7/8/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
New Waterbury, Ltd., A California Limited Partnership,	)	**Docket No. TSCA-I-88-1069**
	)	
	)	
Respondent	)	

Toxic Substances Control Act - PCB Rule - Responsibility For Compliance - User v. Owner

Where purchaser of property, which included buildings and substations containing PCB transformers, immediately leased the property back to the former owner, the former owner at all times remaining in possession of the transformers and the lease provided that the lessee was responsible for compliance with all environmental laws and regulations and that, inter alia, appurtenances, walls, pipes, conduits and utility installation be maintained in good order and repair, lessee, not lessor, was user of PCBs and thus responsible for violations of PCB use rules.

Toxic Substances Control Act - PCB Rule - Penalty Policy - Estimation of Risk

1990 PCB Penalty Policy held to be evidence Agency over-estimated risk in promulgating 1980 Penalty Policy which provided that all "use" violations were Circumstances Level 2 on Penalty matrix.

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Appearance for Respondent:

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INITIAL DECISION

This is a civil penalty proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). The proceeding was commenced by a complaint, issued September 30, 1988, charging Respondent, New Waterbury, Ltd., a California Limited Partnership, with violations of the Act and applicable regulations, i.e., the PCB rule, 40 CFR Part 761. Specifically, the complaint alleged that at the time of an inspection on November 20, 1987, 13 PCB transformers were in use at seven separate locations and that the means of access to these transformers were not marked with the M_L label, illustrated in 40 CFR § 761.45, as required by 40 CFR § 761.40(j). At three of the mentioned locations, combustible materials were allegedly stored within five meters of the transformers in violation of 40 CFR § 761.30(a)(1)(viii). Additionally, the complaint alleged that none of these transformers had been registered with local fire response personnel having primary jurisdiction as required by 40 CFR § 761.30(a)(1)(vi). For these alleged violations, it was proposed to assess Respondent a penalty totaling $153,000.

In an answer and an amended answer, Respondent essentially denied the alleged violations, contended that, in any event, failure to mark the means of access to PCB transformers was a marking rather than a use violation, raised an issue of ownership and control of the transformers, disputed the appropriateness of the proposed penalty and requested a hearing.

A two-day hearing on this matter was held in Hartford, Connecticut.

Based on the entire record including the proposed findings and conclusions and briefs of the parties,[1/] I make the following:

FINDINGS OF FACT

1. Respondent, New Waterbury, Ltd. is a California limited partnership, the managing partner of which is Vanta, Inc., a California Corporation (testimony of Louis G. Hardin, Tr. 253-56). New Waterbury was formed in 1987 to acquire property from Century Brass Products, Inc. (Century) which was in bankruptcy. Mr. Hardin is an employee of Winston Management and Investment, Inc., a property management firm headquartered in Burlingame, California. Mr. Hardin's present duties include managing the New Waterbury project for the partnership.

2. Mr. Hardin participated in the negotiations by which New Waterbury acquired property from Century. The sale was approved by the Bankruptcy Court on September 29, 1987 (Tr. 273-74). The property is a large area in Waterbury, Connecticut, consisting of approximately 100 buildings occupying approximately 100 acres.[2/] Manufacturing

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[1/] Proposed findings of the parties not adopted are either rejected or considered unnecessary to the decision.

[2/] Tr. 284-85; Final Report--Property Conveyance Surveys by TRC Environmental Consultants, Inc., hereinafter TRC Report, R's Exh 1.

activities have been conducted at the site since 1802. New Waterbury did not purchase the entire site, because of environmental problems, including a sludge pile, referred to as a "metal hydroxide sludge landfill" in the TRC Report Figure 5-2 at 20, on a portion of the property. Mr. Hardin referred to property not included in the sale to New Waterbury as the "retained parcel" and described this parcel as everything to the east of Silver Street on a map of the site.[3/]

3. As soon as the purchase was completed, New Waterbury leased a portion of the property back to Century as debtor in possession (Tr. 279-82; Lease, dated October 1, 1987, R's Exh 3). Because the purchase and the "lease-back" required approval of the Bankruptcy Court, these transactions were essentially "simultaneous" (Tr. 285). The buildings or portions thereof involved in the "lease-back" were identified in Exhibit C to the lease and described by Mr. Hardin as the "West Plant" in the upper left-hand corner of a map of the site (R's Exh 11). Definitions in Exhibit A to the lease define buildings as including any "buildings or other structure or appurtenance."[4/] Mr. Hardin further referred to

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[3/] Tr. 269; Map, R's Exh 11. From examination of the map, it appears that the "retained parcel" could appropriately be described as that parcel at the extreme right east of the Mad River.

[4/] Paragraph 1 of Exh A entitled "building" provides:

(continued...)

the "lease-back" as including "most of the property to the west of Hamilton Avenue" (Tr. 282). He estimated that the space leased to Century involved 15 to 17 acres and approximately 800,000 sq. ft. of building space out of 2,500,000 sq. ft. involved in the purchase (Tr. 284-85). Exhibit C to the lease lists buildings and portions thereof included in the lease and states that for all purposes of the lease, the buildings and portions thereof shall be deemed to constitute 827,000 sq. ft. Respondent's amended answer states that Substations I, M, N and E are in the parcel leased to Century.

4. The TRC Report (supra note 2) constitutes an environmental analysis or investigation commissioned by New Waterbury prior to purchase of the property and appears to relate primarily to RCRA closure. The Second Amendment To Restated Agreement by which New Waterbury purchased the property provided that $1,450,000 of the purchase price would be placed in escrow to fund remediation work, including removal and associated cleanup of under ground tanks (R's Exh 2f). Regarding PCBs, the TRC Report quotes Century personnel as stating they did

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4/(...continued)

1. building. "building" shall mean any building or other structure or appurtenance existing on the Property as of the Commencement Date as identified on a Building Survey entitled "Factory Building Information 1978" which is attached as Exhibit B and made a part of the Lease to which this Exhibit A is attached, which Exhibit B is made a part of the Lease, and "buildings" shall mean more than one such building, structure or appurtenance.

not know how many transformers were on site, but that transformers with sample cocks had been tested, of which approximately one-half contained PCB-contaminated oils (Id. at 12). Tested transformers had reportedly been labeled with PCB warning or clearance signs. Although the Second Amendment To Restated Agreement allocated or withheld $600,000 of the purchase price for transformer removal, this related to transformers associated with equipment being sold by Century. New Waterbury expressly assumed responsibility for removal and replacement of PCB-contaminated transformers not associated with operations of any equipment being sold by Century.[5/]

5. The lease from New Waterbury to Century contained provisos to the effect that the lessee was responsible for compliance with all laws, rules, regulations and orders of all federal, state and municipal governments and subdivisions or agencies thereof (Para. 7 at 5). Regarding utilities, the lease provided (Para. 10 at 11-16) that the demised premises and other space within buildings located in the West Plant, except for Building 150, were not separately metered.[6/] Within 60 days

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[5/] R's Exh 2f at 28, 29. There is no indication and I conclude that "PCB-contaminated" in this context does not refer to a transformer having a PCB concentration of 50 ppm to 500 ppm (40 CFR § 761.3).

[6/] Paragraph 10 of the lease provided in pertinent part:

10. UTILITIES: (a) Lessor and Lessee shall make provision for facilities necessary to provide gas, water, compressed air and electricity to the Demised Premises and the responsibility of Lessor and Lessee to so provide

(continued...)

after the commencement of the lease, the lessee was to install a primary meter and associated equipment necessary for lessee to separately meter electricity consumed in the demised premises and Building 4, a portion of which was not included in the lease. At its sole cost, the lessor was to install a transformer in the West Plant. Mr. Hardin testified that New Waterbury, at its expense, complied with this requirement (Tr. 338).

6. The lease provided that the lessee was responsible for compliance with all environmental laws and regulations,

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[6/](...continued)
and the cost of such services shall be determined as set forth in paragraphs (1) through (v) below.

