged areas immediately repaired. The memorandum of June 13, 1983, referring to Atkinson, Washington and Ross High Schools, states that to date we have repaired any damaged areas and all ceilings have been painted during the past five years. The newspaper article of April 29, 1981 (Exh y-2), reports that $798 was spent in replastering restroom ceilings at Atkinson and that asbestos in ceilings was removed prior to the plastering.

crushable by hand pressure' -- even if surface coated with paint.) We must also notify the employees and P.T.A. or parents by June 27, 1983."5/

13. On March 26, 1984, Microbac Laboratories made an air test for possible asbestos fibers at Ross High and Washington Elementary Schools (memorandum, dated March 26, 1984, Exh BB). The samples were conducted while school was in session and resulted in a determination of 0.024 fibers per cubic centimeter (main office area) at Ross High and 0.029 fibers per cubic centimeter (reading room) at Washington Elementary School. The cited memorandum indicates that most of the fibers appeared to be cellulose and that under present standards, EPA believes that air is safe up to 2.0 fibers per cubic centimeter.

5/ Describing further steps intended for compliance, the cited memorandum provides:

> We plan to take the following action in order to comply with the EPA regulations before the June 27, 1983 deadline:
>
> - To post the EPA Form 7730-3 Notice to School Employees in Atkinson, Washington and Ross High School. (See Copy A attached.)
> - Also, distribute the EPA Form 7730-2, A Guide for Reducing Asbestos Exposure to all employees in buildings involved. (See Copy C attached.)
> - Notice mailed to parent-teacher association. (See Copy C attached.)
> - Complete the necessary forms and file as required with the EPA and the State Department of Education.

14. The proposed penalty was determined in accordance with the TSCA Civil Penalty System (45 FR 59770, September 10, 1980) and guidance issued as to the application of the policy to the asbestos in school regulation (Complainant's Exhs 2 and 3). In applying the matrix in the penalty policy (45 FR at 59771), the guidance indicates that the "extent of the violation," i.e., amount of potential risk to human health for all violations of the asbestos in school regulation, is in the significant category. Complainant determined that the circumstances of the violation," or the probability that the violation has impaired the ability of the Agency and the public to assess the health hazard involved, was low range or Level 6. Level 6 violations are those where the LEA has made a good faith effort to comply with the rule, but has fallen short of full compliance. Application of these principles and the matrix system resulted in a proposed penalty of $1,300 for each of the five counts in the complaint.

5/ (contd)

In addition, we plan to do the following:

- To instruct maintenance personnel with important points when working in these buildings.
- Continue to monitor all ceilings in these buildings for physical damage and repair any damaged area as soon as possible.
- Continue to cooperate with the EPA and local Board of Health.
- Continue to paint these ceilings with latex paint when decorating or after any repair.
- Continue to inform the Board, Superintendent, employees and P.T.A. of any changes in regulations and procedures.

Conclusions

1. The record reveals that the purpose of the asbestos-in-schools rule (40 CFR Part 763, Subpart F), i.e., notification of those exposed to asbestos, has been substantially served.
2. The penalty calculated by Complainant in accordance with the guidance on Assessing An Administrative Penalty appears to make no allowance for the foregoing conclusion and is inappropriate.
3. An appropriate penalty for the violations herein found is the sum of $1,600.

Discussion

The findings support, and Respondent concedes, that there were violations of the Act and regulations (40 CFR Part 763, Subpart F). Accordingly, the only matter for determination is the amount of an appropriate penalty. In making this determination, I am required to consider, but am not bound by civil penalty guidelines issued under the Act (40 CFR § 22.27(b)).

The proposed penalty appears to have been calculated in accordance with the TSCA Civil Penalty System (45 FR 59770, September 10, 1980) and guidance for "Assessing An Administrative Penalty" (note 2, supra). The guidance indicates that all violations of the asbestos-in-schools rule are placed in the significant category for the purpose of determining the extent of the violation, i.e., amount of potential risk to human health, and applying the matrix in the TSCA Civil Penalty System (45 FR 59771). Because of this fact and the fact that all violations were placed in the low range (Circumstances

Level 6), the result is that an identical penalty ($1,300) is being assessed for the violations at each school. The inescapable conclusion is that the penalty for the more serious violations (Fremont Ross High School) is too low or that for the least serious violations (Fremont Junior High and Stamm Elementary Schools) is too high. Because the purpose of the rule, i.e., notification of those exposed to asbestos has been substantially served, it is my conclusion that a penalty determined in accordance with the guidance is inappropriate.

Among the factors § 16(a)(2)(B) of the Act requires the Administrator to consider in determining the amount of the penalty are the "nature, circumstances, extent and gravity of the violation or violations." The purpose of the asbestos-in-schools rule is that persons be notified of exposure to asbestos so as to avoid or reduce the risk of such exposure. The most serious violation from the point of view of gravity is the failure to notify the parents of pupils directly of the results of inspections and analyses of friable materials at Ross High School, there being no parent-teacher organization at this school. The reason, of course, is that such failure makes it more likely that the purpose of the rule, notification of asbestos exposure, will be frustrated. The extent of asbestos-containing material at Ross High School makes it unlikely that one could attend or work at this school without exposure to areas containing asbestos. Consequently, the failure to have on file at the administrative office of this school the laboratory reports and a diagram or blueprint showing asbestos and sampling areas is unlikely to

have increased the potential risk to human health. Likewise, "Notice to School Employees" (EPA Form 7730-3) was posted in the entrance to this school and a similar form "Notice To Employees and Parent-Teacher Associations" distributed to each employee. Also distributed to each employee was a "Guide for Reducing Asbestos Exposure" (EPA Form 7730-2). Accordingly, it is highly unlikely that failure to post "Notice to School Employees" in the common rooms of this school denied any employee knowledge of the presence of asbestos, which after all is the purpose of the posting requirement. Under all the circumstances, an initial gravity based penalty of $1,200 for the violations at Ross High School is appropriate.

At Washington Elementary School, the PTA was notified of the presence of asbestos and a "Notice To School Employees" was posted in the lobby. Additionally, as at Ross High School, a very similar form "Notice To School Employees and Parent-Teacher Associations" and a "Guide for Reducing Asbestos Exposure" were distributed to each employee. Under the circumstances, the violations at this school, i.e., failure to post "Notice to School Employees" in the common rooms, failure to maintain in the administrative office laboratory reports of analyses of asbestos, correspondence relating thereto and a diagram or blueprint showing asbestos and sampling areas, is not likely to have appreciably increased the potential risk to human health. A gravity based penalty of $500 is considered appropriate.

Friable asbestos materials were not present at Atkinson Elementary School and the violations consisted in the failure to maintain in the administrative office the blueprint or diagram showing areas of friable materials,

areas where samples were taken and a copy of all laboratory reports and correspondence concerning analysis of samples as required by 40 CFR § 763. 114(a)(4) and a certification that the requirements of the rule have been satisfied as required by § 763.114(a)(6). Violations at Fremont Junior High and Stamm Elementary Schools consisted of failure to file the certification required by § 763.114(a)(6), friable materials not being present at either of these schools. An appropriate penalty for the violations at Fremont Junior High and Stamm Elementary Schools is $100 each and for the violations at Atkinson Elementary an appropriate penalty is $200.

This brings us to the "violator" portion of TSCA § 16(a)(2)(B), which requires consideration of, inter alia, ability to pay, degree of culpability and such other matters as justice may require. The record reveals that Respondent was aware of the rule and made a good faith effort to comply. Even as to the violation considered most egregious, i.e., failure to directly notify all parents having students in Ross High School of the results of inspection and analysis of friable asbestos materials, the record shows substantial compliance, a calendar showing the presence of asbestos having been distributed to each family having students in the school. In this connection, it is worthy of note that the summary of actions Respondent intends to take in order to comply with the regulations (note 5, supra), which reflects a fair understanding of the regulation, does not mention notifying parents of students at Ross High School of the presence of asbestos. While an affidavit from an attendee of the workshop conducted by the Ohio Department of Education would have been hopeful, it may well be that

Respondent was misled as to the requirements for strict compliance with the rule by statements made at the workshop. Such an event would be among "other matters as justice may require" warranting a substantial downward adjustment in the amount of the gravity based penalty. Moreover, although Respondent may not have been responsible therefor, the record reflects a substantial amount of newspaper publicity concerning asbestos problems in Fremont schools, making it unlikely many parents would be unaware of that fact. When the omissions were called to its attention, Respondent proceeded promptly to comply. Under the circumstances, a downward adjustment of $500 is appropriate in the gravity based penalty determined for violations at Ross High School.

The remainder of the gravity based penalties are sufficiently nominal that no downward adjustment is considered to be appropriate. A total penalty of $1,600 will be assessed against Respondent, Fremont Ross High School, for the violations of the Act herein found.6/

Order

Having violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations promulgated thereunder (40 CFR Part 763, Subpart F) as charged in the complaint, a penalty of $1,600 is assessed against Respondent, Fremont City Schools, in accordance with § 16(a) of the Act (15 U.S.C. 2615). Payment

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6/ The civil penalty guidance reflects that sums spent on asbestos abatement and control may be credited against the penalty (note 2, supra) and invoices or vouchers detailing amounts expended for this purpose may well have resulted in a substantial reduction in the penalty proposed by Complainant.

will be made by sending a certified or cashier's check in the amount of $1,600 payable to the Treasurer of the United States to EPA Region V (Regional Hearing Clerk), P. O. Box 70753, Chicago, Illinois 60673, within 60 days of receipt of this order.7/

Dated this 26th day of June 1985.

Spencer T. Nissen
Administrative Law Judge

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Transformer Service (Ohio), Inc.,	)	Docket No. TSCA-IX-84-0013
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - Default Orders - Assessment of Penalty - Where an accelerated decision finding that Respondent had violated the Act as charged in the complaint had been issued and only issue remaining was appropriateness of penalty and Respondent failed without explanation to appear at duly noticed hearing set for the purpose of receiving evidence on that issue, penalty proposed in the complaint would be conclusively deemed appropriate.

Appearance for Complainant: David M. Jones, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
San Francisco, California

Appearance for Respondent: None

Default Order

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615). The complaint, issued on April 16, 1984, charged Respondent with violations of the Act and regulations in that PCBs stored for disposal at the BKK site, Beatty, Nevada, prior to January 1, 1983, had not been removed and disposed of prior to January 1, 1984, as required by 40 CFR § 761.65(a). A penalty of $10,000 for the violation was proposed to be assessed. Facts surrounding the violation and leading to an amendment of the complaint for the reason that the action was instituted against the wrong party are fully set forth in the accelerated decision issued by the undersigned on January 16, 1985, which is incorporated herein by reference, and will be repeated here only insofar as necessary to an understanding of the decision reached.

The complaint, as originally issued, named Transformer Service, Inc. (TSI) as respondent. However, upon Respondent's presentation of evidence that it was a New Hampshire corporation separate and distinct from Transformer Service (Ohio), Inc., an Ohio corporation, which was the actual owner and generator of the wastes involved, the complaint was amended to name Transformer Service (Ohio), Inc. (TSO), as respondent.1/ The pleadings and documentary evidence (a purchase order and manifests) established

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1/ Although Respondent has alleged that TSI and TSO are separate and distinct corporations having no common officers, directors or shareholders, a Dun & Bradstreet report, dated May 15, 1985, attached to counsel's posthearing memorandum, indicates that Greg Booth is President and that Maureen Booth is Secretary of TSO. These individuals were identified as contact people for TSI in records maintained by BKK concerning the PCBs in storage here concerned.

that in February 1979, TSO had ordered the transportation from Hayward, California and the storage at the BKK facility, Beatty, Nevada, of approximately 125 gallons of PCB liquid waste and that this waste was not removed from the mentioned site for proper disposal until March 24, 1984. These facts were deemed to establish that TSO had violated 40 CFR § 761.65(a), which requires that PCB articles or containers stored for disposal before January 1, 1983, be removed from storage and disposed of in accordance with Subpart D prior to January 1, 1984. While no issue of material fact relating to the violation remained, Respondent was held to be entitled to a hearing in accordance with 40 CFR Part 22 as to the appropriateness of the proposed penalty.

A notice setting the hearing at EPA Headquarters, in Washington, D.C., one of the locations Respondent's counsel had previously agreed was appropriate, on Thursday, May 2, 1985, at 9:30 a.m. was issued on March 20, 1985. Under date of March 25, 1985, Roetzel and Andress, Akron, Ohio, by and through Jeffrey J. Casto filed notice of withdrawal as counsel of record for Respondent.

Respondent did not appear at the date and time duly set and noticed for hearing as stated above and has not made any effort to explain such failure. Testimony from Complainant's sole witness is to the effect that the penalty was calculated in accordance with the PCB Penalty Policy (45 FR 59770, September 10, 1980) upon the assumption that the seven drums stored at the BKK facility on February 2, 1979, which were removed on March 24, 1984, each contained 55 gallons of PCB fluid. This assumption is not supported by the

documentary evidence, the purchase order of February 2, 1979, calling for the transport and storage of approximately 125 gallons of PCB liquid waste and the manifest of March 24, 1984, by which the material was removed from storage, indicating that three of the drums were empty and that PCB liquids in two drums totalled 100 gallons.

The witness testified, however, that Respondent was considered to have knowledge of the PCB rule, indicating that the violation was willful and that in accordance with the penalty policy, a 25% upward adjustment in the penalty for culpability was warranted. The witness further testified that the penalty as adjusted ($14,000) was for a one-time violation and that if this were regarded as a continuing violation and the mentioned sum multiplied by the 58 (actually 60) days between the date of inspection of the BKK facility (January 24, 1984) and the date Respondent contracted for removal of the PCB items (March 24, 1984), an appropriate penalty would be the sum of $812,000.

In his posthearing memorandum, counsel for Complainant alludes to the above facts, but appears to recognize that 40 CFR § 22.27(b) precludes the ALJ from raising the penalty proposed in the complaint where respondent has defaulted, and argues that $10,000, the amount proposed in the complaint, is appropriate.

By failing to appear at the hearing without explanation, Respondent is in default and in accordance with 40 CFR § 22.17(a), the penalty proposed in the complaint is due and payable 60 days after entry of a final order.

Order

Respondent, Transformer Service (Ohio), Inc., having violated Section 14 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations thereunder (40 CFR § 761.65), as charged in the complaint, a penalty of $10,000 is assessed against Respondent in accordance with § 16(a) of the Act (15 U.S.C. 2615). Payment of the full amount of the penalty shall be made by forwarding a cashier's or certificate check payable to the Treasurer of the United States to: EPA - Region IX (Regional Hearing Clerk), P. O. Box 360863M, Pittsburgh, Pennsylvania 15251, within 60 days of receipt of this order.2/

Dated this 28th day of June 1985.

Spencer T. Nissen
Administrative Law Judge

2/ In accordance with 40 CFR § 22.17(b) this Default Order constitutes an initial decision and unless appealed in accordance with 40 CFR § 22.30, or reviewed by the Administrator, sua sponte, as therein provided, will become the final order of the Administrator in accordance with 40 CFR § 22.27(c)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Madeira City Schools,	)	Docket No. TSCA-V-C-302
	)	
Respondent	)	

1. Toxic Substances Control Act - Asbestos in Schools Rule - A school comprised of five single story buildings interconnected by covered walkways must be listed as having five associated buildings rather than as one building for purposes of records under section 763.114 (a).

2. Toxic Substances Control Act - Asbestos in Schools Rule - the written notice to school employees required by section 763.111(b) requires individual written notice to each employee and is not satisfied by wide posting in the school of EPA Form 7730-3 "Notice to School Employees."

3. Toxic Substances Control Act - Asbestos in Schools Rule - the notice to the PTA required by section 763.111(d) must be given promptly by the local education agency upon discovering the presence of asbestos material in the schools and cannot be deferred until the asbestos has been removed or encapsulated.

4. Toxic Substances Control Act - Asbestos in Schools Rule - penalty of $1200 assessed for violation of the notification and recordkeeping requirements.

Appearance for Complainant:

James M. Thunder, Esquire,
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V, 230 South Dearborn Street
Chicago, IL 60604

Appearance for Respondent:

J. Michael Fischer, Esquire
Ennis, Roberts & Fischer Co.
1000 Mercantile Library Building
Cincinnati, OH 45202

Decision on Motion for Accelerated Decision

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violation of a rule promulgated under section 6 of the Act, 15 U.S.C. 2605. The rule establishes requirements for the identification and notification of friable asbestos-containing materials in schools ("Asbestos in Schools Rule"), 40 C.F.R. sections 763.100-763.119. 1/ The complaint issued by the EPA charges that Respondent, Madeira City Schools of Madeira, Ohio, violated certain recordkeeping and notification requirements of the rule. A penalty of $4,900 was requested. Respondent answered denying the violations charged, and its liability for a penalty.

