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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	DOCKET NO. TSCA 10-2010-0253
Chilkoot Lumber Company, Inc. and	)	
Mr. L. Edward Lapeyri	)	
	)	COMPLAINANT'S INITIAL
	)	PREHEARING EXCHANGE
Haines, Alaska	)	
	)	
Respondents.	)	
	)	

By the Prehearing Order of Judge Barbara A. Gunning, dated December 15, 2010, and pursuant to Section 22.19(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. § 22.19(a), Region 10 of the U.S. Environmental Protection Agency ("Complainant"), respectfully submits the following initial prehearing exchange of information.

**I. EXPECTED WITNESSES AND TESTIMONY**

The Prehearing Order directs each party to submit "the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witnesses' expected testimony, or a statement that no witnesses will be called...." The

following is a list of witnesses Complainant intends to call and a brief summary of their expected testimony:

(1) Mr. Bruce Long: Mr. Long is an Investigator for the Inspection and Enforcement Management Unit of the EPA Region 10 Office of Compliance and Enforcement. Mr. Long's office is located in Portland, Oregon, but the geographic scope of his duties spans the entire Region, including Alaska. Mr. Long's duties include conducting inspections to assess compliance with the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601, *et seq.*, providing compliance assistance, and collecting and reviewing evidence regarding alleged violations of TSCA and implementing regulations. On August 21, 2007, Mr. Long conducted a compliance inspection of a facility owned by Respondents located at or around milepost 5 on Lutak Highway in Haines, Alaska, 99827 ("Facility"). The purpose of this inspection was to assess compliance with TSCA regulations pertaining to polychlorinated biphenyls ("PCBs") that are codified at 40 C.F.R. Part 761 ("PCB Regulations"). Mr. Long will provide testimony related to his inspection of the Facility and equipment located thereon. This testimony will cover his observations and findings, the results of samples he collected, his correspondence and conversations with Respondents and employees of Respondents, and his review of the evidence that forms the factual basis for the violations alleged by Complainant. Mr. Long will also testify as to his review of a prior inspection reports and other environmental assessments concerning PCBs and PCB Items at the Facility. On September 27, 2007, Mr. Long completed an Inspection Report that contained his personal observations and findings, photographs and sampling data taken during his inspection, and correspondence with Respondents. A complete copy of the 2007 Inspection Report is attached as Complainant's Exhibit ("CX")-1. In addition to the printed photographs provided with the 2007 Inspection Report, the photographs are also

provided as digital files on the compact disc attached as CX-21. Mr. Long's field notes from his inspection are attached as CX-2.

(2) Mr. Andrew Hess: Mr. Hess was formerly employed by Complainant as an Environmental Scientist in the Investigations and Engineering Unit of the EPA Region 10 Office of Environmental Assessment. Mr. Hess retired in 2007 and currently resides in Port Orchard, Washington. During his employment, Mr. Hess' duties included conducting inspections, obtaining sampling data, performing data analysis, and providing technical support for a variety of programs including solid waste, toxics, and water. On July 16, 1999, Mr. Hess conducted a compliance investigation of the Facility to assess compliance with TSCA and other federal environmental regulations. Mr. Hess will provide testimony related to his inspection of the Facility and equipment located thereon. This testimony will cover his observations and findings, the results of samples he collected, and his correspondence with Respondents. Mr. Hess will also provide testimony on the information he reviewed prior to his inspection pertaining to PCBs and PCB Items at the Facility. On August 10, 1999, Mr. Hess completed an Inspection Report that incorporated his observations and findings, inspection photographs, sampling data, and correspondence with Respondents related to the inspection and its findings. On August 10, 1999, Mr. Hess completed an Inspection Report that contained his personal observations and findings, photographs and sampling data taken during his inspection, and correspondence with Respondents. A complete copy of the 1999 Inspection Report is attached as Complainant's CX-4. In addition to the printed photographs provided with the 1999 Inspection Report, the photographs are also provided as digital files on the compact disc attached as CX-21.

(3) Mr. Daniel Duncan: Mr. Duncan is the Regional PCB Program Manager for the Pesticides and Toxics Unit of EPA Region 10's Office of Compliance and Enforcement. Mr.

