UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GROUP EIGHT TECHNOLOGY, INC.	)	**Docket No. TSCA-V-C-66-90**
	)	
Respondent	)	

INITIAL DECISION AND ORDER ON REMAND GRANTING ACCELERATED DECISION, SUBJECT TO MODIFICATIONS

On April 2, 1997, as amended on April 3, 1997, Complainant filed a motion for accelerated decision which, if granted, would resolve all of the remaining issues in this proceeding. No response from Respondent[(1)] was received. By order issued May 12, 1997, Respondent was directed to show cause why it should not be deemed to have waived its right to respond to Complainant's motion for accelerated decision and Complainant's companion motion to vacate the undersigned's March 10, 1997 order setting procedural dates. No response to the May 12, 1997 order was received. For the reasons set forth below, a penalty of $ 58,000 shall be assessed. The March 10, 1997 order, as modified by the August 13, 1997 and the October 10, 1997 orders, shall be vacated.

BACKGROUND

This phase of the proceeding began by the issuance, on February 11, 1997, of an Environmental Appeals Board (EAB) order which affirmed in part, and vacated and remanded in part, an Initial Decision issued on September 29, 1995.[(2)]

The Initial Decision concluded that Group Eight Technologies, Incorporated (Group Eight) was liable for the six storage, marking, and disposal violations alleged in the amended complaint. For these violations, the Initial Decision assessed a $58,000 penalty against Group Eight, instead of the $76,000 proposed by Complainant. The complaint against Group Eight's insurance carrier, Employers Insurance Company of Wausau

(Wausau), was dismissed because the record did not establish that Wausau engaged in the disposal of the transformer.[(3)]

Complainant appealed the Initial Decision to the EAB, challenging the dismissal of the complaint against Wausau and the penalty assessed against Group Eight.[(4)] The EAB affirmed the Initial Decision with respect to Wausau, vacated the penalty calculation, and remanded the action against Group Eight for further penalty proceedings.

The EAB reversed the Initial Decision's rejection of Complainant's reliance on EPA's Polychlorinated Biphenyl's Penalty Policy (PCB Penalty Policy or Penalty Policy). The PCB Penalty Policy, issued by EPA on April 9, 1990, prescribes a method for interpreting the Toxic Substances Control Act (TSCA) § 16(a)(2)(B) penalty assessment criteria in numerical terms. The EAB stated that it was not *per se* inappropriate for Complainant to rely on proof of adherence to its PCB Penalty Policy to establish, *prima facie*, that it took into account each of the TSCA § 16(a)(2)(B) statutory factors discussed in the PCB Penalty Policy when it calculated the recommended penalty.

By order issued March 4, 1997, the undersigned was redesignated to preside in this matter. On March 10, 1997, the undersigned issued an order setting procedural dates, which was modified by orders issued August 13, 1997 and October 10, 1997.

On April 2, 1997, Complainant filed a motion for accelerated decision on the remanded penalty issues.[(5)] No response to Complainant's motion was received. Complainant states that its proposed $76,000 penalty was properly determined by applying the statutory penalty criteria of TSCA in the manner described in the Penalty Policy. Complainant also states that it has nothing further to put into evidence and it asks the undersigned to consider the existing evidentiary record to support the revised penalty calculation. Motion at 4-5. The motion further asserts that a second evidentiary hearing is not necessary because Respondent did not present argument or evidence at the hearing concerning the penalty issue, nor timely appeal the Initial Decision, and Complainant does not intend to produce further evidence to support its case. Motion at 5-6.

Complainant's motion does, however, include additional argument to support the proposed penalty. Although Complainant asserts that the originally proposed $76,000 penalty is appropriate, it modified the penalty calculation to account for "other factors as justice may require," and, on remand, proposes that the Judge

assess a penalty of $58,000.[(6)] Complainant considers the procedural posture of this case to be an "other factor" justifying reduction of the originally proposed penalty. Motion at 38-40.