The matter is now before me on Complainant's motion for an accelerated decision under the Rules of Practice, 40 C.F.R. section 22.20. Respondent in its response to the motion agrees that there is no dispute about the material facts, and contends that on the undisputed facts judgement should be rendered in its favor.

Complainant's motion and Respondent's response and the relevant papers of record demonstrate that there are no genuine issues of material fact in

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1/ TSCA, section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for the purposes of this subsection, constitute a separate violation of section 15."

TSCA, section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under section . . . 6."

this case. 2/ For the reasons stated below a penalty of $1200 is assessed against Respondent.

Findings of Facts

1. Respondent Madeira City Schools, Madeira, Ohio, is a local education agency as defined in 40 C.F.R. 763.103(e), and is subject to the requirements of the Asbestos in Schools Rule. 3/

2. Respondent operates three schools: an elementary school (DuMont Elementary School); a middle school (Sellman Middle School); and a high school (Madeira High School). Affidavit of William G. Williamson submitted with Respondent's response to Complainant's motion (hereafter "Williamson affidavit").

3. In 1982, the Hamilton County Board of Health inspected Respondent's schools for asbestos. This was done pursuant to a recommendation by the Ohio Department of Education that the inspection required by the EPA's regulations could be conducted by a county board of health. No areas were found where asbestos problems might be present. Williamson affidavit, pars. 2, 3, and Exh. A.

4. In 1984, on being advised that the inspection by the Hamilton County Board of Health may not be acceptable to the EPA, Respondent had the schools reinspected by PEDCo Environmental, Inc., an engineering firm specializing in asbestos related matters. Williamson affidavit, par. 4.

2/ Complainant has also filed a reply to Respondent's response. While the rules do not specifically provide for replies by the moving party, Complainant's reply will be considered because it discusses an issue raised in Respondent's response, the applicability of the exemption in 763.117(c)(2)(i), and also because it narrows the issues with respect to the high school.

3/ Respondent has never denied that it is subject to the Asbestos in Schools Rule.

5. The inspection by PEDCo as reported on July 5, 1984, disclosed that friable asbestos was present in the DuMont Elementary School and Sellman Middle School. No friable asbestos was found in the Madeira High School. Wiliamson affidavit, par. 5 and Exh. E.

6. On August 29, 1984, Maurice Horwitz of the United States Environmental Protection Agency inspected Respondent to determine its compliance with Asbestos in Schools Rule. Affidavit of Maurice Horwitz submitted with Complainant's motion for accelerated decision (hereafter "Horwitz affidavit"). In his report of the inspection, the inspector confirmed that there were no friable materials present at the high school, and that the asbestos present at the Sellman School was either encapsulated or removed. Friable areas, however, were still found at the DuMont School. Report of EPA's inspection on August 29, 1984, submitted as part of Complainant's prehearing exchange (hereafter "EPA Inspection Report").

7. The Madeira High School consists of five one story buildings connected to each other by covered cross-walks. Inspection Report at 2.

8. A file containing asbestos related documents and materials was maintained at the principal's office at the Madeira High School. Among the papers in this file were the following:

    a. Reports of the inspections made by the Hamilton County Board of Health in 1982, and by PEDCo dated July 5, 1984. Neither of these reports made reference to the Madeira High School.

    b. Two completed EPA Forms 7730-1, "Inspections for Friable Asbestos-Containing Materials", one form dated October 11,

1982, filed after the Hamilton County Board of Health inspection, and one dated July 26, 1984, filed after the PEDCo inspection. Williamson affidavit, par. 11 and Exh. I.

9. The EPA Form 7730-1 showed that three schools had been inspected for friable materials, and the July 26, 1984 form, showed that friable materials was present in two schools. The schools were not identified by name. Horwitz affidavit; Williamson affidavit, Exh. I.

10. After being notified by PEDCo that friable asbestos-containing material was found at the DuMont Elementary School and Sellman Middle School, Respondent posted EPA Form 7730-3, "Notice to School Employees," in every area of the schools where friable asbestos material was located as well as in other conspicuous places in the buildings such as the teacher's lounge and the employee's lounge. Respondent also orally notified the employees of the DuMont School of the presence of asbestos and furnished each individual with a copy of EPA Form 7730-2, "A Guide for Reducing Asbestos Exposure." Williamson affidavit, par. 8 and Exhs. F and G thereto; Horwitz affidavit, par. 11.

11. Respondent acted immediately to carry out PEDCo's recommendations for the removal or encapsulation of friable asbestos material found in the DuMont Elementary and Sellman Middle Schools. By the time of the EPA inspection on August 29, 1984, all asbestos-containing material at the Sellman School had either been encapsulated or removed. The work at the DuMont School was "substantially" completed at the time of inspection and was fully completed on August 30, 1984, or shortly thereafter. Williamson affidavit, par. 9, and Exh. K thereto; EPA Inspection Report.

12. On August 30, 1984, Respondent sent a letter to PTA leaders inviting them to an inspection tour of Respondent's schools to show them how Respondent had contained and removed all friable asbestos. This inspection tour was conducted on September 6, 1984, and an additional tour was conducted later in September for those PTA leaders and members who could not make the first one. Williamson affidavit, par. 10 and Exh. H thereto.

Discussion, Conclusions and Penalty

The EPA has proposed a penalty of $1300 for Respondent's failure to have the required records at Madeira High School and a penalty of $3600 for Respondent's failure to comply with the warning and notification requirements at the DuMont Elementary School. These penalties, it claims, are in accord with the EPA's guidelines for assessment of civil penalties under TSCA, section 16, 45 Fed. Reg. 59779 (September 10, 1980), and the EPA's revised enforcement response policy for the Asbestos in Schools Rule, dated June 22, 1984.

An argument made by Respondent which should be considered at the outset is its claim that it is exempt from the requirements of the rule by reason of the fact that its program for removing and encapsulating asbestos material was "substantially" completed on August 29, 1984, the date of the inspection, and was fully completed either the next day or in any event before September 6, 1984. 4/ The pertinent exemption is 40 C.F.R. 763.117 (c)(2)(i), which provides as follows:

4/ Respondent's response to Complainant's motion for an accelerated decision at 10-11. The Williamson affidavit is somewhat ambiguous on the actual date of the completion of the abatement program, but it seems clear from the affidavit that the work had been completed at the time of the PTA inspection on September 6, 1984. See Williamson affidavit, pars. 9 and 10.

> (2) No provision of this subpart applies to any school if:
> (i) The local education agency has conducted abatement programs that result in the elimination of all friable asbestos materials from the school either by removal or encapsulation of the materials.

Complainant, reading the exemption in conjunction with 40 C.F.R. 763.115(a), requiring compliance with the rule by June 27, 1983, contends that the exemption applies only to schools in which all the asbestos had been removed or encapsulated by that date. 5/ It is not entirely clear either from the wording of the exemption or from the legislative history that the exemption should be so construed that a school abating its asbestos material subsequent to June 27, 1983, would not thereafter be exempt from the rule. 6/ It is not necessary to consider the question further, however, since it seems clear from its wording that the exemption does not apply to either the DuMont School or the Madeira High School, the only two schools for which violations are charged. With respect to the DuMont School, Respondent says that the abatement program was "substantially completed" on that date. The exemption is for schools which

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5/ Complainant's reply to Respondent's response at 4-5.

6/ See preamble to the final rule, 47 Fed. Reg. 23367, where the Agency stated as follows:

> The Agency has also determined that in a school where previously discovered friable asbestos-containing material has been removed or satisfactorily encapsulated so that it is no longer friable, the provisions of the rule should not apply. By undertaking these corrective actions, school officials not only will have substantially complied with the identification requirements, they will also have removed the types of materials which are the focus of the recordkeeping and notification parts of this rule.

This language would not seem to place a time limit on when the school could take advantage of the exemption, so far as further compliance is required.

have eliminated all friable asbestos material. Since there was still friable asbestos material at the school that had not been encapsulated or removed, the exemption did not apply to the DuMont School, as of the date of the inspection. The Madeira High School is not covered by the exemption because it is not a school in which an abatement program for the encapsulation or removal of asbestos has been undertaken. Schools which contain friable materials apparently are not exempted at least under this particular provision simply because no asbestos materials have been found.

The Madeira High School Recordkeeping Violation

Complainant raises only the issue of whether the records for this school were deficient in that they did not list all school buildings associated with the school and indicate that each had been inspected for friable materials as required by 763.114(a)(2). It concedes, that the violation of section 763.114(a)(1), charged is de minimis and that there has been no violation of section 763.114(a)(6). 7/

According to the record, the five buildings which comprise the high school are connected with covered walkways, and Respondent states that each building houses a particular function or segment of the educational program, e.g., administrative offices, gymnasium, laboratories. 8/ The EPA's construction of the rule as requiring that the school be listed as having

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7/ See Complainant's reply at 1. The reference to section 763.114(a)(3), is obviously in error since no violation of that provision was charged in the complaint, and it is assumed therefore that what was intended was section 763.114(a)(6).

8/ Respondent's response to Complainant's motion for an accelerated decision at 1, n. 1. Respondent's description is consistent with the description of the school in the EPA's inspection report as five one story buildings connected to each other with covered crosswalks.

five buildings even though constructed as Respondent contends is in accordance with the normal use and meaning of the word "building." Respondent's contention that a "building" can also mean several buildings connected together by walkways seems a more technical construction. It is a general rule of construction that words in a statute are to be given their ordinary meaning unless it is indicated either in the statute or its legislative history that the word is to be given a technical meaning. Burns v. Alcala, 580 U.S. 575, 580-81 (1975); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1948). Here, I find no indication that the word building is to be used in other than its ordinary sense. In assessing the penalty, however, the significance of not listing the high school as five separate buildings must also be considered. Recordkeeping under the rule serves two purposes, it provides the EPA with a means of verifying compliance and it also provides notice and warning of the presence of friable asbestos-containing materials. 9/ Practices, accordingly, which result in records that are ambiguous or vague with respect to the inspection of and presence of asbestos materials in the schools should be proscribed. It does not seem likely, however, that the failure to mention that there are five buildings associated with the high school would leave a person looking at the records and knowing that they apply to the high school in doubt as to whether all buildings were covered by the records. Possibly, the importance of listing the high school as five buildings and the potential for harm if it is not, is better assessed if asbestos-containing materials had been found in the school. On this record, however, this particular violation does appear to be minor in extent.

9/ See preamble to proposed rule, 45 Fed. Reg. 61978 (September 17, 1980).

Complainant also contends that the records did not indicate whether any of the buildings of the high school had been inspected for friable material or whether there was or was not such material present in any of the buildings. 10/ This is not totally true for there are reports in the file of a sample having been taken and analyzed from the "H.S. Boiler Room," and of a sample having been taken and analyzed from the "High School South Gym," during the inspection by PEPCo in 1984. Both reports disclosed that although friable materials were present, no asbestos was observed. 11/ Also, since the records showed that three schools were inspected and friable asbestos materials found in only two, the DuMont Elementary School and the Sellman Middle School, one carefully reading the records would undoubtedly be able to glean from them that there was no friable asbestos material at the high school. Such records, however, cannot be considered as an adequate substitute for records that on their face expressly state that the high school has been inspected and whether or not any buildings in the high school have friable materials present, which is what the rule actually requires. The risk of harm arising from this deficiency in the records, nevertheless, is also minor. In view of what the record discloses about Respondent's conscientious efforts to comply with the rule, it is safe to assume that if friable asbestos material had been found in the high school, it would have been disclosed with the same detail of information that was provided with respect to the two schools where friable asbestos was found. 12/

10/ Complainant's motion for accelerated decision at 3.

11/ Williamson affidavit, Exh. I.

12/ See letter from PEDCo dated July 5, 1984, in Exh. I to the Williamson affidavit.

Accordingly, for the reasons stated, I find that recordkeeping violation charged with respect to the Madeira High School is minor in extent and not significant as claimed by Complainant, and that the appropriate penalty is $200.

The Notification Violations at the DuMont Elementary School

Respondent contends that compliance with the requirements that persons employed at the DuMont School be given written notice of the presence of asbestos-containing materials as required by 40 C.F.R. 763.111 (b), was accomplished by Respondent posting EPA Form 7730-3 in the areas where friable asbestos material was found and also in other conspicuous places in the building such as the teacher's lounge and the employee's lounge. 13/ Contrary to what Respondent argues, the rule requires individual written notices to each employee. This is in accord with the usual construction of a requirement for giving written notice. See N.L.R.B v. Vapor Recovery Systems Co., 311 F.2d 782, 785 (9th Cir. 1962). Moreover, it is clear from a study of the rule itself and of Form 7730-3, that the posted notice and the notice to individual employees were to serve two separate but complementary purposes. Form 7730-3 alerts those who read it to the presence of friable asbestos-containing material in the school and where they may obtain more complete information about it. The notice to each employee insures that he or she will be informed of the actual location in the school of the friable asbestos-containing material. While Respondent has listed on Form 7730-3 the location by room or building area

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13/ Respondent's response at 9.

where the asbestos material is present, this is not the actual information called for on the form. 14/

Nevertheless, although written notice was not given to the individual employees, Respondent did apparently orally notify them of the location of friable asbestos material and also furnished each non-teaching employee with a copy of EPA Form 7730-2 "A Guide for Reducing Asbestos Exposure." When these actions are combined with the wide posting of Form 7730-3, the probability of persons being unwittingly exposed to asbestos once Respondent learned of its presence seems very small.

With respect to notifying the PTA leaders as required by 40 C.F.R. 763.111(d), Respondent contends that it did more than what the law requires by conducting a personal tour of the building for all PTA leaders and members shortly after the EPA had made its inspection. The violation arises, however, from the fact that Respondent did not give prompt notice but waited until it had completed its abatement program for removing or encapsulating the asbestos material. Respondent's letter of August 30, 1984, to the PTA leaders suggests that Respondent did so because it was concerned in not making the PTA overly anxious and causing them to react excessively to the fact that asbestos materials had been found in the schools. 15/ The rule, however, must be construed as requiring prompt notice in the absence of some indication to the contrary. Any question about this is resolved by an examination of the legislative history.

14/ The rooms and building areas having asbestos-containing material were noted in the space on the form in which Respondent was to give the building and room where the record of the inspection, a diagram of the locations of the asbestos-containing materials and a copy of the EPA regulations were available. Williamson's affidavit, Exhs. F1 and F2.

15/ See Williamson affidavit, Exh. 4.

In responding to comments on the proposed rule in its analysis of comments, the EPA stated as follows:

> The Agency disagrees that the schools should not send notices to parents or parent-teacher associations until after abatement work is conducted. As noted previously, EPA does not believe that all schools with an asbestos problem will require abatement work and the Agency does not want to encourage local education agencies to undertake such activity unnecessarily. Furthermore, because abatement work will be more costly and require some preparations, EPA finds that schools will act more slowly to carry out remedial programs than they will to carry out detection programs. The Agency finds that employees and parents should be notified promptly, before schools begin remedial work. 16/

It is also to be noted that in the preamble to the final rule, the EPA recommended specific wording for the notice to parents to avoid any overreaction by them, which wording could also be used, it would seem, on notices to the PTA. 17/

Taking into account, however, the fact that Respondent immediately acted to remove or encapsulate the asbestos material after learning of its presence at the school, that this work was substantially completed by the time of the EPA's inspection, and completed very shortly thereafter so as to remove all risk of exposure, and also the evidence generally indicating that Respondent even though it did not meet all the requirements of the rule did act responsibly in endeavoring to keep the school population from being exposed to asbestos, it would appear that the risk of harm created by the delay in notifying the PTA, was only a minor one.

16/ USEPA, OPTS, OTS Analysis of Comments (January 1982) at 37-38. Since this document is listed as a support document (No. 4) in the preamble to the rule, see 47 Fed. Reg. 23367 (May 27, 1982), and is frequently referred to in the preamble, there is no question of its being part of the legislative history of the rule. Although not cited by Complainant, I may take official notice of its content so long as Respondent is informed of the source. See Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981).

17/ 47 Fed. Reg. 23366.

Accordingly, I find that the appropriate penalty for the notification violations at the DuMont School is $1000. It is recognized that this is a considerably greater reduction in the penalty set by the EPA's guidelines than the 40% proposed by the EPA. Taking into account, however, Respondent's good faith efforts to comply with the rule, that while Respondent's first inspection probably did not meet the EPA's requirements, Respondent had good faith reasons for believing it did, that Respondent promptly had the school reinspected on learning that the first inspection was inadequate, that it promptly acted to remedy the situation once it learned that there was friable asbestos material in the schools, and that its efforts although falling short of full compliance did minimize the risk of exposure, it is believed that this reduction is proper.

Conclusion

It is concluded that Respondent has violated the Asbestos in Schools Rule, 40 C.F.R. 763.111(b) and (d) and 763.114(a)(2). It is further concluded that a penalty of $1200 should be assessed for these violations.

ORDER 18/

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. 2615(a)(1), a civil penalty of $1200 is assessed against Respondent Madeira City Schools, for the violations of the Act found herein.

