

2/10/79

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

_____)
)
 In the Matter of:)
)
 WESTERN COMPLIANCE SERVICES, INC.,)
)
 Respondent)
 _____)

TSCA Docket 1087-11-012615 (X)

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TOXICS SUBSTANCES CONTROL ACT - Evidence

1. Documents and statements made in the context of settlement are not admissible in an administrative hearing and, having been excluded from admissibility at subject hearing, any reference thereto in a post-hearing submission will be disregarded (40 C.F.R. 22.22).

TOXICS SUBSTANCES CONTROL ACT - Evidence

2. Testimony and exhibits which were not offered at subject hearing, and are, therefore, not included in the record, should not be referred to in a post-hearing submission. Reference to such testimony and exhibits in Respondent's post-hearing submission was properly disregarded.

TOXICS SUBSTANCES CONTROL ACT

3. Where the facility used for storage of PCBs and PCB items designated for disposal did not have a floor and six-inch high curb which were constructed of smooth and impervious material but consisted of a piece of black plastic spread over a trailer floor constructed of wood and aluminum and afforded openings that would permit liquids to flow from the the storage area, such arrangement was found inadequate to meet the requirements provided by the Act, 40 C.F.R. 761.65(b).

TOXICS SUBSTANCES CONTROL ACT

4. Drums and transformers stored by Respondent are "PCB items" as that term is defined by 40 C.F.R. 761.3.

TOXICS SUBSTANCES CONTROL ACT

5. Provisions of 40 C.F.R. 761.180(b) require that each owner or operator of each facility used for the storage or disposal of PCBs and PCB items shall, by July 1, 1979, and each July 1 thereafter, prepare and maintain a document consisting of specified information relating to such materials so handled during the previous calendar year and that such document be available at such facility for inspection by authorized representative of the Environmental Protection Agency, and Respondent's failure to so prepare such annual documents for each of the years 1983, 1984 and 1985, and maintain same at its facility for such inspection, constituted violations of said regulation.

Appearances

For Complainant: Joan C. Shirley, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, Washington 98101.

For Respondent: Charles D. Scott, Ph.D.
Corporate Environmental Safety &
Regulatory Officer
Western Compliance Services, Incorporated
Post Office Box 338
Tualatin, Oregon 97062.

INITIAL DECISION

By Complaint, on seven counts, filed on November 6, 1987, Complainant, United States Environmental Protection Agency (hereinafter ("Complainant", "EPA" or "the Agency") charges Respondent Western Compliance Services, Inc. (hereinafter "Wescomp") with violations of federal regulations addressing the use and/or disposal of polychlorinated biphenyls (hereinafter "PCBs"), viz., 40 CFR Part 761, promulgated under Section 6 of the Toxic Substances Control Act (hereinafter "TSCA" or "the Act") and Section 15 of TSCA, 15 USC §2614, as hereinafter set forth.

Count I charges that Wescomp violated 40 CFR 761.65(b) because it stored PCB items and containers in a truck trailer that did not comply with said §761.65(b), which requires that facilities used for the storage of PCBs and PCB items designated for disposal have (1) adequate floor with continuous curbing a minimum of six inches high, constructed of continuous smooth and impervious materials, and (2) no valves, drains or other openings that would permit liquids to flow from said curbed area. For said violation, Complainant proposes the assessment of a \$10,000 civil penalty.

Count II charges that PCB items and PCB containers in said truck trailer were not dated and that Wescomp therefore violated 40 CFR 761.65(c)(8), which requires that PCB articles and PCB containers be dated on the article or container when they are placed in storage and that the storage be managed so that said items can be located by the date they entered such storage. No civil penalty is by Complainant proposed for said alleged violation.

Count III charges that Wescomp violated 40 CFR 761.60 and §761.65(c)(5) in that PCB transformers were by it stored for disposal in said truck trailer when said transformers showed evidence of leaking in that dielectric fluid was

present on their external surfaces; further, that Wescomp failed to immediately clean up said "spilled or leaked" materials and dispose of PCB-contaminated materials and residues in accordance with §761.60(a)(4). For said violation, Complainant proposes that a civil penalty of \$5000 be assessed.