* * *

(ii) Within sixty (60) days after the Commencement Date, Lessee shall install a primary meter and all associated equipment as is required for Lessee to separately meter electricity consumed in the Demised Premises and Building 4, a portion of which is not a part of the Demised Premises and Lessor shall install a transformer at its sole cost in the West Plant. Until such time as such transformer and separate meter are installed, the utility bill shall be in the name of the Lessee and Lessee and Lessor shall equitably pay for the cost of electricity supplied to the Property and Lessor shall collect for a portion of the same from Hardware Designers, Incorporated and I.C.C. International (which are other tenants on the Property). From and after the date of the installation of such separate meter for the Demised Premises and Building 4, the electric service for the same shall be in the name of Lessee and Lessee shall promptly pay all bills rendered to it by the electric company supplying electricity to the Demised Premises. Lessor shall pay for all electricity consumed in the East Plant without right of reimbursement from the Lessee.

* * * *.

whether of the State or the United States, now or hereafter in effect (Para. 18 at 23). Also the lease under a heading "Lessee's Repairs" included a requirement that the lessee was not to allow refuse or other waste materials to accumulate outside the demised premises (Para. 12 at 17). Among items the last mentioned paragraph provided were to be kept in good order and repair, ordinary wear and tear excepted, were without limitation all appurtenances, alterations and improvements thereto, walls, pipes, conduits, utility installation, air conditioning and heating equipment, boilers and glazing and doors, sewers and drains. Mr. Hardin, who was instrumental in negotiating the lease, testified that the cited paragraph included transformers and electrical installation, gas and water lines and anything having to do with utility usage (Tr. 288). Although he indicated the going rental rate in Waterbury for similar property was about three-dollars a square foot, lease payments from Century were to be one-dollar a square foot, because Century accepted responsibility for maintenance and repair for operating the premises on an ongoing basis (Tr. 289).

7. Paragraph 28 of the lease "Inspection Of Leased Premises" conferred upon the Lessor the right of entry at reasonable times for the purpose of, inter alia, inspection, alteration and repair and exhibition of the leased premises to prospective tenants. Lessor retained a set of keys to all

doors. Under the lease, Century had a right to use "common areas." "Common areas" were defined in Exhibit A as follows:

> "2. COMMON AREAS. The "Common Areas" are the parking areas, roads, access roads, driveways, retaining walls, landscape areas, serviceways, loading docks, pedestrian walks, stairs or tunnels, adjacent to the West Plant which are used in common by Lessor and other occupants of the West Plant or by employees, licensees, customers and invitees of Lessor and tenants of buildings forming a part of the West Plant."

Century's obligation as to such areas included maintenance and repair of parking lots, drives, sidewalks, common stairs and hallways, cleaning and removal of snow, trash and debris (Paragraph 5 "Common Area Maintenance and Security Services"). Additionally, the Lessee was obligated to repair "Exterior lighting." No mention is made of transformers.

8. Inspections of the former Century Brass Products Company's facility described above for compliance with the PCB rule were conducted by Ms. Diane Lauricella, an employee of the Connecticut Department of Environmental Protection (DEP), during the period October 6 through December 15, 1987. The inspection of October 6, 1987, was made by Ms. Lauricella accompanied by two other employees of the DEP.[7/] On each of the inspections, Ms. Lauricella was met and accompanied by Michael R. Walker, formerly Manager of Environmental

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[7/] Inspection Report R's Exh 13. Although marked C's Exh 18 in a supplemental prehearing exchange, this report was not offered by Complainant, but was admitted as Respondent's exhibit. Ms. Lauricella was employed by DEP, but had credentials as a representative of EPA.

Compliance and Safety for Century, but employed at the time by Rostra Engineered Components, Inc.[8/] In addition to Century and Rostra, Mr. Walker was authorized to represent New Waterbury during the inspections (Tr. 23, 25). Information that Walker was authorized to represent New Waterbury was obtained by Ms. Lauricella from Mr. Lee Coleman, identified as either Property Director or President of New Waterbury (Tr. 22, 157-58; 163; Report of Inspection of Rostra Engineered Components, supra, note 8). Ms. Lauricella's practice was to write up inspection reports from four weeks to a month after the inspections were completed relying on notes taken during the inspections and her memory.[9/] The inspection reports are not dated. After internal review, the originals of the reports and attachments such as photographs were forwarded to EPA in Boston, because, as Ms. Lauricella explained, "they sort of held the purse strings" (Tr. 19). Describing situations wherein her supervisors might request changes in

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[8/] Tr. 19. Mr. Walker did not appear as a witness at the hearing. Rostra Engineered Components, Inc. (Rostra) was a sublessee of the "West Plant" or a portion thereof from Century. Ms. Lauricella conducted an inspection of Rostra on November 20, 1987, resulting in the determination that it neither owned nor was responsible for any of the transformers on the leased premises (Tr. 161; Inspection Report, R's Exh 12).

[9/] Tr. 149-50. Upon motion of Respondent, the ALJ ordered Complainant to produce the notes (Tr. 142-45). Although Ms. Lauricella testified that the notes were delivered to her supervisors when she left the Department, counsel for Complainant reported that DEP was unable to find the notes (Tr. 140-41, 199, 341-42).

inspection reports, she referred to glaring errors as to potential violations, instances where information was not sufficiently complete to be readily understandable and spelling and grammatical errors (Tr. 361). She did not recall whether any changes had been requested in the reports of concern here, but doubted that there were (Tr. 362).

9. The inspection of New Waterbury of most interest here occurred on November 20, 1987 (Tr. 21, 22; Inspection Report, C's Exh 1). As in prior inspections, Ms. Lauricella was accompanied on the inspection by Michael Walker, identified finding 8. Electrical substations identified by Walker as "utility-related," dedicated solely to supplying electricity to buildings, and therefore, according to Walker, the property of New Waterbury were the primary subject of the inspection. Ms. Lauricella relied on Mr. Walker for information on substation locations, whether transformers were in-service and who, as between Century Brass Products and New Waterbury, was responsible for the transformers (Tr. 30-31, 161, 165-66). Transformers associated with manufacturing were considered the responsibility of Century Brass Products.

10. Mr. Walker provided Ms. Lauricella a copy of a document entitled "PCB Survey Index" (Tr. 52; C's Exh 5). She testified that Walker told her the Index was prepared by Century Brass personnel and that she used the Index as a tool in identifying transformer serial numbers and to verify the amount and type of oil in the transformers (Tr. 57, 60).

Handwritten notations on the Index, which she stated were on the Index when she received it, identify the transformers of concern here as "New Waterbury." Because she did not know who made the notations and whether they were reliable, she relied on Mr. Walker as to responsibility for transformers. Although she acknowledged that she did not fully understand the real estate transactions that had taken place, she considered that, at the conclusion of the inspections, she had good knowledge [as to ownership and responsibility] of transformers and capacitors (Tr. 372-73). She also acknowledged, as a general matter, that often times a transformer was too far away for serial number and other nameplate information to be read from outside the transformer enclosure (Tr. 33, 34) and it is unclear the extent to which such information was derived solely from the Index.

11. The above mentioned report reflects that Substation G was an outdoor enclosure, located near Buildings 52 and 23, containing four GE Pyranol transformers. These transformers are also identified as Pyranol on the PCB Survey Index (C's Exh 5). The inspection report reflects that, although there was no M_L label on the entrance fence or gate to Substation G, an M_L label was visible on one of the transformers as the enclosure was approached. This is verified by a photo of the entrance gate of this substation taken by Ms. Lauricella with a Polaroid camera (C's Exh 3(e)). Although Ms. Lauricella had no independent recollection of this substation, she identified

notations on the back of the photo as her handwriting (Tr. 29, 31-33, 39, 43, 44) and the number and substation identification on the back, correspond with the number and substation identification of this photo on the Receipt For Samples And Documents (C's Exh 2(c)). The mentioned photograph is also referred to on a map of the "West Plant" (C's Exh 4), which was annotated by Ms. Lauricella to reflect the location of substations and where samples were drawn.[10/]

12. The inspection report, prepared by Ms. Lauricella, reflects that Substation I, which was located outdoors in an alleyway near Building 71, contained one in-service GE Pyranol transformer. This transformer was reportedly marked with an M_L label, but the entrance gate was not similarly marked. The report indicates that combustibles are located near the rear fence next to the transformer. Two photos of this substation, taken by Ms. Lauricella, are in evidence, the first, showing the entrance gate bearing a large danger sign, but no apparent M_L label and what could be an M_L label on the transformer in the background and the second, showing what appears to be a newspaper or magazine or portions thereof inside the transformer enclosure, while general litter such as small cardboard cartons, a soft drink container, paper bags and

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[10/] Tr. 48-51. Ms. Lauricella could not recall where she obtained the map and acknowledged in effect that the map in evidence was a copy, because the sketch or draft map used during the inspection was "very messy" (Id. at 51). The map shows all transformer substations inspected on November 20, 1987, and Substation E which was inspected on December 15, 1987.

napkins are on the outside of the fence (C's Exhs 3(a) and 3(b)). Ms. Lauricella did not remember this particular substation, but identified notations on the back of the photos as her handwriting (Tr. 62-65). These notations, i.e. substation and identification numbers, correspond with numbers and substation identifications on the Receipt For Samples And Documents. These photo numbers are also referred to on the map of the West Plant annotated by Ms. Lauricella (C's Exh 4).

