UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2018 MAY 23 PM 1:33

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
SUPERIOR RESTORATION	)	
& CONSTRUCTION LLC,	)	**Docket. No. TSCA-07-2016-0017**
	)	
Respondent.	)	
	)	

COMPLAINANT'S RESPONSE TO ORDER TO SHOW CAUSE AND SUPPLEMENT THE RECORD

On May 1, 2018, the Presiding Officer issued an Order to Show Cause and Supplement the Record directing Complainant to provide explanation regarding the effective date of the "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" ("LBP Consolidated ERPP"), a copy of which was enclosed with the Complaint and attached as Exhibit M to the Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order ("Memorandum of Points and Authorities"). Complainant files this response to the Presiding Officer's order pursuant to Section 22.5(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.5(a), providing the requested explanation and certification of the U.S. Environmental Protection Agency's penalty calculation in this matter.

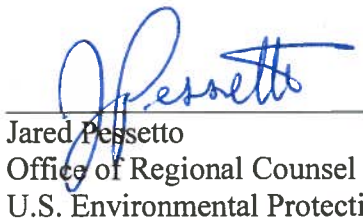
Initially, Complainant wishes to clarify that the LBP Consolidated ERPP, issued by the EPA in August 2010,[1] was revised only in part in April 2013. These revisions pertained

[1] Rosemarie A. Kelley, the director of the Waste and Chemical Enforcement Division of the Office of Enforcement and Compliance Assurance, drafted a transmittal memorandum that accompanied the issuance of the LBP Consolidated ERPP on August 19, 2010. This memorandum, a copy of which is attached as proposed Exhibit N, states that the "[LBP Consolidated ERPP] is immediately effective and applicable, and it supersedes any enforcement response or penalty guidance previously drafted or issued . . . ."

specifically to Appendix A, relating to the "Circumstance Level" assigned to provisions of the Renovation, Repair, and Painting Rule.[2] The revisions to Appendix A included the correction of regulatory citations, adjustment of Circumstance Level assignments, and subdivision of certain regulatory provisions (e.g., 40 C.F.R. § 745.89(d) made individually assessable as (d)(1) or (d)(2)). Aside from these discrete revisions to Appendix A, the structure and substance of the LBP Consolidated ERPP was unrevised at this time, remaining as issued in August 2010.

Complainant's proposed civil penalty was calculated utilizing the LBP Consolidated ERPP, as revised in April 2013. As detailed in the Memorandum of Points and Authorities, the specific Circumstance Level assigned to each of the nine alleged violations was derived from updated Appendix A of the LBP Consolidated ERPP.[3] The remaining components of Complainant's penalty calculation relied on the relevant portions of the LBP Consolidated ERPP, as issued in August 2010.[4] In support of the penalty proposal requested in its Motion for Default Order, Complainant hereby submits as proposed Exhibit O to the Memorandum of Points and Authorities the Declaration of Case Review Officer Candace Bednar, certifying her responsibility for Complainant's penalty calculation and its compliance with applicable statutory penalty factors and civil penalty guidelines contained in the LBP Consolidated ERPP.

RESPECTFULLY SUBMITTED,
this 23rd day of May, 2018,



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

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[2] *See generally* Memorandum of Points and Authorities, p. 24 (Mar. 28, 2018).

[3] *Cf.* Memorandum of Points and Authorities, pp. 25-26 (Mar. 28, 2018) (providing table with Circumstance Level assignments for alleged violations) *with* Exh. M, pp. A-1 (assigning Circumstance Levels for 40 C.F.R. §§ 745.84(a)(1), .85(a)(1)); A-3 (40 C.F.R. §§ 745.81(a)(2)(ii), .89(d)(2)); A-5 (40 C.F.R. §§ 745.85(a)(2)(i)(A), .85(a)(2)(i)(C), .85(a)(2)(i)(D), .85(a)(4)(i)); and A-6 (40 C.F.R. § 745.85(a)(4)(ii)).

[4] *See* Memorandum of Points and Authorities, pp. 23-27 (Mar. 28, 2018).

Exh. N

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 19 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of the Interim Final Lead-Based Paint Consolidated Enforcement Response and Penalty Policy

FROM: Rosemarie A. Kelley, Director
Waste and Chemical Enforcement Division

TO: Addressee List

This memorandum transmits the Interim Final Lead-Based Paint Consolidated Enforcement Response and Penalty Policy (LBP Consolidated ERPP) for civil administrative enforcement actions taken pursuant to Section 16 of the Toxic Substances Control Act (TSCA). This Policy sets forth guidance for Agency officials to use in determining the appropriate enforcement response and penalty amounts for violations of Section 409 of TSCA resulting from failure or refusal to comply with provisions of the Pre-Renovation Education Rule (PRE Rule); Renovation, Repair and Painting Rule (RRP Rule); and Lead-Based Paint Activates, Certification and Training Rule (LBP Activities Rule).

This Policy is immediately effective and applicable, and it supersedes any enforcement response or penalty guidance previously drafted or issued for the PRE Rule or LBP Activities Rule. This Policy should be used to calculate penalties sought in all TSCA civil administrative enforcement actions or accepted in settlement of civil administrative enforcement actions brought under TSCA § 16 after the date of the Policy, regardless of the date of the violation. To the maximum extent practicable, this Policy shall also apply to the settlement of civil administrative enforcement actions instituted but not yet resolved prior to the date of this Policy.

Initial Enforcement of the RRP Rule

EPA recently issued two memoranda and two sets of questions and answers providing policy and guidance on the implementation and enforcement of the Renovation, Repair and Painting Rule (RRP Rule) which was effective on April 22, 2010. Taken together, these documents provide new timeframes and conditions for firms to submit their applications and fees to obtain certification and for individual renovators to apply for and obtain training and certification. Therefore, as stated in the April 20 and June 18, 2010 supplemental guidance memos from Cynthia Giles regarding firm certification and individual renovator training and certification requirements, EPA will not take formal enforcement action where the following conditions and timeframes are met:

- Any firm that submitted an application and fee to EPA before April 22, 2010 and, without time limit, is waiting for a final response from EPA.

- Any firm that submits an application and fee to EPA and is certified by September 30, 2010.

- Any individual renovator who applies to enroll in or is enrolled in an accredited training program not later than September 30, 2010, takes the training, and receives their certification by December 31, 2010.

EPA will continue to enforce the work practice standards (40 C.F.R. § 745.85), associated recordkeeping requirements (40 C.F.R. § 745.86) and information distribution requirements (40 C.F.R. § 745.84). However, the work practice standards and associated recordkeeping requirements contain several provisions, including a certification requirement that must be performed by a certified individual renovator. In order to allow renovation firms and individual renovators to comply with these requirements, EPA will respond to any violation of a requirement to use a certified renovator or have a certified renovator certify that certain actions were carried out, by issuing a Notice of Noncompliance if the renovation firm is in substantial compliance because it is using an individual to perform the duties of a certified renovator, who has applied to enroll in or is enrolled in an accredited renovation training course by September 30, 2010.

Continuing Renovations Beyond the Effective Date of the Opt-out Amendment

On July 6, 2010, the Opt-out Amendment to the RRP Rule went into effect applying work practice standards, recordkeeping and reporting, and certification requirements to additional target housing units. Where it is infeasible for a renovation firm conducting renovation projects under an opt-out waiver signed before July 6, 2010, to complete all activities that disturb painted surfaces by July 6, 2010, renovation, repair, and painting projects may briefly continue under the benefit of that opt-out waiver. Ongoing projects that are not in full compliance with the work practice standards must be completed as expeditiously as possible and new projects may not be started. All training and certification requirements and implementation policies, including the new compliance timeframes for firms and individuals as addressed above, apply to all projects captured under the Opt-out Amendment.

Acknowledgements

I want to thank the workgroup and everyone who provided comments throughout the development of this document. Regional comments were considered carefully by the Waste and Chemical Enforcement Division (WCED) and incorporated into this interim final policy in all instances where WCED found the recommended change consistent with the Agency's enforcement objectives and policies or the comments clarified the document. This Policy represents a significant step forward in how EPA will structure these documents and how EPA will consider various factors in determining the violator's culpability, ability to pay, and the economic benefit of noncompliance in the assessment of TSCA civil administrative penalties. In

particular, the analysis of economic benefit is a very important part of this policy because inclusion of the economic benefit component in the penalties EPA assesses will help to ensure that our enforcement actions serve as a true deterrent to violations. The Agency's 1984 Policy on Civil Penalties mandates the capture of any significant economic benefit that accrues to a violator from noncompliance with the law.

WCED realizes that this consolidated policy covers violations of TSCA resulting from failures or refusals to comply with three significant rules of the lead-based paint program. WCED will provide assistance through consultation and additional guidance as we implement the rules and this policy.

If you have questions about this memorandum or the LBP Consolidated ERPP, please contact Michael Bellot, Branch Chief, at (202) 564-3083 or Mike's staff members, Tony Baney at (202) 564-4169 and Dean Ziegel, Attorney-Advisor, at (202) 564-4038.

Attachment

Addressees:

OCSPP and Enforcement Division Directors, Regions 1 – 10
Cynthia Giles OECA
Steve Owens, OCSPP
Lisa Lund, OC
Adam Kushner, OCE
Wendy Cleland-Hamnett, OPPT
Leslye Fraser, OGC

cc: Regional Enforcement Coordinators for the LBP Program
National Lead Enforcement Group teleconference members
ERPP Workgroup Members

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BEFORE THE ADMINISTRATOR

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SUPERIOR RESTORATION	)	
& CONSTRUCTION LLC,	)	**Docket. No. TSCA-07-2016-0017**
	)	
Respondent.	)	
	)	

DECLARATION OF CASE REVIEW OFFICER CANDACE BEDNAR

I, Candace Bednar, am the Case Review Officer assigned to this matter by Complainant, the Chief of the Toxics and Pesticides Branch of the U.S. Environmental Protection Agency, Region 7. By this declaration, I certify that I was primarily responsible for the preparation of the penalty calculation supporting the penalty proposal sought in Complainant's Motion for Default Order. Furthermore, I certify that I developed the penalty calculation utilizing the "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" ("LBP Consolidated ERPP"), issued in August 2010 and revised in April 2013.

To the best of my knowledge and belief, the calculation supporting Complainant's civil penalty proposal is compliant with the applicable civil penalty guidelines provided in the LBP Consolidated ERPP.[1] By extension, to the best of my knowledge and belief, the penalty

[1] *See* Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order, pp. 20-27 (Mar. 28, 2018) (providing step-by-step explanation of the methodology and justification supporting Complainant's penalty calculation).