Counts IV through VII charge four separate violations of 40 CFR 761.180(b) in that Wescomp did not prepare and maintain annual report documents for the years 1982, 1983, 1984 or 1985, respectively, including information as follows:

1. The date when PCBs and PCB items were received during the previous calendar years for storage or disposal, and identification of the facility, and owner and operator thereof, from whom such PCBs were received;
2. Dates of the storage disposal or transfer of specifically identified PCBs and PCB items;
3. The total weights of such PCB items in containers and PCB transformers received and the amount thereof transferred to other facilities or retained, during the subject year, and
4. The number of PCB items handled by Wescomp during each such calendar year, identifying all such items received, transferred from or remaining at Wescomp's facility and when so transferred, the identity of the facility to which such PCBs were transferred.

For each violation charged by said Counts IV through VII, Complainant proposes the assessment of a separate civil penalty in the sum of \$6,000.

On April 19, 1988, after being granted extensions of the time in which to file its pleading, Wescomp filed its Answer to the Complaint, requesting an evidentiary hearing and placing in issue the allegations in subject Complaint.

Said hearing was convened in Portland, Oregon, on August 17, 1988, beginning at 10 a.m. At said hearing, EPA withdrew Counts III and IV of the Complaint, leaving for decision the issues raised by Counts I, II, V, VI and VII. The total penalties now proposed total \$35,000, i.e., \$10,000 on Count I and \$6000 each on Counts V, VI and VII plus a 25% adjustment upward attributed to Wescomp's history of previous violations within the five years next preceding the issuance of the instant Complaint (Transcript [hereinafter "TR"] 175). Respondent was cited (Count II of Complaint) for failure to date PCB items stored in Respondent's trailer; however, no penalty was proposed for such dating violations due to the fact that a penalty was proposed for storage violations concerning the same undated PCB items.

Following receipt of the transcript (hereinafter "TR") of the testimony taken at the hearing, the parties timely filed their respective Proposed Findings of Fact, Conclusions of Law, Brief and Argument and each party also filed a Reply to the original Briefs. Respondent's Brief, and its Reply Brief as well, refer to documents and statements made in the context of settlement discussion even though they were excluded from admission into evidence by my ruling at the hearing (TR 7).

Further, Respondent has submitted in the text of its Brief and Reply Brief and as attachments thereto, documents that were not presented at the hearing and, therefore, are not a part of the record. Complainant moved, by Motions filed November 14, 1988, and December 6, 1988, to strike and to delete all references to documents and statements made in the context of settlement and statements by Respondent in its Brief and Reply Brief that refer to testimony and exhibits (hereinafter "EX") that were not offered at the hearing and/or that were specifically excluded from admissibility as aforesaid (citing 40 C.F.R. 22.22, which incorporates Federal Rule of Evidence 408).

Such improprieties are specifically catalogued in Complainant's Memoranda in Support of Said Motions. It is hereby held that all such references and proffered exhibits are not a part of the record proper and will be disregarded as irrelevant to the issues presented for decision.

Upon the basis of the record, including the transcript of the testimony taken at the hearing, the exhibits then received and upon consideration of the proposed findings of fact, conclusions of law, brief and arguments of the parties, I make the following

FINDINGS OF FACT

1. The Respondent, Western Compliance Services, Incorporated ("Wescomp"), is an Oregon corporation which at all times relevant to this action maintained a place of business at 11330 S.W. Clay Street, Sherwood, Oregon.
2. On May 11 and 15, 1987, the U.S. EPA conducted an inspection of the Wescomp facility to determine compliance with the TSCA PCB regulations, 40 C.F.R. Part 761 (1978).
3. Participating in the inspection on May 11, 1987, were Bruce Long, U.S. EPA Region 10, Environmental Protection Specialist; Laura Hamilton, State of Oregon, Department of Environmental Quality, Environmental Engineer Permit Writer; Roy Druby, Wescomp Operations Manager; Charles Scott, Consultant to Wescomp (EX Complainant [hereinafter "C"] -1; Long, TR 57).
4. Participating in the inspection on May 15, 1987, were Bruce Long, U.S. EPA Region 10, Environmental Protection Specialist; Laura Hamilton, State of Oregon, Department of Environmental Quality, Environmental Engineer Permit Writer; Gene Tienken, Wescomp President; Matthew Dunn, Wescomp Sales Coordinator (EX C-1; Long, TR 66; Dunn, TR 117).
5. At the time of the inspection, Mr. Long provided Wescomp representatives with a written Notice of Inspection (Long, TR 58).