Duncan has served as the Regional PCB Program Manager since 1995. His office is located at the Regional headquarters in Seattle, Washington. As the Regional PCB Program Manager, Mr. Duncan's duties include overseeing, coordinating, and developing PCB compliance and enforcement efforts throughout the Region, including Alaska. Mr. Duncan is Complainant's primary point of contact with respect to compliance assistance for, and enforcement of the PCB Regulations. Mr. Duncan is expected to provide testimony on his involvement with, and review of the findings and conclusions of both the 1999 Inspection Report and the 2007 Inspection Report. Mr. Duncan will also testify to Complainant's attempts to bring Respondents into compliance with the PCB Regulations and to remediate PCBs at the facility. These efforts are documented and memorialized in letters and email correspondence between Complainant, Respondents, and Respondents' contractor Chilkat Environmental, LLC ("Chilkat"). Copies of this correspondence are attached as CX-5, CX-6, CX-7, CX-8, CX-9, CX-10, and CX-11. Mr. Duncan will also testify as to his receipt and review of a PCB Remedial Action Closure Report ("PCB Remediation Report") concerning the Facility and prepared by Chilkat. A complete copy of the PCB Remediation Report is attached as CX-12. Finally, Mr. Duncan will testify to Complainant's calculation of the proposed penalty based on its application of the statutory penalty criteria and in accordance with methodology provided for in the *Polychlorinated Biphenyls (PCB) Penalty Policy* dated April 9, 1990 ("PCB Penalty Policy" or "Policy"). A copy of the PCB Penalty Policy and the Penalty Policy Supplement applicable to this action are attached as CX-13 and CX-14, respectively.

(3) Elliot Rosenberg: Mr. Rosenberg is a Senior Economist for the EPA Region 10 Office of Environmental Assessment. Mr. Rosenberg's office is located at Regional headquarters in Seattle, Washington. Mr. Rosenberg's duties include providing economic

analysis and financial expertise to all Regional programs. As part of his responsibilities, Mr. Rosenberg conducts analysis of individuals and businesses to determine their financial ability to pay proposed penalties and the impact of such payments on the ability to continue in business or on personal finances. Mr. Rosenberg is expected to provide testimony concerning the financial relationship between the Respondents, and the ability of Respondents to pay the proposed penalty.

## II. DOCUMENTS AND EXHIBITS

The following is a list of documents and exhibits that Complainant intends to introduce at trial and which accompany this Prehearing Exchange.

- CX-1 Bruce Long, EPA Region 10 Compliance Inspection Report, Chilkoot Lumber Company (Sept. 27, 2007)
- CX-2 Bruce Long, Field Notes from Compliance Inspection of Chilkoot Lumber Company (Aug. 21, 2007)
- CX-3 Chuck Kleeschulte, *Chilkoot Lumber Aims to Light up Haines*, Alaska Business Monthly (Feb. 1, 1989)
- CX-4 Andy Hess, EPA Region 10 PCB Inspection Report, Chilkoot Lumber Company (Aug. 10, 1999)
- CX-5 Letter from Montel Livingston, Manager, Region 10 Solid Waste and Toxics Unit, to Ed Lapeyri, President, Haines Sawmill, Notice of Noncompliance and Letter of Advisement (Nov. 2, 2000)
- CX-6 Letter from Scott E. Downey, Manager, Region 10 Pesticides and Toxics Unit, to Mr. Ed Lapeyri, President, Chilkoot Lumber Company, Letter of Advisement (Feb. 15, 2008)
- CX-7 Letter from Ed Lapeyri, President, Chilkoot Lumber Company, Inc., to Mr. Scott Downey, Manager, Region 10 Pesticides and Toxics Unit, Re: PCB Inspection Report Review (Apr. 24, 2008)

