

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

COX CREEK REFINING COMPANY

[TSCA] Docket No. III-421

Respondent

INITIAL DECISION

DATED:

TSCA: Pursuant to Section 16(a)(2)(B) of the Toxic Substances Control Act (TSCA or the Act), 15 U.S.C. §2615(a)(2)(B), Respondent Cox Creek Refining Company is assessed a civil penalty of \$17,210 for failure to mark properly the means of access to PCB transformers as required by Section 761.40(j)(1) of the PCB Regulations, 40 C.F.R. § 761.40(j)(1); and for failure to prepare and maintain quarterly inspection records of PCB transformers as required by Section 761.30(a)(1)(xii) of the PCB Regulations, 40 C.F.R. § 761.30(a)(1)(xii).

APPEARANCES:

For Complainant:

Dean Jerrehian, Esq.
for U.S. Environmental Protection
Agency, Region III

For Respondent:

W. Scott Armentrout, Esq.
for Cox Creek Refining Company

I. PROCEDURAL HISTORY

In this proceeding, the Complainant, Region V of the United States Environmental Protection Agency (EPA or Agency) filed a Complaint alleging that Cox Creek Refining Company, (Respondent or Cox Creek) had committed six violations of Section 16(a) of the Toxic Substances Control Act (TSCA) 15 U.S.C. § 2615(a)¹.

Counts I and II of the Complaint allege that the Respondent failed to mark properly the means of access to polychlorinated biphenyls (PCB) transformers at two locations at the Cox Creek facility involved, in violation of Section 761.40(j) of the PCB Regulations, 40 C.F.R. § 761.40(j)². Complainant seeks a total of \$20,000 in civil penalties for these two violations. Counts III and IV allege that the Respondent failed to conduct quarterly inspections and to maintain the record of such inspections of the PCB transformers in two locations at the Respondent's facility, in violation of Section 761.30(a)(1)(ix) and (xii) of the PCB Regulations. The Complainant initially sought \$13,000 each for these two alleged violations but subsequently, in a March 22, 1993 Motion for Accelerated Decision, reduced the amount sought for each violation to \$6,000. Therefore, the total penalty asked for Counts III and IV is \$12,000. The basis for this reduction is that Respondent presented an affidavit which established compliance with the requirement to conduct quarterly inspections, although Counts III and IV still allege Cox Creek's failure to maintain records of the quarterly inspections.

Finally, Counts V and VI seek a penalty of \$2,000 each for the Respondent's failure to prepare and maintain annual documents for the PCB transformers at the two locations, in violation of Section 761.180(a) of the PCB Regulations. However, Complainant filed a motion to withdraw Counts V and VI, which motion was unopposed and was granted by the Presiding Judge in an order issued November 22, 1996.

Accordingly, the total civil penalty now being sought from the Respondent is \$32,000³, with \$20,000 asked for Counts I and II and \$12,000 requested for Counts III and IV.

Respondent filed an Answer denying liability on all six Counts of the Complaint. Moreover, Respondent asserted that the proposed penalty calculation did not fairly apply to the operations of Cox Creek.

An evidentiary hearing was held on April 26, 1994 during which the following decisional record was established. Complainant presented one witness and introduced twelve exhibits. All the Complainant's exhibits were admitted into

evidence except Ex. C-8, which was withdrawn, and Ex. C-13, which was excluded. Also, Ex. C-14 was admitted for the limited purpose of showing that certain environmental projects were initiated pursuant to a consent order (Tr. 131). Respondent presented two witnesses and three exhibits, numbered Ex. R-1, Ex. R-2 and Ex. R-3. All of the Respondent's exhibits were admitted into evidence. Furthermore, a written stipulation between the parties as to facts no longer at issue was admitted into the record (Tr. 10-11). Initial briefs and reply briefs were submitted according to the schedules established⁴.

This initial decision will provide a brief outline of the pertinent facts, a review as necessary of the parties' positions on the matters at issue; an analysis and resolution of the contested issues; a determination of the amount of any penalties to be assessed; and an order disposing of the issues. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this decision.