18/ This accelerated decision disposes of all issues in the case and constitutes the initial decision of the Administrative Law Judge. 40 C.F.R. 22.20(b). Unless an appeal is taken pursuant to section 22.30 of the rules of practice or the Administrator elects to review this decision on his/her own motion, the Accelerated Decision shall become the final order of the Administrator (see 40 C.F.R. 22.27(c)).

Payment of the full amount of the civil penalty assessed 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 United States of America and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Gerald Harwood
Administrative Law Judge

DATED: September 11, 1985
Washington, D.C.

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	
MEXICO FEED & SEED COMPANY, INC.,	TSCA Docket No. VII-84-T-312
AND	AND
JACK PIERCE d/b/a	TSCA Docket No. VII-84-T-323
PIERCE WASTE OIL SERVICE, INC.,	(CONSOLIDATED)
RESPONDENTS	

TOXIC SUBSTANCES CONTROL ACT (TSCA) - PARTIES

1. Motion to make an individual shareholder and officer of a corporation a Party-Respondent will be granted on the showing that said individual actively defended the subject Complaint, after receiving notice of the alleged violation and institution of the action, hired counsel, participated in preparation of the defense, attended the hearing and testified concerning the violations alleged in said Complaint. Under said facts, the individual has entered his appearance by actively preparing the defense and no other service or formal amendment of the pleadings is necessary.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CONTRACTS

2. Where essential elements of an alleged attempted sale were left to be negotiated, there was no agreement or meeting of the minds of the parties to such negotiations and no sale resulted.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CORPORATIONS

3. Respondent was not released of his personal liability by simply showing the organizing of a corporation in the State of Delaware when it further appeared that the Delaware corporation wholly failed to comply with the laws of the State of Missouri and had no authority to make a contract or transact business in Missouri.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CORPORATIONS

4. The corporate laws of the States of Delaware, Illinois and Missouri have a common intent and objective, that is, to make available corporate assets to bona fide creditors and provide for following said assets, or the proceeds thereof, and to thus place liability, to such extent, on the person or persons into whose hands the assets, or proceeds, have fallen.

APPEARANCES

For Complainant:	Henry F. Rompage, Attorney Office of Regional Counsel U.S. Environmental Protection Agency Region VII 726 Minnesota Avenue Kansas City, Kansas 66101
For Respondent JACK PIERCE:	G. Edwin Proctor, Esquire HEAVNER, JARRETT & KIMBALL, P.C. Suite 900, Bryant Building 1102 Grand Avenue Kansas City, Missouri 64108
For Respondent MEXICO FEED AND SEED CO., INC.:	Arthur A. Benson II, Esquire BENSON & McKAY 911 Main Street, Suite 1430 Kansas City, Missouri 64105

INITIAL DECISION

On July 20, 1984, separate Complaints were filed by the Regional Administrator of the United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant"), Region VII, against Mexico Feed & Seed Company, Inc., North Jefferson Street, Mexico, Missouri (hereinafter "Respondent Mexico" or "Mexico"), Jack Pierce, an individual formerly doing business as Pierce Waste Oil Service, Inc. (hereinafter "Respondent Pierce" or "Pierce" or "PWO") and Moreco Energy, Inc. (hereinafter "Moreco"). The allegations of each Complaint charge identical violations of the Toxic Substances Control Act ("TSCA") as shown by an investigation made by an authorized representative of Complainant on June 27, 1984, and July 5, 1984. On April 4, 1985, the Complaint against Moreco was dismissed without prejudice as requested by Complainant in its Motion to Withdraw Complaint, dated March 28, 1985, after said Complaints had been consolidated for hearing. The Consolidated Complaints against Respondents Mexico and Pierce charge that samples taken from four waste oil tanks located on a site which is part of a three-acre tract leased and controlled by Mexico and owned by one J. F. Covington, 1/ contained significant amounts of PCB; that said site was leased by Covington to Pierce, around 1964, allowing Pierce to place one and, thereafter, three additional, oil tanks thereon, which were owned by Pierce. Count One charges that the four tanks are PCB containers (40 C.F.R. 761.3[v]) and contained PCB on the date of said inspection; that Respondents failed to maintain said PCB containers in a facility meeting the requirements of 40 C.F.R. 761.65(b)(1); that there was no Spill Prevention and Countermeasure Plan as required

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1/ The record shows that, since around 1959, Mexico Feed & Seed, including the business and real estate, was the sole property of said J.F. Covington and wife (Transcript [hereinafter "TR"] T-239) until said business was incorporated January 1, 1980 (TR 238). The corporation has leased the real estate and equipment from Covington since its formation January 1, 1980.

by 40 C.F.R. 761.65(c)(7)(ii) or documentation that the design, construction and operation of the tanks conformed to the requirements of 761.65(c)(7)(i); and that said PCB containers were not dated when placed in storage and that said failures violated Sec. 15(1) of TSCA, 15 U.S.C. 2614(1).

Count Two charges that said PCB containers were not marked, in violation of 40 C.F.R. 761.40(a)(1), which requires that, as of July 1, 1978, PCB containers shall be marked as provided by Section 761.45(a), and that such failure violates said Section 15(1) of TSCA.

Count Three charges Respondents with failure to develop and maintain records, beginning July 2, 1978, on the disposition of PCBs and PCB items and to prepare and maintain an annual document each July 1, covering the calendar years 1978 through 1983, and to include information specified at Section 761.180(a)(1) through (3) in violation of said Section 15(1) of TSCA.

Count Four charges that a composite soil sample taken from a spill (see 40 C.F.R. 761.60[d][1]) between the above tanks was analyzed and found to contain 330 parts per million (hereinafter "ppm") PCB, and that Respondents have thus violated TSCA by disposing of PCBs while not following the requirements of 40 C.F.R. 761.60(a). For said alleged violations, said Complaint proposes the assessment of civil penalties totaling $65,000: $15,000 on each of Counts One and Two, $10,000 on Count Three and $25,000 on Count Four. At the hearing, held herein on June 11, 1985, the parties stipulated on the record (TR 5) prior to the taking of evidence, that Complainant "would make a prima facie case for a civil penalty of $29,000" and that the Complaint is by Complainant amended to propose penalties totaling $29,000 instead of $65,000, and that EPA agrees not to seek penalties exceeding $29,000. In addition, the parties stipulated (Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 1) as follows:

1. That on or about June 27, 1984, and July 5, 1984, David Ramsey, EPA Region VII Consumer Safety Officer, conducted an investigation at Mexico Feed & Seed Company, Inc., at Mexico, Missouri.

2. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey found on the premises four waste oil tanks.

3. In approximately 1967, the principals of Pierce Waste Oil Service, Inc. and Mexico Feed and Seed Company, Inc. entered into a verbal lease agreement for the placement by Pierce Waste Oil Service, Inc. of waste oil tanks on the premises of Mexico Feed & Seed Company, Inc.

4. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey properly sampled, sealed, identified and shipped to the EPA NEIC Laboratory, Denver, Colorado, oil from the four tanks referred to in Stipulations No. 2 and 3.

5. That EPA NEIC Laboratory personnel properly conducted analysis of the four oil samples referred to in Stipulation No. 4 and said analysis of the four oil samples referred to in Stipulation No. 4 established the east-central tank contained oil of 80% PCB content; the west-central tank contained oil of 74% PCB content; the north tank contained oil of 730 ppm PCB content, and the south tank contained oil of 160 ppm PCB content.

6. That the four tanks referred to in Stipulations No. 2, 3, 4 and 5 are "PCB containers" as defined at 40 C.F.R. §761.3(v).

7. That two of the four tanks referred to above, specifically the east-central and west-central tanks, are subject to the regulations of April 18, 1978; and two of the tanks, specifically the north and south tanks, are subject to the regulations of July 1, 1979.

8. That the four tanks referred to above were not stored in a facility meeting the requirements of 40 C.F.R. §761.65(b)(1), as required by 40 C.F.R. 761.60(c)(3).

9. That prior to July 1, 1979, said tanks were not subject to the storage regulations at 40 C.F.R. 761.60(c)(3).

10. That, in regard to the four tanks referred to above, there was no Spill Prevention Control and Countermeasure Plan prepared or implemented, as required by 40 C.F.R. 761.65(c)(7)(ii).

11. That prior to July 1, 1979, said tanks were not subject to a requirement for a Spill Prevention Control and Countermeasure Plan pursuant to the requirements of 40 C.F.R. 761.65(c)(7)(ii).

12. That in regard to the four tanks above, there was no documentation that the tanks were designed, constructed and operated in compliance with 29 C.F.R. 1910.106, as required by 40 C.F.R. 761.65(c)(7)(i).

13. That prior to July 1, 1979, said tanks were not subject to the design, construction and operation requirements at 29 C.F.R. 1910.106, as required by 40 C.F.R. 761.65(c))7)(i).

14. That the four tanks referred to above were not dated when placed in storage as required by 40 C.F.R. 761.65(c)(8).

15. That prior to July 1, 1979, said tanks were not required to be dated when placed in storage as required by 40 C.F.R. 761.65(c)(8).

16. That the four tanks referred to above were not marked with the mark M_L as described at 40 C.F.R. 761.45(a) and required by 40 C.F.R. 761.40(a)(1).

17. That prior to July 1, 1979, said tanks were not required to be marked with the mark M_L as required by 40 C.F.R. 761.40(a)(1).

18. That, in regard to the four tanks above, there were no records developed or maintained or annual report prepared as required by 40 C.F.R. 761.180(a), for the years 1979, 1980, 1981, 1982 and 1983.

19. That prior to April 18, 1978, there were no requirements to develop and maintain records or annual reports.

20. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey properly collected a composite soil sample from an oil spill between the tanks referred to above, and properly sealed, identified and shipped said soil sample to the EPA NEIC Laboratory, Denver, Colorado.

21. That EPA NEIC Laboratory personnel properly conducted analysis of the soil sample above, and said analysis of the soil sample referred to in Stipulation No. 20 established the presence of 330 ppm PCB.

22. That pursuant to 40 C.F.R. 761.60(d)(1) and 761.60(a), there was a disposal of PCBs not in accordance with 40 C.F.R. 761.60(a).

23. That prior to April 18, 1978, the disposal of PCBs which occurred prior to said date were not regulated.

I find that by said Stipulations the charges in the Complaint are by the Respondents admitted and the determination shall be made herein whether all or any one or more of the parties are responsible for the said violations and the payment of $29,000 total penalty agreed upon as an appropriate penalty for said violations. On the basis of the evidence educed at the hearing, the exhibits received in evidence and upon consideration of the post-hearing submissions of the parties, I hereby make the following

FINDINGS OF FACTS

1. Mexico Feed & Seed Co., Inc. (hereinafter "Mexico") is a Missouri Corporation authorized to do business from and after January 1, 1980 (Transcript [hereinafter "TR"] 238). Prior to 1980, said business was a sole proprietorship (TR 239) owned by James F. Covington.

2. Mexico was and is located at the north city limits of Mexico, Missouri, on three acres (TR 237) which is the corner portion of a 55-acre tract (TR 237) acquired by Covington in 1959 (TR 238).

3. Covington has been in the feed and seed business for 36 years, has operated a farm for 50 years and has never been in the waste oil disposal, or any other, business (TR 236).

4. Mexico has at all times since its incorporation leased said three acres from Covington and wife (Respondent [hereinafter "R"] Mexico [hereinafter "M"] Exhibit [hereinafter "EX"] 5; TR 255). The tract so leased includes the area of land on which subject four oil tanks were placed by Respondent Pierce (TR 257); said tanks are located on an area off the side entrance where ingress and egress is afforded without interfering with the Mexico operation (TR 240).

5. Covington's first contact with Respondent Pierce was circa 1964 after Covington was contacted by Eugene Affloter, a Pierce employee (TR 258, 264), who inquired about the availability of an area of land for the placement of one tank (TR 258).

6. Respondent Jack Pierce verbally made a deal with Covington, circa 1967, to place storage tanks on subject Mexico tract for an agreed rental charge of $150 per year, as a result of his trip to Mexico, Missouri, for that purpose (TR 32).

7. Pierce is retired from Pierce Waste Oil Service, Inc. (hereinafter "PWO"] of Springfield, Illinois, whose business was picking up waste oil, i.e., its truck drivers picked up waste oil from service stations and factories and transported it to places where it was sold (TR 31).

8. Jack Pierce operated said business for 30 years (TR 31) until sale of the assets used in said business to Motor Oils Refining Technology Co ("MORECO") on or about March 5, 1983 (R Pierce [hereinafter "P"] EX 2; TR 51).

9. PWO is a Delaware Corporation formed by Respondent Jack Pierce sometime in 1964 (R-P EX 9; TR 44), which continued up until the retirement of Jack Pierce

(TR 44), after which it was dissolved (TR 72) in 1983 or 1984 (TR 58) following the sale of the assets of PWO and the assets of the other Pierce companies (TR 52).

10. Other Pierce companies in which Respondent Pierce held ownership were Industrial Fuels, Inc., Central Refining Co., Inc. and Tri-State Oil, Inc. (TR 52).

11. The assets sold were identified in said Asset Purchase Agreement (R-P EX 2 [see document referred to as R-P "Exhibit A"]; TR 54). The subject tanks and ground lease in Mexico were not there listed (TR 55); contents of the tanks were not there listed (TR 174).

12. At all pertinent times, Jack Pierce was Chief Executive Officer and President of PWO (TR 50); Pierce testified he was authorized to generally conduct business for PWO which included entering into lease agreements (TR 50), and that he could make all decisions for PWO if he wanted to, although he does not remember any express authority, from PWO's Board of Directors, or resulting from a corporate meeting, to enter into a lease for the corporation (TR 48).

13. Upon formation of said PWO, Inc., in 1964, Jack Pierce's brother, Perry Pierce, and Perry's wife, served as officers and on the Board of Directors; later, Jack Pierce's son, Martin Pierce, served on the Board (TR 46). At that time, Jack Pierce owned 49 shares, his wife one share; Perry Pierce then owned 49 shares and Perry's wife, one share (TR 47).

14. Jack Pierce was paid a salary by said corporation, but no other person was paid a salary. No dividends were paid by the corporation. Perry Pierce, although a holder of one-half of the corporate stock, received no salary, dividends or other pecuniary benefit (TR 48).

15. Jack Pierce acquired all of the equipment and assets of PWO (TR 50).

16. Pierce testified that in 1973 or 1974, Covington asked Pierce what he would take for the 10,000-gallon tank; Pierce did not give Covington an answer (TR 37);

that later, Pierce asked Covington if he would give up three years' rent for all the tanks, and that Covington agreed to the deal proffered (TR 38).

17. Pierce testified that his reason for the aforesaid agreement was that "we were going to pull out of there" as soon as "we got to the point where we could put on bigger trucks" (TR 38-39).

18. Pierce continued in operation at the Mexico site until August or September, 1976, when a final pull-out was made (TR 39).

19. The last rental check paid by Pierce was in the amount of $400 (two years' rent at the increased rental rate of $200 per year) and dated 1-11-73 (although it was meant to be correctly dated 1-11-74), payable to Mexico Feed and Seed Co., purportedly drawn on the account of Waste Oil Service and purportedly signed by Jack Pierce, an individual. There was no indication on the check of the purpose for which said payment was made, but Pierce testified that he anticipated free rent for the years 1975, 1976 and 1977, and that his pull-out in September, 1976, was before the end of his "free rent" period (TR 41), because "we had a big truck at that time" (TR 42).

20. Pierce testified that said check was actually drawn on the corporation's account; that the Waste Oil Service checks were used to avoid a mix-up with Pierce Oil and Refining Company account (TR 42).

21. Pierce testified that he met with Covington in August or September, 1976, "out at the tanks where we loaded and unloaded oil", where he told Covington "we (have) a bigger truck . . . "; that the tanks would not be used and they were his (Covington's) and that Covington said "Okay" (TR 43) in acknowledging the tender of said tanks by Pierce. One of Pierce's drivers, Paul Sailer, was present at the meeting (TR 43). At said time, there was oil in the tanks (TR 55).

22. Paul Sailer testified he worked for Pierce for about eight or nine months - less than a year - picking up oil, and then until October 1977 as a semi-driver (TR 123); that he was present, and participated in conversation, at the meeting between Covington and Pierce about August 1976 - "standing right there" (TR 116); that he was (there) to clean out the (four) tanks (TR 118); that Covington was heard by him to say he would accept the tanks in exchange for the term of the lease (TR 121).

23. Pierce had gone to Mexico "to make sure (Sailer) pumped all the oil out" and he pumped over the top. "The valves stuck up a little bit and you don't get it out that way, so we had to fill your hose inside and pump it out." "Over the top" means going in the manhole over the top, clear to the bottom of the tank and "that is the way Sailer pumped (the) oil out" of all four tanks (TR 56). Sailer testified that a gear-type positive-displacement pump (on the same tractor) was used with two-inch suction hoses (TR 118).