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calculation is compliant with applicable statutory civil penalty criteria codified at Section 16(a)(2)(B) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2)(B).[2]

I declare under penalty of perjury that the foregoing is true and correct.

Date: 5/23/18

Candace Bednar
Case Review Officer
Toxics & Pesticides Branch
Water, Wetlands & Pesticides Division
U.S. EPA, Region 7

[2] The LBP Consolidated ERPP was developed pursuant to the EPA's "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," which "provides standard definitions and a calculation methodology for application of the statutory penalty factors that TSCA requires the Administrator to consider in assessing a civil penalty." *See* Exh. M, p. 8 (citing "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," 45 Fed. Reg. 59771 (Sept. 10, 1980)). These guidelines, a copy of which is attached to this declaration, state that "[s]eparate guidances will apply the penalty system to specific regulatory and statutory provisions . . . ." Accordingly, the LBP Consolidated ERPP states that, "[i]n developing a proposed penalty, EPA will take into account the particular facts and circumstances of each case, with specific reference to the TSCA statutory penalty factors." *Id.*

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ENVIRONMENTAL PROTECTION AGENCY

[FRL 1601-6]

Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

AGENCY: Office of Enforcement, Environmental Protection Agency (EPA or the Agency).

ACTION: Notice of a policy for implementation of the Toxic Substances Control Act, with respect to the assessment of civil penalties under Section 16; interim guidance for the determination of penalties for violations of the PCB regulations.

SUMMARY: Section 16 of the Toxic Substances Control Act (TSCA or the Act) authorizes the Administrator of EPA to assess civil penalties for violations of the Act. On March 10, 1980, Jeffrey G. Miller, Acting Assistant Administrator for Enforcement, transmitted to the EPA Regional Administrators a document which implements an administrative civil penalty policy for TSCA. This document sets forth a general penalty assessment policy which will be supplemented by regulation-specific penalty assessment guidance. Together, these documents provide internal procedural guidelines to aid EPA personnel to assess appropriate penalties. They are not regulations. The penalty assessment policy establishes standardized definitions and applications of the statutory factors that the Act requires the Administrator to consider in assessing a penalty. It also provides a mechanism whereby Agency personnel may, within specified boundaries, exercise discretion in negotiating consent agreements, and otherwise adapt the proposed penalty to the exigencies of special circumstances.

Separate guidances will apply the penalty system to specific regulatory and statutory provisions. These guidances will be developed on a continuing as-needed basis.

On April 24, 1980, Richard D. Wilson, deputy Assistant Administrator for General Enforcement, transmitted to the EPA Regional Administrators the first of the regulation specific penalty policies. This document consisted of interim guidance for the determination of penalties for violations of the PCB regulations.

The TSCA civil penalty policy and the PCB penalty policy were effective on March 10, 1980 and April 24, 1980, respectively, the dates these policies were issued to the Regional Offices. Although the Agency is not required to publish these documents, EPA is doing so in order to give them the wide circulation that publication will provide.

The full text of the TSCA civil penalty policy, and the PCB penalty policy, with the appropriate transmittal memoranda, appear below in the "Supplementary Information" section.

FOR FURTHER INFORMATION CONTACT: Peter J. Niemiec, Attorney-Advisor, Pesticides and Toxic Substances Enforcement Division (EN-342), 401 M St., SW., Washington, D.C. 20460, (202) 755-9404.

SUPPLEMENTARY INFORMATION: The doucments appearing below were transmitted to the EPA Regional Administrators on March 10, 1980, and April 24, 1980, respectively. The "Technical Support Document" referred to in the TSCA civil penalty document has not been reproduced, but is available upon request from the EPA address above.

Dated: July 7, 1980.

Jeffrey G. Miller,

Acting Assistant Administrator for Enforcement.

TSCA Civil Penalty System

Introduction

The Toxic Substances Control Act (TSCA), passed by Congress and signed into law in 1976, provides for increased regulation of chemical substances and mixtures. The Environmental Protection Agency is charged with carrying out and enforcing the requirements of the Act and any rules promulgated under the Act.

Section 16 of the Act provides for civil and criminal penalities for violations of TSCA or TSCA rules. Civil penalty amounts may range up to $25,000 per violation, with each day that a violation continues constituting a separate violation. Civil penalties are to be administratively imposed, after the person is given a written notice and the opportunity to request a hearing. There is a right to review in the United States Courts of Appeals after the penalty has been imposed by the Administrator.

Section 16 of TSCA requires that a number of factors be considered in assessing a civil penalty, as follows:

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

The purpose of the general penalty system is to assure that TSCA civil penalties be assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations.

Scope of the Civil Penalty System

The penalty system described in this document provides the general framework for civil penalty assessment under TSCA. It establishes standardized definitions and applications of factors the Act requires the Administrator to consider in assessing a penalty. As regulations are developed, specific penalty guidelines will be developed adopting in detail the application of the general penalty system to the new regulation. These specific guidelines will generally be issued when enforcement strategies are issued for each new regulation.

> Note.—This document does not discuss whether assessment of a civil penalty is the correct enforcement response to a given violative condition. Rather, this document focuses on determining what the proper civil penalty should be if a decision has been made that a civil penalty is the proper enforcement remedy to pursue.

Brief Description of the System

The general civil penalty system is designed to assign penalties for TSCA violations in accordance with the statutory requirements of Section 16. Penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

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

- The "nature" of the violation,
- The "extent" of environmental harm that could result from a given violation, and
- The "circumstances" of the violation.

These factors are incorporated on a matrix which allows determination of the appropriate gravity based penalty.

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors:

- Culpability,
- History of such violations,
- Ability to pay,
- Ability to continue in business, and
- Such other matters as justice may require.

Civil Penalty System and Its Application

This section describes in detail the

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general civil penalty system, how specific penalty guidances will be developed and applied, and the reasoning behind the development of the system.

The Penalty Factors

The Act requires the consideration of eight named factors in any penalty assessment, as well as "other factors as justice may require."

The first four factors—nature, circumstances, extent, and gravity—relate to the violation. Under the penalty system these four factors are charted on a matrix which yields the Gravity Based Penalty (GBP). This matrix is a *constant* throughout the penalty system. As will be seen below, however, the specific penalty guidelines will affect into which category along each axis of the matrix the violation will fall.

Once a GBP figure is reached, several adjustment factors are applied:

- An upward or downward adjustment may be made for particularly culpable or non-culpable conduct. An upward adjustment of up to 100% may be made where there is a history of such a violation.
- Two other adjustments (not specifically required by the Act, but authorized under the "as justice may require" language of § 16) are to recover cleanup costs paid by the United States, and to reduce or eliminate any financial or competitive advantage gained by the violator as a result of his failure to follow the Act, or its regulations. Other case-by-case adjustments may also be warranted under the "as justice may require" language.
- The final statutory adjustment factors are the violator's ability to pay and the effect on the violator's ability to continue to do business. For several reasons we have combined the concepts involved in these factors onto one "ability to pay" factor. This factor will often act as a limit on the amount of penalty assessed, even where other factors indicate a higher penalty is warranted.

Calculation of the Gravity Based Penalty

The gravity based penalty (GBP) is found on the following matrix:

Circumstances (probability of damages)	Extent of potential damage		
	A major	B significant	C minor
High range:			
1	$25,000	$17,000	$5,000
2	20,000	13,000	3,000
Mid range:			
3	15,000	10,000	1,500
4	10,000	6,000	1,000
Low range:			
5	5,000	3,000	500
6	2,000	1,200	200

NOTE.—Significant violations are assessed at 60-68% of major violations, while minor violations are assessed at 20% and 15% of major violations for levels 1 and 2, and 10% for levels 3-6.

The GBP incorporates nature, extent, circumstances, and gravity as follows:

1. *Nature.* The "nature" factor, as all factors in the penalty system, is used in accordance with its commonly understood meaning: "The essential character of a thing; quality or qualities that make something what it is; essence" (Webster's New World Dictionary).

In the context of penalty assessment, this factor indicates which specific penalty guideline should be used to determine appropriate matrix levels of "extent" and "circumstances" (of environmental harm surrounding the violation). Thus, the nature (essential character) of a violation is best defined by the set of requirements violated, such as the PCB rule, or the premanufacture notification requirement. Since each TXCA section, rule, or other appropriate group of requirements will have a separate specific penalty guideline that will include criteria for assigning violations to the several levels of "extent" of potential harm, and probability of harm, the specific tailoring of these operational criteria for each section or rule ensures that penalties assessed will reflect the nature of the violation.

Also incorporated in the concept of "nature" is whether the violation is of a *chemical control, control-associated data gathering,* or *hazard assessment* nature:

Chemical control: Chemical control regulations are aimed at minimizing the risk presented by a chemical substance, by placing constraints on how it is handled. Sections 6, 7, 12, 13 and subsections 5(e), and 5(f) authorize a wide variety of chemical control actions, from labeling requirements to total bans on manufacture. These requirements are variously imposed by rulemaking, administrative order, court injunction, or by the Act itself.

Control-associated data gathering: Control-associated data gathering requirements are the recordkeeping and/or reporting requirements associated with a chemical control regulation. These requirements enable the Agency to evaluate the effectiveness of the regulation, and to monitor compliance.

Hazard assessment: Hazard assessment requirements are used to develop and gather the information necessary to intelligently weigh and assess the risks and benefits presented by particular chemical substances, and to impose chemical control requirements when appropriate. The requirments include those of premanufacture notification under § 5, testing under § 4, and reporting and recordkeeping under § 8.

As discussed in the next two sections, the "nature" of the violation will have a direct effect on the measure used to determine which "extent" and "circumstances" categories are selected on the GBP matrix.

2. *Extent.* "Extent" is used to take into consideration the degree, range, or scope of the violation. The matrix provides three levels for measuring extent:

Level A (Major):
—Potential for "serious" damage to human health or for *major* damage to the environment.

Level B (Significant):
—Potential for "*significant*" amount of damage to human health or the environment.

Level C (Minor):
—Potential for a lesser amount of damage to human health or the environment.

A number of factors affect into which level of "extent" a particular violation fits. The specific application of these factors depends in large degree on the specific penalty system's treatment of a particular violation. For example, the specific penalty system will not only provide guidance for PCBs in general, but also for the type of PCB violation.

Chemical control: For a chemical control violation (e.g., rules for storage

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and disposal of PCBs), the *quantity* of the regulated substance involved might be the principal basis for categorizing extent. In other words, a violation involving under 10 pounds of a given substance might be Level C, 10 to 100 pounds Level B, and over 100 pounds Level A.[1] In the development of specific guidelines, environmental impact data and other analyses developed in support of the chemical control rule making will generally be the basis for determining "extent" levels.

