UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CITY OF LONG BEACH, PORT OF	)	
	)	**Docket No. TSCA-09-90-0081**
LONG BEACH.,	)	
	)	
Respondent	)	

INITIAL DECISION

DATED:

TSCA: Pursuant to Section 16(a)(2)(B) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a)(2)(B), the Respondent, City of Long Beach, Port of Long Beach, is assessed a civil penalty of $ for the following: failure to register a PCB transformer with the fire response personnel in violation of Section 761.30(a)(1)(vi)of the EPA Regulations on Polychlorinated Biphenyls (PCBs), 40 C.F.R. § 761.30(a)(1)(vi); failure to mark properly a PCB transformer and the means of access to such equipment in violation of Section 761.40(c)(1) and (j)(1) of the PCB Regulations; and unlawful disposal of PCB's in violation of Section 761.60(a) of the PCB Regulations.

APPEARANCES:

For Complainant:	David M. Jones, Esq. for U.S. Environmental Protection Agency, Region IX
For Respondent:	Richard L. Landes, Esq. Jon K. Wactor, Esq. for City of Long Beach, Port of Long Beach

I. PROCEDURAL HISTORY

This proceeding was initiated pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), which provides for the assessment of civil penalties for violations of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C), and duly promulgated regulations thereunder. In its Complaint, the United States Environmental Protection Agency's (EPA) Region IX (Complainant), charges the City of Long Beach, Port of Long Beach (Respondent or Long Beach), with ten violations of Part 761 of the EPA Regulations governing polychlorinated biphenyls (PCB's) (hereinafter the PCB Regulations), 40 C.F.R. Part 761.[1] The PCB Regulations were promulgated under Section 6(e) of TSCA, 15 U.S.C. § 2605(e), so violations threreof constitute violations of Section 15(1)(C)of TSCA.

Count I of the Complaint alleges a failure to register a PCB transformer with the appropriate fire response personnel in violation of Section 761.30(a)(1)(vi) of the PCB Regulations. Counts II and III involve improper marking for a PCB transformer and for the means of access to such equipment, in violation of Sections 761.40(c)(1) and (j)(1). Counts IV through X concern disposal of PCB's in violation of Section 761.60(a) of the PCB Regulations. Alleging the same violations noted above, Complainant filed an Amended Complaint changing the address of the facility where the inspection occurred. For these alleged violations, Complainant proposed to assess Respondent a penalty totaling $74,000.

Respondent served its Answers to both the Complaint and Amended Complaint, denying all charges stated therein. The Answers alternatively assert that, if Respondent did violate any of

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[1]The C.F.R. cite is to the Code of Federal Regulations, and for simplicity, this reference will be omitted in the remainder of this decision. As a result, the regulation citations hereafter will contain only the appropriate section numbers of the PCB Regulations.

the PCB Regulations, the penalty sought is unreasonable. The Answer to the Amended Complaint, pp. 9-12, also contained a Statement in Mitigation (Statement) which noted that the subject property had been acquired in March 1986 for the purpose of demolishing the improvements thereon to develope the site as a marine cargo terminal. The Statement set out that the facility was fenced, patrolled and vacant of any occupancy. It also indicates that the Respondent had hired an environmental consulant who submitted a report in April 1989 on the extent of equipment containing PCBs at the site, which resulted in a contract for removal of such equipment, including the transformers involved herein. The Statement contends that, because of the pendance of removal and disposal of the transformers, and the fact that the property was in a remote location, and was vacant, fenced and patrolled, imposition of any civil penalty for failing to notify fire personnel and to mark the PCB transformer is not warranted. And, the statement notes that the EPA inspection report indicates that the leaks and spills appear to be of a long term historical nature, so the fact that the Respondent completed removal of the transformers and disposal of the contanimated material from the spills within six months of the EPA inspection, makes the impoition of any penalty for the spills inappropriate.