13. According to the inspection report (C's Exh 1), Substation K is an outdoor, in-service bank of two transformers, located on the Mill Street side of the property, which is the extreme west side of the "West Plant." Although not referred to as GE Pyranol transformers in the inspection report, these transformers were so identified in the PCB Survey Index (C's Exh 5). The inspection report reflects that both of these transformers were marked with the M_L label, but that the outdoor main entrance or alleyway was not similarly marked. The transformer enclosure is reportedly approximately five or six feet from the "CERA Building" and cafeteria, which is near Building 150 on the map (R's Exh 11). The latter building is annotated "not CB" on a map of the West Plant (C's Exh 4). Ms. Lauricella remembered visiting this substation, because it was near the Century Brass Cafeteria and the building identified as "CERA" (Tr. 70, 71). She relied on Mr. Walker as to identification of the substation and as to whether the transformers were in-service (Tr. 74). She could not recall

the material from which the transformer enclosure was made or details concerning M_L marks or labels without reference to her report (Tr. 73, 74). Mr. Hardin, identified finding 1, testified that Substation K was required to provide electricity to buildings "leased-back" by Century and was thus the responsibility of Century (Tr. 293). Under cross-examination, he was less positive, asserting that Substation K was "possibly the responsibility of Century Brass" (Tr. 335).

14. The inspection report states that Substation M, located in Building 36, contained a single GE Pyranol transformer. The report further states that the transformer displayed the M_L mark, but that there was no similar mark on the main entrance gate. Combustible materials to the left of the enclosure reportedly included boxes and a map on the wall. A photo of a portion of this substation is in evidence (C's Exh 3(d)) and it appears to verify the lack of an M_L label on the entrance gate and to show a large piece of paper wrapped or attached to a post or support member and boxes on the outside of the transformer enclosure. Ms. Lauricella identified notations on the back of the photo as her handwriting (Tr. 76, 80), which notations correspond with the substation identification and Photo 04 on the Receipt For Samples and Documents. She described the boxes as almost blocking the main entrance [to the transformer enclosure] and the piece of paper as a map hung on a fence or wall (Tr. 77, 78). She testified that the

boxes and the map were well within five meters of the transformer.

15. The inspection report describes Substation N as containing four outdoor, in-service GE Pyranol transformers. The PCB Survey Index, however, refers to only one GE transformer at this substation, Serial No. C856913, and this is the only transformer particularly identified in the inspection report at Substation N. Ms. Lauricella testified that she considered the transformers contained Pyranol, because of the GE nameplate (Tr. 92). This substation is located along the alley of Building 71. Although the transformers displayed an M_L label, there was no similar mark on the entrance gate. A portion of the entrance gate to the enclosure and of a transformer appears in a photo (C's Exh 3(c)). Ms. Lauricella identified handwriting on the back of the photo as hers (Tr. 84, 75) and the Number 03 and the substation identification correspond with the number and identification on the Receipt For Samples and Documents. The inspection report states that these transformers showed no sign of weepage, but are located next to storm drains on either side of the enclosure.

16. On December 2, 1987, Ms. Lauricella continued her inspection of the former Century Brass Products' facility (Tr. 93, 94; Inspection Reports, C's Exhs 6 & 9). Again, her contact representative was Mr. Michael Walker. The first of the mentioned reports (C's Exh 6) is entitled "TSCA Inspection 786, Century Brass Products, Inc." and Mr. Walker signed the

Notice of Inspection, the TSCA Inspection Confidentiality Notice and the Receipt For Samples and Documents on behalf of Century (C's Exhs 7(a), 7(b) and 7(c)). Although, as indicated, Exhibit 6 is a report of inspection of Century, the report states that, while touring transformer vaults which are the responsibility of New Waterbury, Ms. Lauricella observed a small can with an M_L mark or label about four feet from Transformer No. G85514 in Building 153A. The can reportedly contained an oily rag. A small amount of combustible paper was reportedly next to the can. Information that this transformer was the responsibility of New Waterbury was furnished by Walker (Tr. 103). A photo taken by Ms. Lauricella shows a portion of the side of a transformer and a can bearing an M_L label in a cardboard box adjacent to the transformer (C's Exh 8). TSCA Inspection 785 was of New Waterbury Limited (C's Exh 9) and, with respect to Building 153A, the report states that it contains an indoor electrical substation which includes GE Transformer No. G85514. This in-service transformer had an outdoor access. While the transformer was marked with an M_L label or mark, the access door was not so marked. Ms. Lauricella remembered visiting this substation and identified notations on the back of the photo (C's Exh 8) as her handwriting (Tr. 98-101).

17. Among buildings and substations visited by Ms. Lauricella on December 2, 1987, was Building 109. The second of her inspection reports for this date (C's Exh 9) states that, when

visiting this building, she observed a fenced enclosure containing a transformer, GE Serial No. [E] 689131. An M_L mark was on the transformer, but the main entrance to this in-service transformer was not similarly marked. A photo, taken by Ms. Lauricella, showing a portion of the fence and entrance gate, is in evidence (C's Exh 11). Although the photo is too dark to be definitive, it appears to show a danger sign, but no M_L label on the entrance gate. A sign on the fence states: "This Eating Area Is For Department 085 Only." Ms. Lauricella testified that she remembered taking the photo, because of the mentioned sign (Tr. 108). She identified notations on the back of the photo as her handwriting (Tr. 108-09) and the building identification and number of the photo, 04, correspond with the number and identification on the Receipt For Samples and Documents (C's Exh 10(c)).

18. Ms. Lauricella conducted further inspections of the former Century facility on December 4 and 15, 1987 (Inspection Reports, C's Exhs 12 and 14). New Waterbury's representative for these inspections was again Michael Walker. During the December 15 inspection, Ms. Lauricella inspected Substation E, located outside the employment office, Building No. 6, which also housed the offices of Rostra, sublessee of Century (note 8, supra). Unlike substations at Buildings 109 and 153A, Substation E is in the West Plant. This substation reportedly contained two GE Pyranol, pad-mounted, in-service transformers. A photo of this substation taken by

Ms. Lauricella on December 15, 1987, is in evidence (C's Exh 16). Her report states that the photo and her observations reveal that there was no M_L label on the outer main entrance gate (C's Exh 14). The photo shows a large danger sign, but no M_L label on the gate. She testified that she remembered this substation, because there was no berms around it and it was very close to a storm drain she was told drained into the Mad River (Tr. 130). She relied on Mr. Walker for the fact the transformers were utility transformers serving offices that were in use. She concluded the transformers contained Pyranol from the nameplates. She identified notations on the back of the photo as her handwriting. The substation identification and number on this photo (04) correspond with the identification and number on a Receipt For Samples and Documents, dated December 15, 1987, signed by Mr. Walker on behalf of Century (C's Exh 21). This substation is also identified on the map of the West Plant (C's Exh 4).

19. The inspection on December 4, 1987, was for the purpose of determining New Waterbury's compliance with document and record-keeping requirements of the PCB rule and Ms. Lauricella did not physically visit any portion of the facility on that date. The inspection report for the December 4 inspection prepared by Ms. Lauricella recites that "(a)s of the date of this inspection, New Waterbury has not informed the City Fire Marshall of the location of their PCB transformers" (C's Exh 12 at 1). Ms. Lauricella testified as to how she came to that

conclusion (Tr. 123-25, 181, 183). She inquired of Walker as to whether he could prove the Fire Department had been notified of the existence of the transformers. He reportedly wasn't sure and had no written proof this task had been accomplished (Tr. 125).