Control-associated data-gathering: For control-associated data gathering regulations, the quantity of regulated substance involved in the recordkeeping will be used as the indicator of the extent of the violation. For example, not reporting the whereabouts of 1,000 pounds of PCBs is more serious than not reporting one pound. In general, the quantity measures used to define the "extent" of such a violation will be the same as those used to define the "extent" categories of the control violation with which it is associated. As with chemical control rules, factors other than quantity may be used when appropriate to indicate the "extent" of potential damage.

Hazard assessment: Hazard assessment data-gathering regulations require a different approach to make an "extent" determination. Unlike chemical control and control-associated data-gathering regulations, the degree of danger or "hazard" presented by the substance in question may not be known. Indeed, this lack of knowledge is the principle reason for the data-gathering. The measure of "extent" of harm will focus on the goals of the given hazard assessment regulation, and the types of harm it is designed to prevent. For example, a § 4 test violation will be of Level A extent *if* it "seriously" affects the validity of a test on a substance which is manufactured in large quantities, with lesser violations treated accordingly, whereas manufacturing a chemical without submitting a premanufacture notification form 90 days in advance, could either be treated as (1) always being of Level A or, (2) varying in level of "extent" according to the volume illegally manufactured. Thus, a great number of judgments must be made in the formulation of the specific penalty policy.

3. *Circumstances.* "Circumstances" is used in the penalty policy to reflect on the probability of the assigned level of "extent" of harm actually occurring. In other words, a variety of facts surrounding the violations as it occurred are examined to determine whether the circumstances of the violation are such that there is a *high, medium,* or *low* probability that damage will occur. The matrix provides the following levels for measuring circumstances (probability factors):

Levels 1 and 2 (High): The violation is *likely* to cause damage.

Levels 3 and 4 (Medium): There is a *significant* chance that damage will result from the violation.

Levels 5 and 6 (Low): There is a *small likelihood* that damage will result from the violation.

The probability of harm, as assessed in evaluating circumstances, will always be based on the risk inherent in the violation *as it was committed.* In other words, a violation which presented a high probability of causing harm when it was committed (and/or was allowed to exist) must be classified as a "high probability" violation and *penalized* as such, even if through some fortuity no actual harm resulted in that particular case. Otherwise some who commit dangerous violations would be absolved. Similarly, when harm has actually resulted from a violation, the "circumstances" of the violation should be investigated to calculate what the probabilities were for harm occurring at the time of the violation. The theory is that violators should be penalized for the violative conduct, and the "good" or "bad" luck of whether or not the proscribed conduct *actually* caused harm should *not* be an overriding factor in penalty assessment. However, the responsibility for clean-up attaches without regard to the probability of harm (see Adjustment Factor 3, Government Clean-up Costs). As with "extent," the specific penalty guidelines are an essential tool in characterizing the circumstances of a violation.

Chemical control: With chemical control violations, probability is determined primarily by physical factors which affect the chance of improper exposure to the chemical's effects. For example, certain types of improper storage of PCBs are more likely than others to result in release of PCBs into the environment, and actual dumping of PCBs is virtually certain to do some harm. Criteria for assessing the probability of harm resulting from a violation will whenever possible be based on information developed in support of the chemical control rule.

Data-gathering and hazard assessment: A slightly different approach is taken to evaluate circumstances of data-gathering violations. The effect on the Agency's ability to implement of enforce the Act is the principal circumstance to be considered. Thus, the matrix levels for measuring circumstances (probability) for data-gathering and hazard assessment violations are as follows:

Levels 1 and 2 (High)—Violations which seriously impair the Agency's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment).

Levels 3 and 4 (Medium)—Violations which impair the Agency's ability to monitor or evaluate chemicals in a less than critical way.

Levels 5 and 6 (Low)—Violations that impair the Agency's ability to monitor or evaluate chemicals in a less than important way.

Under these criteria, a violation of a Section 4 test standard (serious enough to make a study totally unreliable) has a higher probability of resulting in harm to the public through its effect on the Agency and would probably be Level 1 or 2, while late submission of a required report might be only a Level 5 or 6 violation.

Whenever possible, the specific penalty system will attempt to classify certain types of violations according to probability of damage. For example, certain types of violations of a disposal rule might always involve a high probability of damage. But other types of violations might involve such a large range of probability of harm that each case would have to be evaluated individually. In the latter case, the specific penalty guideline will include criteria to guide the evaluation of each violation. It is difficult to estimate the probability of harm presented by given situation, particularly in light of the many variables that make up "circumstances." However, "circumstances" can be evaluated for guideline purposes by comparing situations. For example, it is clear that, as a general rule, there is a greater probability of a falsified laboratory test leading to *actual damage,* than to have such damage resulting from minor errors in test report formatting.

The specific guidelines will also address the range of probabilities within each of the six "circumstances" classifications. For some violations, any probability of causing harm of over 10% might be in the "high" range, while other violations might be classified quite differently. One particular factor that may affect probability determinations is the length of time during which the violation presents a threat to health or the environment. Dumping PCBs in an unapproved landfill may not cause harm immediately but may inevitably cause harm as it leaches into nearby

[1] Other criteria, such as number of people exposed or potentially exposed, could have been utilized here, but (1) those factors are difficult and expensive to quantify for individual violations, and (2) these factors are already considered, to some extent, under "circumstances."

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groundwater. But where only temporary improper *storage* is intended, and removal is planned, the probability of harm would be decreased accordingly.

4. *Gravity.* "Gravity" refers to the overall seriousness of the violation. As used in this penalty system, "gravity" is a dependent variable, i.e., the evaluation of "nature," "extent," and "circumstances" will yield a dollar figure on the matrix that determines the gravity based penalty.

The Adjustment Factors

The gravity based penalty reflects the seriousness of the violation's threat to health and environment. The Act also requires the Agency to consider certain factors in assessing the violator's conduct: Culpability, history of such violations, ability to pay, and ability to continue in business. In addition, the Act authorizes the Agency some discretion to consider "other factors as justice may require." Under this last authorization, two additional factors are considered and balanced: the cost of the violation to the government, and the benefits received by the violator due to his non-compliance. In order to compute penalty adjustments in a logical fashion, these adjustment factors are considered in the following sequence:

(1) Culpability;
(2) History;
(3) Cost to the government;
(4) Benefits from non-compliance; and
(5) Ability to pay/ability to continue in business.

1. *Culpability.* Since the law only requires the Agency to consider the culpability of the violator as an adjustment factor, the existence of a violation can be established without relying solely on this "blameworthiness" factor. In other words, the Agency may pursue a policy of strict liability in penalizing for a violation, though some allowance must be made based on the extent of the violator's culpability.[2] Under this penalty system, the gravity based penalty may be increased or decreased, or may remain the same depending on the violator's "culpability."

The two principal 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.

(a) *The violator's knowledge:* The lack of knowledge of a particular requirement would not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of TSCA and its requirements. The test under TSCA will be whether the violator knew or should have known of the relevant TSCA requirement *or* of the general hazardousness of his actions. This latter point will allow the Agency to find a violator fully culpable even if he has no knowledge of a particular regulatory requirement when he does have knowledge that the particular substance he was dealing with was hazardous. For example, lack of knowledge of the PCB rules would not reduce culpability if the violator had knowledge that the dumping of PCBs creates a serious threat to human health. Thus, a reduction in the penalty based on lack of knowledge could only occur where a reasonably prudent and responsible person in the violator's position would not have known that the conduct was hazardous or violative of TSCA. It is anticipated that such situations and attendant reductions will be rare.

(b) *Degree of control over the violation:* There may be situations where the violator may be less than fully responsible for the violation's occurrence. For example, another company may have had some role in creating the violative conditions and thus must also share in the legal responsibility for the resulting consequences. Or an employee whose conduct caused the violation may have been disobeying his employer's instructions. Such situations would probably warrant some reduction in the penalties.

(c) *Initial culpability determination:* For penalty assessment purposes, three levels of culpability have been assigned, as follows:

Level I: The violation is willful, i.e., the violator intentionally committed an act which he knew would be a violation or would be hazardous to human health or the environment.
—Adjust the GBP *Upward 25%.*
Level II: The violator either had sufficient knowledge to recognize the hazard created by his conduct, or significant control over the situation to avoid committing the violation.
—No adjustment to the GBP.
Level III: The violator lacked sufficient knowledge of the potential hazard created by his conduct, and also lacked control over the situation to prevent occurrence of the violation.
Adjust the GBP *downward* 25%.

It is anticipated that most cases will present Level II culpability. Level I situations, in many instances, could be treated as criminal violations (and often will be so treated). However, the decision to file a criminal action has no effect on civil penalty calculations and is a totally separate issue.

(d) *Attitude of the violator:* In assessing the violator's "attitude," the Agency will look at the following factors: Whether the violator is making "good faith" efforts to comply with the appropriate 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.

Since "attitude" is already reflected in Level I culpability, and since it is largely irrelevant to Level III culpability, this adjustment will really only be utilized where "knowledge" and "control" result in a Level II culpability finding. While Level II normally yields no reduction or increase in penalty, the attitude of the violator may justify a penalty adjustment of up to 15% of the GBP in either direction. Objective evidence, such as statements or actions of the violator, should be used to justify such adjustments.

2. *History of prior such violations.* The gravity based penalty matrix is designed to apply to "first offenders." Where a violator has demonstrated a similar history of "such violations," the Act requires the penalty to be adjusted upward. The need for such an upward adjustment derives from the violator's not being sufficiently motivated to comply (deterred from non-complying) by the penalty assessed for the previous violation, either because of economic factors consciously analyzed by the firm, or because of negligence. Another reason for penalizing repeat violators more severely than "first offenders" is the increased enforcement resources that are spent on the same violator.

The Agency's policy is to interpret "prior *such* violations" as referring only to prior violations of *TSCA,* even though it would seem "such" could refer to *any* violations of EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). However, since Congress did not *explicitly* state it wanted the Agency to go beyond TSCA in determining violation history, the Agency is using this narrower interpretation. The penalty system distinguishes between previous TSCA violations in general, and previous violations of the same set of regulatory requirements.

The following rules apply in evaluating history of prior such violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in a *final order,* either as a result of an uncontested complaint, or as a result of a contested complaint which

[2] There are certain circumstances where an "act of God" or some other circumstance totally out of a company's control may not result in assessment of a violation (no legal liability). For example where PCBs are *properly* stored, and a plane crashes into the storage facility, causing a spill, there will probably be no violation.

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is finally resolved against the violator. Violations litigated in the Federal courts, under the Act's imminent hazard (§ 7), specific enforcement and seizure (§ 17), and criminal (§ 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of non-compliance does *not constitute* a *"prior* such *violation"*, since no violation has formally been found, and no opportunity to contest the notice has been given.