Prior to Complainant filing its Amended Complaint, the then Presiding Judge ordered the parties to submit memoranda on what precedential effect, if any, In re City of Detroit Public Lighting Department, (hereinafter City of Detroit), TSCA Appeal No. 89-5 (CJO, February 7, 1991), had on the subject proceeding. Both parties submitted these memoranda.

The proceeding went to an evidentiary hearing on August 10, 1993, during which the following decisional record was established. Complainant presented two witnesses and introduced two exhibits, C-1 and C-2, both of which were admitted into evidence. Respondent

presented one witness and four exhibits, numbered R-1 through R-4. The Respondent's exhibits were also admitted into the evidence. The transcript is contained in one volumn totalling 108 pages. Initial briefs and reply briefs were submitted according to the schedules established.[2]

This initial decision will consist of an overview of the factual circumstances relating to the alleged violations to place them in context; a description as necessary of the positions of the parties with regard to the matters at issue; an analysis and resolution of the those issues; and an order disposing of the issues. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this decision.

II. OVERVIEW OF THE FACTUAL CIRCUMSTANCES

To place the alleged violations in context, an overview of the factual circumstances relating to the violations is helpful. The Respondent in its function as the Port of Long Beach (the Port) is an operating commercial port, which maintains a landlord relationship with a number of industrial businesses located on the Port's land. In 1986, the Port was in the process of expanding and obtaining adjacent areas, one of which was the old Henry Ford Plant (the Facility), which was purchased by the Port in March 1986. The Port intended to demolish the Facility and assimilate the land into the Port functions. (Ex. C-1, p. 3.) After its purchase by the Port, the Facility was

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[2]The exhibits will be cited as "Ex." with "C" and the number for the Complainant's exhibits (e.g., Ex. C-1); "R" and the number for the Respondent's exhibits (e.g., Ex. R-2); the transcript will be cited as "Tr." with the page number (e.g., Tr. 55); and the briefs will be cited by abbreviated party designations and page number (e.g., Comp. Init. Br. p. 10).

not used and was vacant. It was also fenced and nonaccessible, and was patrolled by Harbor security officers. (Tr. 76-77; Ex. R-2.)

In connection with the demolition of the Facility, the Respondent had an Environmental Study (Environmental Study) made to determine the presence of hazardous materials (Tr. 78; Ex. C-2, Attachment 5). This Environmental Study dated April 1989 showed, among the 13 electrical transformers at the Facility, the presence of 1 PCB transformer (containing 1600 ppm PCBs) and 6 PCB contaminated transformers (ones having more than 50 ppm but less than 500 ppm PCBs) (Ex. C-1, pp. 4, 16, 17, Attachment 5). The Respondent was originally going to demolish the entire Facility at the same time but, after becoming aware of the PCBs, it let a separate contract to remove the PCBs before doing the rest of the demolition. The PCB removal contract was ordered in February of 1990 and the removal was completed in the spring of 1990. After the removal of the electrical transformers involving PCBs, the remainder of the Facility was demolished, with the demolition being completed by September 1990. (Tr. 78-80.)

On December 9, 1989, Mr. David Price, an inspector with the State of California, County of L.A., Toxic Division, conducted an inspection of the Plant, under a contract agreement with the EPA to conduct PCB inspections (Tr. 8-11; Ex.C-1). As a result of this inspection, Mr. Price submitted an Inspection Report (Inspection Report)dated January 4, 1990, that resulted in the Respondent being charged with the 10 violations set out in the Amended Complaint herein (Tr.54; Ex. C-1). The 10 violations consisted of the following: three violations relating to the PCB transformer (one for failure to notify fire response personnel of the transformer; one for not having proper marking on the transformer; and the third for not having proper marking on the entrance to the area where the transformer was located); and seven disposal violations involving

spills and leaks from the PCB transformer and from the 6 other PCB contaminated transformers (Ex. C-2).