6. At the time of the inspection on May 11, 1987, and May 15, 1987, Wescomp stored PCB items consisting of several transformers and nineteen 55-gallon drums. These PCB items were located in Trailer #4 at Wescomp's Sherwood facility (EX C-1; EX C-3, photographs 8 and 9; Long, TR 61-62).
7. On both May 11 and May 15, 1987, the trailer in which the PCB items were stored did not have an adequate floor with continuous smooth and impervious six-inch berming (Long, TR 62-63; EX C-1; EX C-2, photographs 11 and 12; EX C-3, pp. 11, 12).
8. On May 11 and on May 15, 1987, the PCB items in Trailer #4 were not dated to show when they were placed into storage (Long, TR 62, 70-71; EX C-1; EX C-2, photographs 9 and 10; Barrick, TR 157-158).
9. Since 1983 and continuing through the May, 1987, inspection, Wescomp has stored PCB items at its facility (Tienken, TR 96-97, 105-106; EX C-1; EX C-6; EX C-11; EX C-12; EX C-13; EX C-20; EX C-21).
10. At the time of the May 11 and May 15, 1987, inspections, Bruce Long asked to see Wescomp's PCB Annual Documents (Long, TR 40-42, 59-60, 64; EX C-1; EX C-3, page 14).
11. In response to Mr. Long's request for Wescomp's Annual PCB Documents, he was given no annual PCB documents at the time of the inspection (Long, TR 68; EX C-3, page 22; EX C-1).
12. Wescomp's Matthew Dunn and Gene Tienken responded to Bruce Long's request for annual reports with queries as to what information was needed to prepare an annual report (Long, TR 68; EX C-1; EX C-3, page 22).
13. Wescomp's Matthew Dunn subsequently telephoned Bruce Long, on May 12, 1987, with questions regarding the format and content of a PCB annual report (Dunn, TR 133-137, 142; EX C-1; EX C-3).

14. Wescomp subsequently submitted documents late in the fall of 1987 which they claimed were the annual reports which they would have supplied at the time of the May inspection had they been asked (Long, TR 83, lines 13-15).

15. Wescomp has claimed that as a transporter it is not subject to the storage for disposal requirements of the PCB regulations (Long, TR 40-42, 59-60, 64; EX C-1; EX C-3, page 14).

16. The TSCA PCB regulation makes no exemptions for transporters but states that "owners or operators of any facilities used for the storage of PCBs and PCB items designated for disposal" must comply with the regulations (40 C.F.R. §761.65(b)).

17. Wescomp is not solely a transporter but is by its own description a "full service" hazardous waste management facility that collects, consolidates and stores hazardous waste (including PCBs) at its facility (Tienken, TR 96-97, 99, 105, 106; EX C-6; EX C-11; EX C-12; EX C-13).

18. Respondent Wescomp claims in its Answer to the Complaint that "excessive fines" could cause the company to go into bankruptcy. However, Wescomp offered no documents into evidence to establish that it could not pay the proposed penalty or that its ability to continue to do business would be seriously impaired.

CONCLUSIONS OF LAW

1. Respondent Wescomp violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulations:

a. 40 C.F.R §761.65(b) for the improper storage of PCBs and PCB items.

b. 40 C.F.R. §761.65(b) for the failure to date its PCB transformers and drums in Trailer #4 to indicate when they were placed into storage for disposal.

c. 40 C.F.R. §761.180(b) for its failure to prepare and maintain an annual PCB document for 1983.

d. 40 C.F.R. §761.180(b) for its failure to prepare and maintain an annual PCB document for 1984.

e. 40 C.F.R. §761.180(b) for its failure to prepare and maintain an annual PCB document for 1985.