(b) To be considered a "prior such violation", the violation must have occurred within five years of the present violation. This five year period begins when the prior violation becomes a final order. Beyond five years, the prior violative conduct becomes too distant to require compounding of the penalty for the present violation.

(c) Generally, companies with multiple establishments are considered as one when determining history. Thus, if one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation However, two companies held by the same parent corporation do not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors. In the case of wholly- or partly-owned subsidiaries, the violation history of a parent corporation shall apply to its subsidiaries, and that of the subsidiaries to the parent.

(d) If the prior such violation is of a different TSCA provision or regulation, the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the prior "such" violation is of the same, or closely similar provision or regulation, the penalty should be upwardly adjusted 50 percent for the first repetition and 100 percent for the second repetition.

For these purposes, a prior such violation is the "same or closely related" if it is *similar* to the present violation. Each TSCA rule or regulation is considered a separate entity for "closely related" purposes. Thus the identical provision does *not* have to be violated both times for this higher adjustment to be made. For example, *two separate* unlawful disposals of PCBs may be "closely similar" if the PCBs were unlawfully dumped on the highways in the first instance, and in the second instance, PCBs of over 500 ppm were burned in a facility that did not comply with the PCB incinerator standards.

The specific guidelines will give some guidance on what violations are "closely similar" to others, and may set up a sliding scale of upward adjustment percentages rather than the 50 percent or 100 percent figures provided here.

3. *Government clean-up costs.* An adjustment factor not specified in the statute, but which the Agency feels "justice * * * require[s]," is reimbursement to the government for funds expended to investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. The government may seek a Federal district court injunction under §§ 7 or 17 to require the violator to clean-up, but there will almost certainly be situations where the government will have to clean-up the violation to quickly alleviate any hazards created. Where these latter situations happen, the government could probably file a non-statutory suit in Federal district court to recover funds which it expended, but it could even more easily assess these costs, when they are sufficiently low, in an administrative proceeding under § 16, particularly where a § 16, particularly where a § 16 action is going to be filed anyway.

The major limitation to seeking reimbursement of government investigatory and clean-up costs is the limit of $25,000 for each violation. However, since each day a violation continues constitutes a separate violation for which a $25,000 penalty may be assessed, in many instances clean-up and investigatory costs can be recovered where the violation is a continuing one. However, where a penalty would be in the area of $25,000 for the violation even before government investigatory and clean-up costs are considered, a § 16 action would be of little value in recovering these additional costs.

In adjusting the penalty, the government investigatory and clean-up cost should be added to the penalty calculated thus far. Where the total penalty under this method exceeds $25,000, the penalty should be cut back to $25,000. As will be discussed later, this type of situation lends itself to utilization of the continuing violation provisions of § 16.

It is important to note that consideration of government investigatory and clean-up costs in the penalty assessment is *not* intended to in any way affect the *right* of the government to *recover investigatory and clean-up costs* in a separate court action. A violator may argue that investigatory and clean-up costs have been abrogated by settlement of the penalty. Thus, if there is a reasonable possibility that the Agency will seek to recover such costs in a separate suit, this factor should *not* be utilized in assessing the § 16 penalty. Thus the investigatory and clean-up costs will *not* be included twice in calculating a penalty for a violation.

4. *Gains from noncompliance.* Another adjustment factor which "justice * * * require[s]" is that the violator not profit from its violative acts. TSCA's ability to prevent harm to public health and the environment is severely weakened whenever an economic incentive exists to violate the law. The penalty system attempts to eliminate, or at least reduce, these economic incentives, by adding to the base penalty an estimate of the economic gains obtained by the violator as a result of his noncompliance.

Among such economic gains would be money saved by not investing in new equipment, or by not following more costly operating procedures, or profits gained through the sale of illegal products. Removing such gains not only protects the public by deterring violations, but also prevents violators from gaining unfair competitive advantage over those who are complying with the law. For example, a company which manufactures a new chemical without submitting a premanufacture notice, pursuant to § 5, may gain a strong competitive advantage over another company who intends to manufacture the same chemical, but follows the § 5 procedure. The violator should be penalized at least to the extent of the economic gains achieved through his noncompliance. Any other result would put a premium on noncompliance.

The specific penalty guidelines should, where possible, indicate the types of economic gains from noncompliance, and include either standard estimates of such gains (e.g., the purchase price of required new equipment or facilities), or a procedure for estimating the gain. In cases where economic gains resulted from the company's failure to make required capital and operation and maintenance expenditures, those gains must be calculated in accordance with the Agency's September 27, 1978, "Technical Support Document" for computing civil penalties under the April 11, 1978, Civil

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Penalty Policy. The resulting economic savings figure must be reviewed by the Civil Penalty Policy Panel for consistency with that policy. In many instances, the GBP will be sufficiently high without adjustment for this factor. In other situations where there is no economic motive or benefit from noncompliance, or when the cost of cleaning up a violation outweighs any economic benefits received, this adjustment factor need not be applied.

5. *Ability to pay and ability to continue in business.* (a) *Usage of these terms.* The Act lists "ability to pay" and "ability to continue in business" as two adjustment factors, but for the purposes of the penalty system the distinctions between the two are so narrow and artificial that they are treated as one. In making this determination it was considered that "ability to pay" might be limited (in the extreme sense) to such indicators as the market value of the violator in liquidation, the profits accrued by the firm over a given time period, the net sales or income generated over a given time period, the value of cash and other liquid assets held by the firm, and the value of all liquid assets plus borrowable cash. Essentially, however, a firm can pay up to the point where it can no longer do business.[3] However, it is evident that Congress, by inserting these two factors into the Act, for *most* cases did not intend that TSCA civil penalties present so great a burden as to pose the threat of destroying, or even severely impairing, a firm's business.

Measuring a firm's ability to pay [4] a cash penalty, without ceasing to be operable, can be extremely complex. The focus is on the solvency of the firm. Rather than performing extensive financial analysis of a firm, which would take an unreasonable effort on the part of both the Agency and the firm, it is believed that a year's net income, as determined by a fixed percentage of total sales, will generally yield an amount which the firm can afford to pay. The average ratio of net income to sales level for U.S. manufacturing in the past five years is approximately five percent (*1978 Economic Report of the President*). Since small firms are generally slightly less profitable than average sized firms, and since small firms are the ones most likely to have difficulty paying TSCA penalties, the guideline is reduced to four percent.

[3] Technically, a firm would often be able to pay even if imposing a penalty would cause it to file for bankruptcy, since a reorganization might still leave the business in operation.

[4] Henceforth "ability to pay" will be used to include "ability to continue in business".

Even where the net income is negative, four percent of gross sales should still be used as the "ability to pay" guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses.

For purposes of calculating the ability to pay, figures for the current year and the prior three years should be averaged. Four percent of the average sales will serve as the guideline for whether the company has the ability to pay.

(b) *Application of ability to pay.* While it would be possible for an inspector to utilize Dunn and Bradstreet, or to inquire during the course of the inspection to ascertain sales data, the firm should be presumed to have the ability to pay at the time the complaint is issued. This is preferable not only for purposes of administrative convenience, but also because many firms will not have their sales information in Dunn and Bradstreet or similar publications, and because the Act indicates that financial and sales data are only subject to inspection when "the nature and extent of such data are described with reasonable specificity in the written notice (of inspection)," § 11(b)(2). This singling out by Congress of these factors indicates that they are not to be routinely asked for in every inspection, and since any alleged violator can raise the issue of ability to pay in his answer to the complaint, both the Agency and the inspected firm will save time and resources by using this approach. Of course, if such information can easily be obtained prior to or during the inspection, there is no harm in doing so.

If the firm raises the issue of inability to pay in its answer, or in the course of settlement discussions, the four percent guideline discussed above should be the model to follow. The firm should be asked to bring appropriate documentation to indicate what their sales have been, such as tax returns, financial statements, etc. If the proposed penalty exceeds four percent of total sales, the penalty may be reduced to an affordable level.

There may be some cases where a firm argues that it cannot afford to pay even though the penalty as adjusted does not exceed four percent of sales. A variety of factors, too complex to discuss here, might require such further adjustment to be made. In complex cases, the agency may need to rely on a management division economist or an accountant to analyze the firm's ability to pay and, on a case-by-case basis, to further reduce the proposed penalty.[5]

6. *Other factors as justice may require.* While two "other factors" have been incorporated as adjustment factors, other issues might arise, on a case-by-case basis, which should be considered in assessing penalties. Among these factors are:

- *Money spent by the violator in cleaning up or otherwise mitigation the harm caused by the violation.* Normally there should be no reduction for these costs, since it is part of the cost of violation. However, there may be instances where the cost of penalty, plus cost of cleanup, are excessive for the particular violation, so that some credit for these expenditures should be given.
- *New ownership for "history of violations."* It may be unfair in some cases to burden new ownership with the previous owner's history.
- *National defense.*
- *Foreign policy.*
- *Conflict or ambiguity vis-a-vis other Federal statutes and regulations* (e.g., OSHA, USDA, DOE).
- *Environmentally beneficial expenditure.* Circumstances may arise where a violator will offer to make expenditures for environmentally beneficial purposes above and beyond those required by law, in lieu of paying civil penalties. The Agency, in penalty actions in the U.S. District Courts under the Clean Air and Water Acts, has determined that crediting such expenditures is consistent with the purpose of civil penalty assessment. Although civil penalties under TSCA are administratively assessed, the same

[5] The analyst must keep several particular points in mind. First, small firms often report no taxable income, and instead provide a return of their owner/operators through salaries and benefits such as automobiles, medical plans, and so forth. When reconstructing the firm's cash flow, owner/operators should receive as payment for services only that amount which they could obtain for providing similar services in the general labor market. The rest of their compensation should properly be assigned to profit for the company. The second point to keep in mind in examining tax returns is that small, privately-owned plants often have several corporations set up to handle various aspects of the business. If one or more of these corporations is culpable for some part of the TSCA violation, the tax returns for all involved corporations should be examined and a combined cash flow prepared. Once the firm's historical cash flows have been assembled, the analyst must make some assessment of the likely future path of the company. In so doing, the analyst must consider the firm's ability to earn cash from its operations, its ability to liquidate assets to meet penalty amounts (and still remain in business), and its ability to raise additional cash from lenders and its owners. The analyst must judge these factors without expending excessive resources on the analysis. Such a process can be assisted through discussions with individuals knowledgeable in the particular industry, such as local bankers, consultants, and others, if appropriate.