- CX-8 Letter from Elijah Donat, MS PMP, Chilkat Environmental, LLC, to Daniel Duncan, PCB Program Manager, EPA Region 10 (Jun. 26, 2008)
- CX-9 Letter from Elijah Donat, MS PMP, Chilkatt Environmental, LLC, to Daniel Duncan, PCB Program Manager, EPA Region 10 (Jun. 26, 2008)
- CX-10 Email with attachment Transformer Update 7 22 08.doc from Elijah Donat, Environmental Engineer, Chilkat Environmental, to Daniel Duncan, PCB Program Manager, EPA Region 10 (Jul. 22, 2008, 8:07pm)
- CX-11 Letter from Elijah Donat, MS PMP, Chilkat Environmental, LLC to Scott Downey, Manager, Region 10 Pesticides and Toxics Unit (Aug. 28, 2008)
- CX-12 Chilkat Environmental, LLC, Chilkoot Lumber Company PCB Remedial Action Closure Report (July 2009)
- CX-13 U.S. Environmental Protection Agency, Polychlorinated Biphenyls (PCB) Penalty Policy (April 9, 1990)
- CX-14 Memorandum from Stephanie P. Brown, Acting Director, Toxics and Pesticides Enforcement Division, Office of Civil Enforcement, Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule (Jun. 5, 2006)
- CX-15 Prudential Jack White Vista Real Estate, Offer to Sell :: Chilkoot Lumber Dock Facility for Sale :: Haines, Alaska, <http://www.alaskadock.com/offer-to-sell.html> (last visited Feb. 15, 2011)
- CX-16 Alaska Department of Commerce, Corporations Business and Professional Licensing, Corporations System Search Results for Chilkoot Lumber Company, Inc., <http://myalaska.state.ak.us/business/soskb/Corp.asp?246685> (last visited Feb. 16, 2011); Alaska Department of Commerce, Corporations Business and Professional Licensing, Corporations System Search Results for Chilkoot Lumber Company, Inc. (printout Sept. 9, 2010)
- CX-17 Haines Borough Real Property Assessment Report 2010 Tax Year, Borough Property Numbers C-LTR-05-1100, C-LTR-05-1200, C-LTR-05-1300, and C-LTR-05-1400
- CX-18 Chilkoot Lumber Company, Inc., Business Corporation Biennial Filing (Oct. 26, 2010)
- CX-19 Email from Bruce Wanstall, Alaska Department of Environmental Conservation, to Scott Downey, Toxics and Pesticides Unit Manager, EPA Region 10 (Jun. 26, 2007, 4:31 pm)

CX-20 Curriculum Vitae of Elliot Rosenberg

CX-21 Compact Disc containing digital files of photographs taken during 1999 and 2007 Inspection

### **III. LOCATION AND ESTIMATED DURATION OF HEARING**

In accordance with 40 C.F.R. § 22.19(d) and 22.21(d), Complainant proposes Anchorage, Alaska as a potential location for the hearing. Anchorage is centrally located for both Complainant and Respondents and is accessible by air on many domestic commercial carriers. There are a number of federal and state court buildings in Anchorage in which to hold a hearing. In addition, Complainant's Anchorage Operations Office has a conference room that could be used to hold a hearing.

Holding a hearing in Anchorage may also provide an opportunity to promote judicial economy. In addition to the present matter, Complainant has another matter before Judge Gunning involving a different respondent located in Anchorage. To the extent feasible, scheduling consecutive hearings in both matters in Anchorage would promote economy by reducing travel time and expense.

Alternatively, Complainant would not object to Haines, Alaska as a hearing location. Haines is in Haines Borough and is the location where Respondents reside and conduct business. There is an Alaska State Courthouse located in Haines that contains both a courtroom and jury room. Complainant contacted the courthouse and was informed that the jury room could be available for a hearing. Haines is accessible by air on local commercial carriers, by ferry from Juneau, Alaska, and by car from Anchorage, Alaska (approximately 15 hour drive).

Complainant estimates that it will require less than one full day, exclusive of cross examination, to put on its case in chief. The length of time required for rebuttal testimony and cross examination of Respondents' witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondents' prehearing information exchange.

As of the date of this prehearing exchange, counsel for Complainant respectfully requests that, should a hearing be necessary, it not be scheduled between the dates of September 5 and 14, 2011.

#### **IV. STATEMENT EXPLAINING PROPOSED PENALTY**

Complainant alleges that Respondents violated Section 15 of TSCA, 15 U.S.C. § 2614, by failing to comply with the PCB Regulations promulgated pursuant to Section 6(e) of TSCA, 15 U.S.C. § 2605(e). Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), authorizes the assessment of civil penalties for violations of Section 15 of TSCA in an amount not to exceed \$25,000 for each such violation. As of the date of violations alleged in this matter, and in accordance with the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. § 19.4, the TSCA maximum civil penalty was increased from \$25,000 to \$32,500 per violation. Accordingly, the statutory maximum for all six alleged violations, assuming each violation lasted only one day, is \$195,000. Complainant proposes a penalty in the amount of \$116,100.