24. Pierce testified (TR-57) that all the oil was pumped from the tanks and they were turned over to Covington (TR 57).

25. Pierce looked inside the tanks after Sailer pumped out the oil and "there was just a kind of film on the bottom of the tanks" (TR 59). Sailer testified (TR 119) that after he pumped out the oil, only the normal oil residue remained.

26. Pierce testified that the tank which Covington allegedly was interested in was the southern-most tank, a vertical tank of approximately 10,000 gallon capacity; on the east side was a 1,000-gallon tank; a 700-gallon tank was in the west-central location; another tank at the north end was 15,000 to 17,000 gallon capacity (TR 61).

27. Pierce testified that "after we decided to pull out of there . . . I agreed to give (Covington) all of (the tanks) for three years' rent" (TR 61).

28. Pierce Waste Oil Service (PWO) was started in 1952 and Jack Pierce and his brother, Perry Pierce, ran it as a partnership until its incorporation in 1964 (TR 63).

29. Perry Pierce, in 1952, owned Springfield Refined Oil Company which he sold around 1970 (TR 65).

30. Besides from garages and service stations, oil was picked up from a factory in Shelbina, Missouri, and Eugene Affloter picked up oil at the Mid-Mo Electric Company in Sedalia, Missouri (TR 81).

31. No special instructions were given to drivers except they were to bring the oil in and dump it in the tanks (TR 82).

32. In 1976, Covington came by his premises late at night and discovered someone stealing oil from said tanks; Covington called Pierce who came to Mexico and signed a complaint at the Prosecutor's office, charging J. Edward Covert with attempted stealing of oil in excess of $50 from Pierce Waste Oil Service, Inc. (R-M EX 8; TR 84).

33. Pierce testified that he doubted whether the alleged trade of the tanks to Covington (for three years' land rent) was recorded in the corporate minutes (because) it was such a small deal (TR 91).

34. No tax returns were produced by Pierce to show whether or not said tanks were depreciated or whether a sale of said tanks was reported (TR 92).

35. Either Jack Pierce or his son, Martin Pierce, sent Rod Waller, their driver, to Mexico Feed & Seed in 1978 to pump oil from subject tanks (TR 94-96) and haul it back to Springfield, Illinois. Jack Pierce testified that Mexico Feed & Seed was not paid anything for the oil (TR 101).

36. The first formal action by the Board of Directors of PWO, Inc., to dissolve the corporation was taken (without a meeting) March 4, 1983 (TR 105), and a Certificate of Dissolution of said corporation by the State of Delaware is dated February 29, 1984 (R-P EX 3; TR 104).

37. Rod Waller testified that he went to Mexico in 1978 and emptied the tanks except for some residue (TR 155); he pumped out two tanks and checked the screen on the truck tank (TR 157) and that he did not see any sludge when he looked in the tanks (TR 160) during daylight hours (TR 157); that there might have been a little sludge in the bottom of the tanks; and that he cannot remember if sludge clogged the "screen" TR 156, 157).

38. Martin Pierce testified he is the son of Jack Pierce; that PWO was a corporation in good standing from 1964 to 1983 (TR 164) and that for a time he was Vice President of PWO; that PWO "pulled out of operation in Mexico, Missouri" in August, 1976 (TR 165); that he dispatched Paul Sailer to Mexico (in 1976) "for a final pump-out of the site"; that Jack Pierce, his father, went over to make sure all the tanks were cleaned out; that his father "gave the tanks to some guy on a deal" of which he did not know the particulars until (recently) (TR 167)"; that Paul Sailer returned from the site and reported that the tanks were drained dry (TR 168), and that he remembers getting a call, and then a second call, from Mexico Feed and Seed in early 1978, asking that oil be picked up at subject site (TR 169).

39. Five years or more after PWO was incorporated (about 1969), Jack Pierce and his wife owned all of the stock of PWO, buying out Perry Pierce, Jack's brother (TR 187).

40. Of the four Pierce family companies, two were incorporated in Delaware and two in Illinois (TR 188).

41. George Nelson, a filling station operator in Mexico, Missouri, sold waste oil to Pierce (or PWO) from 1971 until he sold his business in 1979. He has known Covington for 35 years, knew Pierce was storing oil on the Mexico Feed premises and never learned directly or indirectly of Covington's going into the

waste oil business and has never known Covington to have any interest in the waste disposal business (TR 191-192).

42. William B. Robnette testified he became associated with Mexico Feed & Seed Co. in August, 1979, and became a shareholder in Mexico Feed & Seed Co., Inc. when it was incorporated in December, 1979 (TR 213).

43. Robnette testified further that he recalls when trucks from Pierce Oil came to subject site after Covington called Pierce and told them a tank was leaking; that the time would have been in 1980 or 1981, as it was in the spring and subsequent to the time he came to Mexico in 1979 (TR 214); that he and Covington thought the "leaking tank" probably froze and started leaking when it thawed with warmer weather (TR 215); that Waller, the driver, hooked up to the valve at the bottom of the upright tank; that Waller was there about one and one-half hours, left and then returned in 30 minutes or an hour and told him he took some of the "stuff" out and spread it on the road to have room for more of it (TR 216-217); that Waller hooked up a second time and then left in 30 to 40 minutes (TR 217).

44. Robnette further testified that, when talking to Covington about the incorporation, Covington stated that the subject oil tanks belonged to Jack Pierce (TR 217) and that Pierce had not paid rent for several years (TR 218); that Robnette wanted to get rid of the tanks but Covington said they were Pierce's and that Covington wanted Pierce to move them (TR 218-219).

45. Robnette further testified that he noted the leaking tank and Covington acted to get hold of Pierce and have him do something about it (TR 225); that the leak was discovered in Spring, 1980, or later (TR 225).

46. James Covington testified that, in 1976, when he called Pierce and told him he caught someone stealing from his tanks, Pierce replied, they would "come

over and file charges" (TR 246); that, in February, 1980, he called Pierce telling him that one tank was leaking and that it might run down the road into the creek and cause trouble and a man was sent (by Pierce) to fix the leaking valve on the tank and the following day a truck came to pump out the tank (TR 247).

47. William B. Robnette was first paid for work on August 15, 1979, and had not worked for Mexico or Covington before August, 1979 (R-M EX 3; TR 248). Robnette and Covington formed a corporation January 1, 1980, pursuant to an agreement that Robnette would be brought into the business (TR 251).

48. James Covington testified further that he had no discussion whatever with Jack Pierce about a deal whereby Covington "could have the tanks in return for three years' free rent on the property" because he never had any interest in the tanks and did not indicate he wanted the tank or tanks because he had no business with the tanks and has had no use for a big tank such as the 10,000-gallon vertical tank (TR 250); that the only knowledge he had respecting the contents of the tanks was what Pierce or Pierce's driver told him, i.e., that the tanks contained waste oil from service stations (TR 251).

49. Effective January 1, 1980, Covington leased to the corporation the land and buildings utilized by Mexico Feed, which lease is now and at all pertinent times has been in effect. Exhibit A, attached to said lease agreement, is a list of all the assets of Mexico; neither subject tanks or the contents (oil) was listed by Covington as an asset (R-M EX 5; TR 252).

50. Covington further testified that when he called Pierce to report the leak, circa February, 1980, he told Pierce he wanted the rent paid and the tanks moved and Pierce said he would do so without mention that Covington might want to keep the tanks for rent; that Pierce did not pay the rent or move the tanks (TR 252-253); and that Covington did not know or learn that the tanks contained

anything except waste oil from service stations until EPA came and told him after the oil was sampled and tested by EPA for the presence of PCBs (TR 253).

51. Covington further testified that he had never known of Pierce's claim that Covington owned the tanks until the testimony heard in the subject hearing; that he cannot remember ever talking to Pierce under circumstances where one of Pierce's employees was in the process of loading oil into a truck (TR 254); that the times Covington remembers talking to Pierce were in Covington's office (TR 277) and on the telephone (TR 289).

52. Catherine Potts (TR 291) testified that she is, and has been since 1965, employed by Covington as a bookkeeper; that she was and is responsible for sending out bills and statements; that she sent bills (hand-written) to Jack Pierce every year; that her journal shows payment of $150 by Jack Pierce in May, 1967, but no copies or records were kept of bills so sent out (TR 293); that statements were sent to Pierce for several years and were unpaid; that she did not send him any more statements after 1980; that entries in her journal were made only when payment was received (TR 295); that she has seen Jack Pierce . . . at the store . . in the office once or twice, but did not talk to him (TR 298); that she remembers the instance, but not the date, when he came to town (Mexico) when people (were prosecuted for stealing oil) TR 299); that she talked to Pierce's driver when they came into the office to use the telephone (TR 300); and that she did not observe the drivers come and go unless they came in (Covington's) office (TR 301).

53. Gary Snodgrass (TR 6; 304) testified that, on August 6, 1984, he initiated a "removal or clean-up" pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") which entailed removal of 2350 gallons of contaminated oil and 2030 cubic yards of contaminated soil from four tanks (C EX 2) on the rear or northwest side of premises of the Mexico Feed and Seed

Company in Mexico, Missouri (TR 7); that oil in a large horizontal tank "north tank" was removed, first by suction with a vacuum hose out of the top part and, when the oil would not flow, oil was removed by way of the valve on the left side of the tank (as seen in Photo 1, C EX 2); that sludge prevented removal of the oil from the valve in the right side of the tank (TR 9). The oil was above the outlet spigots on the tank by almost two feet (TR 10) and estimated at 1000 gallons (TR 10).

54. Snodgrass further testified (TR 307) that the "large horizontal tank" was ten feet in diameter (TR 305) and 30 feet long (TR 306) and that, without a flashlight, he could not tell, looking down into the tank, if the tank was empty, so a pole was used to determine if the tank contained fluid; that he and the technicians with him could pump only 200 gallons from said horizontal tank with a gear pump (such as that purportedly used by Pierce employee); that a Weldon diaphragm pump was used to pump sludge, and several drums of sludge were pumped after which sludge still remained that they could not remove from said tank (TR 307); that the Pierce tanker had a screen on it "because if they pump in material that's too thick then they can't pump it back out . . . "; that no screen was used with said diaphragm pump (TR 308); that 43 drums full of oil and sludge were pumped from subject tanks; it was thick, black and viscous, not water but waste oil (TR 309); that most of the liquid and sludge was found in the south (upright) tank and the large horizontal tank; that sludge had to be shoveled from said south tank (TR 11); and that he had no knowledge of how said oil got in the tanks (TR 312).

55. Rod Waller further testified that his purpose in going to Mexico in February, 1978 (TR 319), was to empty the subject tanks and also to pick up oil from accounts (TR 320; 321); that he was sent to Mexico by Martin Pierce who

said he a got a call from a customer at Mexico Feed "and we want you to go pump out the contents of the tanks" (TR 322); that Waller had a short conversation with somebody at Mexico Feed, whose identity is unknown, concerning a leaking valve (TR 324); that no record exists of the liquid obtained from the Mexico tanks because it was "mostly water" (TR 325); that, to see what is coming from the tank, the hose is connected to the top of the tank and then pumped into the tanker (TR 327); that it is not hard to tell water (which is clear) from oil; that if the liquid were taken from the bottom of the tank "you wouldn't know what you're getting and you'd be paying for a lot of water" (TR 326); that the water removed was dumped on back roads (TR 328); that the upright tank was drained through a valve on the bottom (TR 329), which procedure is consistent to that observed by Robnette (TR 330; Finding 43, supra).

56. Respondent Pierce placed in evidence the articles of incorporation, minutes, by-laws and certificate of incorporation along with a certificate of authority for said Pierce Delaware corporation (Pierce Waste Oil Service, Inc.) to do business in Illinois (TR 336). A similar certificate to do business in Missouri was not placed in evidence, however, Jack Pierce was sure such certificate exists (TR 336). Along with its post hearing Reply Brief, Respondent Mexico Feed supplied a certificate, dated September 5, 1985, from the Missouri Secretary of State, Corporate Division, certifying that there are no records there on file which show that Pierce Waste Oil Service, Inc., and/or Pierce Waste Oil Company, Inc., is now or ever has been registered as a Foreign or Domestic corporation or under the Fictitious Name Act.

57. James R. Gipson worked for Jack Pierce picking up waste oil for about two months beginning in late 1973. He testified that he picked up oil at service stations and from a plant in Shelbina, Missouri, that makes conduit pipe; that

he was told by his predecessor, McGuire, to put any oil from the Shelbina plant in a separate tank; pursuant to such instructions he put the "heavy" oil from the Shelbina conduit pipe plant in the upright tank located at Mexico Feed and Seed (TR 198199). He was given no instructions about washing out the tank in between loads and said tank was not "washed out" (TR 199). Gipson also testified that he worked for (Respondent) Mexico Feed as a laborer at different times including the 1979 to 1983 time period during which time he was supervised by Bill Robnette; that he saw Rod Waller at some time during this period drive his truck up alongside and hook up the hose from the truck to the "upright tank's" lower faucet valve (TR 201); that this observation was occasioned by Gipson's duties at Mexico Feed which required him to pass by the subject tanks in going back and forth between the seed house and feed store (TR 201). Gipson further testified that he observed, prior to seeing the Pierce truck at the tank, that the lower valve had either frozen up or broken (and) was "leaking water out on the ground" (TR 204); and that, during the time he worked for Covington, he did not see anybody other than the Pierce company use subject tanks (TR 208).

58. James F. Covington, who testified as a witness concerning the conduct, transactions and occurences set forth in subject Complaints (TR 236 et seq.), was advised by EPA when they secured a sample of subject waste oil in 1983 and, in 1984, after a test had been made of said sample showing that said waste oil contained PCBs (TR 253). He participated in the defense of Mexico Feed and Seed Co., Inc. (which, in 1980, succeeded a sole proprietorship, owned by Covington) and hired and conferred with counsel employed by him to represent said corporation (TR 259; 284). Covington was present during the entire two-day hearing held herein (TR 256) and testified concerning the issues which the hearing addressed.

CONCLUSIONS OF LAW

The Conclusions of Law reached herein are set forth and discussed herein-below.

COMPLAINANT'S MOTION TO ADD JAMES F. COVINGTON AS A PARTY RESPONDENT

At the close of the evidence, Complainant moved (TR 342) that James F. Covington, individually, be made a party Respondent herein. The Counsel for Mexico objected to the Motion on the ground that the granting of said Motion would deny Covington "due process", as he would be entitled to Notice and to his own Counsel, as there might be a conflict between him and Mexico Feed and Seed, Inc. The granting of subject Motion is clearly within the contemplation of the Federal Rules of Civil Procedure (FRCP), Rule 15. On this record, it was James F. Covington who actively defended the Complaint. He hired Counsel (TR 259; 284), received notice of the alleged violation from EPA and notice of the institution of the action against Respondent Mexico Feed (TR 253), was present during meetings with witnesses (TR 259), was in attendance during the two-day hearing (TR 256), and testified as a witness (TR 236-286) concerning the transactions constituting the violations alleged in subject Complaint. It has been stated that Rule 15 of FRCP codified the law as declared by the Courts (see matter of J.V. Peters and Co., Inc., RCRA Docket V-W-81-R-75, 1985, EPA Region V, l.c. 36-37, citing Ocean Accident and Guarantee, Ltd., et al. v. Felgemaker et al., 47 FS 661, 663[5]; 143 F.2d 950, 952 [CCA, 6th Cir. 1944]) where it was held that, while no jurisdiction was obtained by service of process, a person, not technically a party, was so directly connected with the case by his interest in the result of the litigation and by his active participation as to be bound by the judgment. The Court pointed out that it is frequently held, citing cases, that a judgment may be rendered directly against one who, although not a formal party . . . has assumed or participated in the defense (l.c. 952[2]).

On the basis of the foregoing, I find that Complainant's Motion to make James F. Covington a party should be and it is hereby granted. On this record, no service of the Complaint or formal amendment of the pleadings is necessary, as Covington entered his appearance herein by actively preparing the defense, providing counsel and by testifying concerning the facts in issue.

THERE WAS NO CONTRACT TO SELL SAID TANKS TO COVINGTON.

The law clearly requires that for a sale to occur or for a contract to be made, there must be a meeting of the minds of the contracting parties (Irvin v. Brown Paper Mills Co., 52 F.S. 43, 146 [F.2d] 232 [1943]); and such contract does not exist so long as any essential element (such as time, place, identity or amount) is open to negotiation (Harbot v. Penn. R. Co., 44 F.S. 319, 320[2] [DCWDNY, 1942]) and that here the burden is on Pierce to prove every fact essential to establish that the sale of or contract for the tanks was made (Bell v. Ralston Purina Co., 257 F.2d 31 [CA OK. 1958]).