By order, issued May 12, 1997, the undersigned directed Respondent to show cause why, as a result of its failure to respond to Complainant's motion for accelerated decision (and the companion motion), "it should not be deemed to have waived its right to respond to Complainant's two motions discussed above." No response was received.[(7)]

It is concluded that no additional evidence is necessary in order for the undersigned to determine an appropriate penalty in accordance with the TSCA requirements and the EAB order. Because neither party has identified additional evidence for the record, an accelerated decision as to penalty is appropriate. To the extent that Complainant's motion requests a decision based upon the existing record, the motion is granted.

The basis for the requested penalty, however, will be independently reviewed. As the EAB emphasized, "[t]he Presiding Officer must ... 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." EAB Order at 32. Accepting Complainant's use of the Penalty Policy to support the proposed penalty, the undersigned disagrees, in several instances, with Complainant's application of the Penalty Policy and conclusions regarding an appropriate penalty. The EAB explained that "[i]f ... [the undersigned] does not agree with [Complainant's] analysis of the statutory penalty factors or their application to the particular violations at issue, [the undersigned] may specify the reasons for the disagreement and assess a penalty different from that recommended by [Complainant.]" EAB Order at 32, *citing* 40 C.F.R. 22.27(b). *See also*, EAB Order at 33 *quoting In re DIC Americas, Inc.*, TSCA Appeal No. 94-2 (EAB, Sept. 27, 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).

The undersigned does not agree that the originally proposed $76,000 is appropriate. For the reasons stated below, the appropriate penalty is determined to be $58,000. The Initial Decision also concluded that $58,000 is an appropriate penalty, as did Complainant in its motion for accelerated decision.[(8)] In recalculating the penalty on remand, the undersigned: 1)

accepted Complainant's reliance on the PCB Penalty Policy to demonstrate that it took into account the factors listed in TSCA §16(a)(2)(B) when it calculated the proposed penalty; 2) considered the rationale used by the Judge in the Initial Decision when he took into account the factors listed in TSCA § 16(a)(2)(B) without using the penalty policy; 3) considered Complainant's modification of its original proposed penalty, based on "other factors" set forth in the motion for accelerated decision; and 4) independently took into account the factors listed in TSCA § 16(a)(2)(B) and the guidance in the PCB Penalty Policy.[(9)]

DISCUSSION

The statutory criteria for assessing a penalty under TSCA are set forth as follows:

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.

15 U.S.C. § 2615(a)(2)(B). Under the PCB Penalty Policy, penalties are determined in two stages: "(1) determination of a 'gravity based penalty' (GBP), and (2) adjustments to the gravity based penalty." PCB Penalty Policy at 1. The PCB Penalty Policy continues as follows:

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- the "nature" of the violation,
- the "extent" of potential or actual environmental harm from a given violation, and
- the "circumstances" of the violation.

These factors are incorporated in a matrix which allows determination of the appropriate proposed GBP.

PCB Penalty Policy at 1-2. The Penalty Policy also provides for adjustments to the GBP to account for the violator's culpability, history of prior violations, ability to continue in business, and other listed "factors as justice may require," including attitude, voluntary disclosure, cost of the violation

to the government, and economic benefit of noncompliance. *Id.* at 14-19.

The Initial Decision stated, "[Group Eight] had no history of TSCA violations. It has not shown that it lacks the ability to pay the proposed penalty. Nor has it shown that it would not be able to continue in business." Initial Decision at 28. A review of Complainant's motion, as well as the record in this proceeding, provides no compelling basis to modify these findings. Accordingly, they are adopted.

The PCB Penalty Policy calculates the "extent" of the violation according to the amount of PCB liquid involved. PCB Penalty Policy at 3-4. The Initial Decision determined that the violations in this matter resulted from improper storage, marking and disposal of one electrical transformer that contained 236 gallons of PCB contaminated oil, at a concentration at 500 ppm or greater. Initial Decision at 9, 28. The Judge concluded that Complainant had not established the presence of regulated levels of PCBs with regard to two other transformers, as alleged in the complaint.[(10)] The EAB did not modify the Initial Decision with respect to its findings regarding liability.[(11)] To that extent, therefore, the Initial Decision stands and is not subject to reconsideration on remand. The EAB remanded the Initial Decision for a narrow purpose: to reconsider EPA's evidence with regard to penalty based upon the PCB Penalty Policy.

