# IN RE EMPLOYERS INSURANCE OF WAUSAU AND GROUP EIGHT TECHNOLOGY, INC.

TSCA Appeal No. 95-6

## *ORDER AFFIRMING INITIAL DECISION IN PART AND VACATING AND REMANDING IN PART*

---

Decided February 11, 1997

---

## Syllabus

These administrative enforcement proceedings, arising under sections 15 and 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2614 and 2615, pertain to events that occurred in the aftermath of an August 1987 fire that destroyed a building in Wyandotte, Michigan. Respondent Group Eight Technology, Inc. ("Group Eight") was the owner of the building at the time of the fire, and respondent Employers Insurance of Wausau ("Wausau") was Group Eight's insurer under a property insurance policy providing coverage against certain fire losses at the Wyandotte location ("Group Eight site"). After the fire, Group Eight presented a claim under its policy with Wausau.

Between the time of the fire and the early part of 1989, seven electrical transformers remained at the Group Eight site, while the building that had occupied the site was undergoing demolition. During that time, the storage and marking requirements prescribed in 40 C.F.R. Part 761 (the "PCB Rule") were not observed. Consequently, in the action filed against it by U.S. EPA Region V, Group Eight was alleged to have committed several violations of those requirements. The EPA administrative law judge ("ALJ") who presided at the hearing into this matter concluded that Group Eight was indeed subject to liability for the alleged storage and marking violations, and his conclusions in that regard were not timely appealed.

The Region also alleged that both Group Eight and Wausau had violated one of the "disposal" provisions of the PCB Rule. One of the seven transformers at the Group Eight site was a "PCB Transformer" as defined in 40 C.F.R. § 761.3, meaning that it contained an extremely high concentration of polychlorinated biphenyls and that its contents could lawfully be disposed of only by incineration. Three of the other six transformers did not contain TSCA-regulated levels of PCBs. Whether any of the remaining three transformers contained regulated levels of PCBs (and whether any such determination was ever made before their contents were collected for disposal) remains in dispute. In April 1989, a disposal contractor hired to remove the transformer fluids from the Group Eight site commingled the fluids from all seven transformers, including the PCB Transformer, and delivered the resulting mixture of fluids to an oil recycling facility (*not* an incineration facility equipped to handle wastes containing high levels of PCBs). The oil recycling facility became contaminated with PCBs, and was required to be addressed by EPA as a Superfund site.

After those events transpired, Group Eight insisted that Wausau had been responsible for making all of the arrangements that led to the eventual mishandling under TSCA of the transformer fluids. Wausau, on the other hand, insisted that it had had no significant involvement in

any of the events that culminated in the TSCA disposal violation. Region V ultimately alleged in its complaints that Wausau, as well as Group Eight, had violated the PCB Rule's disposal requirements. The Region specifically alleged, among other things, that: (1) Wausau's claims adjuster had invited a cost estimate from the disposal contractor regarding the contractor's proposal for removing transformer fluids from the Group Eight site; (2) Wausau's claims adjuster had agreed that Wausau would guarantee payment to the contractor for work done in accordance with that proposal; and (3) Wausau did in fact pay the contractor for work that ultimately included the unlawful disposal of PCB-contaminated fluid at an oil recycling facility.

Region V now appeals from an initial decision issued after the conclusion of a consolidated evidentiary hearing into the Region's TSCA claims against both Wausau and Group Eight. In the initial decision, the ALJ ordered the dismissal with prejudice of Region V's Amended Complaint against Wausau, concluding that the Region had failed to establish Wausau's liability for disposal of PCBs in a manner that violated TSCA section 15 or the PCB disposal regulations. The ALJ concluded, on the other hand, that Group Eight had violated the PCB Rule's disposal provisions as well as the storage and marking requirements cited above, and that a civil penalty would therefore be assessed against Group Eight pursuant to TSCA section 16.

In assessing a civil penalty against Group Eight, the ALJ declined to adopt Region V's recommendation that the amount of the penalty be fixed at $76,000. The Region had attempted to support that figure by showing that it was derived in accordance with the analytical framework in EPA's Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"), which describes a method for translating the TSCA § 16(a)(2)(B) penalty assessment criteria into numerical terms. The ALJ concluded, however, that proof of the recommended penalty's consistency with the Penalty Policy contributed nothing to a determination of whether the recommended penalty was an "appropriate" one — an issue on which the burden of proof belonged to the Region pursuant to 40 C.F.R. § 22.24. He reached that conclusion because the Penalty Policy does not enjoy the status of a "rule" promulgated in accordance with Administrative Procedure Act requirements and was therefore, the ALJ believed, required to be disregarded as if it "never existed." After concluding for those reasons that the Region's penalty recommendation was inadequately supported, the ALJ performed his own analysis of the penalty criteria described in TSCA § 16(a)(2)(B) and, based on that analysis, calculated that a $58,000 penalty should be assessed against Group Eight.

On appeal, Region V argues that the ALJ erred when he determined that Wausau was not shown to have committed any TSCA violations. The Region also argues, with respect to Group Eight, that the ALJ erred when he rejected the Region's $76,000 penalty recommendation based on a perceived failure of proof.

Held: 1. The ALJ's initial decision with respect to Wausau is affirmed. Region V failed to satisfy its burden of proving that Wausau engaged in conduct that constitutes improper PCB disposal within the meaning of 40 C.F.R. Part 761, Subpart D. Wausau's liability must be analyzed in terms of its conduct, not its status as an insurance carrier, and nothing in the record clearly establishes that such conduct violated the applicable TSCA regulations. (Nothing in this opinion addresses any principles of liability under Superfund.)

2. The ALJ's initial decision with respect to Group Eight is vacated insofar as it concludes that the Region failed to demonstrate the "appropriateness" of its proposed $76,000 civil penalty. More particularly, the ALJ erred when he concluded that it was impermissible for the Region, in making such a demonstration, to rely on proof of its adherence to the PCB Penalty Policy without also introducing evidence to substantiate the "findings, assumptions and determinations" underlying the Penalty Policy itself.

(a) Nothing in TSCA § 16 required Region V to present the evidence that the ALJ's initial decision deems necessary. Section 16 requires that EPA "take into account" certain enumerated factors when assessing a civil penalty under TSCA. In the PCB Penalty Policy, each of those factors is addressed and analyzed, with specific reference to the manner in which they might

apply to the kinds of activities that are regulated under the PCB Rule. The Region acted permissibly by offering to show its reliance on the Penalty Policy in order to establish, thereby, that the penalty it was recommending had indeed taken each of the statutorily prescribed factors "into account."

(b) Nothing in EPA's own regulations required Region V to present the evidence that the initial decision deems necessary. The Region was required, pursuant to 40 C.F.R. § 22.24, to bear the burden of proving that the penalty it had proposed to the ALJ was an "appropriate" one. Part 22 nowhere suggests, however, that that burden ordinarily includes, as a matter of course, a requirement for the Region to introduce evidence to support each and every factual proposition that is either recited in, or implicit in or underlying, any penalty policy on which the Region may have relied in developing the proposed penalty. Rather, as the Board stated in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), the complainant must come forward with evidence to show that it, in fact, considered each of the statutory factors and that its recommended penalty is supported by its analysis of those factors.

When an ALJ considers the question of a proposed penalty's "appropriateness," in a case in which the complainant has relied on a penalty policy in developing its proposal, the ALJ is not under a legal obligation to impose the complainant's recommended penalty even if the recommended penalty takes all of the required statutory factors into account. The ALJ may also conclude that he or she cannot adequately evaluate the proposed penalty's appropriateness without receiving additional argument or evidence. Also, the ALJ may confront a situation in which a respondent genuinely takes issue with the contents of a penalty policy cited by the complainant in support of a proposed penalty. The ALJ is free to demand from the complainant such additional argument or evidence as the ALJ may deem necessary for an informed decision as to the proposed penalty's appropriateness. That does not, however, describe what occurred in this case. Here, neither of the respondents challenged Region V's penalty proposal or anything in the PCB Penalty Policy; and the ALJ, for his own part, never put Region V on notice that it would be expected to present argument or evidence justifying the underlying assumptions of the Penalty Policy.