Complainant has the burden of presentation and persuasion that the relief sought is appropriate. 40 C.F.R. § 22.24. The Environmental Appeals Board ("EAB") has held that a penalty proposed by Complainant is appropriate only if it is calculated in a manner consistent with the factors enumerated in TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). *In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 EAD 529* (EAB, Oct. 20, 1994). Section 16(a)(2)(B)

of TSCA provides that, in determining the amount of a civil penalty, Complainant “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, and prior history of such violations, the degree of culpability, and such other matters as justice may require.”

EPA has developed a specific penalty policy for violations of PCB Regulations that applies each of the TSCA statutory penalty factors. See *In re Environmental Protection Services Inc., TSCA Appeal No. 06-01, 13 EAD 506, 591* (EAB, Feb. 15, 2008) (the PCB Penalty Policy “provides a methodology for calculating penalties for violations of PCB regulations in accordance with a set of statutory penalty factors that EPA must consider when assessment penalties in civil administrative enforcement under TSCA.”). A copy of the PCB Penalty Policy is attached as CX-13. The PCB Penalty Policy provides a logical methodology for calculating a penalty in a manner that is consistent and equitable so that members of the regulated community are treated similarly for similar violations. See *In re DIC Americas, Inc., TSCA Appeal No. 94-2, 6 EAD 184, 189* (EAB, Sept. 27, 1995). Proof of Complainant’s adherence to the PCB Penalty Policy is also evidence that the statutory factors were taken into account. *In re Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 EAD 735, 760* (EAB, Feb. 11, 1997).

The PCB Penalty Policy provides a two-step procedure for calculating penalties for violations of the PCB Regulations. The first step is to calculate the gravity-based component of the penalty. The second step is to adjust this gravity component by applying violator-specific penalty factors.

## 1. Gravity Based Component of Penalty

In calculating the initial gravity-based component of a penalty, the PCB Penalty Policy takes into account the statutory factors pertaining to the “nature, circumstances, extent, and gravity of violations.” 15 U.S.C. § 2615(a)(2)(B).

### A. Nature of Violations

PCBs are highly toxic and persistent chemicals that are consequently subject to a comprehensive regulatory regime. Congress banned the production of PCBs on January 1, 1977 and directed EPA to promulgate regulations concerning the use, processing, distribution, and disposal of PCBs. 15 U.S.C. § 2606(e). These regulations are found at 40 C.F.R. Part 761 and prescribe restrictions on storage, use, distribution, and disposal of PCBs, as well as requirements for registration and recordkeeping. The purpose of the PCB Regulations is to prevent or limit harm to human health and the environment from PCB exposure.

The PCB Regulations generally provide that PCBs already in existence may continue to be used or stored for use subject to certain requirements. The Complaint alleges that Respondents violated such requirements related to storage, inspection, labeling, recordkeeping, registration, and maintenance and repair of PCBs and PCB Items. Each of the alleged violations runs contrary to the PCB Regulations enacted for the purpose of ensuring that, if a decision is made to continue storing or using PCBs, such storage or use is done in a manner that prevents harm to human health and the environment.

### B. Extent of Violations

The TSCA penalty factors take into account the “extent” of a violation. The “extent” factor involves the potential or actual harm to human health or the environment from a given violation. The PCB Penalty Policy considers the “extent” of a violation focusing on the quantity

of PCBs involved, which correlates to the potential or actual harm that occur. A greater quantity of PCBs has the potential for greater exposure and therefore greater harm to human health and the environment. In addition, the "extent" of a violation is also dependent on whether a violation involves the disposal or release of PCBs. Such disposal violations present a higher potential for harm than non-disposal violations.