II. FACTUAL BACKGROUND

Cox Creek is a Maryland corporation which owns a facility (the facility or site) in Anne Arundel County, Maryland, which it purchased from Kennecott Corporation on December 16, 1986 (Stip. Nos. 1, 2, Ex. C-1). As of August 1988, Cox Creek employed 235 persons refining copper and casting copper rods at the facility (Ex. C-1).

On August 26, 1988 Ms. Siw Lea (now Siw Lea Robertson), a TSCA inspector employed by the State of Maryland and Department of the Environment, conducted an inspection of the facility to determine compliance with PCB Regulations (Tr. 7; Ex. C-1, p. 1; Ex. C-6, pp. 1-3). The inspection consisted of a review of documentary records required to be available to inspectors under the PCB Regulations, and a visual inspection of the facility (Ex. C-1, p.1; Ex. C-6, p.1). Following the inspection Ms. Robertson prepared a report containing her findings regarding Respondent's compliance with the PCB Regulations (Ex. C-1).

This facility inspection revealed the following information on the presence of PCBs at Cox Creek facility. As of August 26, 1988, Cox Creek was using seven PCB transformers⁵, identified by serial numbers as F-962381A, F-962381B, PAV258608, PBV 852101, PBV 842201, ZCP 76521 and D263910 (Stip. No. 3). Four of the transformers were located near or in the Tank House at the site and

contained approximately 662 gallons of PCB fluids; and three of the transformers were located at or near the Rod Casting Building at the facility and contained approximately 931 gallons of PCBs (Stip. No. 3; Ex. C-1, pp. 2-3). In total, these transformers contained about 1,593 gallons of PCB fluids.

At the time of the August 26, 1988 inspection, none of the means of access to the four PCB transformers near or in the Tank House and to the three PCB transformers near or in the Rod Casting Building at the facility were labelled as illustrated in Figure 1 in Section 761.45 of the PCB Regulations (Stip. Nos. 5, 6). Figure 1 of Section 761.45 requires notice: that PCBs are present; that PCBs are a toxic environmental contaminant; that PCBs are to be handled and disposed of in accordance with Part 761 of the PCB Regulations; and that the telephone number to report spills and accidents to the Coast Guard National Response Center be listed. The means of access to the four transformers in or near the Tank House and the three transformers in or near the Rod Casting Building were labelled only with the letters M_L (id.).

Further, at the time of the inspection, records of quarterly inspections for 1987 and the first two quarters of 1988 required by Section 761.30(a)(1)(ix) of the PCB Regulations were not maintained and were not made available to Ms. Robertson for the four PCB transformers in or near the Tank House or for the three PCB transformers in or near the Rod Casting Building (Stip. Nos. 8, 9).

Given this brief background, the four remaining violations at issue will be reviewed. Counts I and II allege Respondent's failure to comply with the provisions of Section 761.40(j)(1) of the PCB Regulations, requiring the proper labeling of the means of access for the four PCB Transformers near or in the Tank House (Count I) and the three PCB Transformers near or in the Rod Casting Building (Count II). Counts III and IV allege Respondent's failure to comply with the provisions of Section 761.30(a)(1)(xii) requiring the maintenance of quarterly inspection records for the four PCB transformers near or in the Tank House (Count III) and the three PCB transformers in or near the Rod Casting Building (Count IV) for 1987, and for the first two quarters of 1988. Since Count I and II are of the same generic nature, they will be considered together. For the same reason, Counts III and IV will also be considered together.

Next, the positions of the parties on the four alleged violations will be reviewed insofar as is necessary for a reasonable disposition of the matters at issue.

III. POSITIONS OF THE PARTIES

A. COMPLAINANT'S POSITION

1. Counts I and II

Complainant sets out that, under Section 761.40(j) of the PCB Regulations, the means of access to PCB transformers must be marked with the mark M_L, which is required by Section 761.45 of the PCB Regulations, to be as shown in Figure 1 of Section 761.45. Figure 1 shows a label that includes substantial important information, including notice that PCBs are present, that PCBs are toxic, that special handling and disposal requirements exist, and the emergency telephone number to call in the event of a spill. (Comp. Init. Br., pp. 5 6.)