(c) Nothing in the Administrative Procedure Act or principles derived from it required Region V to present the evidence that the initial decision deems necessary. APA principles prohibit the unquestioning application of a penalty policy as if the policy were a rule with "binding effect." Because the validity of the PCB Penalty Policy's application to the facts of this case was never put at issue prior to the initial decision, there is no indication in the record that Region V intended to apply the PCB Penalty Policy in such an inflexible manner as to suggest that it was treating the policy as a rule. Moreover, contrary to the view expressed by the ALJ, the APA does not require that a penalty policy which has not been adopted as a rule must be disregarded for all purposes as if it "never existed."

For these reasons, the action against Group Eight is remanded for further penalty assessment proceedings consistent with the Board's opinion.

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.***

***Opinion of the Board by Judge Reich:***

The U.S. Environmental Protection Agency, Region V, brought administrative enforcement actions against Employers Insurance of Wausau ("Wausau") and Group Eight Technology, Inc. ("Group Eight"), alleging violations of the Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions (here-

inafter "PCB Rule"), 40 C.F.R. Part 761, promulgated pursuant to section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e).[1] The two enforcement actions were consolidated, and a hearing was held on October 12 and 13, 1993, before then Chief EPA Administrative Law Judge Jon G. Lotis ("ALJ"). The ALJ issued an initial decision dated September 29, 1995, concluding that (1) Region V failed to establish, by a preponderance of the evidence, that Wausau had violated the PCB Rule as alleged in the Region's Amended Complaint, but (2) the Region did establish Group Eight's liability for certain of the violations with which it was charged. The ALJ directed that the Amended Complaint issued to Wausau be dismissed with prejudice, and that Group Eight be assessed a penalty in the amount of $58,000.

Region V has appealed the ALJ's decision with respect to both respondents.[2] In its appeal, the Region contends that the ALJ erred by concluding that the Region failed to prove its claim against Wausau, and by reducing the penalty proposed to be assessed against Group Eight. For the reasons that follow, we affirm the initial decision with respect to Wausau, but we vacate the initial decision in part and remand for further proceedings with respect to the assessment of a penalty against Group Eight.

## I. *BACKGROUND*

On August 24, 1987, fire destroyed a building in Wyandotte, Michigan, that had recently been purchased by Group Eight. Group Eight was insured against certain fire losses at the site under a policy issued by Wausau, and Group Eight sought coverage under the policy. As part of its initial response to Group Eight's claim, Wausau arranged with a pollution control company for removal of three transformers from the site for disposal. More specifically, on September 1,

---

[1] Section 15 of TSCA, 15 U.S.C. § 2614, makes it unlawful for "any person" to fail or refuse to comply with any EPA regulation governing PCBs. TSCA section 16, 15 U.S.C. § 2615, authorizes EPA to assess civil penalties for such violations administratively in an amount not to exceed $25,000 for each such violation.

[2] With its response to the Region's appeal, Wausau also filed what it termed a "protective cross-appeal" to preserve, in the event of a decision to reinstate the Region's complaint against Wausau, challenges to certain subsidiary rulings made by the ALJ. Because we do not reinstate the complaint against Wausau, we do not reach any of the issues raised in Wausau's "protective cross-appeal."

In addition, Group Eight filed an appeal challenging the ALJ's conclusion that Group Eight had violated the PCB Rule. Group Eight's appeal was untimely, however, and was dismissed by the Board on that basis by order dated November 28, 1995.

1987, a letter from Wausau's outside counsel was hand-delivered to Group Eight's president, Bernard S. Schrott, informing Schrott that it would be "necessary to undertake removal of three electric transformers" from the site, and that Wausau, while reserving any determination regarding coverage, "ha[d] made arrangements, on [Group Eight's] behalf, to have a certified pollution control company undertake the proper disposal of these items." On the same day, at Wausau's request, Schrott executed a document stating, in part, "[t]his will authorize Wausau Insurance Companies to have Marine Pollution Control remove the transformer, transport and dispose of the three (3) P.C.B.'s." In reality, there were seven transformers at the Group Eight site when the fire occurred, although Wausau may not have been aware of the other four at the time of its September 1 letter to Schrott.[3]

As envisioned in Wausau's September 1 letter, three transformers were removed from the Group Eight site on or about September 3, 1987. The three transformers were not disposed of, however. Rather, the transformers were taken by Wausau's contractor, Marine Pollution Control, to its own storage facility, and samples of the transformer fluids were forwarded to a testing laboratory on September 4, 1987. Complainant's Trial Exhibit ("CTE") No. 23. The testing laboratory, Environmental Quality Laboratories, Inc., analyzed the samples and concluded, on September 9, 1987, that none of the three transformers contained regulated levels of PCBs. *Id.* On September 10, Marine Pollution Control, which had brought the transformers to its facility under a hazardous waste manifest, notified the Michigan Department of Natural Resources ("MDNR") that the transformer fluids were non-hazardous and that the manifest should therefore be canceled. *Id.* Finally, on or about October 6, 1987, the three transformers were simply returned to the Group Eight site. CTE No. 24.[4]

---

[3] As with many of the factual matters in this case, the administrative record is not clear as to when Wausau first became aware of the other four transformers. The first occasion on which the record unmistakably shows Wausau to have become aware of them is upon its receipt of a December 15, 1987 letter from the demolition contractor at the Group Eight site, Alfonzo Sclafani. Sclafani's letter is quoted at length later in this section of our opinion.

[4] Wausau contends that six (rather than three) transformers were sampled for PCBs in September 1987. Wausau asserts that in addition to the three transformers removed from the site and tested, three others were tested at the site (but not removed). Wausau further contends that test results for all six transformers showed PCB concentrations below regulated levels. Wausau notes that six sample analysis sheets were prepared by Environmental Quality Laboratories, Inc., identifying the samples tested as "Oil #1," "Oil #2," "Oil #3," "Oil #4," "Oil #5," and "Oil #6." But as Region V points out, the sample analysis sheets nowhere indicate that each sample came from a different transformer; and indeed, when Marine Pollution Control forwarded those analysis sheets to the MDNR, it described all six samples as having been taken from a group of only

Continued

Meanwhile, during September 1987, Group Eight acceded to a request from the City of Wyandotte by agreeing to have the damaged building demolished. *See* Wausau Trial Exhibit ("WTE") No. 3. In a letter to Group Eight dated November 1, 1987, a company called Sclafani Trucking, Inc. proposed to do the demolition work for a price of $120,000.00, specifying, however, that "[t]his price does not include handling of any hazardous waste or removal of any asbestos." By letter dated November 13, 1987, the Wausau general adjuster assigned to the Group Eight claim, Howard T. Aidenbaum, guaranteed payment to Sclafani Trucking for the services identified in Sclafani Trucking's November 1 proposal, in an amount not to exceed the quoted price of $120,000.00. Aidenbaum further agreed that "[y]our exclusions for handling any hazardous waste or removal of asbestos in the quoted price [are] acceptable."[5]

On December 1, 1987, Schrott sent a brief letter to Sclafani Trucking. CTE No. 23; WTE No. 7. To that letter he attached a copy of the MDNR manifest that had been prepared on September 3, 1987, in connection with the removal of three transformers from the Group Eight site for PCB testing. He may also have attached some of the sample analysis sheets showing the results of the testing that was performed by Environmental Quality Laboratories during September, although that is uncertain. *See* Hearing Transcript at 162-63, 230-31. In

---

three transformers (Serial Nos. R20557, R26697, and R20554). CTE No. 23. Moreover, the demolition contractor for the site, writing during December 1987 in reference to these test results, stated that only three transformers "have been tested negative for PCB's," whereas the other four transformers had yet to be tested and therefore "currently have no disposal status." CTE No. 6.

That dispute has legal significance because untested transformers are required to be handled just as if they were known to be "PCB-contaminated." *See* 40 C.F.R. § 761.3 ("Oil-filled electrical equipment * * * whose PCB concentration is unknown must be assumed to be PCB-Contaminated Electrical Equipment."). The number of transformers that were left untested in September 1987 — one or four — therefore affects whether one penalty or four penalties could have been sought in this action for each storage or disposal requirement allegedly violated. However, because Region V has never proposed to assess multiple penalties (*i.e.*, a penalty for each transformer) for any of the storage or disposal violations alleged in this action, it is unnecessary, for purposes of this appeal, to decide how many transformers were actually tested in September 1987 and how many were left untested.