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rational applies. This adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations. The criteria for acceptable credits are discussed in detail in section VIII of the April 11, 1978 Civil Penalty Policy. Before proposed credit amounts can be incorporated into a settlement, the complainant must assure himself that the penalty (with credit adjustment) is consistent with the April 11, 1978, Civil Penalty Policy, and that the company has not already received credits in another enforcement action for the same environmentally beneficial expenditures. The settlement agreement incorporating such an adjustment should make clear what the actual *penalty* assessment is, after which the terms of the reduction should be spelled out in detail and in a clearly enforceable manner.

• *Significant-minor borderline violations.* Occasionally a violation, while of significant extent, will be so close to the borderline separating minor and signficant violations that the penalty may seem disproportionately high. In this situation, additional reduction of up to 25% off the GBP may be applied before the other adjustment factor are considered.

Continuing Violations

Since the Act provides not only that civil penalties may be assessed up to $25,000 for each violation, but that each day a violation continues constitutes a separate violation for which additional penalties may be assessed, there is a potential for very large penalties to be assessed in many situations. In some cases, such large penalties will be appropriate for continuing violations, while for others, such as late inventory reporting, assessing an additional penalty for each day of violation would yield a penalty assessment for greater than the violation merits. The specific penalty guidelines will discuss the types of continuing violations which should be assessed on a per-day basis. This discussion should indicate how criteria such as this will be applied, e.g., which continuing violations should never be penalized on a per-day basis, and which should usually or always be so penalized.

When a penalty is assessed on a per-day basis for a continuing violation, care must be taken to assure that the adjustment factors, "government clean up costs", and "economic benefits from non-compliance" are spread over the entire penalty, since these figures are calculated by looking at the entire violative situation. For example, if a continuing violation lasted four days and generated $40,000 in government clean-up costs, these $40,000 in costs should be added to the daily penalties (although each day would still be limited to a maximum $25,000 penalty).

Continuing violations are distinguished from multiple violations and violations which occur several separate times. These latter violations will generally be separately assessed.

Settlement

This guidance does not prescribe a specific percentage guideline for penalty reductions in the course of settlement. While, as a general rule, penalties may be altered in the course of settlement, there should always be some substantive reason given, which is to be incorporated in any settlement agreement and consent decree and final order for any penalty reduction. Other aspects of settlement are discussed in the context of particular penalty factors.

Designing and Applying a Specific Penalty Guidance

Designing a Specific Penalty Guidance

The specific penalty guidance, which will usually be developed as part of the enforcement strategy for a particular regulation, will provide the detailed information needed to fit particular violations in the overall civil penalty system. Each specific penalty guidance will address:

• To the extent possible, the types of violations that can occur;

• How to evaluate the nature (i.e., whether chemical control; or information gathering) of a violation;

• How to determine and classify the extent of possible harm posed by a given violations;

• Special considerations in using the adjustment factors, particularly including means of estimating government clean-up costs and economic benefits from non-compliance;

• How and when to utilize the concept of multi-day violations;

• Any "other matters as justice may require" which may particularly apply to the given regulation; and

• Anything else necessary to effectuate enforcement of the regulation and the Act's penalty policy.

Applying a Specific Penalty Guidance

This section briefly summarizes the steps necessary to calculate a proposed penalty assessment.

Step 1: Utilizing the specific penalty guidances, determine the nature, extent, and circumstances of the violation.

Step 2: Find the appropriate extent and circumstances levels on the gravity based penalty matrix to determine the gravity based penalty (GBP).

Step 3: Determine the percentage adjustment for culpability, if any.

Step 4: Determine the percentage adjustment for history, if any.

Step 5: Add the adjustment percentages from steps 3 and 4 and apply the GBP. If the amount is in excess of $25,000, reduce the penalty to $25,000.

Step 6: Multiply the step 5 figure by the number of days of violation.

Step 7: Apply government cleanup costs adjustment, if applicable. Add to the step 6 figure.

Step 8: Apply economic gains from non-compliance adjustment, if applicable. Add to the step 6 figure.

Step 9: Make other adjustments "as justice may require."

Step 10: Issue formal complaint proposing the penalty.

Step 11: Discuss settlement any time before a final administrative law judge's decision (unless the complaint is not contested and becomes final as a matter of law). If applicable, determine violator's ability to pay. If appropriate, reduce penalty to amount violator can afford to pay. Penalties may be reduced as a condition of settlement.

Step 12: Issue Final order.

Civil Penalty Assessment Worksheet

Name of Respondent:_____
Address of Respondent:_____

(1) Complaint I.D. Number: _____
(2) Date Complaint Issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1. Gravity Based Penalty (GBP) from matrix, $____.

2. Percent increase or decrease for culpability, %____.

3. Percent increase for violation history, %____.

4. Add lines 2 and 3, %____.

5. Multiply GBP by percentage total on line 4, $____.

6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage), $____.

7. Enter line 6 amount or $25,000, whichever is *less*, $____.

8. Multiply line 7 by the number of days of violation, $____.

9. Government clean-up costs, if any, $____.

10. Economic gains from non-compliance, if appropriate, $____.

11. Add lines 8 through 10, $____.

12. Total of other adjustments as justice may require, $____.

13. If line 12 represents a net *increase* to the penalty add line 12 to line 11, $____,

or

If line 12 represents a net *decease* to the penalty subtract line 12 from line 1, $____.

Note.—Line 13 should be the proposed penalty for a given violation. This procedure is repeated for each violation.

PCB Penalty Policy

Introduction

Background

On March 10, 1980, the Agency issued a TSCA Civil Penalty Policy memorandum. That document

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implements a system for determining penalties in administrative actions brought pursuant to Section 16 of the Toxic Substance Control Act (TSCA). Under that system, penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

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

- The "nature" of the violation,
- The "extent" of environmental harm that could result from a given violation, and
- The "circumstances" of the violation.

These factors are incorporated on a matrix which allows determination of the appropriate gravity based penalty.

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors:

- Culpability,
- History of such violations,
- Ability to pay,
- Ability to continue in business, and
- Such other matters as justice may require.

The TSCA Civil Penalty Policy system provides a framework for the development of individual penalty guidances for each rule promulgated under TSCA. This document sets forth Agency policy for the use of the GBP Matrix to assess penalties for specific violations of the regulations regarding polychlorinated biphenyls (PCBs). These regulations appear at 43 FR 7150 (Feb. 17, 1978) and 44 FR 31514 (May 31, 1979). The document also will explain where multiple violations should be charged, and how penalties should be determined for such violations.

This policy is being issued as an interim guidance for the determination of penalties for violations of the PCB regulations. The Agency will review its experience with this policy before issuing a final penalty policy for the PCB rule. The final policy will also address any special considerations which the Agency decides should be used to apply the adjustment factors (e.g., removing benefits from non-compliance.)

A summary of the policy appears immediately below the applicability section. That summary is followed by a detailed explanation of the policy.

Applicability

This policy is immediately applicable and should be used to calculate penalties for all administrative actions concerning PCBs instituted after the date of the policy, regardless of the date of violation. Pending cases should be reviewed to determine whether the penalty calculated under this policy is lower than the penalty in the civil complaint. If this policy yields a lower penalty, an amendment to the complaint should be made to substitute the lower penalty. This policy should not be used to raise penalties in existing actions. No case should be settled for an amount higher than the penalty which this policy would yield.

Summary of the Policy

The gravity based penalty (GBP), based on the nature, extent, and circumstances of the violation, is found from the following matrix:

Table I

		Extent of potential damage		
		A Major	B Significant	C Minor
Circumstances (probability of damages):				
High range	1	$25,000	$17,000	$5,000
	2	20,000	13,000	3,000
Mid range	3	15,000	10,000	1,500
	4	10,000	6,000	1,000
Low range	5	5,000	3,000	500
	6	2,000	1,200	200

Since the purpose of the PCB regulation is to prevent additional PCBs from entering the environment, all violations of it are chemical control violations by nature. Thus, the nature is the same for all violations. To use the GBP matrix to determine a penalty for a PCB violation, it is necessary to determine the extent and circumstances of each violation.

Extent

The extent is determined by the amount and concentration of the PCB material involved. The total weight of PCB material should be ascertained for each violation of the rule. That weight should then be reduced, depending on the concentration, as follows:

Table II

Concentration Reductions

(1) 50–499 ppm—70% reduction.
(2) 500–9,999 ppm—50% reduction.
(3) 10,000–99,999 ppm—20% reduction.
(4) over 100,000 ppm—no reduction.

Exceptions: This reduction step does *not* apply in the following circumstances:

(i) Violations of 40 CFR 761.10(d) (road oiling, coating, dust control);
(ii) Where the violation consists of failing to test to qualify for an authorization; or
(iii) For solids, where the unit of measurement is other than the actual weight.

Extent categories: The total weight figures, reduced by the concentration, if applicable, are used to determine extent, as follows:

Table III

(A) Major—5000 kg. or more.
(B) Significant—1000 kg. more, but less than 5000 kg.
(C) Minor—less than 1000 kg.

Alternative measures: If weight is not available, use these alternative measures:

Table IV

(A) *Major:*

Liquid

(a) 1100 gallons or more, or
(b) a contaminated area of 750 square feet or more, or
(c) 300 or more large capacitors.

Non-liquid

(a) 100 or more fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors; or
(b) 25 or more drained transformers, or 100 or more empty drums which once contained PCB fluid, or any other PCB solids having a volume of 750 cubic feet or more.

(B) *Significant:*

Liquids

(a) 220 gallons or more but less than 1100 gallons, or
(b) A contaminated area of 150 square feet or greater, but less than 750 square feet, or
(c) 60 large capacitors or more, but less than 300 large capacitors.

Non-liquids

(a) 20 or more, but less than 100 fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors.
(b) 5 or more, but less than 25, drained transformers, or more than 20, but less than 100, empty drums which once contained PCB fluids, or any other solid having a volume of 150 or more, but less than 750 cubic feet.

(C) *Minor:*

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Liquids

(a) Less than 220 gallons, or
(b) A contaminated area of less than 150 square feet.
(c) Less than 60 large capacitors.

Non-liquids

(a) Less than 20 fifty-five gallon durms containing contaminated soil, rags, debris or small capacitors; or
(b) Less than 5 drained transformers, 20 fifty-five gallon drums which previously contained PCB fluids, or any other PCB solid having a volume of approximately 150 cubic feet.

Spills into water, food or feeds. Any PCB disposal which results in contamination of surface or ground water, or food or feeds is *always* major in extent.