Complainant argues that Cox Creek admitted, during the August 28, 1988 inspection, that the means of access to the four PCB transformers located near or in the Tank House were not labeled in accordance with Section 761.45 of the PCB Regulations (Stip. No. 5). Similarly, Complainant points out that the Respondent also admitted that the means of access to the three PCB transformers near or in the Rod Casting Building did not have the labels required by Section 761.45 of the PCB Regulations (Stip. No. 6). Instead, in both locations, the only labels present on the means of access to these transformers were the inscriptions M_L (Stip. Nos. 5, 6). (Comp. Init. Br., pp. 6, 7.)

Complainant asserts that the literal mark M_L painted on the doors is clearly an inadequate marking as it fails to provide even the most basic information required by Section 761.45, such as the identification of the hazardous constituent (PCBs), contacts in the event of an emergency, and a national response spill telephone number. Instead, as noted above, Respondent painted the means of access with only the label M_L, which Complainant persuasively contends does not inform lay people such as firemen, contractors, inspectors and other people at the facility of the existence and danger of PCBs. (Comp. Init. Br., p. 6.)

Complainant takes the position that the Respondent's failure to mark the means of access to the PCB transformers at the Tank House (Count I) and at the Rod Casting Building (Count II) as required by Section 761.45, constitutes in each instance a violation of Section 761.40(j) of the PCB Regulations (*id.* at 6, 7). Relying on calculations made using the Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy (hereinafter Penalty Policy), 45 Fed. Reg. 59770 (Sept. 10, 1980),

Complainant asserts that a civil penalty of \$10,000 each for Counts I and II is appropriate and asks that a total penalty of \$20,000 be assessed against Cox Creek for these Counts (id. at 11-13).

2. Counts III and IV

Complainant sets out that, under Section 761.30(a)(1)(ix) of the PCB Regulations, Respondent is required to conduct a visual inspection of each PCB transformer at least once every three months and that, under Section 761.30(a)(1)(xii), Cox Creek must make and maintain records of these quarterly inspections, which records shall be made available upon request (Comp. Init. Br., pp. 7, 8).

Complainant avers that, at the August 26, 1988 compliance inspection, Ms. Robertson requested to see copies of quarterly inspection records for Cox Creek's PCB transformers (Ex.C-1, pp. 2, 4). However, Cox Creek conceded that, prior to Ms. Robertson's inspection, no quarterly inspection records had been maintained for 1987 and the first two quarters of 1988, either for the four PCB transformers at the Tank House (Count III) or for the three PCB transformers at the Rod Casting Building (Count IV) (Stips. Nos. 7, 8). Therefore, Complainant argues that the Respondent in each instance is in violation of Section 761.30(a)(1)(xii) of the PCB Regulations, which requires maintenance of records of the quarterly inspections of the transformers and also requires such records be made available upon request. (Comp. Init. Br., pp. 7, 8.)

Again using calculations from the Penalty Policy, Complainant urges that a civil penalty of \$6,000 be entered against Cox Creek for each violation, making a total civil penalty of \$12,000 for Counts III and IV (id. at 14, 15).

B. RESPONDENT'S POSITION

1. Counts I and II

Cox Creek asserts that Section 761.40(j)(1) of the PCB Regulations became effective December 1, 1985, when the property was still owned by Kennecott Refining Company. At that time, Mr. Sackalosky, an electric shop foreman who worked for both Kennecott and Cox Creek, was directed by Kennecott to place signs with M_L on the doors leading to the PCB transformers. Once these erroneous marks were in place, they remained on the signs when Cox Creek commenced operations and until the inspection visit in August 1988. (Resp. Init. Br., pp. 5, 6.)

Respondent contends that, whoever directed Mr. Sackalosky to place these signs had apparently read Section 761.40(j) of the PCB Regulations in isolation from Section 761.45(a). The mark actually placed on the means of access, M_L indicates a literal reading of Section 761.40(j). Respondent also asserts that the profuse number of painted M_L marks on the means of access to the PCB locations is a further indication that the individual(s) responsible were certain that this was in compliance with the PCB Regulations. (Id. at 6.)

Respondent argues that Cox Creek's earnest but very misguided effort to comply with Section 761.40(j)(1) of the PCB Regulations does not justify the \$20,000 penalty assessment proposed by Complainant. And, Respondent asserts that a high degree of culpability is not present in this case where there is evidence of a literal, good faith attempt to comply with the regulation involved. (Id. at 6, 7.)