With regard to the failure to notify the fire response office, this situation was determined based on statements to Mr. Price by Plant representatives (Tr. 13; Ex. C-1, p. 4). The two marking violations were determined by the inspector's observations during the inspection, and were backed up by photos (Tr. 14; Ex. C-1, p.5, Attachment 6). As to the seven disposal violations charged, the spills and leaks from the transformers involved was established by visual observation by Mr. Price but no samples or analysis of the leaked and spilled material were taken (Tr. 12, 21, 25). Also, the inspector confirmed that the leaks and spills appeared to be of a longterm historical nature (Tr. 26; Ex. C-1, p. 4).

Moreover, it is significant to point out that the January 4, 1990 Inspection Report and the Resondent's April 1990 Environmental Study listed 6 transformers in the Main Vault, and 6 more in the Second Floor Vault (Ex. C-1, pp. 16, 17, Attachment 5). The 6 transformers in the Main Vault were not energized but the 6 in the Second Floor Vault were energized (Tr. 17, 22, 39)[3]

III. POSITIONS OF THE PARTIES

1. Complainant's Position

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[3]In the Inspection Report, Mr. Price had indicated that all the transformers involved were energized (Tr. 12; Ex. C-1, p. 4). However, his testimony at hearing made it clear that the Main Vault transformers were not energized, and he could get close enough them to get information from the name plates on the transformers (Tr. 17, 22, 39). On the other hand, the transformers in the Second Floor Vault were energized, so the inspector could not get close enough to secure information from their name plates (id.) It should also be noted that the Respondent did admit that the PCB transformer in the main vault was in service (Amended Comp. p. 2, § 4), but this is clearly incorrect if it was not energized. The sworn testimony from Mr. Price on this point is more probative and must be accepted in resolving this apparent factual contradiction.

Complainant avers that Respondent gained knowledge of the existence of the PCB transformer and the 6 PCB contaminated transformers from the April 1989 Environmental Study conducted by its consultant (Comp. Init. Br. p. 4; Ex. C-1, Attachment No. 5). Complainant contends that the PCB transformer and that some of the six PCB contaminated transformers were energized or in use (Comp. Init. Br., pp. 5, 8, 10; Ex. C-1, p. 4; Tr. 11-12, 39). Complainant avers that the December 7, 1989 inspection by Mr. Price disclosed that the Respondent had failed to provide registration to the local fire personnel concerning its PCB transformer, had failed to mark properly the PCB transformer and the means of access to this item with the cautionary M_L label, and had, because of the leaks and spills in the area of the transformers, unlawfully disposed of PCB's from the PCB transformer and the six contaminated PCB transformers (Comp. Init. Br. pp. 5, 6, 8-10; Ex. C-1, Attachment 6; Tr. 12-14, 39, 40).

With regard to the City of Detroit case, Complainant notes that the Respondent was held not liable since Detroit merely owned the property and did not cause the spills or leaks that were the subject of the violations. However Complainant seeks to distinguish City of Detroit Complainant argues that Long Beach either was aware or should have been aware of the prior use of the Facility as an automobile manufacturing plant. Complainant urges that good customary practice at the time of purchase should have made the Respondent inspect the Facility to determine its condition, and should have made the sale conditional on the seller cleaning up the Facility. Instead, Long Beach waited three years from the time of its purchase in March of 1986, to apprise itself of the presence of PCB's. Under these circumstances, Complainant contends that, when Long Beach took possession of the Facility, the Respondent stepped into the shoes of the

grantor and assumed responsibility for the leaks and spills, and for their clean up. (Comp. Init. Br., pp. 10-13.)

The 10 counts set out in the Amended Complaint are described by Complainant in more detail as set out below, as is the Complainant's position on the appropriate penalty to be imposed in this proceeding.

A. Count I

Based upon the inspection of Respondent's facility, Complainant argues it was discovered that Respondent had not complied with the registration requirement to local fire personnel for its PCB transformer as required by the Section 761.30(a)(1)(vi) of the PCB Regulations. During this inspection, four representatives of Respondent's facility accompanied Mr. Price. After informing him of there being one PCB transformer, Mr. Price related that the facility representatives also stated that this transformer was not registered with the fire response personnel having primary jurisdiction (Ex. C-1, p. 4; Tr. 13).