20. Ms. Lauricella recalled visiting the City Fire Marshall's office and finding the clerk, which she was informed was in charge of all documents and information concerning hazardous chemicals, which industry was required to submit to the Fire Department. She did not recall the date of this visit, but testified that it was prior to December 4, 1987 (Tr. 180-81). The Acting Fire Marshall informed her that his office had jurisdiction over the [Century Brass] facility (Tr. 186). She inquired whether New Waterbury, Ltd. had filed any report, map, documentation of an oral conversation or letter indicating the presence of PCB equipment or transformers (Tr. 124, 181-82). The clerk went to the file and reportedly could not find a company by that name. She repeated the inquiry as to Century and received the same response. She inquired whether there were any other files where this information might be located. The Acting Fire Marshall referred to another file cabinet which was searched by the clerk with the same negative result. While Ms. Lauricella was allowed to "paw" through the files, she could not find anything either (Tr. 124-25, 184-186). She testified that the files she "pawed" through included reports of chemicals [inventories]

filed by companies pursuant to SARA Title III [EPCRA, 42 U.S.C. § 11022] (Tr. 185-86). She did not recall the names of the persons with whom she spoke. While she referred to a memo she had prepared concerning this visit, such a memo could not, however, be located (Tr. 123, 188, 342).

21. Mr. Anthony Palermo, an environmental scientist for EPA, Region I, testified as to the calculation of the proposed penalty (Tr. 202). For this purpose, he used the Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770, et seq. (September 10, 1980) (C's Exh 20). He testified that each of the counts (I through VIII) alleging failure to mark the means of access to PCB transformers was considered a separate violation, because the transformers were in separate and distinct locations (Tr. 207; Civil Penalty Assessment Worksheets, C's Exh 19). He explained that failure to mark the means of access to PCB transformers was considered a "use" violation, because the so-called "Fires Rule," promulgated in 1985, placed additional conditions on the use of transformers (Tr. 208, 211). Although not mentioned in the Penalty Policy, because the "Fires Rule" was promulgated subsequent thereto, a memorandum, dated June 13, 1986, entitled "Amendment to the Compliance Monitoring Strategy for TSCA § 6(e)-PCBs," provides that violations of the "Fires Rule" are considered to be "Use" violations (C's Exh 17).

Under the Penalty Policy, all use violations are regarded as Circumstances Level 2 (45 Fed. Reg. 59778).

22. The extent of the violations was determined by the amount of PCBs involved in the violations. Information as to the volume of PCBs in the transformers is contained in the PCB Survey Index (C's Exh 5), but is not in the inspection reports prepared by Ms. Lauricella. Mr. Palermo explained that the Penalty Policy established three categories of extent, i.e., for PCB quantities of 220 gallons or less the extent is Minor, for quantities between 220 gallons and 1100 gallons the extent is Significant and for quantities over 1100 gallons the extent is Major (Tr. 209). Because the quantities of PCBs in the transformers as shown in the PCB Survey Index were, with the exception of Count V (Substation N), more than 220 gallons but less than 1100 gallons, these violations, except for Count V, were determined to be in the Significant Extent category. As noted (finding 21), all use violations are regarded as Circumstances Level 2 for penalty calculation purposes. The mentioned determinations as applied to the Penalty Policy Matrix resulted in a proposed penalty of $13,000 each for Counts I through IV and VI through VIII, failure to mark the means of access to PCB transformers (Tr. 211-15; Civil Penalty Assessment Worksheets, C's Exh 19). For Count V, involving Substation N, the extent of the violation was considered to be

minor, because the quantity of PCBs was less than 220 gallons.[11/]

23. Because New Waterbury was considered to have knowledge or control over the violations, Mr. Palermo testified that no adjustment in the proposed penalty was made for culpability (Tr. 215). New Waterbury had no prior history of violations and no adjustment was made for this factor.[12/] Likewise, Mr. Palermo testified that no information was available concerning New Waterbury's ability to pay and no adjustment in the proposed penalty was made for that factor (Tr. 216).

24. Regarding Counts IX through XI of the complaint relating to alleged storage of combustibles within five meters of transformers at Substations I, M and in Building 153A, respectively, Mr. Palermo testified that all of these violations were regarded as improper use and thus Level 2 on the Penalty Policy Matrix (Tr. 216). The Amount of PCBs placed these violations in the Significant Extent category resulting in a proposed penalty for each of these violations of $13,000. Count XII, alleging failure to register PCB

[11/] Tr. 210. The PCB Survey Index reflects that the quantity of PCBs in the transformer at Substation N is 155 gallons. As noted above (finding 15), the inspection report states that there are four transformers at this substation.

[12/] Mr. Palermo indicated, however, that there was a prior history of violations by Century (Tr. 215-16). A Consent Agreement and Final Order, approved October 3, 1984 (TSCA Docket No. 83-1024), wherein Century agreed to pay a penalty for violations of the PCB Rule is in evidence (R's Exh 7(a)).

transformers with the local fire response personnel having primary jurisdiction, was also regarded as a use violation and thus Level 2 on the Penalty Policy Matrix (Tr. 217). The quantity of PCBs placed the extent in the Major Extent category resulting in a proposed penalty of $20,000. Again no adjustments in the proposed penalty as calculated were made.

25. Testifying as to the financial condition of the New Waterbury, Ltd. partnership, Mr. Hardin asserted that the project could be described in one word as a "disaster" (Tr. 297). The reasons for this were that, after the 1987 stock market crash, the leasing market had "absolutely dried up overnight" and financing was not available (Tr. 298). He explained that they were only able to lease some 260 odd thousand feet and that of two major tenants only one was paying rent.[13/] This was because the lease of the second of these tenants, known as N.E. Packers, required that improvements, costing $280,000 to $310,000 be made, and the rents were being escrowed. Improvements were made out of escrowed funds, because New Waterbury had no money of its own (Tr. 297, 320). Mr. Hardin testified that New Waterbury had general accounts payable of over $1.1 million, mechanics liens of over $1.176 million and operating losses last year [apparently 1990] of $900,000 (Tr.

[13/] A Rent Roll for the month of April 1991 (R's Exh 9k) reflects that 268,621 sq. ft. were leased and that 1,718,836 sq. ft. were vacant. Tenants shown on the Rent Roll do not include Century Brass Products as the "lease-back" expired by its terms on October 1, 1989.

297, 322). This testimony is substantially supported by a summary of accounts payable as of February 20, 1991 (R's Exh 9h), which shows a total due and owing of $942,853.16 and a summary of Construction In Progress (CIP) accounts payable as of March 22, 1991 (R's Exh 9g), which shows a balance due of $1,176,753.50. Additionally, Mr. Hardin stated that New Waterbury owed the City over $3-million for taxes and water bills. A letter from the Tax Collector, City of Waterbury, dated March 18, 1991 (R's Exh 9j) shows a total due and owing, including interest through March 1991, of $3,023,643.14, comprised of $2,679,616.85 in real property taxes, $142,816.82 in taxes on fixtures and $147,209.47 for water. Taxes in the amount of $2,500,000 were assumed by New Waterbury as part of the purchase price (Second Amendment To Restated Agreement, R's Exh 2f).

26. Mr. Hardin referred to first, second, third and fourth mortgages on the property totaling approximately $21-million in principal, not counting interest (Tr. 299-300). He stated that not all of the mortgages were for purchase of the property, some being for operating expense such as utility bills. Because of nonpayment on certain of these notes and mortgages, foreclosure actions by Century Brass Products are pending in Superior Court and in the Bankruptcy Court.[14/] In

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[14/] Tr. 297, 300. Among obligations of New Waterbury issued at the closing of the purchase of the property was a promissory note in the amount of $270,000 secured by a first purchase money mortgage (R's Exh 2f at 3).

addition, he testified that there was an outstanding unsecured loan from Winston Management of $4.4-million. Mr. Hardin stated that initial financing for the project was provided by loans from people who were partners "of ours" in other ventures and that, other than maybe a couple hundred thousand dollars, which he said was "probably on the high side," these lenders were not receiving any [returns on their] money, interest or otherwise (Tr. 298). According to Mr. Hardin, $600,000 of the purchase price withheld for transformer removal (finding 4) related solely to Pan Metal transformers.[15/] He testified that this money was not set aside in a separate bank account and that it no longer existed.