In light of this analysis, Cox Creek asks that these Counts be dismissed, in whole or in part, or that, alternatively the penalties assessed be such as the interests of justice might require (id. at 11) .

2. Counts III and IV

Respondent points out that the visual inspections of the PCB transformers occurred and that these inspections actually happened far more frequently than required by Section 761.30(a)(1)(ix) of the PCB Regulations. Respondent also notes that at no time did the inspection show any irregularities with the transformers. (Resp. Init. Br., p.7.)

Respondent argues that, where the substantive work - the physical inspections of the transformers - is accomplished, as it was in this case, then it is inappropriate to assess a \$12,000 civil penalty for failure to maintain the records, which go nowhere and serve primarily as a useful discipline for the property owner/ inspector and the public at large (id. at 8).

As with Counts I and II, Cox Creek asks that Counts III and IV be dismissed, in whole or in part, or that, alternatively the penalties assessed be such as the interests of justice might require (id. at 11)

III. ANALYSIS AND RESOLUTION

A. Counts I and II

As noted above, Count I of the Complaint alleges that Respondent did not properly label the means of access to the four PCB transformers near or in the Tank House, and Count II charges that Cox Creek did not properly label the means of access to the three PCB transformers near or in the Rod Casting Building, as illustrated in Figure 1 of Section 761.45(a). Both Counts assert that the failure to mark properly the means of access to the PCB transformers involved is in violation of Section 761.40(j)(1) of the PCB Regulations, which provides:

(1) [A]s 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 as required by paragraph (a) of this section.

As stipulated between the parties, at the time of the August 26, 1988 inspection, none of the means of access to the PCB transformers near or in the Tank House and near or in the Rod Casting Building were labeled as in Figure 1 of Section 761.45 of the PCB Regulations. Instead, the means of access were labeled only with the literal mark, M_L . (Stip. Nos. 5, 6.)

As Complainant correctly argues, just the literal mark M_L painted on the means of access to the PCB transformers is clearly an inadequate marking since it fails to provide the basic information set out in Figure 1 of Section 761.45(a), namely that PCBs are present, that PCBs are toxic, that special handling and disposal requirements exist and the emergency telephone number to call in the event of a spill. As the Complainant also persuasively contends, just the letters M_L painted on the means of access would not inform lay people such as firemen, contractors, inspectors and other people at the facility of the existence and dangers of PCBs. It must be concluded that the mere presence of the letters M_L is not an adequate substitute for marking the means of access to the PCB transformers with the information contained in Figure 1 of Section 761.45 of the PCB Regulations. Therefore, since the means of access to the seven PCB transformers at the Cox Creek facility were not marked as required by Section 761.45(a), the Respondent must be and hereby is held to be in violation of Section 761.40(j)(1) of the PCB Regulations, with regard to both Counts I and II of the Complaint.

Respondent does argue that painting the letters M_L in many places on the means of access to the PCB transformers shows a good faith effort to comply with the PCB Regulations. However, this argument does not excuse the Respondent for

liability for the violations, although it will be considered infra in connection with the penalty determination.

B. Counts III and IV

As previously described, Count III alleges Respondent's failure to maintain records of the quarterly inspections of the four PCB transformers in or near the Tank House for 1987, and for the first two quarters of 1988, and Count IV charges Respondent with the failure to maintain these quarterly records for the three PCB transformers in or near the Rod Casting Building for the same period⁶. The maintenance of quarterly inspection records is required by Section 761.30(a)(1)(xii) of the PCB Regulations, which provides:

(xii) Records of inspection and maintenance history shall be maintained at least 3 years after disposing of the transformer and shall be made available for inspection, upon request by EPA.

Respondent stipulated that records of quarterly inspections for 1987 and the first two quarters of 1988 were not maintained and were not available to Ms. Robertson at the time of the August 26, 1988 inspection, as required by Section 761.30(a)(1)(xii) of the PCB Regulations, either for the four PCB transformers in or near the Tank House or for the three PCB transformers in or near the Rod Casting Building (Stip. No. 8, Tr. 148-149.) It is clear, therefore, that Cox Creek violated Section 761.30(a)(1)(xii) as charged in both Counts III and IV. Therefore, the Respondent must be and hereby is held liable for the violations charged in Counts III and IV of the Complaint.