James F. Covington (Finding 48) unequivocably denies having any discussion respecting an agreement whereby Covington would become the owner of the tanks. He further states that he was not interested in owning a tank of the size of the 10,000-gallon tank because he had no use for a tank of that volume (TR 250). The only knowledge that Covington had respecting the contents of the tanks was what he was told. He stated, "They (the driver and Mr. Pierce) told me it was waste oil from service stations" (TR 251). Further, Covington's testimony states that the only business he had ever been in was the feed and seed business (for 36 years) and farming (50 years) and that he has never been in the waste oil business (TR 236).

I have further considered that Covington would not place any value on the oil but, like service station operators, would view it as a commodity that he would be glad to dispose of. Whether the last-mentioned pick-up of oil by

Pierce was in 1978 or 1980, it is undisputed that Pierce obtained the oil from the tanks and Covington was not paid anything for the oil (Findings 35, 43 and 45).

To enter the waste oil business, it is apparent one would need more than the tanks. Either he would be required to purchase oil tanker trucks and construct facilites to "refine" the waste oil, or find a willing buyer (such as Pierce) who would willingly buy, haul and refine the oil.

Even if the testimony of Jack Pierce is believed, it is clear that no contract was made at the alleged meeting "in 1973 or 1974." During that meeting, it is claimed that Covington "asked Pierce what he would take for the 10,000-gallon tank". Pierce testified that he did not give Covington an answer (TR 37). Pierce's further testimony was that later he asked Covington if he (Covington) would give up three years' rent for all (four) of the tanks and that Covington "was agreeable" (TR 38); that the time when the deal was made was somewhere in 1973 or 1974 and that Pierce anticipated free rent for 1975, 1976 and 1977 and his "pull out", although apparently not then contemplated, was in August or September 1976, "some time in there", and that after the alleged agreement with Covington, he continued his operation, using the tanks, for "a couple of years, probably . . . a little longer, maybe" (TR 39).

On this record, I find that, in 1976, when advised that persons stealing oil from subject tanks had been apprehended, Jack Pierce came to Mexico and personally filed charges representing that the oil was the property of Pierce Waste Oil Service, Inc. (TR 246). I further find that in February, 1980, Pierce was advised that one tank was leaking and that it might pollute the creek, whereupon Pierce sent a man to fix the leaking valve on the tank and a truck to pump out the contents of the tank (TR 247). These instances are inconsistent with Pierce's claim that the tanks were not then his property.

The instant record also indicates that Pierce's contention is that Covington was "interested" in one of the tanks, and not the contents - the oil. Even under Pierce's testimony, it must be implied that the tank, when "delivered" to Covington, would be empty. Pierce at all times claimed ownership of the oil and made an effort to secure the oil from the tanks (Findings 23, 24, 25 and 46) Covington was aware that the leaking oil, discovered by him and Robnette in 1980 "might run down the road into the creek and cause trouble". In 1984, EPA employees removed 2350 gallons of contaminated oil from the tanks and over 2000 cubic yards of contaminated soil from the site (TR 7; Finding 53).

From the foregoing, I find that there was no meeting of the minds as to the subject of the "sale" claimed by Pierce. There was no agreement as to the condition of the tanks, which was a concern of both the alleged contracting parties; there was no agreement as to the time of delivery. The essential elements of the alleged attempted sale were left to be negotiated and, until agreed upon, no sale or exchange resulted (Cases cited, supra.)

INDIVIDUAL LIABILITY

I find that Pierce Waste Oil Service, Inc., is a Delaware Corporation and one of four "Pierce family companies" (TR 181). Said Corporation was, until its dissolution in February, 1984, authorized to do business in Illinois but was not authorized to do business in the State of Missouri (see certificate from Missouri Secretary of State, dated September 5, 1985, which is attached to Respondent Mexico's Brief).

Delaware law provides that all corporations "shall continue for a period of three years after dissolution or for such longer period . . . necessary to resolve all claims against it." Where others are not appointed trustees, the directors of the dissolved corporation become its trustees and civil action proceeds against them and it is the duty of such trustees of the dissolved

corporation to pay all claims to the extent that funds of the Corporation are "in their hands" (8 DCA Section 279).

Illinois law provides that a foreign corporation authorized to do business in Illinois must file its notice of intent to dissolve such corporation and where said notice is not given, the directors of the corporation are liable for any unsatisfied claims against the corporation (see 32 I.A.S., Section 8.65[a] and 32 I.A.S., Section 12.80).

In Missouri, where Jack Pierce conducted business giving rise to the subject Complaint without authority being obtained by said Corporation to conduct business in Missouri, the directors and trustees are liable for the claims of the Corporation "to the extent of its property and effects that shall have come into their hands" (see MO R.S. Section 351.525).

On this record, the assets of the corporation were sold by Jack Pierce, its chief officer and stockholder (EX A to R-P EX 2; TR 54). As the assets of the corporation, Pierce Waste Oil Service, Inc., have been sold and the proceeds of the sale are in the hands of Jack Pierce, an individual, it would be a futile exercise to bring suit against the corporation (as urged by Pierce), as its assets have been liquidated. The object and intent of the laws of Delaware, Illinois and Missouri are the same, that is, to follow the corporate assets and to place liability on the person into whose hands the assets, or their proceeds, have fallen. The better view, and that which is adopted under the facts in this record, is that Jack Pierce, by carrying on business for a purported corporation which at no time had authority to do business in Missouri, is personally liable for the corporation's obligations and liabilities to the extent of the property, or proceeds thereof, that have come into his hands (Rowden v. Daniell, 132 SW 23, l.c. 27[8], [1910]; Borbein Young and Co. v. Cirese, 401 SW 2d 940 [KC App., 1966]).

In Rowden it is stated, l.c. 27:

> "When the plaintiff showed that (defendant) was engaged with others as the (WZ) Company . . . previous to the organization of the corporation by that name in Michigan, and that mining was carried on in said name . . . , and during said time (defendant) was furnishing money and was one of the managers of the business, he could not be released of his personal liability . . . by simply showing the organization of the corporation in Michigan, when it further appeared that the corporation wholly failed to comply with the laws of (Missouri) and had no right to make any contract or transact any business in (Missouri)."

I find that the civil penalty in the sum of $29,000 should be and is hereinbelow assessed against Respondent Jack Pierce, an individual.

I further find that the Act (TSCA) does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor and, therefore, is no logical or legal basis for holding Respondent J.F. Covington responsible for violations committed by the lessee under the theory of vicarious liability (see ARRCOM, Inc., Drexler Enterprises, Inc. et al. [Oct. 1985], Docket Nos. X-83-04-01 and 02-3008, citing Amoco Oil Co. v. EPA, 543 F.2d. 270 [1976]). ARRCOM further held, and correctly so, that "there is . . . nothing to prevent the Agency from causing the facility to be cleaned up and then attempting to obtain contribution from . . . landowners under CERCLA."

Upon consideration of the record, the submissions and stipulations of the parties and the conclusions reached herein, in accordance with the criteria set forth in the Act and pertinent regulations, I propose the following:

FINAL ORDER 2/

1. Pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. 2615, and the stipulations of the parties herein, a civil penalty in the total sum of $29,000 is hereby assessed against Respondent Jack Pierce, an individual.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding to

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251.

3. No penalty is assessed against Mexico Feed and Seed Co., Inc., or J.F. Covington.

IT IS SO ORDERED.

DATED: October 25, 1985

Marvin E. Jones
Administrative Law Judge

2/ 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon upon the parties unless an appeal is taken by one of the parties herein or the Administrator elects to review the Initial Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.

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 of Region VII, U.S. Environmental Protection Agency, 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, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: October 25, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Lever Brothers Company, Inc.,	)	Docket No. TSCA-III-113
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Manufacturer's or Cautionary Labels - Where a PCB transformer was not marked with the PCB label described in 40 CFR 761.45, but was marked with cautionary labels warning anyone approaching of the presence of PCBs, Penalty Policy (45 FR 59770 et seq., September 10, 1980) required that this failure be considered a minor extent marking violation. Briggs & Stratton, TSCA Appeal No. 81-1 (Final Decision, February 4, 1981) distinguished.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Location of Spill or Discharge - Although PCB Penalty Policy does not provide for mitigation of penalty based on location of spill or discharge of PCBs, where discharge was miniscule in relation to upper limits of minor extent category of Penalty Policy and occurred in a closed, protected area, thus minimizing likelihood of exposure of PCBs to humans or the environment, 25% reduction in gravity-based penalty was determined to be proper.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Extent of Potential Damage - Where quantity of PCBs in transformers involved in record-keeping violations (failure to have available annual documents on disposition of PCBs and records of quarterly inspections) placed violations in major extent category of Penalty Policy Matrix, but record supported finding that annual documents had previously been maintained and transformers regularly inspected for leaks, extent of potential damage, which is primarily related to ability to enforce the Act, was determined to be only partially related to quantities of PCBs involved and violations were placed in significant extent category of Penalty Matrix.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Lack of culpability - Where it appeared that a PCB transformer, although not marked at time of inspection which was genesis of proceeding, had previously been marked as required by 40 CFR 761.40, that Respondent had begun visually inspecting transformers for leaks and documenting results thereof long before it was required to do so, but PCB records were missing, and that Respondent acted promptly to correct deficiences noted, a 40% reduction in gravity-based penalty for good faith (lack of culpability) was determined to be in the interests of justice and to be consonant with PCB Penalty Policy. Expenditures by Respondent in removing PCB transformers from service, held not to warrant a further reduction in penalty so determined.

Appearance for Complainant: Robert J. Smolski, Esq.
Office of Regional Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Appearance for Respondent: Michael W. Lower, Esq.
Semmes, Bowen & Semmes
10 Light Street
Baltimore, Maryland 21202

Initial Decision

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced on April 17, 1985 by the issuance of a complaint by the Director, Hazardous Waste Management Division, U.S. Environmental Protection Agency, Region III, Philadelphia, Pennsylvania. The complaint, in four counts, charged Respondent, Lever Brothers Company, Inc. with violations of the Act[1/] and regulations (40 CFR Part 761). Specifically, Respondent was charged with failure to mark a PCB transformer with an M_L label as required by 40 CFR 761.40, with disposal of PCBs in violation of 40 CFR 761.60(a), with failure to prepare and maintain annual records on the disposition of PCBs and PCB items as required by 40 CFR 761.180(a) and with failure to conduct quarterly visual inspections of in-service transformers and maintain records of such

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1/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
>
> (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;
>
> * * *.

The instant rules were promulgated under § 6(e) of the Act.

inspections in violation of 40 CFR 761.30(a)(1)(ii) and (iv). For these alleged violations it was proposed to assess Respondent a penalty of $19,000.

Respondent answered, denying the alleged violations and requesting a hearing.

A hearing on this matter was held in Philadelphia, Pennsylvania on October 1, 1985.

Findings of Fact

Based on the entire record including the briefs and proposed findings and conclusions submitted by the parties, I find that the following facts are established:

1. Lever Brothers Company, Inc. operates a facility for the production of soaps and detergents at 5300 Holabird Avenue, Baltimore, Maryland.
2. On May 1, 1984, the mentioned facility was inspected by Mr. Stephen Markowski of the Maryland State Department of Health and Mental Hygiene (Tr. 6; Inspection Report, Complainant's Exh 1). This inspection and similar inspections are conducted by the State of Maryland pursuant to grants issued by EPA to the State.
3. Mr. Markowski met with and was accompanied on the inspection by Mr. Charles Carroll, Environmental Engineering Manager for Lever Brothers and Mr. Walter Wiczkowski, Environmental Control Coordinator for Lever Brothers and the individual responsible for compliance with environmental matters at the mentioned facility (Tr. 8, 132, 135; Complainant's Exh 1).
4. At the time of the inspection, Lever Brothers had on hand two PCB transformers in service and six PCB transformers which had been taken

out of service (Tr. 10, 132; Complainant's Exh 1). According to Mr. Carroll, Lever Brothers in 1981 made a decision to remove all PCB transformers from its plants and the six out-of-service transformers were designated for disposal on April 30, 1984 (Tr. 144, 155).

5. One of the in-service transformers was manufactured by General Electric Company and bore Serial No. H8850422. This transformer was located on the lower roof of Warehouse No. 180, sometimes referred to as the Liquid Packing Building, and did not have affixed to its exterior the M_L (6" x 6" yellow PCB) label described in 40 CFR 761.45 (Tr. 13, 142; Complainant's Exh 1 at 3).

6. Mr. Markowski testified that Messrs. Carroll and Wiczkowski were surprised and embarrassed that the PCB label was not on the transformer (Tr. 14). He stated that Mr. Carroll and Mr. Wiczkowski surmised that the label may have deteriorated and come off due to the weather or may have been ripped off (Tr. 15).

7. At the time of the inspection, the transformer referred to in finding 5 was labeled in separate locations (one label was beneath a gauge and near a valve on the upper part of the transformer and the other label was close to a valve near the floor or deck upon which the transformer rested) containing the word "CAUTION" in large letters followed in small print by "The insulating fluid in this transformer contains Polychlorinated Biphenyls (PCB's). Care should be taken to prevent entry into the environment. In the case of malfunction or leaks consult the instruction manual or the Manufacturer. NP229A3316." (Tr. 142-43; photos, Respondent's Exhs 5, 5-A, 5-B and 5-C).

8. The second in-service transformer maintained by Respondent was a Westinghouse, Serial No. 6991991. This transformer was located in a closed room on a diked, concrete pad in a vaulted area of the southwest corner of the second floor of the main building at the facility (Tr. 19; Complainant's Exh 1 at 3). Mr. Markowski observed a stained area of approximately six to eight inches in diameter on the concrete pad beneath a valve on this transformer (Tr. 15, 19, 20; photos, Complainant's Exh 2).

9. Mr. Markowski scraped the stained area referred to in finding 8 with a razor blade, filling a 2 ml volatile organic analysis bottle to approximately one-half its capacity with the scrapings, which included dirt particles. The stained area was dry and dusty and there was no indication of fluid on, or active leaks from, the transformer (Tr. 20, 26, 143). To Mr. Markowski's knowledge, there was no source of PCBs, other than the transformer, in the area where the transformer was located (Tr. 25).

10. Approximately one week after the inspection, Mr. Markowski delivered the sample referred to above along with other samples to the Maryland State Department of Health Laboratory in Baltimore (Tr. 22, 23). Analysis of the sample showed 37% PCB as Aroclor 1260 (Inspection Sample Analysis, Complainant's Exh 1). This indicates a PCB concentration of 370,000 ppm (Tr. 24).

11. At the time of the inspection, Lever Brothers did not have available any records relating to the disposition of PCBs and PCB items (Tr. 27, 137; Complainant's Exh 1 at 4). A search for the records had

been made prior to the inspection with negative results. Messrs. Carroll and Wiczkowski informed Mr. Markowski of the belief that the disappearance of the records was related to the dismissal of the employee in charge of the records.

12. Mr. Carroll identified the employee mentioned in finding 11 as Mr. Ronald Tognocchi, Safety Manager, who was responsible at the time for the handling of PCBs (Tr. 135-36). He testified that Mr. Tognocchi left the company under unhappy circumstances in December of 1983, that Mr. Wiczkowski subsequently assumed responsibility for PCBs and that searches for the records were conducted on or about March 30, 1984, with results previously indicated (Tr. 136-37, 146). He acknowledged that Lever Brothers did not have any direct information that Mr. Tognocchi had removed the records (Tr. 145).

13. Mr. Markowski testified that there were indications Lever Brothers had made quarterly inspections of in-service transformers, but other than a record maintained by Mr. Wiczkowski commencing March 30, 1984, there were no records of such inspections available (Tr. 28, 29). Mr. Markowski stated that Mr. Wiczkowski again relied upon the possibility that all records relating to PCBs had been removed by a discharged employee as an explanation for the non-availability of the records.

14. Lever Brothers Baltimore, Maryland facility had previously been inspected by Mr. Barry Chambers of the Maryland State Department of Health on April 8, 1983 (Complainant's Exh 1, Attach 6). Mr. Chambers was identified as an employee of the Maryland State Department of

Health by Mr. Markowski, who testified that Mr. Chambers was his supervisor on May 1, 1984.2/ Mr. Chambers' report states that the facility has eight in-service PCB transformers located in locked limited access areas and includes the following finding: "All transformers were properly labeled and nonleaking." The report does not identify the transformers by serial number or manufacturer.

15. Regarding record-keeping, Mr. Chambers' report refers to a copy of one page from the inspection log which is included as Attachment #5 and states that "The annual report is included as attachment #6." (sic)

16. The report is otherwise silent on record-keeping. Mr. Markowski testified that if records were missing or if there were record-keeping violations, that fact should have been noted in the report. The mentioned page from the inspection log shows inspections of the GE transformer identified in finding 5.3/ This document reflects that inspections of the transformer occurred on October 18, 1979, March 3, and April 1, 1980; April 21, August 14 and November 30, 1981; April 17, October 4 and December 3, 1982 and January 6, February 7 and March 10, 1983. All findings are "OK" with the exception of the inspection of April 21, 1981, which indicates that a valve was leaking. The record shows this valve was repaired on April 22, 1981.