B. Counts II and III

Complainant contends Respondent did not mark either the PCB transformer or the entrance to that transformer as required by Sections 761.40(c)(1) and 761.40(j)(10 of the PCB Regulations. To support its position, Complainant points out that Mr. Price's did not see the M_L label on either Respondent's transformer or on the passageway to this transformer (Ex. C-1, p. 5; Tr. 14). Moreover, Mr. Price took a photograph which allegedly documents the absence of the mark on Respondent's PCB transformer (Ex. C-1, Attachment No. 6, Photo No. 1).

C. Counts IV-X

For the PCB transformer and the six contaminated PCB transformers, Complainant avers that disposal of PCB's occurred in violation of Section 760.60(a) of the PCB Regulations. These violations are based on the visual observations of spills or leaks by Mr. Price (Tr. 12). Mr. Price did not observe any actual leaking but rather explained that there were stains, like an oil residue, on the transformers and trailing away from them as well (Tr. 25). However, Complainant did note tha these PCB leaks were described by Mr. Price as being of a long-term historical nature (Ex. C-1, p. 4; Tr. 26). For all the leaks, Mr. Price took photographs displaying their presence (Ex. C-1, Attachment No. 6, Photos Nos. 1-4; Tr. 12-13).

D. Penalty

Complainant avers that a penalty of $13,000 each for Counts I through III, and a penalty of $5,000 each for Counts IV through X is appropriate. For all the Counts, Complainant asserts that the penalty was calculated in accordance with the Guidelines for Assessment of Civil Penalties under Section 16 of TSCA (PCB Penalty Policy), 55 Fed. Reg. 59770 (April 13, 1990) and all factors set forth in Section 16(a)(2)(B) of TSCA. Thus, the total proposed penalty of $74,000 represents the proper total amount for the violations. (Comp. Init. Br. pp. 7, 14.)

2. <u>Respondent's Position</u>

Respondent argues that the conclusions reached in Mr. Price's December 9, 1989 inspection report, which forms the basis of the Amended Complaint, are not supported by evidence and are not a proper foundation for the Complainant's penalty calculations. Respondent contends that, because the is no evidence of disposal violations committed by Long Beach, no disposal penalties are appropriate and judgment must be entered for the Respondent. (Resp. Init. Br. pp. 1, 2.)

Respondent avers that the testimony of Mr. Price on cross-examination establishes his conclusions in the inspection report were mere suppositions. In support of its assertion, Respondent lists the following admissions by Mr. Price reflecting a lack of factual evidence: no samples or tests were taken of the alleged PCB-fluid either inside or outside of the boxes assumed to be transformers (Tr. 21-22); no calculations or measurements were performed to check the volume of fluid inside the transformers or the size of the transformers (Tr. 33); and only stains were observed on and near the transformers but no actual leaking was seen (Tr. 25-26). Thus, Respondent argues that there is no evidence to establish the alleged violations. (Resp. Init. Br., pp. 2, 3.)

Even if it is determined that the inspection report establishes the alleged volume and concentration of PCB-fluid inside the transformers, Respondent contends there is no evidence of any actual leaking or when a leak happened. In fact, Mr. Price described the spills as being of a long term historic nature. Therefore, even if it is also determined that the alleged disposal of PCB's occurred at the Facility, Respondent asserts that there is no evidence to establish that the spills occurred while Long Beach owned the facility. Accordingly, Respondent argues that, base on the precedent of City of Detroit, where Detroit was not held responsible for PCB spills of an historic nature, Long Beach should not be held liable for the PCB spills in this cause, if such spills are found to have occurred. (Id. at 3.)

Respondent also argues Complainant's penalty calculations must be disregarded because they were made solely on information about the alleged spills from Mr. Price's Inspection Report, which Respondent avers was based on supposition, not fact (id. at 3, 4).