2. Dr. Charles Scott, who appeared at the hearing as a representative of Respondent, had a duty to conform to the standards of conduct and ethics required of practitioners before the courts of the United States (40 C.F.R. 22.10).

3. Evidence relating to settlement, which would be excluded under the Federal Rules, is not admissible in an administrative hearing (§22.22).

4. An appropriate civil penalty should be assessed for such violations as a means of achieving compliance with applicable regulations.

DISCUSSION

Improper Storage

I have found that Respondent violated 40 C.F.R. 761.65(b) because it stored PCB items in its truck trailer which, on May 11 and May 15, 1987, dates of the subject inspection, did not comply with said requirements for facilities used for storage of PCBs and PCB items designated for disposal. Said trailer contained 19 55-gallon drums of PCB items as well as 12 to 13 PCB transformers. Containment of said PCB material was attempted by placing the drums and transformers on plywood, lying on a piece of black plastic which was spread over the trailer floor which was constructed of wood and aluminum (Long, TR 62-63; EX C-1, C-2 [Photograph 11], C-3). Clearly, such arrangement does not meet the requirements of said Section 761.65(b) which requires that an area used for storage for disposal of PCBs have an adequate

floor, a continuous six-inch berm, and that the floor and berm be constructed of smooth and impervious material without drains or other openings that would permit liquids to flow from the curbed areas. It was noted that, because of the lack of adequate berming, any liquids would roll out the back of the trailer (TR 63, 76). The inspector pointed out this deficiency to Dr. Scott, Respondent's senior vice president at the time of the hearing.

Because the storage area within said trailer lacked a continuous six-inch curbing, the volume containment requirement (Section 761.65(b)(1)(ii)) could not have been met for any volume of liquid (TR 157, 187).

EPA's Inspector Long observed on the second day of the inspection, May 15, 1987, that bags of "floor dry" had been placed on the plastic; however, there were spaces between and underneath the bags of "floor dry" large enough for the inspector's arm and fist to be inserted. Obviously, such arrangement was not in compliance with the regulatory requirements, which specified continuous and impervious berming at least six inches in height (TR 65, 67; EX C-2, Photograph 12).

Improper Temporary 30-Day Storage

Wescomp claims that it was storing the PCB items for less than 30 days and, thus, was entitled to a temporary storage exemption from the containment requirements. However, 40 C.F.R. 761.65(c) provides for such temporary storage only if a notation has been attached to the PCB item or to a PCB container (containing the item) indicating the date the item was "removed from service". Wescomp did not qualify for the temporary storage exemption. The PCB items stored in subject trailer had not been dated on May 11, 1987, the first day of the inspection (TR 62). On May 15, 1987, the second day of the inspection, even after Wescomp claimed to have dated said items, the dates used were the dates Wescomp "received" the PCB items rather than the

dates "removed from service", as required (TR 70-71; EX C-1, C-2; TR 157-158). It also is significant that some of the PCB items in the trailer had been stored by Wescomp from February and March of 1987; thus, at the time of the May, 1987, inspection, such items had been stored by Wescomp at its facility far in excess of 30 days (TR 71; TR 158-159).

Storage Not Adjacent to a Storage for Disposal Facility

Wescomp claims that the transformers stored next to the plastic on the trailer floor were correctly stored because they were adjacent to a storage facility (see Section 761.65(c)(2)). Such claim is rejected because (1) the plastic-floored section of said trailer did not meet the regulatory requirements for a storage-for-disposal facility, and a building being constructed had not been completed in May, 1987 (TR 94-95), and (2) said provision allows such adjacent storage for PCB-contaminated electrical equipment, not the full PCB transformers that were in Wescomp's trailer.