2/ Tr. 33. From this testimony, it could be inferred that Mr. Chambers was available at the time of the hearing. He did not, however, appear as a witness.

3/ Although the page does not contain the serial number of the GE transformer inspected, it does identify the transformer as being located on "Top of liq. Packing bldg." (sic) The record of transformer inspections conducted by Mr. Wiczkowski beginning March 30, 1984 (Respondent's Exh 3), identifies the transformer inspected as "GE H885042" and specifies its location as "Liquid pack roof of warehouse" or over railwell in Warehouse 180.

17. The annual report (document) referred to by Mr. Chambers is dated July 1, 1982, and reflects that it is for the year ending June 30, 1982. Ms. Tan noted that the document did not cover either the calendar years 1981 or 1982, but indicated that it was otherwise satisfactory (Tr. 76). The document shows the disposal of one 2000KVA transformer (Serial No. H882379) which was shipped to Chemical Waste Management, Inc. on February 10, 1982. This document also reflects eight in-service transformers were on hand, containing a total of 2194 gallons or 12,948.99 kg of PCB fluid.

18. Lever Brothers contracted with MET Electrical Testing Company, Inc. to perform inspection and testing services on electrical equipment including transformers (Contract No. 1-0562-1 for the period 1981 through 1983 and a contract bearing the same number for the period 1984 through 1986, Respondent's Exhs 1 and 2). While the contracts require inspection of transformers for leaks, visual inspections are to be performed on a yearly basis. Reports of inspections and tests conducted by MET Electrical Testing are in the record (Respondent's Exhs 4-A, 4-B and 4-C). These reports, bearing dates of August 27, 1982, July 25, 1983 and March 1984, reflect inspections of the Second Floor Substation where the Westinghouse PCB transformer (Serial No. 6991991) was located. While the earlier reports list transformers as among equipment inspected, only the report of March 1984, reflecting an inspection on January 16, 1984 (Exh 4-C), specifically mentions the above transformer and indicates no leaks.

19. Mr. Carroll testified that in consonance with the program to eliminate PCBs from its plants (finding 4), Lever Brothers removed the

last two PCB transformers from active service in July of 1985 (Tr. 133). He estimated the cost of disposing of the transformers and PCB fluids in accordance with the regulations at $25,000 per transformer (Tr. 134).

20. Proposed penalties to be assessed against Lever Brothers for the violations alleged were calculated by Ms. Patricia Tan, an environmental engineer employed by Complainant, in accordance with the PCB Penalty Policy, 45 FR 59770 et seq., September 10, 1980 (Tr. 63-65). Under the Penalty Policy, penalties are determined by use of a matrix employing extent of potential damage (major, significant and minor) on a horizontal axis and circumstances (probability of damages), (high, mid and low ranges) on a vertical axis. Each range is broken into two levels of penalty amount.

21. Regarding the failure to have one of the transformers in active service marked with the PCB label, Ms. Tan testified that she regarded this as a Circumstances Level 3 or major marking violation (actually probability of damage in the mid-range) and the extent as significant, resulting in a penalty of $10,000 for this violation (Tr. 66, 67). The significant determination was based on the fact the transformer was reported to contain 350 gallons of PCBs and Table IV in the Penalty Policy, which places PCB quantities of 220 to 1100 gallons in the significant category. Ms. Tan stated that had she known the transformer had been marked with manufacturer's labels (finding 7) it would have been regarded as a minor marking [Level 5] circumstance (Tr. 68). She explained, however, that the "extent" would have remained in the Significant Category, resulting in a penalty of $3,000.

22. Concerning Count II of the complaint for improper disposal, Ms. Tan determined that the circumstance was Level 1 and the extent minor resulting in a penalty of $5,000 (Tr. 69). The "extent" was considered to be minor because of the small amount of material involved in the spill (Tr. 72, 73). As to the violations for failure to have an annual document and failure to have records of quarterly inspections, Ms. Tan determined that the "extent" was major and the circumstances Level 6, resulting in a penalty of $2,000 for each of these counts (Tr. 74, 78, 79). The major extent category was selected based on the fact the eight transformers at the facility contained in excess of 1100 gallons of PCB fluid. Ms. Tan testified that in the absence of the annual document furnished to Mr. Chambers at the time of the 1983 inspection (the circumstances would have been Level 4 and the penalty $10,000 (Tr. 75). She maintained that the firm could have been cited (penalyzed) for five such violations covering the years 1978 through 1982) rather than one (Tr. 75, 76).

23. Although Lever Brothers had started documenting inspections of PCB transformers before they were required to do so, Ms. Tan pointed out that the page from the inspection log attached to the Mr. Chambers' report was deficient in that it did not show inspections for the first and third quarters of 1982 (Tr. 77, 79). She also testified that documentation for inspections required to be performed during the second, third and fourth quarters of 1983 was missing (Tr. 85). This testimony does not consider the MET Electrical Testing Company report, dated July 25, 1983, which provides results of an inspection of the

Lever Brothers facility conducted on June 13, 1983 (MET Electrical Testing Company letter, dated August 17, 1983, Respondent's Exh 6).

24. Lever Brothers representatives were cooperative in the inspections and repeatedly indicated that action necessary to fully comply with the regulations would be taken (Tr. 30, 31, 109). Lever Brothers has not previously been charged with violations of the Act (Tr. 109, 145). Mr. Carroll testified that an appropriate PCB label was placed on the PCB transformer lacking such a label on the day of the inspection (Tr. 148).

Conclusions

1. At the time of the inspection on May 1, 1984, Lever Brothers was in violation of the Act and regulations in the following respects:

   A. One of two in-service transformers, i.e., GE Transformer, Serial No. H8850422, was not marked with the M_L label described in 40 CFR 761.45 as required by 40 CFR 761.40.

   B. The leak or spill of PCBs beneath or adjacent to a valve on the other transformer in active service, Westinghouse Transformer, Serial No. 6991991, constituted an improper disposal of PCBs (40 CFR 761.60(d)) in violation of 40 CFR 761.60(a).

   C. Failure to have available records and annual documents on the disposition of PCBs and PCB items constitutes a violation of 40 CFR 761.180(a).

   D. Respondent's failure to inspect PCB transformers on a quarterly basis and maintain records of such inspections is a violation of 40 CFR 761.30(a).

2. The inspection conducted by Mr. Barry Chambers of the Maryland State Department of Health on April 8, 1983, supports the conclusion that Lever Brothers was then in substantial compliance with the requirements of 40 CFR Part 761.

3. For the violations referred to in conclusion 1 above, Respondent is liable for a civil penalty in accordance with § 16(a)(1) and (2)(B) (15 U.S.C. 2615).

4. An appropriate penalty is the sum of $5,610.

Discussion

Pointing to the cautionary labels on the GE transformer in active service at the time of the inspection on May 1, 1984 (finding 7), and to the similarity between the language on these labels and that on the M_L label described in 40 CFR 761.45, Respondent cites the doctrine de minimis non curat lex (the law does not concern itself with trifles) and argues that Count I concerning the lack of the EPA specified labels on the transformer should be dismissed (Proposed Conclusions of Law at 8, 9). Respondent also relies upon Ms. Tan's testimony to the effect that the purpose of the EPA label was to warn anyone approaching of the presence of PCBs and that the labels on the transformer would provide such notice (Tr. 92).

In Briggs & Stratton Corporation, TSCA Appeal No. 81-1 (Final Decision, February 4, 1981), the Judicial Officer rejected a similar argument, pointing

out that the EPA specified label includes information to contact EPA for proper disposal. It might also be noted that the label specified by the regulation includes a toll-free number of the Coast Guard, which is to be contacted in case of accident or spill. The Judicial Officer ruled that the presence of manufacturer's labels indicating the presence of PCBs was not an adequate substitute for the label required by the regulation and did not warrant any mitigation of the penalty assessed by the presiding officer.4/

It will be recalled that Ms. Tan testified that she would have reduced the proposed penalty for the lack of an EPA label from $10,000 to $3,000 had she known of the cautionary labels on the transformer (finding 21). The effect of this testimony is to change the marking violation in the Penalty Policy Matrix (Significant Extent) from Level 3 to Level 5. This is in accord with the Penalty Policy which defines minor marking violations as situations where all the requirements of the rule have not been followed, but there are sufficient indications to notify someone unfamiliar with the situation of the presence of PCBs and to enable the identification of PCB items (45 FR at 59780). In Briggs & Stratton, supra, the initial decision was rendered prior to publication of the PCB Penalty Policy and the Penalty Policy was held to be inapplicable. Accordingly, Briggs & Stratton does not control here and gravity-based penalty for the marking violation is determined to be $3,000.

4/ Id. at 29. It should be noted, however, that the ALJ reduced the penalties sought by the Agency for marking violations from $10,000 to $7,500 in one instance and from $10,000 to $5,000 in another instance.

Under the Penalty Policy, any improper disposal of PCBs is considered to be a Level 1 violation. Because of the quantity involved in the spill was less than 220 gallons and contaminated an area of less than 150 square feet, the extent was determined to be minor and the proposed penalty for this violation set at $5,000. Based on the small quantity involved in the spill or stained area (6" to 8" in diameter), the location of the stained area (in a closed, locked room in a vaulted, diked area), the fact that there is no evidence the transformer was leaking and the possibility that the spill could have been caused by MET Electrical Testing when it drew samples for testing in August of 1983 and thereafter, Respondent argues that this count of the complaint should be dismissed (Proposed Conclusions of Law at 10-11).

The regulation (40 CFR 761.60(d)) provides that spills and other uncontrolled discharges of PCBs in concentrations of 50 ppm or greater constitute disposal of PCBs. Because this is true regardless of the quantity of PCBs involved in the spill or discharge, and it is clear that the PCB concentration exceeds the 50 ppm limit, there is no basis for dismissing this count of the complaint.

The Penalty Policy places all improper disposals of PCBs in Circumstances Level 1 and provides for variations in extent of potential damage (major, significant and minor), the quantity involved here being in the minor category. Indeed, it is clear that the discharge here is miniscule in relation to the upper limits (less then 220 gallons or a contaminated area of less than 150 square feet) of the minor extent classification. Of course, inherent in any demarcation along quantity lines is the likelihood

that the upper limits will vary widely from the minimum and thus make a uniform penalty assessment based on such a demarcation appear inequitable in a given instance. Accordingly, the fact that the discharge here is miniscule in relation to the upper limit of the minor extent classification is not in and of itself a sufficient reason for reducing the penalty otherwise determined. Nevertheless, the spirit, if not the letter of the Policy[5/] provides for adjustments in such situations and it is concluded that the small quantity of the discharge here involved warrants a 25% reduction in the gravity-based penalty, reducing that sum to $3,750.[6/] This reduction is especially warranted in view of the location of the discharge--a closed, locked room, in a vaulted, diked area--where the likelihood of substantial exposure of PCBs to humans or the environment is minimal. While the Policy does not provide for adjustments depending on the location of the discharge, except that spills into water or contamination of food and feed are always regarded as major, this reduction is in no sense rewarding a lucky or fortuitous violator, because a manyfold greater discharge would not have appreciably increased the risk.

Turning to record-keeping violations, it is clear that annual documents or other records concerning the disposition of PCBs and the quantity on

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5/ The Policy provides at 45 FR 59776:

> Significant-minor borderline violations. Occasionally a violation, while of significant extent, will be so close to the borderline separating minor and significant violations that the penalty may seem disproportionately high. In this situation, additional reduction of up to 25% off the GBP may be applied before the other adjustment factor are considered. (sic)

6/ Respondent has not established its contention that the spill was due to the activities of MET Electrical Testing in drawing samples.

hand were not available at the time of the inspection on May 1, 1984. It is equally clear that an annual document for the year ending June 30, 1982, was available at the time of the inspection on April 8, 1983. Although this document is not for a calendar year as required by the regulation (40 CFR 761.180(a)), Ms. Tan indicated that the document was otherwise satisfactory (finding 17). The real question here is whether the record permits or requires an inference that annual documents other than the one mentioned were available at the time of the 1983 inspection. Although the inference would be stronger if the Chambers' inspection report referred to "an annual report" or "the most recent annual report," it is concluded that the inference is appropriate and should be made. Mr. Chambers' report is silent as to omissions in or violations of record-keeping requirements and inasmuch as inspection policy requires that such omissions or violations be noted (finding 16), it is concluded that the annual document attached to the report was not the only such document available at the time. The Chambers' report refers to and attaches a copy of one page from the inspection log and there is clearly a sound basis for an inference that other records of inspections of PCB transformers were available on April 8, 1983.

The gravity-based penalties of $2,000 for each of the record-keeping violations, were calculated in strict accordance with the Penalty Policy (major extent because of the quantity of PCBs in the transformers and Circumstances Level 6 because of the low potential for damage). These record-keeping violations related primarily to hinderance or obstruction of EPA's ability to enforce the Act and the extent of that hinderance is not primarily related to the quantity of PCBs involved. The record

supports the finding that Respondent prepared and maintained annual documents on the disposition of PCBs and inspected and maintained records of such inspections, albeit in neither instance in strict accordance with the regulations. Under these circumstances, it is concluded that these record-keeping violations may appropriately be placed in the Significant Extent category of the penalty matrix.7/ The "Circumstances" or probability of damage remains in the low range at Level 6, thereby establishing the gravity-based penalty for these record-keeping violations at $1,300 each.

This brings us to the "with respect to the violator" language of the Act8/ under which factors such as the degree of culpability and such other matters as justice may require are considered. The fact that the GE transformer was previously properly labeled, that Respondent had commenced keeping records of visual inspections of PCB transformers long before it was

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7/ In Bell & Howell Co., TSCA-V-C-033, 034 & 035 (Final Decision, December 2, 1983), the Judicial Officer made it clear that the presiding officer was not required to assess a penalty identical to one of the amounts shown in the Penalty Policy Matrix and that where warranted, other amounts (boxes) may be selected in determining an appropriate penalty.

8/ Section 16(a)(2)(B) of the Act provides:

> (B) In 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 to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

required to do so[9/] establish Respondent's good faith or otherwise stated a small or low degree of culpability.[10/] Although the evidence will not support a finding that the PCB records were removed or destroyed by the former employee responsible for such matters, it is worthy of note that Respondent searched for the missing records in March of 1984, sometime prior to the inspection on May 1 of that year. These facts coupled with the fact Respondent has no prior history of violations of the Act and moved promptly to correct deficiencies noted in the inspection warrant a 40% reduction in the gravity-based penalty, which as computed above totals $9,350, to $5,610.[11/]

Respondent argues that no penalty should be assessed because it is entitled to a credit for environmentally beneficial expenditures in excess of $100,000 incurred in removing PCB transformers from service (Proposed Conclusions of Law at 15, 16). The Penalty Policy does in some circumstances provide for credits for sums expended in cleaning up or otherwise mitigating the harm caused by the violation (45 FR at 59775). The Policy makes clear, however, that because cleanup costs are considered to be part

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9/ In accordance with the Interim Measures Program (46 FR 16091, March 10, 1981) the first inspection of transformers, other than those posing a risk to food or feed, was to be completed by August 10, 1981.

10/ Culpability as used in the Act is given its normal definition as being synonymous with "blameworthy."

11/ Although the penalty so determined is considered to be consonant with the Penalty Policy, it is, of course, clear that I am not bound thereby (40 CFR 22.27) and have considerable discretion in determining an appropriate penalty. Electric Service Co., TSCA Appeal No. 82-2 (Final Decision, January 7, 1985).

of the cost of the violation, such credits will only be granted in situations where the penalty plus the costs of cleanup are excessive for the particular violation. Here, Respondent made a business decision to remove PCB transformers from its plants and while this decision eliminates the possibility of future violations of the regulation, the costs of transformer removal are not related to correcting the violations found. Although there is no evidence in the records of the costs of cleaning up or remedying the violations, such costs would not appear to be substantial. Under such circumstances, the costs of correcting the violations found plus the penalty may not be considered excessive in relation to the violations and an appropriate condition for applying the credit has not been demonstrated.

ORDER

Respondent, Lever Brothers Company, Inc., having violated the Act and regulations in the particulars hereinbefore recited, is assessed a penalty of $5,610 in accordance with § 16(a) of the Act. Payment of the penalty shall be made by mailing a cashiers or certified check in the amount of $5,610 payable to the Treasurer of the United States to Regional Hearing Clerk, EPA, Region III, P. O. Box 360515M, Pittsburgh, Pennsylvania 15251, within 60 days of the date of this order.11/

Dated this 13th day of December 1985

Spencer T. Nissen
Administrative Law Judge

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Jackson Brewery Development Corp. New Orleans, Louisiana,	)	
	)	
and	)	
	)	
NOLA Demolishing Corporation New Orleans, Louisiana,	)	Docket No. TSCA-VI-83C
	)	
and	)	
	)	
New Orleans Public Service, Inc. New Oleans, Louisiana,	)	
	)	
Respondents	)	

1. Toxic Substances Control Act - PCBs - Defense of abandonment of PCB-contaminated transformers determined by reference to Louisiana law where transformers were located in Louisiana.