Circumstances (Probability for Damage)

To determine which level on the circumstances axis to use, classify each violation of the regulation into one of these eight categories of violation:

(1) Disposal
(2) Marking
(3) Storage
(4) Manufacturing
(5) Processing
(6) Distribution
(7) Use
(8) Recordkeeping

After classifying the violations, determine the level on the circumstances axis from the following chart:

Table V

High range:
Level one:
(1) Improper disposal.
(2) Manufacturing
Level two:
(1) Processing.
(2) Distribution.
(3) Improper use.
Medium range:
Level three:
(1) Major storage violations.
(2) Major recordkeeping violations, disposal facilities.
(3) Major marking violations.
Level four:
(1) Major recordkeeping violations, use and storage facilities.
Low range:
Level five:
(1) Failure to date PCB items placed in storage.
(2) Minor storage violations.
(3) Minor marking violations.
Level six:
(1) Minor recordkeeping violations.
(2) Failure to use "No PCBs" lable as rquired.

Finding the GBP penalty. The extent and circumstances, as determined above, will determine a penalty amount on the GBP Matrix, Table 1. This figure should be entered on line one (1) of the Civil Penalty Assessment Worksheet, (hereinafter, "worksheet") attached as Appendix A. The other penalty factors, such as culpability, ability to pay, and others, should be applied in the manner described in the TSCA Civil Penalty Policy.

Multiple Violations

Assess multiple violations against a single violator in any of the following circumstances:

(1) The violations fall into more than one violation category;
(2) The violations are in substantially different locations; or
(3) There is evidence that the violation has been committed on repeated occasions or has continued for more than one day.

If multiple violations are charged because of evidence of repeated or continuing conditions, the penalty will normally be calculated using the proportional penalty calculation, which appears in Table VI, below. However, the Agency can exercise its discretion either to charge for only one day, or to charge on a straight per day or per violation basis (GBP X number of days or violations), depending on factors such as substantial actual harm, the unusual nature of risk presented, or other unique circumstances.

Table VI

Proportional Penalty Calculation

Step 1: Find the total amount of PCB materials involved. If more than two times the major extent category, (more than 10,000 kg.) go to step 2. If less than two times the mimimum amount in the major extent category (less than 10,000 kg.), use this amount to get a penalty from the GBP Matrix. Divide the penalty by the number of days [1] and enter on line one of the worksheet (Appendix A).

Step 2: Divide the amount from step one by the minimum amount in the major extent category (5000 kg). (Round fractions to one decimal place.)

Step 3: Multiply the amount form step two by the dollar amount from the GBP Martix major extent category. This is the total GBP charged.

Step 4: Divide the amount from step 3 by the number of days or violations involved. Enter this daily amount on line one of the worksheet (Appendix A).

Explanation of Policy

Nature

Since the purpose of the PCB regulation is to prevent further introduction of PCBs into the environment, this regulation is a chemical control regulation, as defined by the TSCA Civil Penalty Policy. Accordingly, most violations of this regulation are chemical control violations. The only exception would be violations of the recordkeeping requirements, which are control-associated data-gathering in nature. The Agency has taken this into account in designing a specific policy for PCB penalties. The definitions of the "extent" and "circumstances" categories below reflect the nature of these violations.

Extent

Because the PCB regulations are chemical control and control-associated data-gathering in nature, the greater the amount of PCB containing material (hereinafter, "PCB material") involved in a particular violation, the more likely it is that harm will result from the violation of the PCB rules. For this reason, the amount of PCB material involved in a particular incident will determine whether the major, significant, or minor extent category should be used in deriving a penalty from the GBP Matrix. Since the concentration of the PCB material involved in an incident will also affect the potential for harm, this factor must also be considered in determining which extent category is applicable to a particular violation.

Amount of Material Involved

The most obvious measure of the amount of PCB material involved in a violation is weight. Therefore, the weight of the PCB material involved in a violation is the primary determinant of the extent category to be used to find the GBP. To be consistent with the three extent categories of the GBP Matrix (i.e. major, significant, and minor), three weight classes have been chosen to define the extent of a PCB violation. These classes are as follows:

(A) Major: 5000 kilograms or more.
(B) Significant: Between 1000 and 5000 kilograms.
(C) Minor: Less than 1000 kilograms.

The minor category weight was defined as less than 1000 kilograms because this is slightly less than the amount of PCBs in an average transformer. Since a major portion of the PCBs in existence are in transformers, it is essential that these items be disposed of properly. Accordingly, the Agency defined the minor category as an amount of PCBs less than the contents of an average transformer, so that most transformers would fall in the significant category. The Agency believes this will encourage the proper disposal of transformers.

[1] It should be noted that if the proportional penalty calculation is based on repeated violations, then the calculation at line 8 of the worksheet should represent the number of violations rather than the number of days.

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The major category weight was selected at 50 kg. kilograms. This is slightly less than the contents of five average size transformers, and corresponds to the fact that the penalty for a major improper disposal is five times larger than that for a minor improper disposal; that is, $25,000 versus $5,000. (As will be seen below, improper disposal is always level one on the circumstances axis.) The significant category is defined as 1,000 kg. or greater, but less than 5,000 kg. This definition is a direct consequence of the definition of the other two categories.

Units Other Than Weight

The Agency realizes that there will be situations where the number of kilograms of PCBs involved is not easily determined. In many cases, other units of measurement (e.g. gallons, cubic feet, etc.) may be more easily obtained. Additionally, some violations will involve non-liquid PCB material, usually as a result of liquid PCBs being spilled into or cleaned up by absorbent solid materials. Such solids will often weigh considerably more than liquid PCBs. If the penalty for such solids were based on the weight categories outlined above, the result, in the Agency's opinion, would be inequitable.

For these reasons, the Agency has decided to define each of the three extent categories by several different units of measurement. Although these units of measurement are not necessarily equal, it is the Agency's opinion that they are generally comparable.

(A) *Major:*

Liquid

(a) 1100 gallons or more, or
(b) A contaminated area of 750 square feet or more, or
(c) 300 or more large capacitors

Non-liquid

(a) 100 or more fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors, or
(b) 25 or more drained transformers, or 100 or more empty fifty-five gallon drums which once contained PCB fluid, or any other PCB solid having a volume of 750 cubic feet or more.

(B) *Significant:*

Liquids

(a) 220 gallons or more, but less than 1,100 gallons, or
(b) A contaminated area of 150 square feet or greater, but less than 750 square feet, or
(c) 60 large capacitors or more, but less than 300 large capacitors.

Non-liquids

(a) 20 or more but less than 100, fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors.
(b) 5 or more, but less than 25, drained transformers; or more than 20, but less than 100, empty fifty-five gallon drums which once contained PCB fluids, or any other solid having a volume of 150, but less than 750, cubic feet.

(c) *Minor:*

Liquids

Less than 220 gallons, or
(b) A contaminated area of less then 150 square feet, or
(c) Less than 60 large capacitors.

Non-liquids

(a) Less than 20 fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors; or
(b) Less than 5 drained transformers, 20 fifty-five gallon drums which previously contained PCB's fluids, or any other PCB solid having a volume of approximately 150 cubic feet.

The figures above are based on the assumption that the density of PCB fluids is 10 lbs. per gallon, which is the average density of high concentration PCB's. If the actual density of the fluid involved is known, then the actual density should be used to convert the volume of fluids involved into kilograms. The figure for capacitors is based on an average of 35 pounds of fluid in the most popular models of large capacitors.

Because it is often difficult to determine the amount of PCB's in a solid, the Agency did not attempt to define the extent categories for solids by trying to estimate how much solid PCB material had the same amount of PCB's as the average PCB transformer. Instead, the Agency tried to maintain the same economic incentives for solids as for liquids. Thus, the decision to make 20 drums the cut off point for the upper limit of the minor category is based on an estimate that the cost of disposing of twenty 55 gallon drums, either empty or containing PCB solids, is approximately the same as the cost of incinerating the liquid in one transformer.

In certain instances, the use of the different units of measurement discussed above would result in a particular violation falling into more than one category. For example, fluid PCB material having a density less than that of average high concentration PCB's may result in 250 gallons weighing as little as 900 kilograms. Using the gallon measurements, this would be a significant violation; but using the kilogram measurement, this would be a minor violation. In such instances, the penalty should be based on the category determined by the actual weight, in kilograms, of the material involved, if this information is known. If the weight is not known, the gallon measure should be used.

Exceptions to Extent Category

Spills into water. Where any improper disposal results in a contamination of surface or ground water, the extent will *always* be considered major. Since it is virtually impossible to remove all PCB's from surface or ground water once a spill occurs, environmental harm is almost assured. Because of this clean-up problem, such a spill creates a substantial risk of human exposure, either directly from the water, or through the food chain. For these reasons, the Agency believes that spills into surface or ground water are always major incidents, regardless of the amount and concentration.

Spills into food and feed. Where any improper disposal results directly in contamination of food or feed, the extent is *always* major. If such spills are not quickly detected, they will result in direct human exposure. Even if the problem is detected before humans eat the contaminated food, it is likely that the cost of finding and destroying the contaminated products will be high. Thus, the Agency believes such incidents should always be considered major in extent.

Concentration Adjustments

The Agency recognizes that the concentration of the PCB materials is a relevant factor to consider in determining the amount of damage done from a violation of this regulation. Obviously, a spill of high concentration PCB's puts more contaminants into the environment than a spill of low concentration PCB's. Nonetheless, because PCB's can be toxic at very low concentrations, a spill of a large amount of low concentration PCB material could cause widespread harm. Thus, a system which would require the total weight of PCB material involved to be reduced in direct proportion to the concentration of that material would severely undermine the regulatory scheme.

The problem is illustrated by the following hypothetical: Someone spills 2,000,000 lbs. (or 909,090 kgs.) of fluid containing PCBs at a concentration of 1,000 parts per million (ppm). If, in calculating the penalty, the total weight of the fluid was reduced by the direct proportion of the concentration, less than 1,000 kilograms of PCBs would be involved for the purpose of calculating a penalty. As a result, this incident would be considered minor in extent, and the violator would not be fined more than $5,000. A penalty as small as this would not reflect the potential for harm to the

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environment and would create an enormous economic incentive for people to improperly dispose of PCBs at low concentrations, contrary to the intent of the regulations.

To account for the effect of the concentration of PCB liquids in determining the extent of a violation, and at the same time establish a system which does not severely hinder the agency's program, the following system has been developed. To determine the extent of probable damage for a particular violation, the total amount of PCB material involved in an incident should be reduced by the percentages which appear below:

(1) 50–499 ppm—70% reduction.
(2) 500–9,000 ppm—50% reduction.
(3) 10,000–99,999 ppm—20% reduction.
(4) 100,000 ppm or above—no reduction.