Respondent questions the basis for assessing multiple violations of the quarterly record keeping requirement and asserts that, since the transformers at the two locations are in close proximity to one another, only one penalty should be assessed. This argument is not persuasive. The 1980 Penalty Policy, 45 Fed. Reg. at 59778 (September 10, 1980)⁷, states that multiple violations should be assessed where the violations are in substantially different locations.

In the case at bar, the record shows that the distance from the Tank House, where four of the PCB transformers were located and the Rod Casting Building, where the other three PCB transformers were located, is approximately one city block (Tr. 140). The distance of one city block leads to the reasonable conclusion that the Tank House transformers and the Rod Casting Building

transformers are in substantially different locations. Therefore, the Complainant properly charged Cox Creek with two violations.

IV. DETERMINATION OF THE PENALTY

In determining an appropriate civil penalty, Section 16(a)(2)(B) of TSCA provides that the Agency:

. . . 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.

These factors are restated and elaborated upon in the Penalty Policy, which establish a two-step process for assessing a civil penalty. First, an appropriate gravity-based penalty (GBP) is selected; and second, the GBP is adjusted (upwards or downwards) for certain factors articulated in Penalty Policy.

With regard to the first phase of the process, the Penalty Policy, 45 Fed. Reg. at 59771, contain a matrix for selecting a GBP. Violations are classified according to the circumstances (probability of harm) on the vertical axis and the extent of potential damage on the horizontal axis. There are six penalty levels on the vertical axis. Violations are classified as high range (1 and 2) indicating that a violation is likely to cause damage, medium range (3 and 4) indicating a significant chance damage will result, or low range (5 and 6) indicating a small likelihood of damage. There are three penalty levels on the horizontal axis: major (indicating a potential for serious damage), significant (indicating a potential for significant damage), or minor (indicating a potential for a lesser amount of damage). The GBP is determined by the dollar figure indicated at the point where the axes intersect.

In the second phase of the penalty assessment process, the GBP may be adjusted (upwards or downwards) based on the remaining statutory factors in Section 16(a)(2)(B) of TSCA: culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require, Penalty Policy, 45 Fed. Reg. at 59770.

A. Phase I: GBP Calculations

1. Counts I and II

As mentioned earlier, Complainant proposes a \$10,000 civil penalty for each Count. Under the Penalty Policy, 45 Fed. Reg. at 59777, the extent of the violation is determined by the amount and concentration of the PCB material involved, and a violation is determined to be in the significant category if 230 gallons or more but less than 1100 gallons of PCBs are involved. Applying this to the present case, it was shown that there was a total of 662 gallons of PCBs in the PCB transformers in or near the Tank House and 931 gallons of PCBs in the PCB transformers in or near the Rod Casting Building. Therefore, both violations should be placed in the significant category from an extent standpoint.

As noted above, the circumstance analysis in the Penalty Policy, id. at 59772, is based on whether there is a high (likely to cause damage), medium (significant chance of damage) or low (small likelihood of damage) probability of damage from the violation. The three probability factors each contain two levels, making a total of six, with levels 1 and 2 in the high area, 3 and 4 in the medium area, and 5 and 6 in the low area. The Penalty Policy, id. at 59778, sets out that the violation should be determined by category and then fit into one of the damage levels. In the present case, Counts I and II are marking violations, so Complainant proposes that they be as level three medium range violations since they should be considered major marking violations. Level three is assessed where there is no indication to someone who is unfamiliar with the situation that PCBs are present, id. at 59780.