Failure to Prepare and Maintain Annual Reports

Wescomp claims it had annual reports as required by 40 C.F.R. 761.180(b) 1/ and that, had the EPA inspector (Long) only asked for them, he would have received them. However, the inspector testified that he did request such documents from Wescomp and the fact of such request is supported

1/ Section 761.180(b) provides, in pertinent part, that each owner or operator of a facility . . . used for the storage or disposal of PCBs or PCB items shall by July 1 (of each year) prepare and maintain a document that includes the information required in paragraphs (b)(1) through (b)(4) of (this) section for the PCBs and PCB items handled at the facility during the previous calendar year. Such documents shall be retained at each facility for at least five years after the facility is no longer used for (such) storage and disposal. The documents shall be available at the facility for inspection by authorized representatives of the EPA. Said paragraph also provides for notice to the EPA Regional Administrator (if subject facility has ceased to be used for such PCB storage or disposal) and such notice shall specify where the documents so required to be maintained are located. (Emphasis supplied.)

"PCB item" is defined by 40 C.F.R. 761.3 as "any PCB article, PCB Article

(Footnote continued on next page)

by Long's field notebook notes, made on the dates of inspection, and Long's inspection report (EX C-1).

Long noted in his field notebook that Dr. Charles Scott, who represented Wescomp at the hearing, informed him that Wescomp was not required to maintain annual reports as the company was only a transporter (TR 40-42, 59-60, 64; EX C-1, C-3, page 14). Long testified that he received no annual reports, or anything that could be construed as such documents, after his requests for same during said inspection.

On the second day of the inspection when he discussed the lack of annual reports with Gene Tienken, then Wescomp's president (TR 90), and Matthew Dunn, then Wescomp's sales coordinator (TR 117), neither was aware that an annual report was required. Dunn later inquired of Long what information was needed to prepare an annual report (TR 68; EX C-3, page 22). Subsequent communications from Wescomp regarding the form and content of an annual report (TR 133137; 142), and the fact that said annual reports for the years 1983, 1984, 1985 and 1986 were submitted after the date of the inspection, lend support to Long's testimony that said reports were not by Wescomp prepared and maintained in May, 1987. Further, Inspector Long is an experienced EPA inspector who describes the general procedures for conducting such inspection as always including an oral request for annual reports (TR 167-17), which fact is supported by his field notes and Inspection Report, as aforesaid. Instances of a written request for such documents are a departure from his usual practice (TR 246-247).

1/ (continued) container, PCB Container, or PCB Equipment, that deliberately or unintentionally contains or has as part of it any PCB or PCBs. In the instant case, it should be noted tht drums stored by Wescomp are "PCB Containers" or "PCB Article Containers" and that a transformer is a "PCB Article". Therefore, the subject drums and transformers stored by Wescomp are "PCB items" as that term is used in said Section 761.180.

From the foregoing, I conclude that Wescomp violated said Section 761.180(b) in that it failed to prepare and did not maintain, at the time of subject inspection, annual documents for the years 1983, 1984 and 1985. That the president, sales coordinator and Dr. Scott were then unaware, if so, that an annual report was required, is of little relevance on the issue of the violation here because the regulation requiring said annual report was published in the Federal Register and, being the Law of the Land as is a Federal Statute, imparted notice to Wescomp of its obligation to prepare and maintain said annual documents. 2/ Further, intent to violate is not an element of the offense charged. Intent or lack of intent to violate, if so, will only be considered in determining the gravity of a violation.

Complainant submits that the fact, if true, that Wescomp had at its facility the information which could form the basis of such annual documents, and could have prepared same after the inspector's visit, does not in itself satisfy the requirements of 40 C.F.R. 761.180(b). I agree. The regulation sets forth the specific information to be included therein and requires that the document be prepared by July 1 of each year and thereafter maintained and retained at the facility and there be available for inspection by an authorized representative of EPA. If no sanctions were provided for failure to prepare such document unless and until the inspector comes to the facility, there would exist no incentive to the regulated community to comply with the regulation; as a consequence, the public health and the environment would not receive the protection contemplated by the Act.