Respondent also discussed the three Counts relating to the PCB transformer separately and treated the remaining seven Counts involving the disposal charges in the context of the City of Detroit case. A brief summary of the Respondent's position in these areas follows.

A. Count I

As to Count I, Respondent claims that Complainant improperly categorized this alleged violation as a significant extent violation because the PCB transformer had a capacity of 280 gallons. Yet, Complainant neither ascertained the amount of PCB-fluid in this transformer nor did it determine whether the transformer was at full capacity. Accordingly, at most, Count I should be a minor extent violation. (Id. at 5.)

Respondent also avers Complainant incorrectly classified this alleged violation as a major use violation instead of a minor use violation. Respondent states that the Penalty Policy recognizes a minor use violation when there is no notification to the fire department but the fire department or adjacent landowners are aware of the transformer location. While admitting that it has not found any records establishing notification to the Long Beach Fire Department, Respondent argues that Complainant has not demonstrated the fire department was unaware of the transformer location by checking the registration records. (Id. at 5, 6.)

B. Count II

Since this Count concerns the same transformer as in Count I, this alleged violation should also be considered to be minor. Additionally, Respondent claims that this alleged failure to mark the PCB transformer should be a minor marking violation because a warning was present on the door providing access to the PCB transformer. A minor violation is appropriate under the Penalty

Policy when there is an adequate showing indicating that PCB's are present and PCB items can be identified. (Id. at 6.)

C. Count III

With the same transformer again at issue, Respondent asserts that a minor extent violation is proper here based on the same rationale set out above with regard to Count I. Also, Respondent contends that this alleged violation should be characterized as minor because, although the label marking access to the PCB transformer did not completely conform to the requirement, the label still provided notice of PCB's. Accordingly, the label marking access to the PCB transformer falls within the minor marking category. (Id. at 6, 7.)

D. Counts IV-X

The Respondent treats Counts IV-X together since they all involve alleged improper disposal of PCBs. Respondent contends that Complainant has not produced evidence that Long Beach caused any disposal, so no penalties are warranted for the alleged disposal violations. Respondent asserts that the City of Detroit case establishes that it cannot be held liable for any disposal simply because it owns the property on which PCB's were spilled. Given the absence of evidence confirming either the presence of PCB's or that Long Beach caused the disposal of PCB's, Respondent submits that no penalty can be assessed for these counts. (Id. at 7, 8.)

E. Summary

In summary, Respondent contends that it should not be subject to penalties of more than $1,000 for Count I, $500 for Count II and $500 for Count III, and that no penalty should be assessed for the alleged disposal violations in Counts IV-X. Hence, Long Beach suggests it should not be subject to total penalties in excess of $2,000. (Id. at 8.)

IV. ANALYSIS AND RESOLUTION

On analysis, it is appropriate first to address Long Beach's argument that would defeat all counts of the complaint, that is, whether the evidence established if PCB's in the alleged quantities were even present at Respondent's facility. Mr. Price relied almost exclusively on the Study provided to him by the facility representatives, as well as their statements, to confirm the existence of PCB's at Long Beach's facility. Despite this Study, Respondent still maintains that Complainant has not independently conducted any testing or analysis verifying the alleged PCB containing equipment.

It is found that the Study and the statements by Long Beach's representatives constitute admissions[4], and thus, under the circumstances have sufficient indicia of credibility to be probative evidence establishing the presence of PCB's as stated in the inspection report. First, the Study was produced by personnel authorized to represent Respondent during inspections, and this factor lends credibility and authenticity to it. Second, other than arguing that Complainant has not corroborated the findings in the Study, Respondent has not attempted to controvert its accuracy. In fact, Respondent submitted the Study as part of its prehearing exchange. Third, Respondent has not made any attempt to repudiate the actions of its representatives on its behalf, regarding their statements on the facility, or by furnishing the Study to Mr. Price, Cf. In re New Waterbury,

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[4] While the Federal Rules of Evidence are not binding upon this tribunal, they provide guidance in areas where the Consolidated Rules of Practice are silent, In re Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1 (June 24, 1991) at 10. The Study can be an adoptive admission under Rule 801(d)(2)(B), See 4 Wigmore, Evidence § 1073 (Chadbourn rev. 1972); McCormick, On Evidence § 261, p. 173, n.5 (4th ed. 1992). Moreover, the statements by the facility representatives can fall within Rule 801(d)(2)(C) or (D), See McCormick § 259, pp. 158-160.