The PCB Penalty Policy considers the "extent" factor by first determining whether a particular violation is a disposal or non-disposal violation. Here, five of the six violations alleged by Complainant do not involve the direct disposal of PCBs and are therefore classified as non-disposal violations. The remaining violation, failure to repair leaking PCB Transformers, can be characterized as a disposal violation. The 1999 and 2007 Inspection Reports document that PCB Transformers had leaks of oil on the exterior surface and PCBs were identified in soil samples around the PCB Transformers. CX-1 at pp. 2 and Photo Documentation 1-12; CX-4 pp. 3-6. Although the alleged violation for failure to repair leaking PCB Transformers can be characterized as a disposal violation, the PCBs which entered the environment were eventually remediated by Respondent. Accordingly, Complainant believes that this violation would be more appropriately characterized as a non-disposal violation for failure to conduct required maintenance on leaking PCB Transformers. This approach takes into account recent efforts by Respondents to remediate PCBs.

The PCB Penalty Policy accounts for the "extent" of a non-disposal violation by assigning it to one of three categories – minor, significant, and major – based on the amount of PCB material involved in the violation. A violation of "major extent" involves a greater quantity of PCBs than and violation of "minor extent," and therefore presents a greater potential for harm.

The Policy provides that the amount of PCBs involved in the violations can be calculated

by determining the weight of PCB Liquids, the weight of PCB Items, the number of drained transformers or capacitors that contained PCBs, or the number of drums that contain solid PCBs. Complainant reviewed the available evidence and determined that the amount of PCB Liquid involved in the violations was uncertain, whereas the weight of PCB Items was recorded by Chilkat during remediation activities. Accordingly, Complainant determined that the weight of PCB Items involved in each violation is the most reliable and accurate way to determine "extent" under the Policy. Relying on the number of drained transformers and capacitors is another approach to determine "extent" under the Policy. This approach produces the same result as relying on the weight of PCB Items.

The PCB Remediation Report provides the weight of each PCB Item. CX-12 at pp. 22-23. Complainant added up the weight of each PCB Item at issue in each violation and determined that the total weight for all six violations was within the range of 1,200 to 6,000 kilograms. For non-disposal violations, the PCB Penalty Policy provides that a violation involving PCB Items weighing between 1,200 and 6,000 kilograms is a violation of "significant extent."

C. Circumstances of Violations

The statutory factor taking into account the "circumstances" of a violation requires consideration of the probability of a violation causing harm to human health or the environment. The probability of harm is based on the type of violation involved. The PCB Penalty Policy assesses this factor through a ranking system that assigns a violation to one of six levels; with level one as the highest probability of harm and level six the lowest. For each level, the Policy provides recommendations for assigning certain types of violations to specific levels.

For each level, the Policy provides categories of violations and examples of some specific violations that are covered by the categories. CX-13 at pp. 10-12. Each of the violations alleged in the Complaint are used as examples in the Policy and are therefore clearly assigned to a specific level.

The first count in the Complaint, failure to register PCB Transformers, is designated as a "Level 2, major use" violation. This designation is based on the requirement that in order to use or store a PCB Transformer, the owner must first submit a registration. CX-13 at p. 10. The second count, failure to repair leaking PCB Transformers, is designated as a "Level 3, minor disposal" violation. This designation is for leaks on any portion of the external surface that did not run off the surface. As previously mentioned, Complainant treated this as a non-disposal violation due to Respondents' remediation activities. CX-13 at p. 11. The third count, improper storage of PCB Articles, is designated as a "Level 2, major storage" violation. This designation is for PCB Articles that are stored in a location where PCBs could be exposed to precipitation or where spilled material would not be contained. CX-13 at p. 11. The fourth count, failure to inspect PCB Items in storage or to maintain inspection records, is designated as a "Level 2, major use" violation. This designation recognizes that if PCB Items are used or stored they must be periodically inspected to ensure that PCBs are properly contained and releases quickly addressed. CX-13 at p. 11. The fifth count, failure to mark PCB Articles, is designated as a "Level 2, major marking" violation. This designation is based on the need to clearly mark PCB Items to inform someone unfamiliar with the item of the presence of PCBs. CX-13 at p. 11. Finally, the sixth count, failure to develop or maintain an annual document log, is designated as a "Level 3, major recordkeeping" violation. This designation is based on the absence of a document log that is intended to incorporate all records that owners of PCB Items in storage

must maintain, including records of inspections. CX-13 at p. 11. In sum, through application of the Policy, there are four "Level 2" violations and two "Level 3" violations.

The factual basis for each violation, and its assignment to the levels identified above, will be established by, among other evidence, the testimony of Complainant's witnesses, through the 1999 and 2007 Inspection Reports and the PCB Remediation Report, and through correspondence with Respondents.