[5] There are conflicting versions in the record of how Sclafani Trucking came to be hired for this job. Aidenbaum states, in an affidavit, that it was Schrott (*i.e.*, Group Eight) who "solicited a bid from * * * Sclafani Trucking, Inc. * * * for the performance of this demolition work." December 19, 1989 Affidavit of Howard Aidenbaum (CTE No. 1), at ¶ 6. Aidenbaum further states that Aidenbaum himself (and, by clear implication, Wausau) had had no prior relationship or even contact with Sclafani Trucking or with its principal, Alfonzo Sclafani. *Id.* Schrott, on the other hand, testified that Group Eight would have preferred to use a different demolition contractor but was overruled by Wausau. Schrott states that it was Aidenbaum, on behalf of Wausau, who insisted that Sclafani Trucking be hired for the job. Hearing Transcript at 172.

his letter, Schrott stated that the enclosed "DNR report on the transformers * * * indicat[es] that no PCB chemicals are present; therefore, you can dispose of them as you wish."

On December 15, 1987, Alfonzo Sclafani wrote to Aidenbaum, reporting that several of the transformers at the Group Eight site had not yet been tested and requesting instructions concerning the disposition of those transformers:

> Dear Mr. Aidenbaum:
>
> It has come to my attention that there are four transformers located at 2246 Third St. Wyandotte, MI, which you have contracted my company to demolish, that currently have no disposal status. Three are located in the elevator shaft tower, and one is located on the Cedar St. side of the building. There also are three transformers located on the ground in the courtyard that have been tested negative for PCB's. I will arrange disposal for these three transformers, however the hazardous waste status for the remaining four transformers must be determined. As you know our agreement excludes handling of any hazardous wastes.
>
> If you would like, I can arrange to have these transformers tested and if they test positive, arrange to have them disposed of in a law full [sic] manner. This service would be above and beyond the prices quoted in our agreement, and would be billed to you when completed with net payable in thirty days.
>
> Please respond in writing as soon as possible, so demolition work is not halted. * * * P.S. I am sending copies of hazardous waste report regarding the three transformers in the courtyard that I will dispose of.

No written response to Mr. Sclafani's December 15, 1987 letter (from Aidenbaum or anyone else at Wausau) appears in the record of these proceedings. Moreover, for reasons that are also not clear from the record, it appears that no further action was taken by any interested party in relation to the seven transformers at the Group Eight site throughout 1988.

Finally, in January 1989, the City of Wyandotte contacted the MDNR to express concern about "the presence of abandoned leaking

transformers and other chemicals discovered on the [Group Eight] site."[6] A PCB compliance inspection was conducted by MDNR on January 11, 1989, at which time the inspector observed "seven liquid filled transformers sitting on the ground of the property." The inspector's report identifies the seven transformers as follows:

(1) Westinghouse Serial No. 6542983; Liquid: Oil.

(2) Westinghouse Serial No. 6542891; Liquid: Oil.

(3) Westinghouse Serial No. 6542892; Liquid: Oil.

(4) ST Transformer Serial No. R20552; Liquid: Oil.

(5) ST Transformer Serial No. R26697; Liquid: Oil.

(6) ST Transformer Serial No. R20554; Liquid: Oil.

(7) Niagara Transformer Serial No. 39233; Liquid: Askeral.

"Askeral" (or "askerel," as the word appears in the ALJ's initial decision) is a trade name identifying transformer fluid that contains very high concentrations of PCBs.[7] It is undisputed that the Niagara transformer found at the Group Eight site was, for TSCA regulatory purposes, a "PCB Transformer" the contents of which could lawfully be disposed of only by incineration.[8]

Shortly thereafter, on February 8, 1989, a meeting took place that was attended by Alfonzo Sclafani of Sclafani Trucking, Mr.

---

[6] MDNR Exhibit No. 1, at 1. This exhibit is the report prepared by the MDNR on the basis of its January 11, 1989 PCB compliance inspection at the Group Eight site. Although identified in the hearing record as "MDNR Exhibit No. 1," the report was offered into evidence by Wausau. *See* Hearing Transcript at 117. The MDNR itself has not been a party to these enforcement proceedings.

[7] According to the ALJ, it was sufficiently established at the hearing that "'Askerel' is an industry term for dielectric fluid containing concentrated levels of PCBs." Initial Decision at 9. No party to this action has disputed "that the Niagara transformer contained regulated levels of PCBs." *Id. See also In re Bell & Howell Co.*, 1 E.A.D. 811, 821 (JO 1983) (noting that Askerel is a "common tradename[] for PCB dielectric fluid").

[8] For purposes of the PCB Rule, a "PCB Transformer" is defined as "any transformer that contains 500 ppm PCB or greater." 40 C.F.R. § 761.3. The Subpart D disposal regulations provide that, subject to exceptions not here relevant, "PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70." 40 C.F.R. § 761.60(a)(1).

Aidenbaum of Wausau, and Michael Van Hook of K&D Environmental Services, Inc. ("K&D"). According to Mr. Aidenbaum's affidavit, at the February 8 meeting he "requested that Mr. Van Hook provide me with cost estimates for the removal, transport and disposal or treatment of the transformer fluids from the transformers at the Group Eight property."[9] Following that meeting, K&D submitted a proposal to Sclafani Trucking dated February 21, 1989 (with copies also furnished to Aidenbaum and to Group Eight) setting forth, among other items, K&D's proposed "prices for pumping out 6 transformers * * * and disposal cost at your Group Eight Technology job site." The reference to *six,* rather than seven, transformers — which appears twice in K&D's February 21, 1989 proposal — is nowhere explained in the record of these proceedings. In any event, with respect to the disposal of transformer fluids and other "oil waste," K&D proposed to charge twenty-five cents per gallon for disposal in the following manner:

> The oil waste will be broken down into two loads. One for transformers and one for the press pits, this is because the transformers have a low trace of PCB's and we don't want to contaminate the press pit oils. All oil will be taken to CIW Company 39209 Ecorse Road, Romulus, Michigan * * *.

The basis for K&D's understanding that six of the transformers at the Group Eight site had only "a low trace of PCB's" is, once again, nowhere explained in the record of these proceedings.

On or about March 13, 1989, a scientist with EPA Region V, Robert Bonace, telephoned Group Eight's president, Schrott, to express "some concerns about transformers on his property including a PCB

---

[9] Aidenbaum Aff. ¶ 11. It is not clear how K&D came to be involved in these discussions, nor is it clear how (or by whom) K&D was determined to be an appropriate candidate for the job of transporting and disposing of waste fluids from the Group Eight site. According to Aidenbaum's affidavit, K&D's field supervisor, Van Hook, was Alfonzo Sclafani's neighbor — suggesting, implicitly, that K&D was recommended for this job by Sclafani Trucking — but Aidenbaum does not indicate the basis for his understanding that there was a preexisting relationship between Sclafani Trucking and K&D. Aidenbaum insists, at all events, that he (and, by clear implication, Wausau) had had no prior relationship or even contact with K&D or with Van Hook. The record contains no further information about K&D, except that: (1) K&D identified itself to EPA and MDNR, in correspondence generated by its attorneys after the events at issue in this action, as "a licensed transporter" (MDNR Exhibit No. 3, Attachment 4); and (2) Aidenbaum at one point assured EPA that K&D was considered to be an "acceptable" waste disposal contractor by the MDNR (CTE No. 19).

transformer."[10] At Schrott's request, Bonace prepared a letter regarding the transformers that had been observed at the Group Eight site. Bonace's letter, addressed to Group Eight on March 20, 1989 (CTE No. 14), stated as follows:

> As you requested in our telephone conversation on March 13, 1989, I am writing to inform you of transformers located on your property at 2246 3rd Street, Wyandotte, Michigan.
>
> One of these transformers is a PCB transformer. The other six are mineral oil transformers. Several of the mineral oil transformers, considered to be PCB contaminated under 40 C.F.R. §761.3, are leaking oil onto the ground. Please be informed that use, storage, marking, recordkeeping, and disposal of PCBs are regulated under 40 C.F.R. Part 761 of the PCB regulations. Violations of the PCB regulations can result in penalties of up to $25,000 per day per violation.
>
> Please keep me informed of any action you take involving these transformers. If you have any questions, feel free to call me * * *.