Ltd., A California Limited Partnership, Docket No. TSCA-I-88-1069 (July 8, 1992) at 32, decision after reh'g on other grounds, (May 7, 1993), rev'd on other grounds, TSCA Appeal No. 93-2 (EAB, October 20, 1994), reconsideration denied, (November 16, 1994)(finding PCB Survey Index hearsay, but meeting the indicia of credibility under the circumstances to be probative evidence, even though it was prepared by a third party).

Accordingly, under 40 C.F.R. § 761.3, transformer No. 2 in the main vault, serial number 154043, containing 1600 ppm of PCB's is a PCB transformer (C-1, Attachment No. 5).[5] Further, under 40 C.F.R. § 761.3, transformers numbered four through six in the main vault, containing 200, 50 and 190 ppm of PCB's, and transformers numbered two, four and five in the second floor vault, containing 52, 96 and 63 ppm of PCB's, are PCB contaminated transformers (C-1, Attachment No. 5).[6]

Due again to a lack of independent verification, Respondent also disputes the fluid volume of 280 gallons listed for its PCB transformer in the inspection report (C-1, p. 16). Respondent's argument is rejected. This figure was obtained from the nameplate on the transformer (Tr. 17, 33). In the absence of evidence to the contrary, this number located on the transformer and transcribed in the inspection report is deemed to be correct, Cf. In re Hollins Electric and Engineering, Inc., Docket No. TSCA-09-90-0082 (Order, March 16, 1993) at 8-10; In re

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[5] Under 40 C.F.R. § 761.3 Definitions:

PCB Transformer means any transformer that contains 500 ppm or greater.

[6] Under 40 C.F.R. § 761.3 Definitions:

PCB-Contaminated Electrical Equipment means any electrical equipment including but not limited to transformers . . . that contain 50 ppm or greater PCB, but less than 500 ppm.

Northville Square Associates, Docket No. TSCA-V-C-017-92 (Order, March 16, 1994) at 4-6 (nameplates indicating presence of PCB's must be assumed to be a PCB Transformer unless contrary evidence establishes otherwise).

A. Count I: Registration with Fire Response Personnel

The first count charges that Respondent failed to register its PCB transformer with the local fire response personnel having primary jurisdiction as required by 40 C.F.R. § 761.30(a)(1)(vi). Respondent's primary contention against liability is that Complainant did not check with the fire department to determine if Respondent had submitted the required notification. Additionally, Respondent argues that this regulation does not require proof of notification during an inspection.

On analysis, Respondent's argument is not persuasive. As stated above, the regulation at issue requires all PCB transformers to be registered with the fire response personnel. In clarifying compliance with the regulation, the Federal Register declared, "registered" means to "record formerly and exactly," 53 Fed. Reg. 27324 (July 19, 1988). However, Respondent's representatives admitted that the PCB transformer was not registered with the appropriate fire response personnel (Tr. 13).[7] In addition, Respondent also concedes in its Initial Brief, p. 5, that it has found no records indicating notification to the Long Beach Fire Department. Such admissions alone, without any controverting statements, establish liability for failure to comply with the registration requirement as specified, Cf. In re New Waterbury, Ltd., Docket No. TSCA-I-88-1069 at 43 (failure by facility representative to affirmatively declare registration had been

[7] The statements of Respondent's facility personnel concerning the registration requirement are admissions. See supra, note 2.

given or to provide written proof of registration justified conclusion of noncompliance with regulation). Therefore, the admissions of the facility representatives dispensed with the need to verify any registration when such was stated not to exist.