The Complainant's position is well taken and will be adopted. The Penalty Policy, id. at 59780, defines a circumstance level three major marking violation as a situation where there is no indication to someone who is unfamiliar with the situation that PCBs are present. Respondent's labeling certainly would not indicate to someone unfamiliar with the facility that PCBs were present. Section 761.40(j) of the PCB Regulations was primarily promulgated by EPA to reduce the risk of PCB exposure to those responding to fires, and others in the vicinity by providing prominent warnings of PCBs, Pacific Refining Company (Pacific Refining), TSCA Appeal No. 94-1, pp. 6-8 (EAB, October 19, 1994). In Pacific Refining, id. at 8, the Environment Appeals Board (EAB) held that failure to mark the means of access to a PCB transformer should be considered a major marking violation even where the transformer itself was properly marked and could be seen from outside the transformer enclosure. The EAB reasoning was that a transformer fire could obscure or

destroy the mark placed on it, so marking of the means of access would reduce the risk of PCB exposure to emergency response personnel, id. at 7.

In the present case, Cox Creek's labeling conveys no cautionary information whatsoever warning people entering these buildings of PCBs being present and who to contact in emergencies. Therefore, there is a high probability for harm at Cox Creek's facility, concerning risk of exposure or improper disposal, because there is no indication to those unfamiliar with the facility that PCBs are located in the Tank House or Rod Casting Building before entering these areas. As a result, the two violations in Counts I and II are properly determined to be circumstance level three major marking violations.

As a result, when the significant extent category is linked with the medium level three circumstance range on the matrix in the Penalty Policy 45 Fed. Reg. at 59771, it is warranted to assess a GBP of \$10,000 each for Counts I and II, which makes the total GBP for these two Counts \$20,000.

2. Counts III and IV

Complainant requests entry of a GBP of \$6,000 each for Counts III and IV involving the Respondent's failure to prepare records of its quarterly inspections of the PCB transformers in or near the Tank House and the Rod Casting Building during 1987, and the first two quarters of 1988. Complainant correctly suggests that these violations fall into the significant extent category on the same analysis made with regard to Counts I and II concerning the gallons of PCBs at the two locations. However, Complainant asks that the violations be put in the medium level 4 circumstance range under the Penalty Policy, 45 Fed. Reg. at 59778, as major recordkeeping violations. Under the Penalty Policy, id. at 59781, a circumstance level four range is set out as involving recordkeeping violations that substantially hinder the Agency's ability to trace the movement of PCBs and make improper disposal more likely.

However, Respondent persuasively asserts that the purpose of preventing environmental damage through leakage has been met by Cox Creek. Respondent contends that recording inspection results are a minor matter when inspections have been conducted and all results of the inspections have been negative. While keeping the inspection records is required by the PCB Regulations, the Cox Creek argument has merit. In Ketchikan Pulp Company (Ketchikan), Docket No. TSCA-X-86-01-13-2615, Initial Decision issued December 8, 1986, a similar situation was present regarding failure to prepare quarterly inspection records. The Presiding Judge reasoned that constant inspection made remote the

likelihood of any significant or measurable leaks of PCBs escaping detection, which is the purpose of the requirement for quarterly inspections. Therefore, it was held in Ketchikan that a circumstance level in the low range was appropriate. Id. at 14. The Presiding Judge also noted in Ketchikan, id. at 14, fn. 8, that this circumstance determination was in accord with Penalty Policy, 45 Fed. Reg. at 59772, which defines the low range circumstance levels as situations where there is a small likelihood that damage will result from the violations.

This approach of Ketchikan is persuasive, and will be adopted for assessing the circumstance level for Counts III and IV. As in Ketchikan, a circumstance level in the low range is warranted for Counts III and IV. In this cause, the record also reflects that the principal objective of leak detection was accomplished through quarterly inspections. It is undisputed that Respondent conducted at a minimum monthly inspections and sometimes weekly inspections, and that no leaks were ever discovered during such visits (Tr. 134, 138-39). Considering the frequency of inspections, the likelihood of an undetected leak was remote at best.

The Penalty Policy, 45 Fed. Reg. at 59781, indicates that a low level six circumstance range should be assigned to violations that pose the least risk of causing harm, such as minor recordkeeping violations. In the current case, the risk to the environment and human health from the recordkeeping violations in Counts III and IV is minimal. Respondent's regular performance of inspections served to reduce any harm and served the purpose of Section 761.30(a)(xii) of the PCB Regulations. Under these circumstances, Counts III and IV will be considered as minor recordkeeping violations and are determined to be at the low circumstance level six range.