Schrott forwarded Bonace's letter to a Wausau representative in Southfield, Michigan (with a copy to Aidenbaum), explaining in a cover note that "[t]he adjuster was supposed to resolve this but has not." Group Eight Trial Exhibit No. 1. In a letter to Bonace dated April 10, 1989, Aidenbaum responded to Bonace's March 20 letter by stating, in relevant part:

> Mr. Bonace, I have now received a copy of your March 20 letter to our insured president, Bernard Schrott.
>
> We have requested and currently received an MID package, which is being completed by the insured so that an MID number can be assigned by the State of

[10] Hearing Transcript at 347. Bonace had previously been contacted in reference to that subject by the City of Wyandotte's City Engineer — who was present during the MDNR's January 11, 1989 PCB compliance inspection conducted at the Group Eight site — and Bonace had confirmed, in a telephone conversation with the MDNR inspector, that "when [the inspector] was at the site he saw an Askerel PCB transformer and six other oil filled transformers, several [of which] appeared to be leaking oil onto the ground." *Id.* at 348.

> Michigan and therefore proceed with the process of having this hazardous waste removed.
>
> Samples are being taken by K and D Industrial Services, Incorporated, who was indicated to be an acceptable contractor by Anthony Pitts of the DNR.

CTE No. 19.[11]

Meanwhile, according to Aidenbaum, he had met for a second time with Alfonzo Sclafani of Sclafani Trucking and Michael Van Hook of K&D on April 5, 1989. "At that meeting," Aidenbaum states, "I agreed to pay a reasonable dollar amount to K&D for the removal, transport and disposal or treatment of the transformer fluids as estimated by K&D in its February 21, 1989 proposal."[12]

K&D's proposal, it will be recalled, indicated that K&D would "pump out 6 transformers" and transport their contents to the CIW Company's facility in Romulus, Michigan — although there were, in reality, seven transformers at the Group Eight site. Moreover, the CIW Company's facility was an oil recycling facility, and as such was not a proper facility for disposal of transformer fluids that either (a) contained PCB concentrations in excess of 50 parts per million (*see supra* note 8), or (b) were untested and therefore presumed to contain such concentrations as a matter of law (*see supra* note 4). In any event, on or about April 15, 1989, K&D drained the fluids from all seven of the transformers at the Group Eight site — including the Niagara "askerel" transformer — commingled the fluids and delivered them all to the CIW facility. Wausau, on behalf of its insured, paid the bill submitted by K&D for performance of those services in accordance with its prior agreement. The CIW facility became contaminated by PCBs and was ultimately required to be cleaned up under the auspices of the federal Superfund program.[13]

---

[11] The "MID" number mentioned in this letter is presumably the identification number required to be obtained by a Michigan generator of hazardous waste pursuant to the Resource Conservation and Recovery Act.

[12] Aidenbaum Aff. ¶ 13.

[13] The case before us presents no issue relating to the responsibility of any person for the contamination of the CIW site, under the liability provisions of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.* ["CERCLA"]) or otherwise, nor does it present any other issue under CERCLA. We are aware, however, of previous litigation between Wausau and EPA wherein

Continued

Region V learned of the contamination of the CIW site, and of its origin in the improper disposal of transformer fluids from the Group Eight site, during May 1989. On or about May 22, 1990, Region V issued a TSCA administrative complaint against Group Eight in six counts, seeking penalties totaling $76,000, and a separate TSCA administrative complaint against Wausau in one count, seeking a penalty of $25,000. Amended complaints were filed in both actions, with leave of Administrative Law Judge Thomas B. Yost, during August 1991. Following Judge Yost's retirement in September 1992, the TSCA penalty actions against Wausau and Group Eight were reassigned to then Chief Administrative Law Judge Jon G. Lotis. Judge Lotis formally consolidated the two actions by order dated July 30, 1993, presided at a consolidated hearing during October 1993, and issued his initial decision on September 29, 1995.

## **II.** *DISCUSSION*

### A. *The Claim Against Wausau (Case No. TSCA-V-C-62-90)*

Region V's TSCA civil penalty action against Wausau alleges that Wausau, by its involvement in the unlawful disposal of PCB-contaminated fluids from the Group Eight site, violated the PCB disposal regulations at 40 C.F.R. Part 761, Subpart D. The ALJ concluded, however, that Region V failed to prove that Wausau had become actively involved in the disposal of PCBs or had otherwise deviated from the usual role of an insurance carrier in adjusting a potentially covered loss. We agree that the evidence introduced before the ALJ was insufficient to support the imposition of a TSCA penalty against Wausau for unlawful disposal of PCBs, and we therefore affirm the initial decision as it relates to Wausau.

We emphasize at the outset that both the Region and Wausau agree — indeed, they both insist — that the Region's claim against Wausau must be analyzed in terms of Wausau's conduct, not its status. Specifically, the Region urges that we impose a TSCA penalty against Wausau "not because of its status as an insurance carrier, but

---

Wausau claimed reimbursement, pursuant to section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2), of costs that Wausau incurred while addressing the contamination of the CIW site in response to an EPA order. Wausau's reimbursement claim was denied by EPA, and that denial was ultimately upheld by the Court of Appeals for the Seventh Circuit, for reasons not directly related to Wausau's CERCLA liability or nonliability with respect to the CIW site. *See Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 699 (1996). The court made no factual findings as to the extent of Wausau's involvement in sending the transformer fluids to the CIW facility. Wausau's inability to obtain reimbursement of its CERCLA response costs in that litigation has no bearing on the TSCA issues that are currently before us.

rather because of what Wausau did." Appellant's Brief at 18. Wausau embraces the same distinction and maintains that the imposition of a penalty against it on the basis of status, as opposed to "specific acts," would represent an "improper, unlawful extension of TSCA." Wausau's Brief at 36. By the same token, neither party suggests that the imposition of a TSCA penalty against Wausau, given proof of violative conduct, would be impermissible merely because Wausau is in the insurance business rather than the waste disposal business.[14] Accordingly, with the parties in agreement that Wausau's conduct is what matters (a proposition with which we, too, agree), our inquiry focuses on the actions taken by Wausau in connection with the removal of the transformer fluids from the Group Eight site.

The underlying statutory provision, TSCA section 6(e)(1), 15 U.S.C. § 2605(e)(1), simply directs EPA to "promulgate rules to * * * prescribe methods for the disposal of polychlorinated biphenyls." TSCA itself does not define "disposal," nor does it otherwise identify the class or classes of persons against whom the Agency's PCB disposal rules were to be made enforceable. The Region therefore relies, for its analysis of what constitutes potentially violative conduct, on the definition of "disposal" that appears in 40 C.F.R. § 761.3:

> *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.

That definitional provision represents the linchpin of the Region's appeal. The Region argues that by facilitating the retention of K&D Environmental Services to dispose of transformer fluids from the Group Eight site — that is, by inviting a cost estimate from K&D for disposal of the transformer fluids, agreeing to pay K&D for the disposal in accordance with that estimate, and ultimately paying K&D for the work that it did — Wausau took "actions related to containing, transporting, destroying, degrading, decontaminating, or confining

[14] Region V expresses some concern that the ALJ's initial decision implies that insurance carriers are "exempt" from TSCA requirements or prohibitions "that apply to everyone else." Appellant's Brief at 20. We think that concern is unfounded. We do not read the initial decision as recognizing such an exemption, nor should anything in our own opinion be construed as endorsing such an exemption.

PCBs," and therefore engaged in PCB "disposal" within the meaning of the Part 761 regulations. We do not agree.

It is true, as the Region emphasizes, that the regulatory definition of "disposal" is extraordinarily broad. However, complicating the analysis is the fact that while section 761.3 defines "disposal," the regulations do not explicitly assign responsibility for TSCA compliance to any particular participants in the disposal process.[15] "The disposal requirements are written in the passive voice, stating *how* PCBs must be disposed of, but not saying *who* is responsible for an improper disposal of PCBs." *In re City of Detroit*, 3 E.A.D. 514, 522 (CJO 1991) (emphasis in original).