27. The Rent Roll (supra, note 13) shows total annual rent for leased space of $827,780.64. After adjustments for escrowed funds, prepaid rental, credits where New Waterbury owed its tenants and uncollectibles, actual rental was $489,000 or approximately $40,000 per month (Tr. 319; Rent Roll). United States income tax returns of New Waterbury, Ltd. for the years 1987 through 1989 are in evidence (R's Exhs 9d through 9f). These show gross revenue of $420,910 in 1987, $1,355,280 in

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[15/] Tr. 341. Pan Metals Corporation is a subsidiary of Poongsan Metal Corporation of Seoul, Korea (Inspection Report, supra at note 7). Pan Metals purchased hydraulic presses and other equipment, including transformers, from Century Brass Products. When Pan Metals learned that PCB transformers could not be exported, the transformers were in effect abandoned. These transformers are not involved in this action (finding 4).

1988 and $1,280,553 in 1989. The returns for 1988 and 1989 show losses totaling $6,609,214 and $7,564,626, respectively. Even if depreciation, amortization and interest expenses were subtracted, losses for those years would have been $2,098,074 and $3,165,814, respectively. As indicated (finding 25), Mr. Hardin testified that operating losses for 1990 were $900,000). While he asserted that the property had no [net] value and would bring nothing if put up for sale, he acknowledged that a piece of the property had been sold for one million dollars (Tr. 329-30). Because of existing mortgages on the property (finding 26), it is unlikely that the proceeds of this sale accrued to New Waterbury. Mr. Hardin opined that New Waterbury could not afford to pay any penalty (Tr. 328).

C O N C L U S I O N S

1. Century Brass Products, Inc., not New Waterbury, was user of PCB transformers referred to in Counts II, IV, V, VIII, IX and X of the complaint and thus responsible for violations therein alleged. The complaint as to these counts will be dismissed.
2. The preponderance of the evidence supports the conclusion that New Waterbury was the user and thus responsible for the violations alleged in Counts I, III, VI, VII, XI and XII of the complaint. New Waterbury's liability for Count XII, failure to register PCB transformers with the local fire department or fire brigade having jurisdiction, extends only to the mentioned counts.

3. Because M_L labels on PCB transformers were clearly visible to anyone approaching, failure to mark means of access is a minor marking violation for penalty calculation purposes.

4. An appropriate penalty is the sum of $35,750.

5. New Waterbury hasn't shown that it is unable to pay the mentioned penalty.

D I S C U S S I O N

A. Respondent's Motion To Strike

With its proposed findings of fact and conclusions of law, New Waterbury submitted a motion to strike Reports of Inspection conducted on November 20, December 2 and December 15, 1987 (C's Exhs 1, 6, 9, 12 and 14), photographs accompanying these reports (C's Exhs 3(a), (b), (c), (d) and (e)) and the PCB Survey Index (C's Exh 5).[16/]

Counsel for New Waterbury made a similar motion at the conclusion of the hearing, contending that, although it was unclear when the inspection reports were prepared, it appeared the reports were not drafted until all the inspections were completed,[17/]

[16/] Motion To Strike and Proposed Findings Of Fact And Conclusions Of Law, dated June 14, 1991, "Motion" at 24-28. It has been held that a motion to strike is an appropriate means of raising the question of whether hearsay, although admissible ab initio, is insufficiently reliable to form the basis of a decision, Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied 452 U.S. 906.

[17/] The report of inspection of Century conducted on October 6, 1987 (R's Exh 13, supra note 7), states, among other things, that it was one of seven or eight conducted to allow review (continued...)

that Ms. Lauricella's inability to recall the specifics of the inspections, made her in effect unavailable for cross-examination and that the failure of Complainant to produce the notes which she used in preparing the reports, the existence of which Respondent was not made aware until the hearing, gravely and irreparably prejudiced Respondent's ability to provide an adequate defense (Tr. 378-81). Respondent argued that the complaint should be dismissed. The ALJ denied the motion, ruling that sufficient evidence had been presented to survive a motion to dismiss.

The inspection reports at issue were admitted as government (public) records. Rule 803(8) of the Federal Rules of Evidence describes this exception to the hearsay rule as including "(r)ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth. . (c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Moreover, Rule 22.22, "Evidence," of the Consolidated Rules of Practice (40 CFR Part 22) instructs that the ALJ ". . shall admit all evidence which is not irrelevant, unmaterial, unduly repetitious, or otherwise unreliable or of

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[17/](...continued)
of a very large tract, consisting of almost 100 buildings. As Respondent points out, this strongly suggests that the inspection reports were not prepared until all inspections of the former Century Brass Products facility were completed.

little probative value. . . ." The reports, containing factual findings resulting from an investigation authorized by law (TSCA § 2610) and are thus prima facie admissible under Federal Evidence Rule 803(8)(C). Moreover, it cannot be gainsaid that the reports constitute relevant evidence within the contemplation of Consolidated Rule 22.22.

It is hardly surprising that Ms. Lauricella could recall few details of her inspections, as she was testifying some three and a-half years after the events concerning inspections of a large, complex facility which extended over a period of 70 days. Inability to recall details of recorded events or transactions is one of the justifications for the public records exception to the hearsay rule.[18/] Respondent alleges that the few specifics Ms. Lauricella recalled are highly suspect, because of her ever-present desire or willingness to give the "right" answer (Motion at 25). Additionally, Respondent emphasizes that the inspection reports are in effect secondary materials, because the reports were prepared from notes Ms. Lauricella took during the inspections, which Complainant failed to produce. According to Respondent, the inspection reports were subject to complete and total revision without notation by Lauricella's supervisors.

[18/] Notes of the Advisory Committee state that justification for the public records exception [to the hearsay rule] is the assumption that a public official will perform his or her duties properly and the unlikelihood that the official will remember details independently of the record. 28 U.S.C.S. Appendix, Federal Rules of Evidence, Rule 803.

The matters alleged are clearly for consideration in determining the "trustworthiness" and probative value of the reports at issue. Of primary significance here, however, is that Ms. Lauricella identified notations on the back of photographs taken at the time with a Polaroid camera as her handwriting and that photo numbers and substation identifications on the back of the photos correspond with numbers and identifications on Receipts For Samples and Documents (findings 12, 13, 15, 16, 17, 18 and 19). These photographs substantiate the lack of M_L labels on access gates to transformers at Substations E, G, I, M, N and Building 109. These photos also substantiate the presence of combustible materials within or near transformers or transformer enclosures at Substations I, M and Building 153A as alleged in Counts IX, X and XI. Because the photos substantiate the inspection reports in the mentioned respects, the implication from Respondent's extravagant assertion that the reports were subject to complete and total revision by Lauricella's supervisors is rejected. Moreover, any implication that her supervisors would irresponsibly change the reports to show non-existent violations is contrary to the well established presumption that public officials will properly perform their duties.

Ms. Lauricella relied on Michael Walker for information as to substation identification, whether transformers were in service and as to responsibility for transformers as between New Waterbury and Century. This, of course, is hearsay as to crucial facts. Walker's reasons for attributing responsibility for certain of the

transformers to New Waterbury, however, had a consistent and rational basis, i.e., substations and transformers which were utility related, dedicated solely to supplying electricity to buildings were the responsibility of New Waterbury. All other transformers were the responsibility of Century. These circumstances afford sufficient credibility to the hearsay statements attributed to Walker as to constitute credible and probative evidence.

The PCB Survey Index was furnished to Ms. Lauricella by Michael Walker, who informed her that the Index was prepared by Century personnel (finding 10). This is clearly hearsay and there is no evidence that it was prepared in the regular course of business or precisely when, and by whom, it was prepared. It is concluded, however, that under the circumstances, the Index has sufficient indicia of credibility to be probative evidence. Firstly, except for Substation N, which the inspection report states contains four transformers, while the Index identifies only one transformer at this substation (finding 15), the Index generally accords with Ms. Lauricella's observations at the time. Secondly, the Index was furnished to her by Michael Walker, who, although an employee of Rostra, was authorized to represent New Waterbury during the inspections and this circumstance affords credibility and authenticity to the Index. Thirdly, Respondent has made no attempt to dispute the accuracy of the Index or to repudiate Mr. Walker's actions on its behalf.