Therefore, when these violations are put into the matrix of the Penalty Policy, id. at 59771, at the significant extent and level six circumstance range, the appropriate GBP for each violation is \$1,300, making a total GBP of \$2,600 for these two Counts.

B. Phase II - Adjustments to the GBP

As noted earlier, Section 16(a)(2)(B) of TSCA lists several factors concerning the violator that the Administrator must consider when assessing a penalty: culpability, history of prior such violations, ability to pay, ability to continue to do business, and such other factors as justice may require. The Penalty Policy, 45 Fed. Reg. at 59770 indicates that it takes into account

these statutory adjustment factors. This section will discuss how each adjustment factor applies to the GBPs determined above. The factors apply equally to all four violations unless otherwise so indicated.

1. Culpability

Under the Penalty Policy, id. at 59773, the two principle criteria for assessing culpability are (a) the violator's knowledge of the particular TSCA requirement, and (b) the degree of the violator's control over the violative condition. Also, in discussing this, the Penalty Policy, id., sets out three levels of culpability. Complainant suggests that the Respondent be placed in level II of the culpability factor, which level indicates that the violator had sufficient knowledge to recognize the hazard created by its conduct or significant control over the situation to avoid committing the violation. Respondent does not contest this designation, and based upon the record, this determination is found to be appropriate.

The only issue that warrants comment here is a subcomponent of the culpability factor, the attitude of the violator. While a level II classification does not by itself merit an adjustment to the GBP, the Penalty Policy states that, for level II assessments, an upward or downward adjustment of up to 15 percent of the GBP may be made based upon attitude. In evaluating attitude, it is appropriate to consider any good faith efforts to comply with the PCB Regulations, the promptness of the violator's corrective actions and any assistance given to EPA to minimize any harm to the environment caused by the violation. To be taken into account are both the statements and actions of the Respondent. (Id.)

Respondent asserts that it is entitled to an adjustment for its good faith, but misguided efforts to comply with the PCB Regulations governing marking the means of access to the PCB transformers. Respondent, therefore, seeks a reduction regarding the marking violations because of the numerous paintings of the literal M_L markings on the means of access. While this was an attempt to comply and not a complete disregard for responsibility under PCB Regulations, it was not the actions of Cox Creek itself since the M_L labeling was made sometime before 1986, when Kennecott owned the property (Tr. 137). Therefore, it is unwarranted to credit the Respondent with good faith efforts it did not initiate.

Moreover, no deductions will be taken since, to permit penalty deductions for a misreading of the PCB Regulations, would not set a good precedent for those

responsible for compliance with regulations designed to prevent harm to the environment and the public. Companies such as Cox Creek have a serious responsibility to comply fully and properly with the PCB Regulations.

On the other hand, when Ms. Robertson requested reconstruction of the records under Counts III and IV, they were promptly prepared. This does constitute a good faith effort by Cox Creek and, on the basis of attitude, will result in a reduction of 15% in the GBP for Counts III and IV based on the culpability adjustment factor.

2. History of Prior Such Violations

Under the Penalty Policy, 45 Fed. Reg. at 59773, the prior violation history adjustment factor is used only to increase the GBP where violators have exhibited a history of similar encroachments under TSCA. The Complainant did not request any adjustment in this area and none will be made for this factor.

3. Ability to Pay

The criteria set out in the Penalty Policy, id. at 59775, regarding the ability to pay factor in cases such as this is whether the proposed penalty is 4% or less of the Respondent's annual sales. In the instant case, the record establishes that the proposed penalty is less than 4% of Cox Creek's gross annual sales (Ex. C-3; Tr. 71). Additionally, Respondent has not alleged an inability to pay the proposed penalty. Accordingly, no adjustment is necessary for this factor.

4. Other Factors That Justice May Require

The last statutory adjustment factor to be considered is such other factors as justice may require. This factor gives the Presiding Judge broad discretion to consider individual circumstances that may be unaccounted for under the Penalty Policy.

The Penalty Policy, id. at 59776, indicates that there are circumstances where violations, while of a significant extent, will be so close to the borderline separating minor and significant violations that the penalty may seem disproportionately high. In this situation, an additional reduction of up to 25% off the GBP may be applied before the other adjustment factors are considered. (Id at 59776.)