2. Toxic Substances Control Act - PCBs - Proof of abandonment under Louisiana law requires an act of abandonment coupled with an intention to abandon.

3. Toxic Substances Control Act - PCBs - The burden of showing abandonment is on the party claiming it.

4. Toxic Substances Control Act - PCBs - Large electrical transformers are not immovables under Louisiana law, title to which passes by operation of law to the purchaser of real property.

5. Toxic Substances Control Act - PCBs - Evidence of whether the parties viewed electrical transformers as immovables considered in determining whether they were immovables under Louisiana law.

6. Toxic Substances Act - PCBs - Ownership of PCB-contaminated transformers determined by reference to state law where owner did not have possession of transformers and claimed they had been abandoned prior to effective date of PCB Ban Rule.

7. Toxic Substances Control Act - PCBs - Owner of PCB-contaminated transformers located in a building which was being demolished disposed of transformer within meaning of PCB Ban Rule when it let building owner remove them in demolishing the building.

8. Toxic Substances Control Act - PCBs - The presumption that oil-filled electrical transformers are PCB-contamined transformers, 40 C.F.R. 761.3, is not rebutted simply by reliance on the fact that the transformers are labeled by the manufacturer as oil-filled.

Appearance for Complainant:	James W. Ingram, Esquire Office of Regional Counsel U.S. Environmental Protection Agency Region VI, 1201 Elm Street Dallas, TX 75270
Appearance for Respondent New Orleans Public Service:	Eugene G. Taggart, Esquire 1424 Whitney Bank Building New Orleans, LA 70130
Appearance for Respondent NOLA Demolishing Corp.:	Thomas L. Giraud, Esquire Giraud, Cusimano & Verderame 610 Poydras Street, Suite 201 New Orleans, LA 70130

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for alleged violations of a rule promulgated under Section 6(a) of the Act, 15 U.S.C. 2605(a), establishing prohibitions and requirements for the manufacturing, processing, distribution in commerce, the use, disposal, storage and marking of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761. 1/ The amended complaint charged that New Orleans Public Service, Inc., improperly disposed of PCB-contaminated electrical equipment, and that New Orleans Public Service, Inc., Jackson Brewery Development Corporation and NOLA Demolishing Company improperly disposed of PBCs, did not properly mark PCBs and improperly stored PCBs. A penalty of $42,000 was requested against New Orleans Public Service, Inc., and $25,000 against Jackson Brewery Development Corporation and NOLA Demolishing Company jointly.

Respondents answered denying the violations and requested a hearing.

Thereafter the EPA and Jackson Development Corporation entered into a consent order and Jackson Development Corporation was severed as a party. 2/ The EPA also withdrew all charges against New Orleans Public Service, Inc.

1/ Section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for the purposes of this subsection, constitute a separate violation of Section 15."

TSCA, Section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under Section . . . 6."

2/ Transcript of proceedings (hereafter "Tr.") Vol. I, p. 67.

except that of improperly disposing of PCB-contaminated electrical equipment. 3/ Thus, the issues left to be resolved at the hearing were: (1) Whether New Orleans Public Service improperly disposed of PCB-contaminated electrical transformers; (2) whether NOLA Demolishing Company improperly disposed of PCBs by spilling them onto the ground, and failed to properly mark and store containers holding PCBs; and (3) the penalty to be assessed for the violations, which the EPA claims should be $17,000 against New Orleans Public Service and $25,000 against NOLA.

A hearing was held in New Orleans on August 13, 14, and 15, 1985. The parties then filed proposed findings of fact, conclusions of law and a proposed order with supporting briefs. On consideration of the entire record and the submissions by the parties, and for the reasons hereafter given, a penalty of $17,000, is assessed against New Orleans Public Service, Inc., and a penalty of $1,000 as assessed against Hamilton Singleton, d/b/a NOLA Demolishing Company. All proposed findings of fact inconsistent with this decision are rejected.

Findings of Fact

1. Jackson Brewery Development Corporation (hereafter "Jackson Brewery") is a Louisiana Corporation doing business in New Orleans, LA (Stipulation, p. 2, Par. 1).

2. At all times pertinent to this proceeding, NOLA Demolishing Company ("NOLA") was a sole proprietorship of Hamilton K. Singleton doing business in New Orleans, LA (Stipulation, p. 2, Par. 3; Tr. Vol. II, p. 283).

3/ Tr. Vol. I, p. 140. Pursuant to this action of Complainant, the violations charged in paragraphs 26, 30 and 33 of the amended complaint are dismissed with prejudice against New Orleans Public Service Co.

3. New Orleans Public Service, Inc. (hereafter "NOPSI") is a Louisiana Corporation doing business in New Orleans, LA (Stipulation, p. 2, Par. 2).

4. In May 1955, NOPSI purchased three 1250 KVA transformers, Serial Nos. C-184440, C-184441 and C-184442, from General Electric Company. The face-plate on the transformers indicated that they were filled with 10-C oil, a mineral oil. Stipulation, p. 2, Par. 4; Tr. Vol. I, p. 159.

5. The three transformers were installed in a room in the Jackson Brewery Building, 620 Rue Decatur, New Orleans, LA, on December 15, 1963, (hereafter "Brewery Building") as part of the electric service furnished by NOPSI to that building. Stipulation, p. 3, Pars. 9 and 10; Complainant's Exh. 54.

6. On June 29, 1979, NOPSI discontinued electric service to the Brewery Building. The three transformers were left in place, Tr. Vol. III, p. 632; Complainant's Exh. 54. 4/

7. On May 12, 1978, the Brewery Building had been sold to the American Can Company. This company, in turn, on January 26, 1982, sold the property to the Jackson Square Investment, Ltd. NOPSI Exhs. 28, 30.

8. On March 16, 1983, Jackson Square Investment, Ltd. on behalf of Jackson Brewery entered into a written contract with NOLA to demolish and remove construction materials and equipment from certain parts of the Brewery Building. The transformers were located in the part of the building which

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4/ NOPSI's proposed finding that the transformers were "abandoned" on June 29, 1979, is rejected for the reasons stated below. See infra at 12-14.

was being demolished. Stipulation, p. 3, Par. 13; NOPSI Exh. 1; Tr. Vol. I, pp. 214-15, Vol. II, p. 309. 5/

9. At about the time that NOLA began its demolition work in early 1983, Jim Rehkopf, a field supervisor for Jackson Brewery met with representatives of NOPSI concerning the disposition of the transformers installed by NOPSI. He testified in pertinent part about this meeting as follows:

> I had called NOPSI and asked them -- or rather, told them we had some transformers located in the brewery that we'd like to get rid of. And I was under the impression that NOPSI still owned them. They referred me to John Thomas because he was the man who controlled that district for NOPSI. He came out with some other gentlemen and looked at the brewery.
>
> Q [Mr. Ingraham] Okay. Do you know approximately when that was?
>
> A It was early 1983, either late February or early March of 1983.

Apparently NOPSI's representatives were noncommittal about the disposition of the transformers except that Rehkopf was left with the impression that the transformers were NOPSI's. Tr. Vol. I, pp. 234-35.

10. Following Rehkopf's meeting with NOPSI's representatives, John Blitch on May 6, 1983, on behalf of Jackson Brewery wrote to NOPSI, attention

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5/ NOPSI alleges in its proposed findings of fact, No. 1, that Jackson Brewery was the general partner of Jackson Square Investment, Ltd. It is not clear from the record that this was the actual legal relationship between the two, see NOPSI Exh. 28. The record, however, is clear that the demolition and removal was done for the benefit of Jackson Brewery. Memorandum of explanation attached to Jackson Brewery's answer at 3. Since all parties appear to have assumed that there is no distinction to be drawn between Jackson Brewery and Jackson Square Investment, Inc., for the purposes of this case, reference to Jackson Brewery will also include Jackson Square Investment, Ltd. where appropriate.

of Thomas, advising NOPSI of NOLA's demolition of the interior and asking NOPSI whether it intended to salvage the transformers. Blitch stated in his letter as follows:

> We are well underway in demolition of various portions of the Old Brewhouse, Jax Brewery at 620 Decatur Street. The demolition consists of exterior non-conforming structures and interior gutting of mechanical and electrical equipment. Still inside the Brewhouse, there are three large NOPSI transformers and six or eight small cylindrical-type transformers. I am sure that these transformers are the property of NOPSI and, as such, you may want to recover them. The demolition contractor is now in the process of cutting out all equipment around this area and eventually will need to move through the transformer room to get to other phases of the demolition.
>
> If it is your intention to salvage these transformers, then I request that you immediately contact me at 581-4002 and advise me as such. If we have not heard from you regarding same by May 16, then we will assume that you are not interested in their recovery.
>
> Your early response to this request will be appreciated.

Complainant's Exh. 4.

11. NOPSI did not respond to the letter. Blitch then called Thomas who after checking with NOPSI's engineering department called back and told Blitch that "they had indicated that the transformers were of no value to them and they did not want them." Tr. Vol I, p. 179.

12. Sometime in the month of June 1983, NOLA at the instruction of Jackson Brewery undertook the removal of the transformers from the Brewery Building. There were eight transformers in all. The three 1250 KVA transformers already referred to, and three 200 KVA transformers and two 100 KVA transformers owned apparently by Jackson Brewery. All were located in a room on the second floor of the building. Stipulation, p. 3, Par. 12; Tr. Vol. II, pp. 284, 312; Complainant's Exh. 2, p. 6; Respondent's Exh. 16.

13. At the time of their removal, the three 1250 KVA transformers contained in excess of 50 ppm PCBs but less than 500 ppm PCBs. Complainant's Exh. 54.

14. While removing the transformers, a pipe on one of the 1250 KVA transformers broke, spilling approximately 125 gallons of transformer oil. Tr. Vol. II, p. 287.

15. After removing the transformers, NOLA drained the oil from transformers and transferred the fluid to twenty-six 55-gallon drums. In the process of doing so about 25 gallons of transformer fluid spilled on the ground. Stipulation, p. 4.

16. The 26 drums filled with transformer oil were transported from the Brewery Building site to NOLA's premises at 8200 Old Gentilly Road, New Orleans, LA. Stipulation, p. 4, Par. 21.

17. The drained transformer bodies were transported by NOLA and sold by NOLA to Southern Scrap Metal Co., Ltd., 4801 Florida Avenue, New Orleans, LA. Stipulation, p. 4, Par. 21.

18. On July 5, 1983, following the completion of his demolition work, Hamilton Singleton, proprietor of NOLA, called Glen Foret of the Louisiana Department of Natural Resources to find out whether oil from the transformers was hazardous. He had apparently become concerned about this after watching a television program a few days earlier in which the subject of electrical transformers containing PCB's was discussed. Tr. Vol. II, pp. 293, 318; Complainant's Exh. 50; Stipulation, p. 5, Par. 25.

19. At the advice of Foret, Singleton took a sample of oil from one of the drums and had it tested by Shilstone Engineering Testing Laboratory

Division of Professional Services, Inc. The test disclosed that the sample contained 140 parts per million (ppm) PCBs. Complainant's Exh. 4; Stipulation, p. 5, Par. 26.

20. On or about July 8, 1983, NOPSI collected three samples of oil taken from the bottom of the tanks of the three 1250 KVA transformers and had the oil analyzed by the Shilstone Engineering Testing Laboratory Division. The test report dated July 11, 1983, disclosed that one sample contained 89 ppm PCBs, one sample contained 86 ppm PCBs, and one sample contained 78 ppm PCBs. Complainant's Exhs. 54, 61.

21. On July 11, 1983, Jackson Brewery contracted with Analysis Laboratories, Inc., to obtain and analyze samples of the fluid contained in the drums of drained transformer oil at NOLA's premises to determine the presence and concentration of PCBs in the fluid. Stipulation, p. 5, Par. 31.

22. On July 11, 1983, Tommy Blythe, an employee of Analysis Laboratories, Inc., collected a sample from each of ten of the twenty-six drums. Analysis of these samples revealed the following results:

Sample Number	Milligrams per Liter (ppm) PCB as Arochlor 1260
1	142
2	32
3	26
4	60
5	55
6	62
7	60
8	22
9	56
10	101

Stipulation, p. 6, Pars. 32, 33, 34, 35; Complainant's Exh. 44.

23. On September 7, 1983, Tommy W. Homes, an employee of Peterson Maritime Services, Inc. collected samples of transformer oil from each of the remaining sixteen drums and submitted them to Analysis Laboratories, Inc. for analysis. The results of the analyses were as follows:

Sample Number	Milligrams per Liter (ppm) PCB as Arochlor 1260
1	151
2	149
4	153
5	145
6	103
7	42
8	46
9	94
11	102
13	131
17	120
20	99
22	108
23	111
24	115
25	117

Stipulation, p. 10, Pars. 62, 63, 64; Complainant's Exh. 44.

24. Of the twenty-six drums of transformer oil, twenty-one were found to contain PCB's in excess of 50 ppm. Findings 21 and 22.

25. Hamilton Singleton on receiving the laboratory report referred to in Finding 18 above that the sample from one of the drums of transformer oil stored on NOLA's premises contained 140 ppm PCBs, notified Foret of the results of the analysis. Foret, in turn, notified Daryl Mount of EPA Region VI of the situation. Jackson Exh. 21. 6/

6/ Although Jackson was severed as a party, it was agreed that certain exhibits originally identified as "Jackson Exhibits" would be admitted into evidence. See list of exhibits attached to Stipulation, and Tr. Vol. I, p. 91.

26. Singleton, apparently on the advice of Foret, roped off the area where the drums were stored and put up a sign warning of the presence of dangerous chemicals. Tr. Vol. II, pp. 328, 335.

27. On July 20, 1983, J. David Sullivan, an EPA inspector from Region VI made an inspection of NOLA's premises. A sample was taken from one of the 55-gallon drums and assigned EPA Sample No. AG1601. Analysis of the sample by the EPA's Houston Laboratory showed that it contained PCBs in concentration of 56 ppm. Stipulation, p. 7, Pars. 42-44; Complainant's Exh. 33.

28. On July 21, 1983, Sullivan also inspected the transformer bodies removed from the Jackson Brewery Building by NOLA, and located at Southern Scrap Material Co. Ltd. He collected a sample from one of the 100 KVA transformer bodies and from one of the 200 KVA transformer bodies. These samples were assigned EPA Sample Nos. AG1602 and AG1603. On analysis, Sample No. AG1602, taken from the 100 KVA transformer, was found to contain PCBs in concentration of 72 parts per billion (0.072 ppm), and Sample No. AG1603, taken from the 200 KVA transformer, was found to contain PCBs in concentration of 29.3 ppm. Sample No. AG1602, however, was analyzed as a water sample and was not a measure of the PCB content of the oil that had been in the transformer. Stipulation, pp. 8-9, Pars. 46-52; Complainant Exh. 2, p. 6; Complainant's Exhs. 36, 38; Tr. 558-59.

29. The drums of drained transformer oil were eventually removed from the NOLA site and properly disposed of and the site cleaned up by Jackson Brewery, which also undertook the cleanup of the PCBs spilled at the Brewery Building. Jackson Exhs. 17, 21.

Discussion, Conclusions and Penalties

The facts can be briefly summarized as follows: NOPSI installed three 1250 KVA transformers in the Jackson Brewery Building in December 1963, to provide electric service to the building. In June 1979, NOPSI discontinued service to the building but left the transformers in place. Apparently no one thereafter paid any attention to the transformers until early 1983, when Jackson Brewery, the new owner of the building wanted them removed so it could proceed with its demolition of the interior of that part of the building. NOPSI was told of the demolition and said that it was not interested in the transformers. Jackson Brewery accordingly had them removed by NOLA as part of its demolition work. While removing the transformers, NOLA spilled some of the transformer fluid, and a further spill occurred when NOLA drained the transformer fluid into 55-gallon drums. After the transformers were taken out of the building, NOLA then stored the drums on its premises prior to further disposing of the oil. The three 1250 KVA trans formers were labelled as oil-filled transformers, but on testing, the transformer fluid was found to contain PCBs in excess of 50 ppm PCBs but less than 400 ppm PCBs.

NOLA does not contest the violations charged against it of improperly disposing of PCBs, and failing to properly mark and store them, but only the appropriateness of the penalty. NOPSI, however, denies the violation charged against it of improperly disposing of PCB-contaminated transformers.

The Liability of NOPSI

NOPSI's defense to the unauthorized disposal of the three 1250 KVA transformers in 1983, is that it did not then own the transformers, having abandoned them when it discontinued electric service to the Brewery Building

on June 29, 1979, which date was prior to the effective date of the PCB Ban Rule. 7/

All parties agree that what constitutes abandonment is to be determined by reference to Louisiana law. Under Louisiana law, to establish the abandonment of personal property it must be shown that there was an act of abandonment coupled with an intention to abandon. Powell v. Cox, 92 So. 2d, 739, 742 (La. Ct. App. 1957); New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 44-45 (La. S.Ct. 1933). The intention of the owner is a matter of material importance. Powell v. Cox, supra, 92 So. 2d 742.