For that reason, we do not share the Region's apparent conviction that Wausau's responsibility for TSCA compliance in this case follows from a straightforward application of clear regulatory language. The regulatory language sweeps broadly, but there must be some reasonable basis for applying the disposal regulations to the conduct that the Region seeks to penalize. It is clearly not sufficient for the Region simply to recite that the respondent performed an "action related to" taking PCBs out of service. If any "action related to" PCB disposal were truly a sufficient predicate for the imposition of TSCA liability, the City of Wyandotte itself would arguably be subject to a TSCA penalty in this case for its "action" of encouraging the removal of the transformers from the Group Eight site — a result that presumably no one would consider appropriate.

Recognizing the ambiguity as to the reach of the PCB disposal regulations, the Agency's Chief Judicial Officer ("CJO") in *City of Detroit, supra*, limited the scope of TSCA penalty liability under those regulations to parties having actual influence over the disposal activity (such as by direct involvement in the activity) or the ability to exert such influence (such as would arise, for example, from ownership of a PCB source). In *City of Detroit*, an improper disposal of PCBs occurred in the form of uncontrolled discharges (*i.e.*, spills and leaks), and EPA sought to assess a TSCA penalty against the entity that owned

---

[15] An introductory provision of Part 761, 40 C.F.R. § 761.1(b), states that "[t]his part applies to all persons who manufacture, process, distribute in commerce, use, or dispose of PCBs or PCB Items." But the Agency has never applied that provision literally, to mean that "all of the PCB rules apply to a person who engages in just one of the listed activities." *In re City of Detroit*, 3 E.A.D. 514, 523 n.18 (CJO 1991). Rather, "it is evident that the regulations on use apply to those who use PCBs; the regulations on storage apply to those who store PCBs; and the regulations on disposal apply to those who dispose of PCBs." *Id.* at 523. Section 761.1(b) is therefore of limited value in deciding whether particular conduct violates particular requirements or prohibitions of the PCB Rule.

the affected real property at the time those discharges were discovered. The CJO concluded, however, that it would not be reasonable to impose a penalty under Part 761, Subpart D, absent proof that the respondent actually caused the disposal or that (in a case involving spillage or leakage) the respondent owned the source of the PCBs at a time when spills or leaks were occurring:

> The regulatory provisions * * * suggest the following two conclusions as to when a person will be held responsible for an improper disposal [of PCBs]: (1) a person will be held responsible if that person caused (or contributed to the cause of) the disposal, and (2) in cases involving uncontrolled discharges, the person who owned the *source* of the PCBs at the time of the discharge will be deemed in most cases to have caused the discharge.

*City of Detroit*, 3 E.A.D. at 526 (emphasis in original). The landowner in *City of Detroit* had not yet taken possession of the affected property at the time of the uncontrolled PCB discharges; nor had the landowner otherwise caused or contributed to the occurrence of those discharges; nor did the landowner own any PCB source at the time of an uncontrolled discharge. The CJO concluded, therefore, that no penalty could be assessed against the landowner for violation of the PCB disposal regulations. *Id.* at 531-32.[16]

Guided by the principles articulated by the CJO in *City of Detroit*, we must first determine what Wausau actually did with respect to the transformers at the Group Eight site, and we must then consider whether Wausau's conduct can reasonably be characterized as the regulated activity of "disposal." Because evidence bearing on the more fundamental question — What did Wausau actually do? — is in important respects either ambiguous, or in conflict, or simply lacking, we emphasize that it is Region V that bears the burden of proving the elements of the alleged violation by a preponderance of the evidence.

---

[16] In determining who may be subject to a penalty under TSCA in a case involving uncontrolled PCB discharges, the CJO asked which parties could reasonably have been expected to minimize the risk of such uncontrolled discharges. Thus, he observed that applying the disposal rules to the owner of a PCB source would make sense because the owner presumably has "the power to control the handling of the PCBs." *City of Detroit*, 3 E.A.D. at 525. Even if a spill were caused by vandalism, the owner of the source could reasonably be subject to a disposal penalty because "the owner would normally be responsible for maintaining security at the site of its PCB sources." *Id.* The interpretation of "disposal" adopted by the CJO in the context of leaks and spills was therefore reasonably related to the apparent objective of the regulations.

*See* 40 C.F.R. § 22.24; *see also In re Santacroce*, 4 E.A.D. 586, 595 (EAB 1993) (noting the heightened significance of the complainant's burden of proof in cases "where, as here, the evidence is scant, contradictory, and subject to varying interpretations").

Chronologically and, we think, analytically, Wausau's actions appear to form two relatively discrete episodes: The first consists of actions taken during 1987, shortly after Wausau received notice of the Group Eight fire loss, and the second consists of actions taken during 1989, after the MDNR's January 11 PCB compliance inspection. Having examined both sequences of conduct in light of the applicable burden of proof, we conclude that neither set of actions undertaken by Wausau will support the imposition of a TSCA penalty for improper disposal of PCBs.

During September 1987, in the immediate aftermath of the fire, Wausau decided that three transformers would have to be removed from the Group Eight site for disposal. Wausau told its insured, in a hand-delivered letter from Wausau's outside counsel, that the planned disposal was "necessary * * * in order to protect the public and the environment from the possibility that the contents of the transformers might be released." Although Wausau took care to obtain the insured's written authorization, we think it clear that the decision to undertake the disposal was Wausau's decision, not the insured's: The disposal was presented to the insured as a "necessary" undertaking, and Wausau apparently engaged a pollution control company of its own choosing to do the job. By making and implementing decisions of that nature, Wausau may well have at least approached the threshold of engaging in TSCA-regulated conduct, if not crossed it. We need not decide whether the threshold was crossed, however, because no improper disposal of PCBs actually occurred at the time of these events. The three transformers removed from the Group Eight site at Wausau's direction did not contain regulated concentrations of PCBs, and the transformers were simply tested and returned to the site. Wausau's involvement in the removal and testing of those three transformers during September 1987 does not support the imposition of a TSCA penalty for an improper disposal of transformer fluids that occurred nearly two years later.

With respect to the events of early 1989, we reach the same result for different reasons: A disposal of PCBs certainly occurred, and the TSCA regulations were certainly violated, but Region V has not proven that the nature and quality of Wausau's actions were such as would subject Wausau to the requirements and prohibitions of the TSCA PCB disposal regulations. Nothing in this record clearly demonstrates that

Wausau made the decision to go forward with the disposal of the transformers, that Wausau selected K&D as the waste removal contractor to do the job, or that Wausau exerted any influence over the scope, timing, or other details of K&D's disposal work. Mr. Aidenbaum's affidavit — which, we note, was admitted into evidence by the ALJ upon the *Region's* motion — states only that he asked K&D for a cost estimate, that he agreed to pay K&D for its services based on the estimate that K&D had submitted, and that he did in fact cause payment to be made to K&D. Aidenbaum specifically denies, moreover, having had any prior association with K&D or any involvement in the selection either of K&D as a disposal contractor or of the CIW Company facility as a disposal site. With the Region relying almost exclusively on Aidenbaum's affidavit as evidence of Wausau's role,[17] we simply cannot conclude that Wausau did anything more at the time of these events.

Of course, it is possible that Wausau played a more influential role in the events of February, March, and April 1989 than it has acknowledged. Schrott's testimony, for example, would certainly tend to support that view, and Aidenbaum's April 10, 1989 letter to Bonace, though ambiguous, could be read to support that view as well. But the Region did not meet its burden of proof with regard to Wausau's role in these events, either to the satisfaction of the ALJ or to our own satisfaction. Both before the ALJ and on appeal, the Region has cited Aidenbaum's affidavit as evidence that Wausau played an active decisionmaking role at the Group Eight site, *see* Complainant's Post-Hearing Brief at 5; Appellant's Brief at 14, but the affidavit, as far as the February through April 1989 period is concerned, is careful to suggest just the opposite. With the Region having offered Aidenbaum's affidavit into evidence, having relied heavily on portions of the affidavit, and having failed to examine Aidenbaum (who was physically present during the Region's case in chief) with respect to the portions of the affidavit that minimize Wausau's role, the record supports no alternative to Aidenbaum's characterization of several events that are central to the outcome of this case. If the Region believed that Aidenbaum's affidavit did not fully or accurately describe Wausau's role, then the Region could and should have called Aidenbaum to testify at the hearing under questioning appropriate to a "hostile" witness.