The instant case presents such a situation with regard to the violations in Count I and II. The means of access to the PCB transformers at the two locations involved were painted in many areas with the cautionary letters M_T (Stip. Nos. 5, 6), and the PCB transformers themselves were properly marked (Ex. C-1, Att. 7, Photo 2). In addition, from 1961 when Kennecott owned the property until the August 26, 1988 visit of Ms. Robertson, frequent inspections of the PCB transformers on a monthly or more often basis were made and the PCB transformers were always found to be in good condition with no leaks (Tr. 133-43), so the likelihood of a spill occurring, of damage to the environment happening, or of injury to fire personnel in the event of a fire was minimal. Accordingly, under these circumstances, a 25% reduction in the GBP for the violations in Counts I and II is warranted in the other factors that justice may require area.

C. GBP and Adjustments Summary

The GBP and adjustments to the GBP are summarized below:

1. The GBP for all Counts at issue:

Count I\$10,000
Count II.\$10,000
Count III	\$1,300
Count IV.	\$1,300
 Total GBP\$22,600

2. Adjustments to GBP for the Counts at issue:

Counts I and II: 25% Reduction for such other matters as justice may require.....(\$5,000)

Counts III and IV: 15% Reduction for good faith efforts in prompt reconstruction of inspection records.....(\$390)

Total Reductions..... (\$5,390)
Final Assessed Penalty..... \$17,210

V. ORDER

Based on the analysis, rulings, findings and conclusions contained in this decision, it is ordered:

1. That, pursuant to Section 16(a)(2)(B) of TSCA, 15 U.S.C. §2615(a)(2)(B), a total civil penalty of \$17,210 be assessed against Respondent for its violations of Section 761.40(j) and Section 761.30(a) (xii) of the PCB Regulations, 40 C.F.R. §761.40(j) and 761.30(a)(xii), as set out in Counts I, II, III and IV of the Complaint filed in this proceeding.

2. That payment by Respondent of the full amount of the \$17,210 civil penalty assessed shall be made within sixty (60) days of service of the final order of the Environmental Appeals Board⁸ by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

EPA--Region III
Regional Hearing Clerk
P.O. Box 360515 M
Pittsburg, PA 15251

Daniel M. Head
Administrative Law Judge

Dated: December 27, 1996
Washington, DC

¹ The Toxic Substances Control Act shall for simplicity purposes hereinafter be cited by the Section number in the original statute and the reference to the U.S. Code will be omitted.

² In citing these regulations hereinafter, the reference to the Code of Federal Regulations volume (40 C.F.R.) will be omitted for brevity.

³ In its Reply Brief, Complainant sought to increase the proposed penalty to \$44,000, but this increase related to Count V of the Complaint, which has been withdrawn.

⁴ Citations to the record and the parties' briefs will be as follows: (1) Complainant's exhibits will be cited with the letter C and the number, such as Ex. C-1; and the Respondent's exhibits will be cited using the same format, e.g. Ex R-1; (2) the transcript will be cited as Tr. with the page number; (3) the stipulation of uncontested facts will be cited by number, e.g. Stip. No. 1; and the briefs will be abbreviated and cited by page number, such as Comp. Init. Br., p. 1.

⁵ Under Section 761.3 of the PCB Regulations, a "PCB transformer" is one that contains 500 or more parts per million of PCBs.

⁶ Counts III and IV had originally charged Cox Creek with failure to conduct the quarterly inspections involved but Complainant did not pursue the alleged failure to inspect since the Respondent established it had conducted the quarterly inspections during the relevant timeframe. See Complainant's March 22, 1993 Motion for Accelerated Decision, Resp. Init. Br., p. 7, Ex. R-1 and Tr. 133-140.

⁷ The Penalty Policy will be cited hereinafter as 45 Fed. Reg. with the page number. The date will be omitted for brevity.

⁸ Under Section 22.30 of the Consolidated Rules of Practice (Rules), 40 C.F.R. §22.30, the parties may file with the Environmental Appeals Board a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the Environmental Appeals Board within 45 days after its service, unless an appeal is taken by the parties or unless the Environmental Appeals Board elects, *sua sponte*, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or *sua sponte* review, the order of the Environmental Appeals Board shall be the final order in this case.