Complainant, however, revisits this issue in its motion for accelerated decision, asserting that three other transformers found on the site are "presumed" to have contained regulated levels of PCB contamination, and that the actual PCB concentration was "unknown." Motion at 14. Alleging that two of the three transformers contained a total of 206 gallons of regulated transformer oil, Complainant proposes to add this amount to the 236 gallons of undisputedly regulated oil. According to Complainant, therefore, the extent of the violations should be determined based upon 442 gallons of regulated oil.

This proposition is rejected for two reasons. First, the conclusion in the Initial Decision that Group Eight was liable for the violations with respect to one transformer containing 236 gallons of contaminated oil was not remanded by the EAB and, therefore, is not subject to challenge in this portion of the proceedings. Second, Complainant does not explain how the increase in oil amount would effect its proposed penalty

calculation. The EAB explained that "the Region's penalty recommendations were based solely on Group Eight's handling of the ... transformer ... whose status as a regulated PCB Transformer is not in dispute." EAB Opinion at n.20. For non-disposal violations, the penalty policy classifies a violation as having "significant extent" if it involves 220 to 1,100 gallons of PCB liquid. PCB Penalty Policy at 6. A disposal violation carries a "major extent" classification if the amount is greater than 25 gallons. PCB Penalty Policy at 7. Both the 236 gallon figure and the 442 gallon proposal fall within the same "extent" categories for non-disposal and disposal violations. Assigning the violations to the "significant" and "major" categories respectively, Complainant's motion is silent as to the effect of the proposed increased amount of regulated oil.

The Penalty Policy also provides for reductions to the total amount of PCB material involved in an incident when the PCB concentration in the material is less than 500 ppm. Because the PCB oil in the transformer was at least 500 ppm, no reduction is warranted. The "extent" of the violation, therefore, is 236 gallons of PCB liquid. According to the PCB Penalty Policy, the five non-disposal violations are "significant extent" violations, and the one disposal violation is a "major extent" violation.

Count I

The Initial Decision determined that Respondent was liable for 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). The Initial Decision's assessment of $3,000 for this violation was remanded by the EAB. Relying on the PCB Penalty Policy, Complainant proposes a penalty of $6,000.

Because this is a non-disposal violation, it falls within the "significant extent" category as explained, *supra*. The Penalty Policy classifies this violation in the "circumstances" matrix at level 4 because it was a minor storage violation when the PCB transformer was improperly stored for more than 1 year. PCB Penalty Policy at 12 (Level 4, item 2). A violation with a "significant extent" at "circumstances level 4" yields a GBP of $6,000. *Id.* at 9. Complainant's proposed penalty does not include any adjustments for culpability, economic benefit, attitude, or the other mitigating factors listed in the policy statement. Complainant argues that the unadjusted GBP of $6,000 is appropriate.

The Initial Decision, however, discussed relevant factors that should be taken into account. As stated in the Initial Decision, some reduction is justified because of Group Eight's President, Mr. Schrott's, lack of knowledge with regard to the storage of the PCB transformer. Initial Decision at 29. This is because Schrott does not appear to have known that a PCB transformer existed on the site until he was contacted by Mr. Bonace, an EPA scientist, in March 1989. Prior to that time, tests showed non-regulated levels of PCBs. *Id.*

The Initial Decision also correctly found that there was some confusion, and that unusual circumstances existed with regard to who was in control of the transformers. This was because when Group Eight first acquired this site, the transformers were not in its possession or control. There were also some delays in progress of demolition and removal of wastes at the site which were not due to Group Eight's conduct. *Id.* These delays support the conclusion that Group Eight lacked control of the transformers.