Contrary to Respondent's assertions, I find Ms. Lauricella to have been a candid and forthright witness. For all of the foregoing reasons, the motion to strike is denied.

B. New Waterbury's Responsibility For The Violations

Having denied the motion to strike, Respondent's other evidentiary arguments do not warrant extended discussion. Although it attack's Complainant's case as unsubstantiated hearsay which cannot pass the substantial evidence test (Reply Brief at 7), the cases it cites recognize that hearsay having probative value and bearing indicia of reliability may constitute substantial evidence for the purposes of judicial review under the Administrative Procedure Act.[19/] Preponderance is, however, the applicable evidentiary standard at the trial stage of civil proceedings, the substantial evidence test being applied in judicial review of administrative decisions.[20/] Preponderance is simply evidence which, as a whole, shows that the fact sought to be proved is more probable than not.[21/] Hearsay may constitute the preponderance no less than substantial evidence.

[19/] See, e.g., Calhoun v. Bailar, supra, note 16 and Hoska v. United States Dept. of Army, 677 F.2d 131 (D.C. Cir. 1982).

[20/] See, e.g., Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) (preponderance of evidence is rock bottom at fact finding level of civil litigation). See also Steadman v. SEC, 450 U.S. 91 (1981) (preponderance is applicable standard of proof in administrative proceeding to determine whether anti-fraud provisions of securities laws were violated).

[21/] Black's Law Dictionary, 6th Ed. (1990).

Mr. Hardin was emphatic that the lease to Century placed responsibility for all utility related items on the Lessee. Although not specifically mentioning transformers, except for New Waterbury's obligation to install a transformer in the West Plant in order to facilitate separate metering of electricity, the "Utilities" clause, making the Lessee responsible for its own utility costs and the "Lessee's Repairs" clause making the Lessee responsible for keeping appurtenances and, inter alia, utility installation in good order and repair, tend to support Mr. Hardin's testimony.

Complainant's argument that the lease did not include transformers is rejected. Buildings, as defined in Exhibit A to the lease, include "appurtenances" (supra note 4), which term squarely fits the transformers at issue here.[22/] Moreover, Complainant's argument ignores the "Lessee's Repairs" clause referred to above and the fact that Century was responsible for compliance with all rules and regulations including environmental matters.

Because Century had uninterrupted possession and control of the transformers both before and after the effective date of the lease, New Waterbury contends that it cannot be held liable for the

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[22/] "Appurtenance" is defined as "(t)hat which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal and which passes as incident to it, as a right-of-way or easement to land; an out-house, barn, garden or orchard, to a house or messuage." Black's Law Dictionary (supra note 21). Moreover, "appurtenant" includes accessories (Id.), which could also encompass the transformers at issue.

"marking" violations alleged in Counts II (Substation I), IV (Substation M), V (Substation N) and VIII (Substation E) and for the storage of combustibles violations alleged in Counts IX and X (Substations I & M) of the complaint (Proposed Conclusions of Law at 28). Respondent points out that under TSCA § 16, the person who violates the regulation [actually § 2614 which includes rules] is liable for a civil penalty. It argues that the crucial factor is control of the regulated conduct and that New Waterbury's status as owner of the leased premises during November and December 1987 is insufficient to make it liable for ongoing violations by Century which predated and postdated the purchase by New Waterbury.

Respondent cites and relies on cases such as Suburban Station, Docket No. TSCA-III-40 (Initial Decision, September 4, 1984) (owner and lessor of property, not involved in PCB cleanup activities, held not liable for PCB storage violations); New Mexico Feed & Seed Company, Inc. and Jack Pierce, d/b/a Pierce Waste Oil Service, Inc., TSCA Docket Nos. VII-84-T-312 & 323 (Initial Decision, October 25, 1985) affirmed on other grounds, TSCA Appeal No. 85-2 (Final Decision, February 28, 1986) (TSCA does not contemplate assessment of a civil penalty against a non-participatory and non-negligent lessor); and City of Detroit Public Lighting Department, TSCA Appeal 89-5 (Final Decision, February 6, 1991) (where City acquired title to property from Chrysler in 1982, but Chrysler remained in possession until 1984 pursuant to a "move out schedule," and there was no evidence that City caused or contributed to PCB spills, City was held not to be liable

therefor). According to New Waterbury, the same result should apply here.

Complainant says that 40 CFR §§ 761.20 and 761.30 apply to any person who uses PCBs[23/] and in order to hold that Respondent violated the use authorizations here, it is only necessary to find that it used the PCB transformers in question at the time of the inspections. According to Complainant, New Waterbury, as owner, used the PCB transformers to supply electricity to its tenants including Century and was thus able to attract tenants and generate rental income. Moreover, Complainant says that Respondent maintained an office and staff on-site and was active in repairing and renovating building space, and, that before purchasing the property, Respondent commissioned an investigation of closure costs by TRC, including the costs of disposing of PCB equipment.[24/] It is argued that this level of ownership, beneficial utilization and planning with respect to PCBs, amounts to an affirmative "use" of PCBs within the ordinary sense of the word.

City of Detroit, supra, stands for the proposition that the disposal requirements of the PCB regulation, 40 CFR § 761.60, apply to the owner of the source of the PCBs and that the person, who

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[23/] Memorandum In Support Of Proposed Findings Of Fact And Conclusions Of Law, "Memorandum" at 4, 5. All CFR references are to the 1987 version unless otherwise noted.

[24/] Memorandum at 5, 6. PCB transformers referred to are apparently those related to equipment being sold by Century, which are not at issue here (finding 4). It should be noted, however, that Respondent assumed responsibility for removal and replacement of all other PCB transformers.

merely owns the land upon which PCBs have been spilled, is not necessarily liable therefor. Section 761.60 does not specify the party responsible for compliance therewith and City of Detroit concluded that the disposal requirements applied to the person who causes or helps to cause the disposal of PCBs. Likewise, section 761.30 "Authorizations" and section 761.40 "Marking requirements" are not specific as to the person or persons responsible for compliance.[25/] In City of Detroit, the Chief Judicial Officer observed in passing that the "regulations on use apply to those who use PCBs" (Id. at 15).

TSCA Compliance Program Policy No. 1, March 4, 1982, addresses the question of responsibility for PCB-containing equipment, which is owned by one party but is used by another party or which is located on property of someone other than the owner. The Policy states that, in general, the Agency intends to hold the owner of PCB-containing equipment responsible for compliance with the PCB rule, but that in instances of use of PCB equipment by a person who does not own the equipment, the Agency will consider the facts of each case to determine whether the user or landowner should be held responsible for compliance, either in addition to, or instead of, the owner of PCBs. Contracts providing that the user will service the equipment, or that the user agrees to comply with all laws

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[25/] The owner of a PCB transformer involved in a fire-related incident must immediately report the incident to the National Response Center (§ 761.30(a)(1)(xi)). See also § 761.30(a)(1)(iv)(C) (1991), reference to owners of lower secondary voltage network PCB transformers.

assertedly favor the user's being responsible. Other factors influencing the Agency's decision are actions of the parties such as whether one party has traditionally serviced the equipment or assumed responsibility for compliance with applicable regulations. The final factor specifically enumerated is access to the equipment and the Policy points out that, if a party has restricted access to the equipment, this argues against that party's responsibility for compliance.

Complainant's contention that the lease to Century did not include the transformers at issue has been rejected. The transformers being included in the lease, the lease clearly placed responsibility for the repair thereof and for compliance with all environmental laws and regulations relating thereto on Century as the Lessee (finding 6). Moreover, the purchase by New Waterbury and the "lease-back" were in effect one simultaneous transaction (finding 3). Under these circumstances, the standard "right of entry" by the Lessor and the fact that New Waterbury retained a set of keys to all doors, which Complainant finds significant, do not alter the fact that possession and responsibility for the transformers remained with Century. Under the broad definition of "use" advocated by Complainant, the owner of PCBs would always be the responsible party, which would in effect abrogate the Policy statement. Moreover, Complainant's argument is contrary to City of Detroit, supra. Although the Lessor assumed responsibility for removal and replacement of PCB transformers (finding 4), this is consistent with ownership and doesn't change the responsibility of

the parties prior to the time removal or replacement becomes necessary. Counts II, IV, V, VIII, IX and X of the complaint will be dismissed.[26/]

There is no reason to doubt that Michael Walker made the statements attributed to him assigning to Respondent responsibility for transformers utilized in supplying electricity to buildings. There is also no reason to doubt that he considered the statements to be truthful when made. Although he was a former environmental manager for Century (finding 8), and presumably familiar with the PCB Rule, he may simply have equated responsibility for compliance with "ownership" (finding 9). As we have seen, ownership and responsibility for compliance are not necessarily the same and not in accordance with the lease. Accordingly, Walker's reported statements, even though accepted as accurate, do not alter the conclusion reached above, i.e., that Century, rather than New Waterbury, was the "user" and thus responsible for transformers at Substations I, M, N and E.