2/ Davis, Administrative Law Treatise, Vol. I, Section 6.10, page 400. See also 44 U.S.C Section 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-5 (1947).

Transporter Issue

Wescomp's suggestion that as a transporter it is not subject to the storage for disposal requirements of the PCB regulations is rejected. TSCA makes no exemptions specifically for transporters. Subject Section 761.65(b) states that those required to comply with its requirements are "owners or operators of any facilities used for the storage of PCBs and PCB items designated for disposal."

On this record, Wescomp is not solely a transporter. Mr. Tienken, who was president of Wescomp at the time of subject inspection, has described Wescomp as a "full service hazardous waste management company"; "often called upon to consolidate PCB materials from various job sites" (TR 99; 105; EX C-11, C-12).

In his letter to EPA in 1984, Tienken explained that "during our customary decommissioning and servicing of PCB electrical equipment, i.e., transformers, it is often necessary to temporarily fill, accumulate and store drums of oil and flushate while work is in progress." (TR 106; EX C-13). There is no transporter exemption under TSCA, but clearly Wescomp would not qualify for such an exemption were it provided.

Civil Penalty

For subject violations of 40 C.F.R. 761.65(b) and 761.180(b), I must determine the amount of the appropriate civil penalty to be assessed in accordance with the Act and regulations. Section 16(a)(2)(B) of TSCA, 15 U.S.C. §2615(a)(2)(B) provides:

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.

40 C.F.R. §22.27(b) provides, in pertinent part:

(b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

While I am not bound to assess the same penalty as that proposed by Complainant, said regulation does provide that I must consider the guidelines in determining the amount of the recommended civil penalty pursuant to Section 16(a)(2)(B) of TSCA and must set forth specific reasons should I conclude that an appropriate penalty is different in amount from that recommended in subject Complaint.

Guidelines for the Assessment of Civil Penalties under the Act 3/ are in two parts: a general TSCA Civil Penalty System 4/ and a PCB Penalty Policy. 5/

The Agency's TSCA Civil Penalty Policy memorandum, issued on March 10, 1980, implements a system for determining TSCA civil penalties, whereby penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP), and (2) adjustments to the GBP.

To determine the GBP, the following factors are to be considered:

(a) The "nature", (b) the "extent" of environmental harm that could result, and (c) the "circumstances" of the violation. These factors are

3/ 45 FR 59770 (September 10, 1980).

4/ 45 FR 59770-59776.

5/ 45 FR 59776-59783.

incorporated on a matrix which allows determination of the appropriate GBP. Once the GBP has been determined, upward or downward adjustments may be made in consideration, if so, of (1) culpability, (2) history of violations (within the preceding five years), (3) ability to continue in business and (4) such other matters as justice may require.

The matrix, 6/ from which the appropriate GBP can be found, provides a vertical axis indicating "Circumstances (Probability of Damage)" and a horizontal axis indicating the "Extent of Potential Damage". The probability of damage on the vertical axis is graduated into three ranges, viz., High Range, Mid Range and Low Range. Each range provides two amounts of civil penalty for each evaluation of "Extent of Potential Damage" on the horizontal axis, viz., Major, Significant and Minor. Thus, at points where the two axes coordinate, two dollar amounts are provided for each range of the vertical axis. The amounts shown in the matrix are viewed as benchmarks along a continuum, a range of penalties (Bell & Howell Co., TSCA-V-C-033, 034, 035 (Final Decision, December 2, 1983)).

Elaine Barrick, a case reviewer for EPA Region 10 since 1985, testified that the \$35,000 civil penalty proposed by the Agency (TR 167) was based on the provisions of Guidelines for Assessing Civil Penalties under TSCA (EX C-17 and C-18) and the Matrix, described supra (EX C-18, C-19).

For violation of the Storage Regulation (Count I of subject Complaint), she proposed assessment of a civil penalty in the amount of \$10,000, using a "level 3" of the "Circumstances (Probability of Damage)", i.e., mid-range, and finding that, because of the volume involved - over 1000 gallons 7/ - the

6/ Said Matrix is set forth in EX C-19.