The logic of the Initial Decision in support of a reduction for culpability and other factors, as discussed above, is persuasive. The PCB Penalty Policy provides that the GBP can be adjusted downward by 25% when considering the violator's culpability when the violator lacked sufficient knowledge of the potential hazard and lacked control over the situation to prevent occurrence of the violation. Penalty Policy at 15 (Level III).

A careful review of this matter indicates that a reduction from the GBP of $6,000, to account for Group Eight's limited knowledge and control, is warranted. Using the rationale of the Initial Decision and the Penalty Policy, I find that a 25% downward adjustment to this end is appropriate.

After Mr. Bonace informed Group Eight of the transformer's existence, and that it was subject to regulation, Group Eight had some obligation to pursue proper storage or removal. Because, as further discussed in the Count II section below, proper storage in the burned-out building where the transformer was located may have been difficult, removal should have been pursued more vigorously. An offsetting adjustment upward, therefore, is appropriate to account for Group Eight's awareness of the hazard in 1989. This should not be a very large increase because Mr. Schrott forwarded Bonace's letter to a Wausau representative, and the transformer was drained approximately one month later. The 25% reduction for lack of culpability,

therefore, will be offset by a 2% increase, resulting in a net reduction of 23%. The penalty for Count I is $4,620.

Count II

The Initial Decision determined that Respondent was liable for 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). The Initial Decision's assessment of $12,500 for this violation was remanded by the EAB. Relying on the PCB Penalty Policy, Complainant proposes a penalty of $13,000.

Applying the Penalty Policy, Complainant accurately found a GBP of $13,000, exclusive of mitigating factors. Because this is a non-disposal violation, it falls within the "significant extent" category, as explained, *supra*. This violation falls within "circumstances level 2" because it is a "major storage" violation. PCB Penalty Policy at 11 (Level 2, item 5). The Penalty Policy states that an example of a major storage violation includes storage in areas with no roof, no curbing, etc. *Id.* A "circumstances level 2" with "significant extent" derives a GBP of $13,000 on the penalty matrix. *Id.* at 9. This would be the penalty without considering any mitigating factors.

The Initial Decision groups Counts II, IV and V together. Initial Decision at 29-30. As for Count II, the Initial Decision cautions that a large amount of PCBs would be released directly into the soil if an accident occurred when the transformers were not properly stored. *Id.* at 30. Evidence shows there were visible oil stains around the PCB Transformer. *Id.* The Initial Decision stated that no mitigation for culpability is warranted for the time **after** Bonace warned Schrott about the existence of the PCB transformer in March 1989. The Initial Decision concluded that Group Eight should have known from that time on that a PCB transformer was being stored improperly. *Id.* On the other hand, the transformer was located in a building that had been destroyed by fire and was slated for demolition. Preparing a storage facility with the required flooring and curbing at such a location may not have been practical. This does not excuse Group Eight's obligation to prepare such a facility, particularly if the transformer was leaking. Considering Group Eight's limited knowledge and control over the transformer, as well as the practical storage limitations once the PCBs were discovered in the burned-out facility, a 25% reduction for lack of culpability will be applied to the penalty calculation for Count II. A 2% offsetting increase is also appropriate because

Group Eight took no action to contain the transformer once it was discovered. A net 23% reduction, therefore, will be applied to the $13,000 GBP. The penalty for Count II is $10,010.

Count III

The Initial Decision determined that Respondent was liable for 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). The Initial Decision's assessment of $5,000 for this violation was remanded by the EAB. Relying on the PCB Penalty Policy, Complainant proposes a penalty of $6,000.

Under the PCB Penalty Policy, this is a "circumstance level 4," minor storage violation for failure to date PCB items placed in storage. PCB Penalty Policy at 12 (Level 4, item 2). The GBP, without taking into account mitigating factors, is $6,000. *Id.* at 9.