[17] As the Region acknowledges in its own appellate brief, "[c]omplainant's claim of Wausau's liability * * * is based upon documentary evidence of the events which culminated in the alleged unlawful disposal of PCBs by Wausau, especially an affidavit of Mr. Aidenbaum, the agent of Wausau directly involved in these events." Appellant's Brief at 4 n.2.

The Region's failure to effectively refute Aidenbaum's account is fatal to the claim against Wausau, because the specific conduct described by Aidenbaum (asking for and agreeing to a cost estimate and paying the subsequent bill) does not appear to deviate, in any obvious respect, from the conduct one would expect of an insurance carrier in circumstances such as these, as opposed to the conduct of one who actually sought to influence the disposal activity itself. Aidenbaum's affidavit states that he was present in an essentially passive role as plans were made to dispose of Group Eight's transformer fluids. He insists that he made no effort to influence any of those plans. *See* Aidenbaum Aff. ¶ 11 ("At [the February 8] meeting I did not discuss potential disposal or treatment sites for the transformer fluids * * * nor did I select a disposal or treatment site or direct that the transformer fluids should be removed to any particular site."); *id.* ¶ 13 ("As I did not have the authority to control the removal, transport, disposal or treatment of the transformer fluids, my only purpose at the [April 5] meeting was to reach an agreed price with K&D."). Aidenbaum does not, in short, portray Wausau actively engaging at the relevant time in conduct that could, in our opinion, reasonably be characterized as PCB "disposal." The Region may disagree with Aidenbaum's account in several respects, but the Region, which bears the burden of proof with respect to Wausau's conduct, has not presented sufficient evidence to refute that account.

The Region objects to the ALJ's finding that the removal of the transformers was performed by K&D "pursuant to an agreement it had reached with Sclafani." Appellant's Brief at 18 (citing Initial Decision at 18). The Region argues that "there is no evidence in the record that Sclafani ever identified to K&D the scope of the work to be performed at the Group 8 property, that Sclafani ever offered to pay K&D to do the work, or that Sclafani ever actually paid K&D to do the work." Appellant's Brief at 18. What the record does or does not show about Sclafani's conduct is, however, ultimately beside the point. The pertinent question is what the record shows about *Wausau's* conduct, and the record evidence on that subject was *introduced by the Region itself* in the form of Aidenbaum's affidavit. That affidavit is entirely consistent with the ALJ's conclusion that Wausau did not, during the early part of 1989, "dispose" of PCBs within the meaning of the TSCA regulations.

For these reasons we conclude, as did the ALJ, that Wausau did not itself engage in PCB "disposal" within the meaning of the Part 761 regulations, either by inviting cost estimates from K&D (so as to determine the magnitude of Wausau's own potential payment obligation), or by agreeing to make payment to K&D for services that included

PCB disposal, or by making such payment. We therefore affirm the dismissal of Region V's Amended Complaint against Employers Insurance of Wausau.

B. *The Claims Against Group Eight (Case No. TSCA-V-C-66-90)*

Because Group Eight did not timely appeal the ALJ's initial decision, there is no issue before us concerning Group Eight's liability,[18] and such liability is assumed in the discussion that follows. The issues presented on appeal arise from the ALJ's rejection of the Region's $76,000 penalty proposal with regard to Group Eight, and his decision to substitute a $58,000 penalty.

In support of its proposed penalty the Region sought to demonstrate, in its briefs and at the hearing, that the proposed penalty had been calculated in a manner consistent with EPA's April 1990 Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"). In his initial decision, however, the ALJ turned aside the Region's effort as fundamentally misguided. He ruled that proof of the proposed penalty's consistency with the Penalty Policy — even if unchallenged — could not have justified his entry of an order assessing that penalty against Group Eight, absent evidence in the record substantiating the various "findings, assumptions and determinations" that are reflected in the Penalty Policy. Initial Decision at 22.

On appeal, Region V challenges the conclusion that its failure to substantiate the factual and legal "underpinnings" of the PCB Penalty Policy on the record compelled the rejection of its $76,000 penalty proposal.[19] We agree with the Region. We therefore vacate the initial decision insofar as it rejects the $76,000 penalty proposal, and we remand for further penalty assessment proceedings with respect to Group Eight. Our reasons follow.

1. *The Region's Penalty Recommendations*

Six different kinds of PCB Rule violations were alleged to have been committed by Group Eight, five pertaining to improper storage and marking and the sixth pertaining to improper disposal. For each

---

[18] *See supra* note 2.

[19] The Region also challenges the size of the penalty ($58,000) ultimately assessed by the ALJ against Group Eight in the initial decision, arguing that that penalty amount lacks any articulated, rational relationship to the factors that the Agency is required to consider in assessing a TSCA penalty. In light of our disposition of the Region's principal claim of error, we do not address this alternative basis for the Region's appeal.

regulation allegedly violated, Region V formulated a penalty recommendation based on Group Eight's conduct with respect to the 236-gallon Niagara askerel transformer.[20] Thus, in its prehearing exchange, the Region presented its penalty recommendations to the ALJ and to Group Eight as follows:

> (1) Amended Complaint Count I — Failure to dispose of the PCB Transformer within one year of its placement in storage, as required by 40 C.F.R. § 761.65(a) — Proposed Penalty: $6000.00.
>
> (2) Amended Complaint Count II — Storage of the PCB Transformer in an inadequate storage facility, *i.e.*, one not satisfying the criteria set forth in 40 C.F.R. § 761.65(b)(1) — Proposed Penalty: $13,000.00.
>
> (3) Amended Complaint Count III — Failure to date the PCB Transformer with the date of its placement in storage, as required by 40 C.F.R. § 761.65(c)(8) — Proposed Penalty: $6000.00.
>
> (4) Amended Complaint Count IV — Failure to mark the PCB Transformer with mark $M_L$, as required by 40 C.F.R. § 761.40(a)(2) — Proposed Penalty: $13,000.00.
>
> (5) Amended Complaint Count V — Failure to mark the storage area used to store the PCB Transformer with mark $M_L$, as required by 40 C.F.R. § 761.40(a)(10) — Proposed Penalty: $13,000.00.

---

[20] More precisely, the Region's Amended Complaint alleged that Group Eight had violated the storage and disposal requirements of the PCB Rule by its conduct with respect to both the Niagara transformer *and* two of the Westinghouse transformers — which, according to the Region, were required to be treated as "PCB-contaminated" because their fluid contents were never tested. Those allegations notwithstanding, however, the Region did not seek multiple penalties for any of the violations that Group Eight allegedly committed with respect to more than one transformer. For example, in regard to Group Eight's alleged use of an inadequate storage facility, the Region proposed to assess a penalty for only one violation even though three allegedly regulated transformers were stored in the facility in question.

Because all of the Region's penalty recommendations were based solely on Group Eight's handling of the Niagara askerel transformer — whose status as a regulated PCB Transformer is not in dispute, *see supra* note 7 — we need not consider whether any of the Westinghouse transformers were subject to regulation under Part 761. *See supra* note 4 (describing conflicting evidence as to how many of the transformers at the Group Eight site were TSCA-regulated).

> (6) Amended Complaint Count VI — Disposal of the fluid from the PCB Transformer in a manner not permitted by 40 C.F.R. § 761.60 — Proposed Penalty: $25,000.00.

*See* Complainant's Prehearing Exchange at 9-11. In total, the penalty proposed to be assessed against Group Eight amounted to $76,000.00.

Region V made clear, before the commencement of the hearing, that its penalty recommendations had been derived by applying the factors listed in TSCA § 16 "to the particular allegations that constitute the violations charged," Amended Complaint at 10, and specifically by applying those factors in the manner described in the Penalty Policy. Complainant's Prehearing Exchange at 8. The Penalty Policy was included among the exhibits identified in the Region's prehearing exchange (*see* Complainant's Prehearing Exchange at 7), and the ALJ admitted the Penalty Policy into evidence at the hearing, without objection by either respondent, as Complainant's Trial Exhibit number 20. Hearing Transcript at 539. At the hearing, EPA witness Robert Bonace testified that he had been personally involved in formulating Region V's penalty proposal with respect to Group Eight, and that the proposal had been developed in the manner described in the Penalty Policy. *Id.* at 353-73.