D. Gravity Based Matrix

The results of the application of the "extent" and "circumstances" factors are applied to the Gravity Based Penalty Matrix ("Matrix"). The Matrix assigns dollar values to various combinations of circumstances and extent categories. These dollar values are periodically updated for inflation. Because the alleged violations at issue occurred prior to January 12, 2009, Complainant relied on the Matrix issued on June 5, 2006 as part of the Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Inflation Adjustment Rule. A complete copy of the Penalty Policy Supplements is attached as CX-14.

As described above, Complainant determined, in accordance with the statutory penalty factors and consistent with the PCB Penalty Policy, that all six violations were non-disposal violations of "significant extent," and that the "circumstances" involved four Level 2 and two Level 3 violations. Complainant applied these inputs to the Gravity Based Matrix and obtained a gravity component of \$92,846 (four violations at \$16,764 per violation, and two violations at \$12,895 per violation).

E. Consideration of Continuing Violations

Under Section 16 of TSCA, 15 U.S.C. § 2615, each day that a violation continues constitutes a separate and distinct violation, and a civil penalty of up to \$32,500 can be applied to

each violation. In the present matter, as testimony, inspection reports, and correspondence will establish, Complainant first documented violations of the PCB Regulations on July 16, 1999. These same violations were again documented on August 21, 2007. Complainant asserts that the violations continued, uninterrupted, from July 16, 1999 until August 21, 2007. However, assessing a separate violation for each day during this period would result in an excessive penalty. Because, as described below, the Policy also provides for consideration of degree of culpability, Complainant has considered the the duration of Respondents' noncompliance in adjusting the gravity upward under this factor.

## **2. Adjustment to Gravity Based Component**

Complainant also took into account respondent-specific statutory penalty factors including ability to pay, effect on ability to continue in business, history of prior violations, degree of culpability, and other factors as justice may require. These penalty factors are incorporated into the PCB Penalty Policy as adjustments to the gravity based component.

### **A. Ability to Pay and Ability to Continue in Business**

The statutory factors of ability to pay and ability to continue in business are closely related and treated similarly. *In the Matter of New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). A respondent's ability to pay may be presumed until it is put at issue by the respondent. *Id.* at 541; PCB Penalty Policy, CX-13 at pp. 16-17. The EAB has held that "where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the prehearing process, the Region may properly argue and the presiding officer [Administrative Law Judge] may properly conclude that any objection to the penalty based upon ability to pay has been waived." *Id.* at 542. Prior and subsequent to the filing of the Complaint, Complainant informed

Respondents that ability to pay would be taken into account and offered Respondents a chance to submit financial information to establish such a claim. As of the date of this prehearing exchange, Complainant has not received any information from Respondents related to their ability to pay the penalty sought in the present matter.

Complainant conducted preliminary research to determine whether Respondents are capable of paying the proposed penalty. Mr. Rosenberg used publicly available information sources to determine that in 2010 the taxed assessed value of the Facility was \$1,681,710. Mr. Rosenberg also found a current real estate listing advertising the Facility for sale at a price of \$25 million. The value of the Facility falls in the range of \$1.6 to \$25 million. Mr. Rosenberg also identified other property owned by Respondents with a tax assessed value totaling \$2,054,680. Copies of the documentation reviewed by Mr. Rosenberg are attached as CX-15 and CX-17. This research does not consider any debts or liabilities that Respondents may have, or other valuable assets, and is therefore not sufficient for purposes of making an informed ability to pay determination. However, the evidence obtained by Mr. Rosenberg establishes that the value of some assets held by Respondents is more than sufficient to pay the proposed penalty.

B. Prior History of Violations

The PCB Penalty Policy provides that where a violator has demonstrated a history of similar prior violations, it may be appropriate to adjust the penalty upward. CX-13 at pp. 15-16. The Policy further defines "prior violations" as those violations that first must have resulted in a final order, consent order, or penalty payment, and second, must have occurred within five years of the present violation. Complainant is unaware of any prior enforcement action brought against Respondents for violations of the PCB Regulations. Therefore, an upward adjustment for a prior history of violations was not a component of the proposed penalty.