The Initial Decision stated that, while this violation definitely occurred, when it is viewed in the context of the ongoing demolition and cleanup of the site and plans to remove the transformers, it is not severe enough to warrant a high penalty. Initial Decision at 30. Group Eight was not aware of the PCB transformer until after it was placed into storage for disposal. *Id.* It would have been difficult for Group Eight to comply with this requirement, even after Bonace informed it of the PCB's, because Group Eight did not own the property when the transformer was placed on-site and the circumstances in this case made it difficult to determine when the transformer was placed "into storage." The Initial Decision suggests that the transformer could have been marked with the date of January 1, 1988, the date it would have been deemed abandoned by a third party purchaser, and subject to removal, according to the rider to the land contract under which Group Eight initially purchased the property. *Id.* at 30. In hindsight, this appears to be an acceptable method to comply with the regulatory requirements. It is unlikely, however, under the circumstances, when Group Eight owned a building destroyed by fire that contained abandoned transformers, that this would have been a readily apparent solution at the time. Therefore, although a penalty should be assessed for failure to comply with the regulations, an offsetting increase to the culpability reduction is not warranted. Taking into account the lack of control, culpability, and unusual circumstances of the case, as described in the Initial Decision and discussions in this opinion, the GBP should

be adjusted downward by 25%. The penalty for Count III, therefore, is determined to be $4,500.

Counts IV and V

The Initial Decision determined that Respondent was also liable for Counts IV and V: failure to mark the PCB transformer with mark M_L, as required by 40 C.F.R. § 761.40(a)(2), and 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). The Initial Decision's assessment of $12,500, each, for these violations was remanded by the EAB. Relying on the PCB Penalty Policy, Complainant proposes a penalty of $13,000, each, for Counts IV and V.

Applying the Penalty Policy, both Counts IV and V fall within "circumstances level 2," major marking violations. PCB Penalty Policy at 11 (Level 2, item 4). These are both non-disposal violations, and, as explained, *supra*, are categorized as "significant extent." *Id.* at 4. "Circumstances level 2" with "significant extent" calculates a GBP of $13,000. *Id.* at 9.

Counts IV and V are both marking violations. The Initial Decision correctly states that the marking violations created a hazardous condition for anyone who entered onto the site because there were no warnings. Initial Decision at 30. Yet, it appears that the previous owner had not complied with the marking requirements either. Group Eight apparently did not know that a PCB Transformer existed on the site until March 1989, and then it was expected to remove the transformer from the site. *Id.* The Initial Decision, therefore, found that issues of culpability exist that may be mitigating factors. The Initial Decision concluded that a significant penalty should be imposed for each of these violations, but that the mitigating factors warranted penalties no greater than half of the maximum amount allowed under the statute. *Id.* at 30. Taking into account the mitigating circumstances, as described in the Initial Decision and throughout this opinion, and considering the PCB Penalty Policy, it is concluded that the $13,000 GBP should be adjusted downward 25% for lack of culpability and control, and for unusual circumstances.

After Bonace informed Group Eight that the transformer was subject to storage and marking regulations, Group Eight should have arranged for the transformer to be marked. Although Group Eight may not have been able to remove or dispose of the transformer, it could have arranged for the transformer to be

properly labeled. A 5% increase, therefore, will offset the initial 25% reduction for Count IV.

The same increase is not appropriate, however, for Count V. Because there was no storage area, it would have been difficult for Group Eight to comply with this marking requirement. Although a penalty should be assessed because the regulations required the area where the transformer was located to be marked, an offset to the reduction for the conditions and circumstances in this case is not warranted. To account for culpability and other factors unique to this case, it is concluded that there be a net 20% reduction to the $13,000 GBP for Count IV, and a net 25% reduction to the $13,000 GBP for Count V. The penalty for Count IV is $10,400; the penalty for Count V is $9,750.

Count VI

The Initial Decision determined that Respondent was liable for Count VI, disposal of the fluid from the PCB Transformer in a manner not permitted by 40 C.F.R. § 761.60. The Initial Decision's assessment of $12,500 for this violation was remanded by the EAB. Relying on the PCB Penalty Policy, Complainant proposes a penalty of $25,000.