Because it hasn't alleged that outdoor Substations G and K, located in the West Plant (Counts I and III), were included in the lease to Century, New Waterbury has in effect acknowledged

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[26/] Although this conclusion makes it unnecessary to decide the question, it is unlikely that the paper litter found within and adjacent to the transformer enclosure at Substation I (finding 12), which was likely blown by the wind, can properly be considered "storage of combustibles," where there is no showing the length of time the litter was at the substation.

responsibility therefor.[27/] It asserts, however, that the requirement to mark the means of access to PCB transformers does not apply to outdoor transformers (Proposed Conclusions of Law at 34). The language of the regulation indicates that only grates and manhole covers are excepted from the requirement for labeling the means of access to PCB transformers.[28/] Respondent's argument is based upon the fact that the Agency, in publishing the proposed "Fires Rule" (49 Fed. Reg. 39966, October 11, 1984) recognized that transformers in outdoor locations posed less risk than those located indoors and upon the words "such as" preceding "sidewalk grates and manhole covers" in a response to comments.[29/] Grates and manhole covers were excluded from the labeling requirement, because of the difficulty of keeping labels at or on such locations over time. While it is conceivable that there are other outdoor locations where similar difficulties in maintaining labels on the

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[27/] Although Mr. Hardin testified that Substation K was required to provide electricity to buildings leased to Century and was thus the responsibility of Century, on cross-examination he stated that Substation K was possibly the responsibility of Century (finding 13).

[28/] The regulation (40 CFR § 761.40(j)) provided:

> (j) As of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access (other than grates and manhole covers) to a PCB Transformer must be marked with the mark M_L. The mark must be placed so that it can be easily read by firemen fighting a fire involving this equipment.

[29/] Response To Comments On The PCB Transformer Fires Proposed Rule, July 1985, at 000009 and 000010, referred to in the preamble to the "Fires Rule" 50 Fed. Reg. 29171 (July 17, 1985).

means of access to PCB transformers might be experienced, the only exceptions specifically listed are "grates and manhole covers." The words "such as" in the Response To Comments are not an unspecified expansion of the excepted category and in any event, are not an abrogation of the requirement that vault and machinery room and doors, hallways and fences, whether indoors or out, be marked with the M_L label. Respondent's argument that the means of access to outdoor transformers are not required to be marked is rejected.

The requirement that the means of access to PCB transformers be marked with the M_L label (section 761.40(j)) is clearly distinct from requirement that the transformers be so marked (section 761.40(a)(2)). Accordingly, New Waterbury's contention that the means of access were properly marked, because M_L labels on the transformers could readily be seen by anyone approaching the enclosures, including firemen (Conclusions of Law at 36), is not accepted.

Respondent also contends that it was not storing combustibles in violation of section 761.30(a)(1)(viii) (Proposed Conclusions of Law at 38 et seq.). It reaches this conclusion by asserting without evidentiary support, that combustibles at Building 153A, which building is acknowledged to be New Waterbury's responsibility, were disposed of by Century personnel or Century contractors. Additionally, Respondent argues that, because it had owned the transformers for less than three months and was not required to have completed an inspection as required by section

761.30(a)(1)(ix), it cannot be held responsible for the combustibles at issue (Count IX).

It is true that the Response To Comments (note 29 supra at 000013-14) indicates that responsibility for operation of PCB transformers rests with the transformer owner and that visual inspections, although intended to detect leaks, will obviously reveal whether combustibles are stored within five meters of a transformer. The Response states that the transformer owner can then notify the property owner of the distance requirement for stored materials. This comment related to enforcement difficulties involving utility owned PCB transformers on a customer's property and was not intended as a three-month suspension of the mentioned prohibition concerning the storage of combustibles. In any event, the regulation does not provide for such a suspension and none will be implied.[30/] New Waterbury's argument that it may not be held responsible for the combustibles at the substation in Building 153A is rejected.

Respondent also argues that Complainant has failed to prove that PCB transformers were not registered (Proposed Conclusions at 40). It asserts that the sum total of Complainant's evidence is that Ms. Lauricella spoke to three unnamed persons at an unknown date concerning whether PCB transformers belonging to New Waterbury

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[30/] If any grace period is to be implied, the periods for compliance--seven days for labeling and 30 days for registration--following discovery that a transformer, assumed to be PCB contaminated, is a PCB transformer are more reasonable (§ 761.30(a)(1)(xv)(B), (C) and (D)).

or Century had been registered with the Waterbury Fire Marshall's office. Respondent alleges that, in examining the records herself, Lauricella discovered the Fire Department was searching for SARA Title III submissions rather than PCB registrations and that Lauricella failed to inquire whether the filings had been made under the name Rostra Engineered Components. Additionally, it is contended that the Agency did not make it clear until July 19, 1988, that written notification was required and oral or informal notification was insufficient, citing 53 Fed. Reg. 27322 (July 19, 1988).

New Waterbury's arguments are not accepted. Firstly, regardless of the date Ms. Lauricella visited the Waterbury Fire Marshall's office, her central conclusion was that "as of the date of the inspection [December 4, 1987], New Waterbury has not informed the City Fire Marshall of the location of their PCB transformers" (finding 19). Secondly, she was in the Fire Department office having jurisdiction over the facility and her inquiries were clearly directed to filings showing the presence of PCB transformers (finding 20). Accordingly, the fact that the files she looked through included chemical inventories, filed by industry pursuant to SARA Title III, is not controlling. Moreover, Mr. Walker, who was the individual most likely to know whether the Fire Department had been notified of the presence of PCB transformers by Century, New Waterbury or Rostra, did not claim that any notification had been given and was unable to provide any documentation of such notification (finding 19). Finally, the

requirement of the "Fires Rule" (50 Fed. Reg. 29170-201, July 17, 1985, codified section 761.30(a)(1)(vi), was that as of December 1, 1985, all PCB transformers must be "registered with fire response personnel with primary jurisdiction." "Registered," as the comment at 53 Fed. Reg. 27324 (July 19, 1988) makes clear, means to "record formerly and exactly." Respondent's argument that prior to the date of this clarification, informal, oral notification was permitted is rejected.

C. Penalty

Having concluded that the violations alleged in Counts I, III, VI, VII, XI and XII insofar as applicable to transformers in the mentioned counts have been established and that New Waterbury is responsible therefor, it is necessary to determine an appropriate penalty. As to the violation, the statute requires consideration of the "nature, circumstances, extent and gravity."[31/] This results in a so-called "gravity based penalty" (GBP). After a GBP is determined, the next step is to consider any adjustments thereto based on the situation of the violator, e.g., ability to pay,

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31/ Section 16(a)(2)(B) of the Act (15 U.S.C. § 2615) provides:

> (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

culpability and such other factors as justice may require.[32/] In making these determinations, I am required to consider, but not necessarily to follow, any applicable penalty guidelines (Consolidated Rules of Practice, 40 CFR § 22.27(b)).

The complaint herein was issued in 1988 and the applicable penalty guidelines are "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, PCB Penalty Policy, 45 Fed. Reg. 59770 (September 10, 1980). This document instructs that all violations of the PCB Rule are chemical control violations and thus that the nature of all PCB violations is the same (45 Fed. Reg. at 59770).

As we have seen (findings 21, 22, 23, and 24), the violations at issue here are of use authorizations or conditions promulgated by the so-called "Fires Rule," 50 Fed. Reg. 29170 (1985). Under the Penalty Policy, all "use" violations are considered Circumstances -probability of damages - Level 2 on the penalty matrix (45 Fed. Reg. at 59778). Extent of potential damage is determined by the amount of PCBs involved in the violations. The amount of PCBs in the transformers for which New Waterbury has been determined to be responsible places the violations in the Significant Extent category, except for Count XII, which is classified as Major Extent. This resulted in a proposed penalty of $13,000 for each of the violations alleged in Counts I, III, VI,

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[32/] See, e.g., 3M Company (Minnesota Mining and Manufacturing), TSCA Appeal No. 90-3, Final Decision (February 28, 1992).