C. Degree of Culpability

The PCB Penalty Policy addresses culpability through two principal criteria, the violator's knowledge and the degree of control over the violation. CX-13 at p. 15. The knowledge criterion is based on whether the violator "knew or should have known of the relevant requirement or the possible dangers of his actions." The degree of control criterion includes situations in which persons responsible for the facility or location where violations are discovered immediately take all necessary steps to come into compliance. *Id.*

Respondents had knowledge of PCBs at the Facility as early as 1997 when samples collected by Respondents from electrical equipment tested positive for PCBs at concentrations up to 612 parts per million. CX-1, CX-4, and CX-12. On July 16, 1999, Mr. Hess conducted an inspection of the Facility and identified a number of violations of the PCB Regulations. CX-4. In a letter dated November 2, 2000, Complainant notified Respondents of each violation observed during the 1999, provided a description of each violation, and a citation to the regulation at issue. CX-5. Respondents had knowledge of the presence of PCBs and PCB Items as early as 1997, and knowledge of the alleged violations of PCB Regulations as early as 2000.

Respondents are the owners of the Facility and of the PCB Items involved in the violations, and therefore have control over both the equipment and property at issue. CX-12, CX-17. The PCB Items involved in the alleged violations have not been used since the early 1990s and Respondents should have been able to implement the necessary steps to achieve compliance without causing any disruption to business or other operations that may have relied on the equipment. CX-12.

In August 2007, at the request of the Alaska Department of Environmental Conservation ("ADEC"), Mr. Long conducted a second compliance inspection of Respondents' facility where

the PCB Items were located. CX-19, CX-1. Mr. Long's inspection identified the same violations that were identified during the 1999 inspection and described in letter dated November 2, 2000. Respondents eventually addressed the violations observed during the 1999 and 2007 inspections by conducting a remediation of PCBs at the facility in 2008. CX-12. This remediation involved collecting, draining, and disposing of PCBs and PCB Items, as well as conducting verification sampling to ensure that no PCBs remained at high concentrations in the areas around where the PCB Items were stored. Complainant asserts that the violations identified during the July 1999 inspection continued, uninterrupted, through the August 2007 inspection.

The Policy recognizes three levels of culpability. CX-13 at p. 15. Level I is assigned where the violation is willful, and in such case the gravity based penalty is adjusted upward by 25 percent. Level II is assigned where the violator had or should have had knowledge or control, and in such cases no penalty adjustment is made. Level III is assigned where the violator lacked sufficient knowledge of the potential hazard and also lacked control to prevent the occurrence of the violation, and results in a downward adjustment of 25 percent.

In the present matter, Respondents had knowledge of the presence of PCBs, knowledge of the regulatory requirements, and control of the PCBs and PCB Items at issue. Notwithstanding this knowledge and control, Respondents did not take any steps to come into compliance for a period of approximately eight years. Applying the Policy to the available facts, Complainant determined that Respondents continued violations were willful and fall within the Level I category for culpability. As a result, the gravity based penalty \$92,846 is adjusted upward by 25 percent, or \$23,211, for a proposed penalty of \$116,057.

D. Other Matters that Justice May Require

Complainant's Prehearing Exchange - 18

DOCKET NO. TSCA 10-2010-0253

U.S. Environmental Protection Agency  
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The TSCA statutory penalty factors include consideration of other matters as justice may require. The PCB Penalty Policy identifies economic benefit, cost of enforcement action to the government, voluntary disclosure, good faith efforts to comply, and performance of supplemental environmental projects as considerations under this statutory factor. In the present matter, Respondents did not voluntarily disclose the violations, act quickly correct the violations once identified, or propose a supplemental environmental project. Therefore, the only remaining consideration for matters that justice may require is the economic benefit Respondents realized by failing to comply with the PCB Regulations.

1. Economic Benefit from Violations

EPA Policy has long emphasized the importance of recapturing through civil penalties any economic benefit obtained by not complying with environmental requirements. EPA's 1984 "Policy on Civil Penalties" provides the rationale for this emphasis:

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.

"Policy on Civil Penalties, EPA General Enforcement Policy # GM-21" (Feb. 16, 1984) at 3.