Under the PCB Penalty Policy, Count VI is a chemical disposal violation involving improper disposal of fluid from a PCB transformer. PCB Penalty Policy at 2, 5-6, 10. It falls within the highest range, carrying a circumstances level of one - major disposal involving "any other disposal of PCBs or PCB items in a manner that is not authorized by the PCB regulations." PCB Penalty Policy at 10 (Level 1 item 1). As explained, *supra*, the extent calculation for this disposal violation is classified as "major extent" *Id.* at 7. Therefore, the GBP, before it is adjusted for mitigating factors, is $25,000 according to the penalty matrix. *Id.* at 9. This is the maximum authorized by statute.

Count VI is a disposal violation. By its very nature, it is more serious. However, the Initial Decision rejected applying the maximum permitted by the statute. Initial Decision at 31. The Initial Decision reflects the belief that this would be an "overly punitive" assessment and the penalty is supposed to act as a deterrent, not as a punishment. *Id.*

In addition to the circumstances described previously in this opinion, the Initial Decision further described evidence in its

discussion of Count VI to demonstrate that Group Eight has a significant lack of culpability in this case and that there existed unusual, unique, and, confusing events surrounding the violation. *Id.* at 31-32. For example, the insurance company arranged for the disposal, although Schrott authorized the disposal. *Id.* at 31. The Initial Decision also concluded that there is evidence that Sclafani Trucking, Inc. (Sclafani), the company that conducted demolition at the site, turned to the insurance company, rather than Group Eight, for decision-making with regard to the transformers. Also, Schrott was left out of meetings. Schrott did not know what K&D Environmental Services, Inc. (K&D), a company hired to dispose of the PCBs, was hired to do, and Wausau's adjuster, Aidenbaum, asked Schrott to "stay out of it (the disposal of the PCB Transformer)." *Id.* The Initial Decision stated that a climate was formed where Schrott assumed, albeit mistakenly, that the insurance company was responsible for handling and disposing of the transformers at the site. *Id.* at 31-32.

The Initial Decision also found that there was little to suggest to Group Eight that K&D's qualifications were suspect and should be investigated because letters to Schrott from Sclafani and K&D mentioned that there was testing of hazardous materials by K&D prior to removal and Aidenbaum had reported to the EPA that K&D was an acceptable contractor by the State and that K&D was taking samples. Also, K&D was a subcontractor of Sclafani, so Group Eight was two steps removed from the actual improper disposal of PCBs. *Id.* The Initial Decision also concluded that Group Eight lacked sophistication with respect to handling and disposing of PCBs. This is so because transformers were not a part of its business. They were just left there by previous owners of the land. These factors contributed to Group Eight's lack of control and support the idea that Group Eight would be unlikely to have knowledge, or correct knowledge, of the proper disposal and handling of PCB transformers. *Id.*

These mitigating factors justify a downward adjustment of 25%. A penalty of $18,750, therefore, is found to be appropriate based upon the rationale of the Initial Decision, as explained in the above discussion.

CONCLUSION

When the penalties for each Count are combined, the total amount is $58,030. This has been rounded down to the nearest thousand dollars. Therefore, the final amount is $58,000.

This result is exactly the same result as that reflected in Complainant's motion as well as that reflected in the Initial Decision. While the rationale and calculation differ from those two positions, the fact that the result herein is the same is support for the instant result, along with the rationale reflected herein.

IT IS ORDERED that:

1. A civil penalty in the amount of $58,000 is assessed against Respondent, Group Eight Technology, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

EPA - Region V
Regional Hearing Clerk
The First National Bank of Chicago
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

4. Failure upon part of Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b)(c)(e).

5. Pursuant to 40 C.F.R. § 22.27(c) this Initial Decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within 20 days after the Initial Decision is served upon the parties or (2) the Environmental Appeals Board elects, sua sponte, to review this Initial Decision.

6. The March 10, 1997 order, as modified by the August 13, 1997 and October 10, 1997 orders, are vacated.

Charles E. Bullock
Administrative Law Judge

Dated: November 17, 1997
Washington, D.C.