In his initial decision, the ALJ ruled that the Region had failed to satisfy its burden of proof with respect to the "appropriateness" of the proposed $76,000 penalty. He explained that when, as in this case, the Region proposes to assess a penalty calculated in accordance with a penalty policy, the Region "must, through its evidence, support the findings, assumptions and determinations on which [the] policy rests." Initial Decision at 22. He further explained that, because Region V had failed to substantiate the "findings, assumptions and determinations" underlying the Penalty Policy, he could not properly consider anything in that policy in reasoning toward his own penalty decision. We conclude, however, that nothing in TSCA itself, in 40 C.F.R. Part 22, or in the Administrative Procedure Act dictates the imposition of such an onerous standard of proof.

2. *Penalty Assessment in General*

Whenever EPA seeks to assess a monetary penalty for violation of TSCA § 15, EPA must adhere to the following statutory requirement:

> In determining the amount of a civil penalty, [EPA] 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.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).[21] EPA procedural regulations seek to ensure compliance with that requirement by providing, among other things, that in administrative penalty proceedings "[t]he complainant has the burden of going forward with and of proving * * * that the proposed civil penalty * * * is appropriate." 40 C.F.R. § 22.24. A TSCA penalty is "appropriate," for purposes of 40 C.F.R. § 22.24, only if it is calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in TSCA § 16(a)(2)(B). *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994) (quoting TSCA § 16(a)(2)(B)). It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the "appropriateness" of a recommended penalty, to demonstrate how the TSCA section 16 penalty criteria relate to the particular facts of the violations alleged.

In *New Waterbury, supra*, we looked closely at the nature of the "prima facie" penalty case that the complainant must present, in any TSCA action, if it is to satisfy its burden of "going forward" under 40 C.F.R. § 22.24. We stated that section 22.24 requires the complainant to "come forward with evidence to show [1] that it, in fact, considered each factor identified in [TSCA] Section 16 and [2] that its recommended penalty is supported by its analysis of those factors." *New Waterbury*, 5 E.A.D. at 538. "The depth of consideration will vary in each case," we explained, "but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case [regarding the proposed penalty's 'appropriateness'] can be made." *Id.*

Once the Region presents a prima facie case with respect to the appropriateness of its recommended penalty, the respondent may or may not choose to offer evidence or argument in rebuttal.[22] In this

---

[21] The statute also provides that no penalty shall exceed $25,000 per violation, and that the assessment of a penalty must be preceded by an opportunity for a hearing in accordance with the Administrative Procedure Act, 5 U.S.C. § 554. TSCA §§ 16(a)(1), 16(a)(2)(A). Neither of those statutory requirements is at issue in this case.

[22] Several different types of "rebuttal" can be imagined in connection with the appropriateness of a proposed TSCA penalty. For instance, a respondent might conceivably offer evidence showing that the Region completely overlooked one or more of the penalty factors that

Continued

case we need only consider the situation in which the Region's penalty case goes unrebutted, *i.e.*, the respondent offers no evidence or argument of its own with respect to the appropriateness of the Region's penalty proposal. In those circumstances, even though the Region has done all that 40 C.F.R. § 22.24 requires of it, the Presiding Officer is (as we explain in the following discussion) nonetheless under no obligation to assess the penalty recommended by the Region. Rather, the Presiding Officer may do either of two things.

If the Presiding Officer agrees with the Region's analysis of the statutory penalty factors and their application to the particular violations at issue, the Presiding Officer may issue an initial decision assessing the penalty recommended by the Region. The Region will have carried its burden of proving that the proposed penalty is "appropriate," and the Presiding Officer, before assessing the recommended penalty, will have ensured that the requisite statutory factors were indeed "take[n] into account." Moreover, by reviewing the Region's analysis of the statutory factors and independently determining that the analysis is a reasonable one and that the recommended penalty is supported by that analysis, the Presiding Officer acts to ensure that the Agency's penalty assessment satisfies the Administrative Procedure Act's "abuse of discretion" standard, 5 U.S.C. § 706(2), *i.e.*, that the assessment is neither "unwarranted in law" nor "without justification in fact." *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973).[23]

---

it was required by statute to consider. Or the respondent might contend that, despite the Region's consideration of each of the prescribed statutory factors, the proposed penalty is not supported by the Region's analysis of those factors and is therefore not "appropriate." *See New Waterbury*, 5 E.A.D. at 538-39. Such a contention might take the form of a legal argument concerning the proper interpretation of undisputed facts, or might include both a factual component and a legal/analytical component — for example, if the respondent were to introduce evidence claimed to show a lack of culpability, and were to argue that that evidence justifies a particular reduction in the size of any penalty that the Presiding Officer might assess. In the case before us, Group Eight presented no evidence or argument whatsoever in relation to the amount of the penalty proposed by Region V.

[23] When an administrative agency assesses a civil penalty or other sanction under authority conferred by statute, the agency's choice of a particular sanction — for example, the size of the civil penalty — may be set aside on judicial review only if the sanction is "'unwarranted in law' or 'without justification in fact.'" *NL Industries v. Dep't of Transportation*, 901 F.2d 141, 144 (D.C. Cir. 1990) (quoting *Butz*, 411 U.S. at 185-86); *accord*, *Bluestone Energy Design, Inc. v. Federal Energy Regulatory Comm'n*, 74 F.3d 1288, 1294 (D.C. Cir. 1996). *See also Monieson v. Commodity Futures Trading Comm'n*, 996 F.2d 852, 858 (7th Cir. 1993) ("When a penalty falls within statutory limits, we review only for an abuse of discretion, asking whether it is rationally related to the offense.").

If, on the other hand, the Presiding Officer does not agree with the Region's analysis of the statutory penalty factors or their application to the particular violations at issue, the Presiding Officer may specify the reasons for the disagreement and assess a penalty different from that recommended by the Region. *See* 40 C.F.R. § 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 Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."). While the Presiding Officer must consider the Region's penalty proposal (and, as discussed below, "any civil penalty guidelines issued under the Act"), he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have "take[n] into account" each of the prescribed statutory factors. If the Presiding Officer chooses not to assess complainant's recommended penalty, even though that recommended penalty may in fact have taken each prescribed factor into account, the Presiding Officer need only explain the basis for that choice in the initial decision. Of course, the Presiding Officer must also ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations.

It is also noteworthy that nothing in the Part 22 regulations expressly limits or restricts what the Presiding Officer may consider in determining whether to adopt the Region's unrebutted penalty proposal or to deviate from that proposal. As previously noted, the regulations do require the Presiding Officer to "consider any civil penalty guidelines issued under the Act" (40 C.F.R. § 22.27(b)) — that is, under the statute authorizing the institution of the enforcement action (*id.* § 22.03(a)) — but they neither specifically require nor specifically preclude the Presiding Officer's consideration of any other materials. Moreover, this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand. *E.g.*, *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) ("[A] presiding officer has *the discretion either to* adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.") (emphasis in original); *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994) ("[W]hile penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed."). The Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide

"specific reasons" for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (*i.e.*, that the choice of a sanction not be an "abuse of discretion" or otherwise arbitrary and capricious).

3. *Use of a Penalty Policy*

Among the principles we have just surveyed, there is nothing that would have required Region V to substantiate the "underpinnings" of the PCB Penalty Policy as a matter of course, as a necessary element of its prima facie case against Group Eight. We recognize, however, that the ALJ had the discretion to demand additional argument or evidence to support the Penalty Policy's interpretation and analysis of TSCA § 16, given that the Region was urging him to assess a penalty based on that policy. In other words, the ALJ was under no obligation to accept the factual assertions or legal interpretations in the Penalty Policy at face value, because — as the ALJ repeatedly emphasized in his decision — the Penalty Policy has never been subjected to the rule making procedures of the Administrative Procedure Act, and thus does not carry the force of law. Indeed, for that reason the ALJ could simply have considered the Penalty Policy's analytical framework and concluded that, in this particular case, application of the TSCA § 16 criteria in the manner suggested by the Penalty Policy did not yield an "appropriate" penalty. The ALJ could likewise have rejected an "appropriate" penalty generated in accordance with the Penalty Policy, in favor of another "appropriate" penalty better suited to the circumstances of this particular case. *See In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996) ("Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [an applicable] Penalty Policy.").