VII and XI. Because the quantity of PCBs in the transformers in the mentioned counts exceeds 1100 gallons, the proposed penalty for Count XII remains at $20,000, notwithstanding dismissal of Counts II, IV, V, VIII, IX and X, relating to transformers at Substations I, M, N & E.

Counts I, III, VI and VII relate to failure to mark the means of access to transformers at Substations G, K and Buildings 109 and 153A. The transformers were marked with the M_L label, which were readily visible to anyone approaching, including firemen, and thus, the purpose of the requirement was substantially served. But for the fact that the regulation was promulgated as a "use" authorization, this would constitute a minor marking violation under the Penalty Policy (45 Fed. Reg. at 59780). It is concluded that the fact the M_L labels on the transformers were readily visible to approaching persons is a circumstance within the meaning of 3M (supra note 32) indicating that the Agency overestimated the risk of damage from the violations at issue. This conclusion is supported by the fact that the requirement for marking the means of access was codified under Part 761, Subpart C "Marking of PCBs and PCB Items" and the fact that the PCB Penalty Policy (April 1990) separates "use" violations from failure to mark the means of access and in effect reinstates the "minor marking violation" category under the facts present here. This results in a GBP penalty of $3,000 for each of the mentioned violations--Circumstances Level 5, Significant Extent--rather than $13,000 as proposed by Complainant.

Counts IX, X and XI concern storage of combustibles at Substations I and M and Building 153A, respectively. New Waterbury has been determined to be responsible for only Count XI, involving the transformer in Building 153A which contained 245 gallons of PCBs. This results in Significant Extent, High Range Circumstances Level 2 violation and GBP of $13,000. Respondent points out, however, that under the 1990 Penalty Policy not all violations of the prohibition against the storage of combustibles near PCB transformers are regarded similarly and that it is only storage of combustible organic solvents or other combustible liquids within the prohibited area which warrant a Circumstances Level 2 designation (Proposed Conclusions of Law at 46). Storage of combustible liquids not being involved, New Waterbury argues that the violation here warrants no more than a Circumstances Level 4 violation. This, coupled with the fact that the combustibles here consist of a small can containing an oily rag which in turn is in a cardboard box are evidence within the meaning of 3M supra, indicating that the Agency overestimated the risk of the violation at issue. The GBP for this violation is therefore Circumstances Level 4, Significant Extent or $6,000.

Notwithstanding dismissal of six of 12 counts, the quantity of PCBs in Count XII, failure to register PCB transformers with fire response personnel, places this violation in the Significant Extent category and under the Penalty Policy matrix this use violation is Circumstances Level 2. Therefore, GBP for Count XII is $20,000.

The total GBP is therefore $38,000. The 1980 Penalty Guideline at 59776, however, allows a downward adjustment of 25 percent where a violation, while of Significant Extent, is so close to the borderline separating minor violations that the penalty seems disproportionately high. This is the case with the transformer in Building 153A, which contained only 245 gallons of PCBs--25 gallons above the minor extent limit. The penalty for Count VII will be reduced to $2,250 and the penalty for Count XI will be reduced to $4,500. Accordingly, the total GBP is $35,750.

This brings us to "matters with respect to the violator" or adjustment factors, only two of which warrant comment here.

New Waterbury contends that Century is primarily responsible for the violations at issue and points out (Conclusions of Law at 51) that the Penalty Policy specifically provides that "(i)t may be unfair in some instances to burden new ownership with the previous owner's history" (45 Fed. Reg. 59775). It is argued that this warrants an additional 25 percent reduction in the proposed penalty (Conclusions at 52). Because Respondent has been determined to be responsible for violations involving transformers at Substations G and K and in Buildings 109 and 153A and counts involving the balance of the transformers referred to in the complaint will be dismissed as Century's responsibility, this argument is not accepted.

Although TSCA section 16(a)(2)(B) treats "ability to pay" and "effect on ability to continue to do business" as separate adjustment factors, the Penalty Policy states that any distinction

is so narrow and artificial that the two factors are only one (45 Fed. Reg. 59775). Pointing out the Policy states that Congress did not intend TSCA civil penalties to present such a great burden as to pose the threat of destroying, or even severely impairing a firm's business, New Waterbury alleges the record here shows a firm on the brink of insolvency and collapse (Conclusions at 52, 53). It therefore argues that any recalculated penalty must be reduced to zero or risk destroying the business. While there can be no doubt that Respondent is in straitened financial circumstances, its claims in this regard may not be readily accepted.

Under Rule 22.24 of the Rules of Practice, Complainant has the burden of establishing the appropriateness of the proposed penalty, which includes some showing of ability to pay based on sales or other data. Consistent with the rule that the burden of production is normally on the party in possession of evidence, the burden of producing information that a proposed penalty is beyond its ability to pay, or would jeopardize its ability to remain in business, may appropriately be placed on the Respondent. Helena Chemical Company, FIFRA Appeal No. 87-3 (November 16, 1989). Where, however, Respondent has shown that it is in severe financial stress and the Agency has not rebutted this showing, a very large reduction in the penalty from that proposed has been held to be warranted. Kay Dee Veterinary, Division of Kay Dee Feed Company, FIFRA Appeal No. 86-1 (Order, October 27, 1988).

New Waterbury is a California limited partnership and Complainant asserts that, under the Uniform Limited Partnership Act

(ULPA) adopted in California, general partners in a limited partnership have all the liabilities of a partner in a standard partnership.[33/] Partners in standard partnership are jointly and

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[33/] Memorandum at 1-3. Complainant cites the Uniform Partnership Act, applicable in California

> § 15013. Liability of partnership for wrongs of partner.
>
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

and the Uniform Limited Partnership Act, § 15509 providing in part

> § 15509. Rights, powers, and liabilities of general partners
>
> (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to * * * *.

and § 15643 providing

> (a) Except, as otherwise provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.
>
> (b) Except, as provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except, as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

severally liable for all debts and obligations of the partnership. Therefore, Complainant says that the general partner here, Vanta, Inc., is jointly and severally liable for the penalty at issue and, inasmuch as there is no evidence of the financial condition of Vanta, Inc., the general partner, Respondent hasn't shown an inability to pay.

Respondent has made no effort to dispute Complainant's legal arguments as to the responsibility of a general partner in a limited partnership. It is concluded that Respondent hasn't shown that the penalty should be further reduced because of inability to pay.

Respondent argues that the penalty should be reduced by 25 percent for what it refers to as a "culpability adjustment factor," because the violations began prior to the time it purchased the property and because of its alleged lack of knowledge and control thereof (Reply Brief at 16). Counts concerning transformers which have been determined to be Century's, rather than New Waterbury's, responsibility will be dismissed and inasmuch as Respondent seemingly had ample warning from inspections which commenced on October 6, 1987, to bring transformers for which it was responsible into compliance, no culpability adjustment is considered appropriate.

New Waterbury also contends that it is entitled to a further unspecified adjustment in the penalty for "other factors as justice may require." It is concluded, however, that the adjustments made above and the fact that Respondent had ample warning and time to

bring its transformers into compliance make a further adjustment for this factor inappropriate. Under all of the circumstances, a penalty of $35,750 is considered proper and will be assessed.

O R D E R[34/]

Counts II, IV, V, VIII, IX and X of the complaint are dismissed.

New Waterbury, Ltd., a California Limited Partnership, having been determined to have violated the Act and regulation in specified particulars as set forth above, a penalty of $35,750 is assessed against it in accordance with section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). Payment of the penalty shall be made within 60 days of receipt of this order by mailing a certified or cashier's check in the amount of $35,750 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
U.S. EPA, Region I
P.O. Box 360197M
Pittsburgh, PA 15251

Dated this 8th day of July 1992.

Spencer T. Nissen
Administrative Law Judge

[34/] Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Environmental Appeals Board elects sua sponte to review the same as therein provided, this decision will become the final decision of the Environmental Appeals Board in accordance with Rule 22.27(c). See 57 Fed. Reg. 5320 (February 13, 1992).