Thus, in the hypothetical quoted above, where 2,000,000 lbs. of PCB fluid at a concentration of 1,000 ppm was disposed of, the total amount would be reduced by 50%. Thus, the amount of fluids for determining the extent of the probable harm would be 1,000,000 lbs., or 454,545 kilograms.

Exceptions to Concentration Adjustment Calculation

These concentrations adjustment factors are not used in the following circumstances:

Waste oil. The use of waste oil that contains detectable concentrations of PCBs as a sealant, coating, or dust control agent, which is prohibited by 40 CFR 761.10(d), is one situation where the concentration reduction would not apply. The agency chose to prohibit these uses whenever any detectable level of PCBs were present because any such use of PCBs is likely to result in widespread environmental and health damage. Thus, allowing any reduction of the amount of PCBs used by virtue of low concentration would be contrary to the regulatory scheme.

Failure to test. The concentration reduction also does not apply where the violation is the failure to test liquid required to be tested; for example, the contents of a heat transfer system that has contained PCBs, 40 CFR 761.31(d)(1). In such cases, the risk created by the violation is that the fluid will be high concentration PCBs, and that this material will continue in use. Thus, the Agency feels that these persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration.

Alternative measure for solids. Finally, the concentration adjustment should not be used when the PCB material is measured by one of the alternative measures for solids which appear in Table IV. These alternative measures were chosen to maintain economic incentives for proper disposal. The cost of disposal of such materials is not dependent on the concentration of the PCBs in them. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly.

Circumstances

The other variable for determining a penalty from the GBP Matrix is the circumstances of the violation, also called the probability of damages. The TSCA Civil Penalty System established three ranges of probability of damages, high, medium, and low. Each of these ranges in turn has two different levels, for a total of six levels of probability of damages.

Explanation of Categories

Because there are many ways the PCB regulation can be violated, and because each of these violations could occur in so many different environmental contexts, it is virtually impossible to assess in advance all the possible factors that logically might have some impact on the probability of damages for a particular PCB violation. It would be even more difficult to try to determine, in advance, how all of these factors would interact in any particular situation. For this reason, the Agency believes it is appropriate to group the different types of PCB violations, assess the probability for harm resulting from each type of violation, and then assign that type of violation to one of the levels on the circumstances axis of the GBP Matrix.

For the purposes of assessing the probability of damages from a particular type of PCB violation, all the possible violations of the PCB rule can be grouped into eight categories, as follows:

(1) Disposal
(2) Marking
(3) Storage
(4) Manufacturing
(5) Processing
(6) Distributing
(7) Use
(8) Recordkeeping

Immediately below is a table assigning the different categories of PCB violations to the levels of probability of damages on the GBP Matrix. After the table, the reasons for the assignment of each category of violation to a level of probability of damages is explained.

High Range

Level one:

(1) Improper disposal of PCBs. This includes operating disposal facilities at conditions which do not meet the requirements of the regulations. It also includes any uncontrolled discharge of PCBs, e.g., Leakage from a stored container.

(2) Manufacturing of PCBs without an exemption or in violation of any condition of an exemption.

Level two:

(1) Processing PCBs without an exemption or in violation of any condition of an exemption.

(2) Distribution in commerce of PCBs without exemption or in violation of any condition of an exemption.

(3) Improper use of PCBs or using PCBs in violation of any condition of authorization. For example, this includes removing a coil from a PCB transformer for servicing, and the failure to test a heat transfer system that once contained PCBs.

Medium Range

Level three:

(1) Major storage violations. A major storage violation means a situation where a significant portion of spilled material would not be contained. Examples of such situations are storage in areas with no curbing, non-continuous or no flooring, or unsealed floor drains. Storage of PCBs in a area with permeable flooring or curbing would also be a major storage violation.

(2) No records or major record keeping violations at disposal facilities, including high efficiency boilers and landfills. Major record keeping violations would include the failure to keep data on incinerator operating parameters.

(3) Major marking violations. A major marking violation is a situation where there is no indication to someone who is unfamiliar with the situation that PCBs are present.

Level four:

(1) No records or major recordkeeping violations at facilities that use or store PCBs. Major recordkeeping violations would include the absence of data on PCB transformers, and the absence of records on any transfer of PCBs from the site.

Low Range

Level five:

(1) Failure to date PCB items placed in storage.

(2) Minor storage violations. Examples of these are small cracks in walls, no roof, or small cracks in otherwise impervious floor or curbing.

(3) Minor marking violations. These are situations in which all the requirements of the rule have not been followed, but there are sufficient indications to notify someone unfamiliar with the situation that PCBs are present and enable them to identify PCB items. An example would be the failure to mark a transport vehicle containing PCB items which are themselves marked.

Level six:

(1) Minor recordkeeping violations. Examples of such violations are small errors in the numbers of large capacitors, small errors in number of containers, or the omission of the date of transfer on PCBs.

(2) Failure to label small capacitors, fluorescent light ballasts, or large low voltage capacitors with a "no PCBs" label as required by 40 CFR 761.20(g).

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Explanation for Assignment of Levels of Probability of Damage

Level one. This level contains the two violations which the Agency considers most serious, manufacturing and improper disposal. Manufacturing is extremely serious because it creates new PCBs. In so doing, it enlarges the risk of environmental and human exposure, places additional burdens on disposal facilities, and increases the cost of protecting the public from this chemical. Improper disposal creates grave risks of harm to the environment or human health, because it assures the entry of more PCBs into the environment. This is contrary to the main thrust of the PCB regulation, which was to prevent further contamination of the environment with PCBs. Thus, these violations are considered to be the most serious, and provide the standard against which the other PCB violations are measured.

Level two. The violations which were placed in level two on the GBP Matrix were those which the Agency considered to be the most likely to result in improper disposal. For example, processing or distribution of PCBs without an exemption or in violation of a condition of an exemption is likely to result in spillage, leakage, volatilization or other uncontrolled discharges of PCBs. Similarly, improper use of PCBs will, at worst, result in PCB contamination of a wide range of products (as when they are used in a leaking hydraulic system), or at best will result in an increased risk of improper disposal.

Level three. This level includes major storage violations, major recordkeeping violations at disposal facilities, and major marking violations. The Agency regards storage violations, such as the lack of a floor, to be somewhat less dangerous than the risk incurred by use, processing, or distribution of PCBs without an exemption. The latter are very likely to result in improper disposal. However, storage violations will only cause damage where there is an accident, or a leak, which probably would be unintentional. Nonetheless, if such events occurred, the possibility for widespread contamination would be high.

The lact of records, or inadequate records, at disposal facilities similarly does not present as severe a risk of improper disposal as processing of PCBs without an exemption. However, such a violation severely reduces the Agency's ability to enforce the requirements of the regulation as they pertain to the operators of such facilities. Accordingly, the absence of adequate records at these facilities removes a significant incentive for compliance, thus substantially increasing the risk of improper disposal.

Major marking violations have been defined as those situations where someone investigating a situation would not know that PCBs were present or would be unable to tell which items contained PCBs. Such a situation creates a high risk of improper disposal. However, if the other portions of the PCB regulation are observed, records would be kept on PCB materials, thereby creating at least some chance that improper disposal would not occur. For this reason, this violation is not considered as risky as improper use or distribution. However, where major marking is associated with other violations, such as recordkeeping, the increased risk will be reflected by an additional penalty.

Level four. Level four includes major recordkeeping violations at facilities that use or store PCBs. Major recordkeeping violations at facilities that use or store PCBs present a somewhat lower risk than major recordkeeping violations at disposal facilities. Since these facilities do not themselves dispose of the PCBs, there is a greater chance that the PCBs will be identified as such before they are actually disposed of. However, the fact that these violations substantially hinder the Agency's ability to trace the movement of PCB's means that they make improper disposal more likely. For this reason, the Agency considers this violation to be significant.

Level five. Included in this category are the failure to date PCB items placed in storage, minor storage violations, and minor marking violations. The failure to date PCB items placed in storage simply means that the items may be stored longer than is presently permitted by the rule. Assuming these items are otherwise treated in accordance with the rule, the lengthy storage will simply increase, by a small amount, the risk of an accidental spill. Similarly, minor marking violations are, by definition, violations where there is sufficient marking to alert someone investigating the situation that there are PCBs present. Thus, the likely ill effect of such violations is simply that, in emergency situations, the length of time required to discover the presence of PCBs might be increased somewhat. This should not significantly increase the amount of damage done. Finally, minor storage violations are those in which any spilled material will be substantially contained. Thus, the amount of damage that could result from such violations would be relatively small.

Level six. Level six represents those violations which the Agency believes pose the least risk of causing harm. It includes only minor recordkeeping violations, and failure to label with the "no PCBs" mark. In the case of minor recordkeeping violations, such violations, although they might make enforcement somewhat more difficult, should not seriously impair the Agency's enforcement efforts. The failure to label with the "no PCB" mark will only result in the disposal of certain items more carefully than necessary, thereby increasing the cost of compliance with the regulation.

The risk to the environment and human health in this case is minimal. Moveover, the Agency believes that there are already substantial economic incentives for manufacturers to comply with this labeling requirement, since their customers would probably be anxious to obtain equipment bearing such a label.

Using the GBP Matrix To Find a PCB Penalty

In order to determine a penalty for a specific PCB violation, the following steps should be followed:

Step 1: Determine which category of violation is involved (i.e., disposal, marking, storage, manufacturing, processing and distribution, use, or recordkeeping). If more than one violation category is involved, repeat the calculation in steps 2 through 8 for each violation category.

Step 2: Find which level the violation fits on the circumstances axis of the GBP Matrix.

Step 3: Calculate the total amount of PCBs involved in the violation. If there are several materials involved which fall into different concentration ranges, do a separate calculation for each concentration.

Step 4: Reduce the amounts in step 3 by the concentration adjustment. (Be sure to note the exceptions to this step).

Step 5: If different concentration ranges are present, add up the figures from step 4.

Step 6: Determine which extent category (major, significant, or minor) is applicable to the amount from step 5.

Step 7: Use the level from step 2 and the extent from step 6 to locate the penalty on the GBP Matrix (E.g., Level 3, significant is $10,000).

Step 8: Enter the amount from step 7 on line 1 of the Civil Penalty Assessment worksheet attached to the TSCA Civil Penalty Policy. Use that worksheet to complete the calculation of the penalty accounting for factors such as culpability, history of violations, etc.

Example

An inspection of X Company reveals that the following items are all stored for disposal in a room with an earthen floor:

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2 transformers
3 capacitors

All three capacitors have name plates that show that they contain high concentration PCBs and have a volume of 30 gallons each. One transformer contains 300 gallons, and is tested at 1000 ppm. The second transformer contains 500 gallons, and is tested at 64% PCBs. It is leaking, and X's general foreman says that about 20 gallons have leaked. The equipment is marked, and X has records on this equipment. Assume the density of all fluids is 10 lbs/gal.