But the ALJ did none of those things. He rejected the Region's penalty recommendation based on a perceived failure of proof, concluding that Region V had failed to "go forward" with sufficient evidence to make out a prima facie case in support of its own penalty proposal. He appears to have reasoned that if EPA applies the TSCA § 16 criteria to a respondent in the manner suggested by the PCB Penalty Policy, without first proving each of the Policy's factual "underpinnings" on the record, EPA somehow violates the Administrative Procedure Act — *even if* the respondent has raised no challenge whatsoever to the Policy's factual underpinnings. *See* Initial Decision at 27. If that premise were valid, it might indeed follow that Region V had to present support (in the form of evidence or argu-

ment, as appropriate) for the PCB Penalty Policy in this case as a matter of course; and that the Region's penalty case against Group Eight was deficient, as a matter of law, because the Region presented no such support.

We conclude that the premise on which the ALJ's analysis hinges is simply unfounded. We are not persuaded that the complainant, having used a penalty policy in formulating a proposed penalty, must offer evidentiary support for each and every factual proposition that is either recited in the policy or implicit in or underlying the policy, in the absence of either a specific challenge to the policy by a respondent or a specific request for such support from the Presiding Officer. The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it "took into account" certain criteria specified in the statute, and that its proposed penalty is "appropriate" in light of those criteria and the facts of the particular violations at issue. To satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16 was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

We conclude, moreover, that proof of adherence to a penalty policy can legitimately form a part of the complainant's prima facie penalty case. Assuming that (as in this case) the policy being cited discusses each of the statutory penalty factors, proof of the Region's adherence to the policy is evidence that the statutory factors were taken into account. And since this particular penalty policy appears to be designed to enhance the fairness and consistency of penalty assessments,[24] proof of adherence to the policy is some evidence of consistency and fairness in enforcement suggesting that, in that sense at least, the proposed penalty is an "appropriate" one.

Here, however, the ALJ criticized Region V for relying too rigidly, or reflexively, on the analytical framework in the PCB Penalty Policy. He said that by proposing a penalty generated in accordance with the Penalty Policy, the Region was merely engaging in a "rote" exercise that effectively assigned to the Penalty Policy a "presumption of validity" to which only duly promulgated rules and regulations are

---

[24] *See* PCB Penalty Policy at 1 ("The purpose of this PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations.").

legitimately entitled. Initial Decision at 22. We do not think the criticism was valid.

The ALJ's criticism was rooted in the principle that an agency cannot, consistent with the Administrative Procedure Act, utilize a penalty policy or other policy statement as if the policy were a "rule" issued in accordance with APA "rule making" procedures.[25] The agency must, in some meaningful way, keep an "open mind" about the issues addressed in the policy document, and cannot act as if those issues are no longer subject to debate. For example, EPA was held to have violated that principle in *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), by denying a RCRA delisting petition on the basis of what was supposed to have been a mere "policy" used to predict the leachability of hazardous constituents; in its decision denying McLouth's petition, EPA had stated that a petitioner's waste "must pass" the test specified in the policy, and that EPA was no longer willing to consider comments on the validity of the policy because the policy had already been "made final." *Id.* at 1321. The court also rebuked EPA for responding to another petitioner's challenge to the merits of the same policy with a "closed-minded and dismissive" recitation that such objections simply would "not be entertained." *Id.*

We readily agree that EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, and must be prepared "to re-examine the basic propositions" on which the Policy is based, *McLouth*, 838 F.2d at 1321, in any case in which those "basic propositions" are genuinely placed at issue. We are not persuaded, however, that we should therefore prohibit any reliance on the Penalty Policy by the Agency's enforcement staff, either as a tool for developing penalty proposals or to support the "appropriateness" of such proposals in individual cases. Nor are we aware of any basis for concluding that EPA decisionmakers, like those in *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994), have applied the PCB Penalty Policy so inflexibly as to belie this Board's repeated assurances that the Agency's Presiding Officers are not "bound" by the Policy. No evidence has been presented to us that would suggest such a pattern of inflexible application.

Further, use of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circum-

[25] For the APA definitions of "rule" and "rule making," see 5 U.S.C. § 551.

stances of a particular violation or a particular violator. To the contrary, fairness in enforcement might well be better served if penalty proposals are developed in a regular and consistent manner, such as by consulting a written policy document, than if those proposals are generated *ad hoc*.[26] So long as the Agency's Presiding Officers (and this Board, as necessary) consider and address challenges raised in individual cases, either to the decision to apply the Penalty Policy to the case at hand, to the Penalty Policy's analysis of the TSCA penalty factors (in general or as applied to a particular set of facts), or to the Penalty Policy's factual basis, the Agency is not impermissibly engaging in "rote" penalty assessment or otherwise granting to the Penalty Policy the "binding" or "conclusive" effect that is properly reserved only for rules and for adjudicative precedents.

4. *Proceedings on Remand*

During the proceedings before Judge Lotis, neither respondent challenged the PCB Penalty Policy's analysis of the TSCA § 16 criteria,

---

[26] The D.C. Circuit, for example, has made clear that the development of non-legislative agency guidelines is entirely proper, provided that the issuing agency does not seek to invest those guidelines with "binding effect":

> Our holding today in no way indicates that agencies develop written guidelines to aid their exercise of discretion only at the peril of having a court transmogrify those guidelines into binding norms. We recognize that such guidelines have the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field. It is beyond question that many such statements are non-binding in nature and would thus be characterized by a court as interpretative rules or policy statements. We are persuaded that courts will appropriately reach an opposite conclusion only where * * * the agency itself has given its rules substantive effect.

*Community Nutrition Institute v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987). That court has also squarely disavowed the conclusion, mistakenly adopted by the ALJ in this case, that principles derived from the Administrative Procedure Act require EPA to choose between issuing its PCB Penalty Policy as a rule or, in the alternative, treating the Penalty Policy as "nonexistent," and "a nullity." *See Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration*, 822 F.2d 1105, 1110-11 (D.C. Cir. 1987). Such an all-or-nothing formulation of the APA's requirements simply "misstates the law." *Id.* at 1110. Rather, EPA may rely on the Penalty Policy's analysis in deciding individual cases so long as EPA responds, in a non-perfunctory way, to any civil penalty respondent who has "seriously attacked the reasoning" set forth in the Penalty Policy. *Id.* Mindful of those principles, we observed in *DIC Americas*, 6 E.A.D. at 189-190, that EPA penalty policies usefully assist "Regional enforcement personnel [to] calculate civil penalties * * * fairly and consistently," but that Agency decisionmakers are under "no obligation to adhere to [a] penalty policy in a particular instance."

although Region V had made clear, at least since the time of its prehearing exchange, that it would rely on that analysis to support its penalty proposals. Similarly, neither respondent challenged any of the factual propositions underlying the Penalty Policy. The Region therefore had no reason to anticipate or to address challenges of that nature in its evidentiary presentation or in its briefs. In our opinion, it was error for the ALJ to reject a penalty proposal based on the Region's failure to offer evidence that the Region was under no general statutory or regulatory obligation to offer and thus, as far as it knew or had reason to know, was not expected to offer. As we have explained, the ALJ was free to demand further support for the Region's penalty analysis on his own initiative, notwithstanding the absence of any challenge by the respondents. But, although it was entirely permissible for the ALJ to demand such additional evidence, it was error to articulate that demand only after the hearing, when the demand could no longer be satisfied.

For these reasons, we will remand the action against Group Eight for further penalty assessment proceedings before a newly designated Presiding Officer (Judge Lotis having left his position with EPA during the pendency of this appeal). On remand, the Presiding Officer shall reconsider the penalty assessment in light of this decision, and allow for the presentation of such additional evidence or argument as he or she may deem appropriate. The Presiding Officer shall then issue a decision, appealable to this Board pursuant to 40 C.F.R. § 22.30, setting forth the amount of the penalty to be assessed against Group Eight.

## **III.** *CONCLUSION*

The initial decision with respect to Employers Insurance of Wausau is affirmed.

The initial decision with respect to Group Eight Technology, Inc. is vacated insofar as it concludes that the complainant failed to prove the appropriateness of its proposed $76,000 civil penalty. The Agency's enforcement action against Group Eight is remanded to the Presiding Officer for further penalty assessment proceedings consistent with the discussion herein.

So ordered.