The EAB has held that "the role that economic benefit plays in penalty assessment under the Policy is to establish the penalty floor – the penalty assessment must at least capture the economic benefit of noncompliance." *In re Newell Recycling Company, Inc., TSCA Appeal No.*

97-, 8 EAD 598, 636 (EAB, Sept. 13, 1999), *aff'd*, *Newell Recycling Company, Inc. v. U.S. Env't'l Prot. Agency*, 231 F.3d 204 (5<sup>th</sup> Cir. 2000).

Respondents likely realized some economic benefit from the alleged violations by not constructing and maintaining proper storage facilities, by not conducting inspections or maintaining documents, and by not repairing leaking equipment. However, the economic benefit realized by avoiding the aforementioned costs was negated by the \$290,000 in PCB remediation costs paid by Respondents in 2008. Through payment of the PCB remediation costs, Respondents did not realize any economic benefit and therefore Complainant has not proposed to increase the penalty to reflect this factor.

## 2. Fair and Equitable Penalty

The PCB Penalty Policy also provides that "a fair penalty for violating the non-disposal requirements can be based on the cost of proper disposal of PCBs or PCB Items." CX-13 at p. 3. The PCB Remediation Report states that the costs associated with removing, draining, rinsing, shipping, and disposing of the PCB Items were \$290,000. CX-12 at p. 29. Consequently, the cost paid to properly dispose of the PCBs and PCB Items, which the PCB Penalty Policy uses to gauge fairness, is more than double the penalty proposed by Complainant.

## 3. Proposed Penalty

As explained above, Complainant considered the TSCA statutory factors and PCB Penalty Policy in calculating the proposed penalty. The gravity based component, which takes into account the "nature," "extent," and "circumstances" of each violation, is \$92,846. No adjustments were made to the gravity component for history of violations, ability to pay, ability to continue in business, or for other matters as justice may require including economic benefit, voluntary disclosure, and cost to the government. An upward adjustment of 25% of the gravity component, or \$23,211, was applied based on the culpability factor. The total adjusted gravity

component is \$116,057. Complainant therefore proposes that a rounded penalty of \$116,100 be assessed against Respondents for the violations alleged in the Complaint.

#### **IV. PAPERWORK REDUCTION ACT**

The Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et seq.*, applies to this proceeding. Pursuant to the PRA, an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection has received a valid control number from the Office of Management and Budget. The information collection at issue in this proceeding was approved by OMB and had received a valid control number. The control number for information collection activities prior to February 28, 2008 was 2070-0112. The current control number for information collection activities is 2060-0112. These control numbers are displayed by publication in the Federal Register, on documents used to collect information, and are listed at 40 C.F.R. Part 9. The provisions of 40 C.F.R. § 3512 are not applicable in this matter because a valid control number assigned by OMB was displayed and Respondents had notice of this control number.

#### **V. RESERVATIONS**

Complainant reserves the right to call all witnesses named by Respondents. Complainant further reserves the right to submit names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to Respondents and to the Presiding Officer.

Dated this 25th day of February, 2011.

**Complainant's Prehearing Exchange - 21**

**DOCKET NO. TSCA 10-2010-0253**

**U.S. Environmental Protection Agency  
1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101  
(206) 553-1037**



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Alexander Eidis, Assistant Regional Counsel  
Office of Regional Counsel

Complainant's Prehearing Exchange - 22

DOCKET NO. TSCA 10-2010-0253

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Seattle, Washington 98101  
(206) 553-1037

**CERTIFICATE OF SERVICE**

*In re Matter of Chilkoot Lumber Company, Inc. and Mr. L. Edward Lapeyri*, No. TSCA-10-2010-0253, I hereby certify that a copy of the COMPLAINANT'S INITIAL PREHEARING EXCHANGE, with copies of all exhibits, was sent to the following persons in the manner specified on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue,  
Suite 900 (Mail Stop ORC-158)  
Seattle, Washington 98101

A true and correct copy, by certified mail, return receipt requested:

Fred W. Triem, Esq.  
Attorney at Law  
Box 129  
Petersburg, Alaska 99833-0129

Hon. Barbara A. Gunning  
Administrative Law Judge  
EPA Office of Administrative Law Judges  
1200 Pennsylvania Avenue, NW  
Mail Code 1900L  
Washington, DC 20460-2001

Dated: \_\_\_\_\_

*25 Feb 2011*

  
\_\_\_\_\_  
*ORC 158*  
U.S. EPA Region 10