7/ The witness further testified to the provision, in said PCB penalty policy, that, where the concentration of PCB liquids is less than 500 parts per million "ppm"), the "Extent of Possible Damage" should be determined by reducing the total amount of PCB material involved by 70%. Since this did not reduce said amount below 220 gallons, no difference in her evaluation resulted.

"Extent of Potential Damage" was significant. I agree with said evaluation and find that the \$10,000 penalty proposed is appropriate.

No penalty was assessed for the violation charged in Count II - Failure to Date PCB Items Placed in Storage - for the reason that said violation fell into the same category (Storage) as the Improper Storage violation, in Count I of the Complaint.

Counts III and IV were dismissed at the hearing (TR 7-8). On Counts V, VI and VII, the witness's evaluation resulted in proposed civil penalties for each violation, in the amount of \$6,000. Wescomp's failure to prepare its annual report for the years 1983, 1984 and 1985, and its failure to maintain same available for inspection by EPA, pursuant to 40 C.F.R. 761.180(b), was determined to be a major recordkeeping violation, and the Extent of Probable Damage was determined to be significant. Said penalty policy provides that "level 4" (of the Matrix) includes major recordkeeping violations. Such violations severely reduce the Agency's ability to enforce the requirements of the regulations that pertain to operation of such facilities. Accordingly, failure to maintain adequate records at those facilities, as here considered, removes a significant incentive for compliance, hinders the Agency's ability to trace the movement of PCBs and could make improper disposal more likely. For this reason, the proposed penalty of \$6000 for each such recordkeeping violation is found to be appropriate and, therefore, I will propose that additional penalties, totaling \$18,000 shall be assessed for said three recordkeeping violations. Accordingly, I find that the appropriate gravity based penalty (GBP) to be here assessed is in the sum of \$28,000.

Said TSCA guidelines further provide for increase or decrease to the GBP if it is found that any other factor or factors provided in the statute and

regulations are present. On this record, Wescomp has a history of a previous violation. Specifically, Wescomp was charged with a TSCA violation in a 1983 Complaint and entered into a Consent Agreement and paid a penalty in settlement of same on January 16, 1984 (EX C-20, C-21). Said Complaint charged Wescomp with violation of 40 C.F.R. 761.40.

Said Guidelines for the Assessment of Civil Penalties (EX C-17, page A-70(d)) provides that "if the prior . . . violation is of a different TSCA provision . . . the penalty should be upwardly adjusted 25% for the first (repeat violation)

EPA's witness testified that an appropriate penalty - that provided by said guidelines - should consist of an upward adjustment of 25%, making the total penalty assessed \$35,000. In the premises, I hold that such penalty is appropriate and should be here assessed.

Wescomp suggests in its brief that it is unable to pay said penalty. However, the record is barren of any evidence concerning Wescomp's financial condition or in support of such claim and, therefore, it will not be considered. 40 C.F.R. 22.24 provides that, after Complainant has established a prima facie case that the proposed civil penalty is appropriate, Respondent "shall have the burden of presenting and going forward with any defense to the allegations set forth in the Complaint."

Having found that an appropriate penalty to be assessed herein is \$35,000, I recommend entry of the following:

FINAL ORDER 8/

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of \$35,000 is hereby assessed against Respondent Western Compliance Services, Incorporated, for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the Service of the Final Order by forwarding a certified or cashier's check, payable to "Treasurer of the United States of America", to

EPA - Region 10
(Regional Hearing Clerk)
P.O. Box 360903M
Pittsburgh, PA 15251.

DATED: February 10, 1989


Marvin E. Jones
Administrative Law Judge

8/ 40 C.F.R. §22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties, unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for an appeal from this Initial Decision within 20 days.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded the Original of the foregoing INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, to Mrs. Sue Atkinson, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region X, 1200 Sixth Avenue, Seattle, Washington 98101, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the Original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said INITIAL DECISION to the Administrator.

DATE: February 10, 1989



Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