Step 1: Determine the categories of violation.

These are:
Disposal
Storage

Because there are two categories, a calculation is needed for each.

Disposal

Step 2: Find the "circumstances" level. This is level one, for disposal.

Step 3: Find the total amount involved. Total disposal: 20 gallons.

$$20 \text{ gal.} \times \frac{10 \text{ lbs}}{\text{gal.}} = 200 \text{ lbs.}$$

$$200 \text{ lbs.} \times \frac{.45 \text{ kg.}}{\text{lb}} = 90 \text{ kg.}$$

Step 4: Make concentration adjustment. No reduction for PCBs over 100,000 ppm, which is what was spilled.

Step 5: Not applicable.

Step 6: Determine extent category. 90 kg. = Minor

Step 7: Find penalty from matrix. Level one + Minor = $5,000

Step 8: Enter $5,000 or line 1 of the worksheet (Appendix A)

Storage

Step 2: Find "circumstances" level. Major storage (permeable floor) is level 3.

Step 3: Find total amount involved.

(a) over 100,000 ppm:

1 transformer @ 500 gal. 500
3 capicators @ 30 gal. 90
590 gal.

$$590 \text{ gal.} \times 10 \frac{\text{lb.}}{\text{gal.}} \times .45 \frac{\text{kg.}}{\text{lb.}} =$$

2655 kg. over 100,000 ppm

(b) 500-10,000 ppm:

1 transformer @ 300 gal.

$$300 \text{ gal.} \times 10 \frac{\text{lb.}}{\text{gal.}} \times .45 \frac{\text{kg.}}{\text{lb.}} = 1350 \text{ kg.}$$

Step 4: Make concentration adjustment.

(a) over 100,000 ppm—no adjustment 2655 kg.

(b) 500-10,000 ppm—50% reduction 1350 kg. X .50 = 675 kg.

Step 5: Add figures from step 4.

2655 kg.
+ 675kg.
3330 kg.

Step 6: Determine extent category.

3330 kg. = Significant.

Step 7: Find the penalty from the matrix.

Level 3 + significant = $10,000.

Step 8: Enter $10,000 on line 1 of the worksheet (Appendix A).

Penalty Assessment for Multiple Violations

In the past, the Office of Enforcement has had numerous questions about which circumstances were appropriate for the assessment of multiple penalties. For the purpose of promoting consistency between regions and to be consistent with the penalty scheme set forth above, the following guidelines should be followed for assessing multiple penalties.

When Not To Assess Multiple Penalties

There are certain instances when separate counts should not be charged and multiple penalties not assessed. The first type of case where this is not appropriate is where a single situation presents violations of many portions of the regulation, which are all in the same violation category. For example, if X Company has a storage area which is unmarked, and which contains one unmarked PCB container, there are two infractions of the regulation: The failure to mark the container, and the failure to mark the storage area. However, only one violation should be charged; namely, a major marking violation. Both infractions present the same risk; that is, that no one will realize that PCBs are present. Accordingly, only one penalty is assessed. If the violation category is one like marking, which appears at several levels of the circumstances axis, the penalty should be assessed by looking at the most serious infraction committed.

Another situation in which only one count should be alleged and one penalty charged is where there are multiple infractions of the same regulatory requirement. For example, if five transformers are unmarked, only one penalty should be charged. Although five transformers present a greater risk than one transformer, this fact is accounted for by the larger extent category applicable to the situation with five unmarked transformers. Again, the nature of the risk presented is the same, so only one penalty is charged.

When Multiple Penalties Should Be Assessed

The most obvious situation for assessing multiple penalties is where the situation constitutes infractions of different violation categories (e.g., marking and storage). In such instances, one count should be charged for each violation category. This was done in the sample penalty calculation, above.

Another example of multiple penalties used properly is where one company has several PCB situations which are in violation of the regulation in substantially different locations. Different buildings or yards on the same site would be sufficient for a multiple violation; two sites in the same building would not, unless the building is very large (for example, an auto assembly building). In these cases, the separate locations present separate and distinct risks to human health and the environment. Thus, separate penalties are justified.

Assessing Penalties for Continuing or Repeated Violations

Section 16 of TSCA clearly gives the Agency the power to assess penalties on a daily basis for continuing situations, such as where a transfomer is improperly stored for a month. It also gives the Agency the discretion to charge a penalty for each separate act of a repeated course of conduct, such as where someone manufactures PCBs on twenty different occasions, without an exemption. However, any simple rule the Agency might develop concerning when to charge multiple counts in such cases is likely to have undesirable effects. For example, a policy which said that only one charge will be assessed for a continuing violation would not adequately protect the environment. Under such a policy, a company with a leaking PCB transformer would have no incentive to correct the leak, since how quickly it acted would not affect the penalty significantly. Alternatively, a policy that required the Agency to assess multiple penalties whenever there was evidence of a continuing

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violation would also cause undesirable effects. Someone who stored an intact PCB transfomer improperly for 30 days could be liable for $300,000. This penalty, in the absence of aggravating circumstances, seems excessive.

For these reasons, the Agency has developed the "proportional penalty calculation", which is explained in detail below. This calculation should be used whenever there is evidence of continuing violations, or repeated violations which are part of a single course of conduct. Except in unusual circumstances, this calculation will yield the penalty to be charged for such repeated or continuing violations. The effect of this calculation is that the penalty is multiplied for repeated or continuing violations where substantial amounts of PCBs are involved. The magnitude of the multiplication is proportional to the amount of material involved, subject to the limitation of $25,000 per day. the Agency believes it is appropriate that the very large penalties that can result from continuing or repeated violations be assessed in those situations where large amounts of PCBs are involved.

Nonetheless, the Agency realizes that there may be situations where no multiple penalties are appropriate, or where the violation merits a penalty calculated by multiplying the GBP penalty directly by the number of days or incidents involved. Accordingly, the Agency reserves the discretion to assess penalties for repeated or continuing violations without regard to the proportional penalty calculation.

The Agency expects that, in most cases, the penalty for repeated or continuing violations will be computed by use of the proportional penalty calculation. The discretion to assess penalties more or less than the proportional penalty can be exercised under the following circumstances:

- Where substantial actual harm has occurred as a result of the violation;
- Where the unusual circumstances of the violation give rise to extraordinary risks to the environment; or
- Other types of highly unusual circumstances.

The decision to use this discretion should only be made after consultations with Headquarters personnel in which the reasons for this exercise are explained in detail.

Explqnation of the Proportional Penalty

The proportional penalty is calculated in the following manner:

Step 1: Calculate the total amount of PCBs involved in the situation, reduced by the concentration adjustment. Using as an example an individual who processes 20 gallons of PCBs for 200 days, the total amount is 4,000 gallons (assuming the concentration is greater than 100,000 ppm). If two 50 gallon capacitors are stored improperly for 20 days, the amount involved is 100 gallons.

Step 2: If the amount from step 1 is less than two times the major extent category (10,000 kg. or 2,200 gallons), use this amount to determine the extent category and obtain a penalty from the GBP Matrix. For example, the penalty for the two capacitors improperly stored for 20 days would be $1,500. Twenty counts would be charged, at a penalty of $1,500/20 days or $75 per day. If the amount from step 1 is greater than 2 times the extent category, proceed to step 3.

Step 3: Divide the total amount from step 1 by the major extent category limit (e.g., 5,000 @ kg. or 1,100 gallons). Multiply the result by the amount in the major penalty category. This yields the proportional penalty. Using the example of the individual who processes 20 gallons of PCBs per day for 200 days, the calculation goes as follows:

Amount from Step 1 = 4,000 gal.

$$\frac{4{,}000 \text{ gal.}}{1{,}100 \text{ gal. (major limit)}} = 3.6$$

3.6 × $20,000 (major, level 2) = $72,000. Total penalty

Step 4: Divide the total penalty by the number of days (or events) involved. Enter this amount on line 1 of the TSCA Civil Penalty Assessment Worksheet. In our example:

$72,000 total penalty/200 days = $360 per day.

This figure goes on line 1 of the worksheet.

The proportional penalty should always be used unless the calculation yields more than $25,000 per day. In that case, the penalty should be $25,000 per day, the maximum allowed by statute.

The proportional penalty should be used in the same way as any other penalty derived from the GBP Matrix.

The per day penalty should be entered on line 1 of the TSCA Civil Penalty Assessment Worksheet, and should be adjusted by the factors, such as culpability and violation history, shown on that document, which is attahced to this policy.

Dated: April 24, 1980.

Richard D. Wilson,

Deputy Assistant Administrator for General Enforcement.

Civil Penalty Assessment Worksheet

Name of Respondent: _____
Address of Respondent: _____

(1) Complaint I.D. Number: _____
(2) Date Complaint Issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1 Gravity Based Penalty (GBP) from matrix ____ $____
2. Percent increase or decrease for culpability ____ %
3. Percent increase for violation history ____ %
4. Add lines 2 and 3 ____ %
5. Multiply GBP by percentage total on line 4 ____ $____
6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage). $____
7. Enter line 6 amount or $25,000, whichever is less. $____
8. Multiply line 7 by the number of days of violation. $____
9 Government clean-up costs, if any ____ $____
10 Economic gains from non-compliance, if appropriate. $____
11. Add lines 8 through 10 ____ $____
12. Total of other adjustments as justice may require. $____
13. If line 12 represents a net *increase* to the penalty and line 12 to line 11,

or

If line 12 represents a net *decrease* to the penalty subtract line 12 from line 1. $____

*Line 13 should be the proposed penalty for a given violation. The procedure is repeated for each violation.

[FR Doc. 80-27780 Filed 9-8-80; 8:45 am]

BILLING CODE 6560-01-M

Exh. O

CERTIFICATE OF SERVICE

I hereby certify that the original and one true and correct copy of the foregoing Response to Order to Show Cause and Supplement the Record was hand-delivered to the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 7, at 11201 Renner Boulevard, Lenexa, Kansas, on May 23, 2018.

A true and correct copy of the foregoing Response to Order to Show Cause and Supplement the Record was sent this day to the following persons in the manner indicated:

By Hand Delivery

Karina Borromeo
Regional Judicial Officer/Presiding Officer
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

By Certified Mail, Return Receipt Requested

Mr. Cory Poulsen
Superior Restoration & Construction LLC
23625 West 92nd Terrace
Lenexa, Kansas 66227

Mr. Cory Poulsen
Superior Restoration & Construction LLC
7861 Mastin Drive
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Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7