APPENDIX

	Judge Lotis' Initial Decision	EPA's Motion	This Initial Decision, after remand
Count I	$ 3,000	$ 6,000	$ 4,620
Count II	$12,500	$13,000	$10,010
Count III	$ 5,000	$ 6,000	$ 4,500
Count IV	$12,500	$13,000	$10,400
Count V	$12,500	$13,000	$ 9,750
Disposal Violation VI	$12,500	$25,000	$18,750
	$58,000	$76,000	$58,030
		-$18,000	Subtotal Reduction for "Other such matters as justice may require" -$30.00 [12]
Recommended Penalty	$58,000	$58,000	$58,000

IN THE MATTER OF EMPLOYERS INSURANCE COMPANY OF WAUSAU, AND GROUP EIGHT TECHNOLOGY, INC., Respondents

Docket Nos. TSCA-V-C-62-90 and TSCA-V-C-66-90

Certificate of Service

I certify that the foregoing Order, dated , was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Sonja Brooks
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy by Regular Mail to:

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U.S. EPA, Headquarters
Mail Code 2245A

401 M Street, S.W.
Washington, D.C. 20460

Marion Walzel
Legal Staff Assistant

Date:

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1. There are no remaining issues as to Respondent Employers Insurance Company of Wausau. The term "Respondent," therefore, refers solely to Group Eight Technology, Inc., and Wausau's name has been removed from the caption.

2. *Employer's Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6 (EAB, Feb. 11, 1997)(EAB Opinion); *Employer's Insurance of Wausau and Group Eight Technology, Inc.*, TSCA-V-C-62-90, TSCA-V-C-66-90 (Initial Decision, Sept. 29, 1995)(Initial Decision). The Initial Decision was authored by then Chief Administrative Law Judge Jon G. Lotis, who subsequently retired from Federal Service.

3. The two cases were consolidated by order issued July 30, 1993.

4. Group Eight filed an appeal challenging the Initial Decision's conclusions regarding its liability, which, by order dated November 28, 1995, was dismissed by the EAB as untimely.

5. As noted earlier in this order, Complainant by companion motion, also requests vacation of the March 10, 1997 order.

6. Page one of the motion indicates that Complainant is requesting civil penalties in the amount of $76,000. Motion

at 1. Subsequently, however, the motion states that Complainant is asking for $58,000. Motion at 38, 40-41. Complainant filed a "Notice of Error" on April 3, 1997, to clarify that the statement on page one was erroneous and Complainant intended to request $58,000, as stated and explained at pages 36-41 of the original motion.

7. By motion received on April 7, 1997, Respondent's counsel filed a motion to withdraw as Respondent's counsel in this

proceeding. By order issued by the undersigned on May 12, 1997, that motion was granted.

8. *See* Appendix for a comparison of Complainant's position, Judge Lotis' Initial Decision, and the instant Initial Decision on remand.

9. It is not necessary to address Complainant's proposal to reduce the penalty to the amount assessed in the Initial Decision because (1) of the unique procedural nature of the case and (2)due to the fact that this order's penalty analysis arrives at the same figure as that proposed in Complainant's motion.

10. The Initial Decision identified tests conducted by the Michigan Department of Natural Resources and by Dihydro Analytical Services, resulting in conflicting conclusions regarding whether the transformers contained PCB contaminated oil. Initial Decision at 9-14. There was also a dispute regarding whether certain samples, tested by Environmental Quality Laboratories (EQL) and found to contain non-regulated levels of PCBs, were taken from the two controverted transformers in this case, or from other transformers located at the facility. Judge Lotis, in the Initial Decision, resolved the charges against the Respondents without ruling as to whether the two transformers at issue were included in the samples sent to EQL. The EAB also declined to resolve the dispute regarding the origins of the EQL samples, stating that "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 ... and how many [if any] were left untested." EAB Decision n.8.

11. The EAB further stated, "Because all of the Region's penalty recommendations were based solely on Group Eight's handling of the ... transformer - whose status as a regulated PCB Transformer is not in dispute ... - we need not consider whether any of the [other] transformers were subject to regulation under Part 761." EAB Decision n.8.

12. [12] For convenience and consistency, the figure has been rounded to the nearest thousand dollars.