NOPSI is correct that the burden of establishing ownership of the transformers is on the EPA. Here the EPA met that burden initially by NOPSI's own admission that it owned the transformers up until the time of the claimed abandonment. The burden of showing abandonment (by which is meant the burden of persuasion), on the other hand, is upon the party relying on it. This seems to be clearly the rule when the owner is defending his property against someone claiming title to it by abandonment. See Linscomb v. Goodyear Tire & Rubber Co., 199 F.2d 431, 435 (8th Cir. 1952). It should also be the rule when the owner pleads abandonment as a means of escaping some obligation or liability that attaches to the property. For unless there is unequivocal evidence that the owner actually intended

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7/ The PCB Ban Rule regulating the disposal of transformers containing PCBs in concentrations of 50 ppm or more became effective on July 2, 1979. 44 Fed. Reg. 31514 (May 31, 1979). Prior thereto, only the disposal of transformers containing PCBs in concentration of 500 ppm or greater was regulated. See PCB Disposal and Marking Rule published February 17, 1978, 43 Fed. Reg. 7157 ("PCB mixture" defined as any mixture containing 500 ppm or greater PCBs). There is no evidence that the three transformers ever contained PCBs in concentrations of 500 ppm or greater.

to abandon the property, the inference is unescapable there was no actual intention to abandon the property at the time but that abandonment is being asserted as an afterthought to escape the liability or obligation that the property imposes upon the owner. See Katsaris v. United States, 684 F.2d 758 (11th Cir. 1982).

Here the act claiming to evidence abandonment of the transformers was NOPSI's not removing the transformers after service was discontinued. That act, however, is equally susceptible of the interpretation that the transformers were let in place not because NOPSI was abandoning them but because NOPSI either had no immediate use for them elsewhere, or it wanted them available in the event that electric service was resumed. It is significant that the two Jackson Brewery representatives involved in demolishing the building thought that the transformers belonged to NOPSI. 8/ While this does not in itself conclusively establish that the transformers were still NOPSI's property, it does confirm the conclusion that the bare act of leaving the transformers at the building does not unequivocally show that what was intended was "the relinquishment of property to which a person is entitled, with no purpose of again claiming it . . . ." Powell v. Cox, supra, 92 So. 2d 741 (quoting 1 C.J.S. Abandonment, § 1, p. 4). Also, the fact that NOPSI's representative on being questioned about the transformers came down

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8/ Finding of Fact Nos. 9 and 10 supra. There is no evidence that the Jackson Brewery representatives were attempting to place ownership in NOPSI because they had in mind the possibility that the transformers might contain PCBs. Their sole concern appears to have been with removing the transformers so they could proceed with the demolition.

to look at the building before deciding that the transformers were of no use to NOPSI, is inconsistent with NOPSI's claim that it had abandoned all rights to the transformers back in 1979.

It is concluded, accordingly, that NOPSI has not sustained its burden of showing that it had already abandoned the transformers when Jackson Brewery approached it about removing the transformers from the building in early 1983.

NOPSI argues that in any event the transformers were component parts of the building and under Louisiana law title to them passed to Jackson Brewery when it purchased the building, as there was no recorded vault agreement or other instrument reserving title in NOPSI, and they were not included in the property which was reserved under the Act of Sale. In support of this argument, NOPSI relies upon Articles 466 and 469 of the Louisiana Civil Code which provide as follows: 9/

> Art. 466. Component parts of buildings or other constructions.
>
> Things permanently attached to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, are its component parts.
>
> Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.
>
> * * *
>
> Art. 469. Transfer or encumbrance of Immovable.
>
> The transfer or encumbrance of an immovable includes its component parts.

9/ The part of the Louisiana Civil Code dealing with immovables, Articles 462-469, is included as NOPSI's Exh. 24.

The second paragraph of Article 466 does not appear to be applicable, since the evidence indicates that the transformers were removed without substantial damage to the building or to themselves. It did require removing louvers from a window, but the louvers were not damaged and could have been reused. While a pipe broke on one of the transformers in the course of removing it, this occurred because of the way in which the transformer was attached to the crane. Once this was corrected the transformer was taken out without any further damage to it, and the other two transformers were also removed without any damage to them. 10/

NOPSI argues that facility of removal is not determinative of the status of the transformers, as the transformers are electrical installations expressly made immovable by paragraph one of Article 466. 11/ The construction of Article 466 was recently considered in the case of Equibank v. United States Internal Revenue Service, 749 F.2d 1176 (5th Cir. 1985). The question before the court was whether chandeliers in a home were immovables and hence subject to a tax lien on the home. The court noted that the Louisiana legislature did not define or otherwise describe an "electrical installation" when it enacted Article 466 in 1978. It concluded that the views of the public may therefore be considered in defining the term, and that chandeliers are ordinarily looked upon by the public as a component part of the building. Accordingly, the court held that the chandeliers should be classified as immovables. Equibank v. United States Internal Revenue Service, F.2d at 1178-79.

10/ Tr. 286-87, 372-73.

11/ Reply brief at 11.

In this case we do not have evidence of the views of the public. We do have evidence, however, as to how the parties themselves viewed the status of the transformers, which would also seem to be relevant in determining whether these transformers are immovables. The fact that Jackson Brewery thought that the transformers belonged to NOPSI, and the fact that NOPSI consented to letting Jackson Brewery remove the transformers not because it considered them fixtures which already belonged to Jackson Brewery, but because NOPSI no longer had any use for them, all indicate that the parties themselves did not regard the transformers as immovables, title to which by operation of law had passed to the purchaser of the building.

I find, accordingly, that NOPSI owned the transformers up until the time it told Jackson Brewery it had no interest in them. 12/

The EPA rests its charge of NOPSI's improper disposal of the transformers upon the claim that when NOPSI expressed no interest in the transformers, it thereby abandoned them. It is unnecessary to have recourse to the technical law of abandonment to find that NOPSI disposed of the transformers within the meaning of the PCB Ban Rule. Disposal is defined in pertinent part as meaning "intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB

12/ The EPA argues that federal policy requires that NOPSI be held responsible for proper disposal of the transformers regardless of whether it held title to the transformers under state property law (response to post-hearing briefs at 4-5). The transformers, however, were not in the physical possession of NOPSI, nor of anyone whose possession could be attributed to NOPSI because of its relationship to NOPSI. If there is some reasonable basis for imposing liability upon NOPSI besides its status as owner under state law, the EPA has not shown what this would be. Nor do I discern that relying upon state law conflicts with any policy underlying the PCB regulations or the Toxic Substances Control Act.

items . . . . There is no question but that when NOPSI left the transformers for removal by Jackson Brewery it was thereby discarding them and terminating their useful life as transformers.

It is also concluded that the 1250 KVA transformers were PCB-contaminated transformers, i.e., contained between 50 - 500 ppm PCBs, at the time of their disposal, and subject to the PCB Ban Rule's requirements for disposal as such. There was considerable discussion at the hearing as to the admissibility and credibility of the analysis made by Shilstone Engineering Testing Laboratory of the oil samples taken by NOPSI from the transformers, which showed concentrations of PCBs ranging from 78 ppm to 89 ppm. 13/ NOPSI, however, presumably would not have used Shilstone to do testing for it, if it were not a reliable laboratory. 14/ It is to be noted that NOPSI itself never appears to have questioned the results of the test at the time they were furnished, which, of course, it could have done, if it were concerned that the results differed from other information in its possession. 15/ The underlying papers showing the gas chromatograms, readouts and also the calibration record were made available to NOPSI. 16/ Apparently these disclosed no irregularities in the procedure, since NOPSI has not pointed out any.

13/ See. Tr. Vol. I, pp. 57-62, and testimony of Larry S. McAnarney. Tr. Vol. II, pp. 381-454.

14/ See Tr. Vol. II, pp. 448-49.

15/ Shilstone has apparently done other testing for NOPSI besides these particular tests and continues to do so. See Tr. Vol. II, p. 384.

16/ See Complainant's Exh. 61; Tr. Vol. II, pp. 420, 424.

Accordingly, I find that the Shilstone analytical reports reliably indicated the PCB concentration of the oil in the three transformers. 17/

In addition to the evidence of the Shilstone tests, the PCB Ban Rule, 40 CFR 761.3, expressly provides that "[o]il filled electrical equipment other than circuit breakers, reclosers, and cable whose PCB concentration is unknown must be assumed to be PCB-contaminated Electrical Equipment." The Rule thus makes the oil-filled transformers presumptively PCB-contaminated transformers to the extent at least of requiring NOPSI to come forward with evidence to show the contrary. As the legislative history of the rule makes clear, the mere knowledge that the transformers are labeled by the manufacturer as oil-filled is not in itself sufficient to rebut that presumption. 18/ Indeed, to construe the requirement otherwise could be to destroy the presumption and make that provision meaningless. Since NOPSI has not come forward with any evidence to show that the transformer oil contained less than

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17/ It is recognized that in contrast to the PCB concentrations of 78 ppm, 86 ppm and 89 ppm reported on the Shilstone tests, the tests done on the drums of drained oil which contained not only oil taken from the three NOPSI transformers but also from the other five transformers disclosed concentrations of over 100 ppm PCBs and as high as 153 ppm in one instance. Findings of Fact Nos. 22 and 23. Dr. Langley, an expert on PCB analytical testing testified that this does not necessarily indicate incorrect or erroneous test procedures, but simply could result from the variability inherent in the procedure itself and from the possible mixing of the oil of all the transformers. Tr. Vol. III, pp. 582-83. The fact that there can be variable results in the tests, however, does not destroy the credibility of NOPSI's tests because the fluid in these tests can be identified as having been taken solely from the 1250 KVA transformers, while the fluid in the drums cannot be so identified.

18/ See 47 Fed. Reg. 17426, 17439-440 (April 22, 1982) (explanation to proposed amendment to the definition of PCB-contaminated Electrical Equipment). The presumption was specifically incorporated in the PCB Ban Rule by amendment to the rule published on August 22, 1982, and made effective September 24, 1982. 47 Fed. Reg. 37342, 37356 (August 25, 1982).

50 ppm PCBs, other than that the transformers were labeled by their manufacturer as "oil-filled", it is also found that the transformers were required by the PCB Ban Rule to be disposed of as PCB-contaminated transformers.

Pursuant to 40 C.F.R. 761.60(b)(4), PCB-contaminated transformers must be disposed of by draining the free flowing liquid from the transformer and disposing of it in the type of facility specified in the Rule. There are no special disposal requirements for the drained transformer casing. Since NOPSI disposed of the transformers without draining the free flowing liquid, it has violated that requirement.

The Appropriate Penalty

(a) The Penalty Assessed Against NOPSI

The EPA has proposed a penalty of $17,000 against NOPSI. This is the correct gravity based penalty under the PCB Penalty Policy. 19/ I find that no adjustment to the penalty is merited. As a provider of electricity it is inconceivable that NOPSI would not have known of the requirements of the PCB Ban Rule. Indeed NOPSI does not make any such claim. In any event, NOPSI is charged with constructive notice of the Rule. 20/ As already

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19/ See 45 Fed. Reg. 59777 (September 10, 1980). The EPA charges NOPSI with the disposal of 1,170 gallons of PCBs, based on the fact that each transformer had a capacity of 390 gallons. See Complainant's Exh. 2, p. 6. Taking the EPA's assumption that each drum stored at NOLA's premises contained 50 gallons, the volume could be somewhat less but it would still be sufficient to bring it within the significant category. The remaining five transformers had a rated volume of 397 gallons. Complainant's Exh. 2, p. 6. Assuming they were filled to capacity, this would leave 903 gallons in the drums which would have had to come from the three 1250 KVA transformers. Adding to that 903 gallons, the estimated 125 spilled during removal, brings the total to 1,028 gallons, which reduced 70% still leaves 308 gallons, well within the significant range of 220-1100 gallons. Improper disposal is a level one violation in the penalty matrix. See 45 Fed. Reg. 59777-778.

20/ See 44 U.S.C. 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947).

noted, its reliance upon the transformer's label to assume that the transformers did not contain PCB's of 50 ppm or over is directly contrary to the requirements of the Rule, and, therefore, is not a ground for reducing the penalty. On the other hand, I do not agree that NOPSI's actions justify an increase in the penalty as contended by the EPA. 21/ NOPSI's violation appears to have been inadvertent, the consequence of overlooking the fact that even through these were oil-filled transformers, the PCB Ban Rule still applied to their disposal. When the violation did come to light, Jackson Brewery, who was directly involved in the removal of the transformers, took responsibility for the clean-up. NOPSI could reasonably assume under these circumstances that no further action on its part was required, particularly since Jackson Brewery never made any demand on NOPSI to take part in the corrective or clean-up actions. 22/

Accordingly, I find that the appropriate penalty to be assessed against NOPSI is $17,000. There is no claim by NOPSI that such a penalty is beyond its ability to pay or would affect its ability to continue to do business.

(b) The Penalty Against NOLA

The EPA initially proposed a penalty against NOLA and Jackson Brewery of $10,000 for the marking violation, $10,000 for the storage and $5,000 for the disposal violation, or a total of $25,000. On the basis of settling

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21/ Post-hearing brief at 39.

22/ Tr. Vol. I, p. 229.

with Jackson Brewery for $8,333.00, the EPA proposes that the balance of the penalty or $16,666.00, be assessed against NOLA. 23/

I find that the gravity based penalty has been properly calculated. 24/ I do not agree, however, with the EPA's claim that no adjustment is merited in the case of NOLA.

There is no question that Mr. Singleton, the sole owner of NOLA, lacked sufficient knowledge of the potential hazard created by the transformers. His entire conduct conclusively demonstrates this. He first learned of the potential hazard when he saw the television program after having removed the transformers and stored the oil on NOLA's premises. He then immediately got in touch with the State EPA. Thereafter, he fully cooperated with both the State and Federal authorities. 25/

Also to be considered is Hamilton Singleton's financial condition. Mr. Singleton receives a pension from the Veteran's Administration, which is his only present source of income. 26/ The business apparently has

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23/ Complainant's post hearing brief at 32.

24/ Jackson Brewery and NOLA were chared with the improper disposal taking place when some 25 gallons of fluid were spilled during the course of draining the transformers. Complainant's Exh. 45. NOPSI suggests that there is an inconsistency between its being charged with the improper disposal of transformers and Jackson Brewery not being charged with the same violation. Reply brief at 2. It is assumed that ownership of the transformers, or at least responsibility for their proper disposal thereafter, passed to Jackson Brewery when NOPSI disclaimed any further interest in them and Jackson Brewery assumed control over them by undertaking to remove them. Unlike NOPSI's action, however, the transformers were drained of their fluid. Thus, the facts in the two cases are not the same.

25/ Tr. Vol. II, pp. 790-92.

26/ NOLA Exh. 3.

now been turned over to his sons and Hamilton Singleton receives no financial benefit from it. 27/ NOLA itself appears to have had and still has very few assets. 28/ Hamilton Singleton still owes money on the loan secured to pay for insurance required for the Jackson Brewery demolition work, work for which he has never been fully paid. 29/

It is true as the EPA argues, and the penalty policy so provides, that lack of actual knowledge of the hazard created by one's conduct is not a defense to a violation where, as was the case with NOLA, the person has sufficient control over the situation to avoid committing the violation. 30/ It is also true that Hamilton Singleton operated NOLA on a shoestring. There is no evidence, however, that Singleton shirked his responsibility to protect the environment or public health where he knew these dangers to exist. His handling of the removal of asbestos during the demolition of Jackson Brewery is proof to the contrary. Complainant argues that reducing the penalty would encourage marginal businesses who violate the Act to volumtarily go out of business, when faced with penalties under TSCA. There is no evidence here that the desire to escape TSCA penalties was a motive in Singleton's discontinuing business. Instead, the decision appears to have been dictated by Singleton's present poor health. 31/

Taking into account that it was Hamilton Singleton who first brought this matter to the attention of the regulatory authorities, his cooperative

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27/ Tr. Vol. II, p. 345.

28/ See Tr. 367-68.

29/ See Tr. Vol. III, pp. 680-82. The original loan was for $10,000 but was refinanced and the balance owed is now $13,000, Id.

30/ See 45 Fed. Reg. 59773.

31/ See Vol. II, Tr. 344; Vol. III; Tr. 679; NOLA Exh. 3.

attitude thereafter, and his financial condition, I find that the appropriate penalty to be assessed against him should be $1,000.

ORDER 32/

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), and for the reasons stated above, a civil penalty of $17,000 is hereby assessed against New Orleans Public Service, Inc., and a civil penalty of $1,000 is hereby assessed against Hamilton Singleton doing business as NOLA Demolishing Company.

Payment of the full amount of the civil penalty assessed 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 United States of America and mailed to:

EPA - Region VI
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: December 16, 1985

32/ 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).