B. Counts II and III: Marking of PCB Transformer and Entrance

Counts II and III allege that Respondent failed to mark its PCB transformer and the entrance to this transformer with the mark M_L described in 40 C.F.R. § 761.45(a), in violation of 40 C.F.R. § 761.40(c)(1)[8], (j)(1)[9]. Mr. Price observed that neither Respondent's transformer nor the means of access to this item had the required M_L mark (C-1, p. 5; Tr. 14). Respondent did not present contradictory evidence establishing that the marks were present. In fact, in its answer to the amended complaint, Respondent admitted that the transformer and the door leading to it were not marked with the required PCB cautionary label (Resp't Am. Answer, p. 3, ¶¶ 8, 11). Additionally, in its Initial Brief, pp. 6-7, Respondent again acknowledged that its PCB transformer had no mark on it and the mark on the entrance to the transformer did not conform to the regulation. These marking requirements are separate and distinct regulations, which mandate that for compliance, the mark must comply with the PCB caution notice displayed in 40 C.F.R. § 761.45(a), In re Pacific Refining Company, TSCA Appeal No. 94-1, (EAB, October 19, 1994) at

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[8] 40 C.F.R. § 761.40(c)(1) provides that:

(c) As of January 1, 1979, the following PCB articles shall be marked with the mark M_L as described in § 761.45(a):
(1) All PCB transformers not marked under paragraph (a) of this section.

[9] 40 C.F.R. § 761.40(j) provides that:

(1) [A]s of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L as required by paragraph (a) of this section.

2-3, 7. Accordingly, as Respondent admits it did not have the required mark on either the transformer or the entrance, it is liable for these violations.

C. Counts IV-X: Disposal of PCB's

Counts IV through X allege that Respondent unlawfully disposed of PCB's from its PCB transformer and from its six contaminated PCB transformers in violation of 40 C.F.R. § 761.60(a). This regulation provides that any disposal of PCB's containing a PCB concentration of 50 ppm or greater must be disposed in a specified manner. As defined in 40 C.F.R. § 761.3, the term disposal includes spills, leaks and other uncontrolled discharges of PCB's (emphasis added). Leaks are further described in § 761.3, as any instance in which a PCB Article, PCB Container or PCB Equipment has any PCB's on any portion of its external surface.

As stated, supra, at p. 3, the parties were ordered to submit memoranda regarding City of Detroit's effect on the subject proceeding. This case stands for the proposition that the PCB disposal requirements apply to the person who caused or helped to cause the disposal, City of Detroit, at 20. Additionally, in situations of uncontrolled discharges the person who owned the source of the PCB's at the time of the discharge will be deemed to be the one who caused the disposal, Id. However, the person who merely owned the property upon which PCB's were spilled is not necessarily liable for the disposal, Id.

Based upon the evidence presented, Respondent argues that it cannot be held liable for any alleged disposal of PCB's. First, Respondent contends that there was no evidence of any PCB spills or leaks, since all Mr. Price observed were old stains on or near the transformers without any testing. Second, relying on City of Detroit, Respondent contends that, if it is decided that the disposal of PCB's occurred, there is no evidence to conclude that the leaks occurred while it

owned the facility especially when the leaks were characterized as being of a "long-term historical nature."

While Respondent's first contention above has merit, it is not convincing. Besides direct evidence, facts at issue may be proved by circumstantial evidence, 1A Wigmore, Evidence §§ 24, 25 (Tillers rev. 1983). Where the preponderance of the evidence establishes that transformers leaked fluid containing PCB's testing the fluid is deemed unnecessary, In re Samsonite Corporation, TSCA Appeal No. 87-6 (CJO, December 26, 1989) at 5. During Mr. Price's inspection, stains were seen on the transformers and in the area below them. When cross-examined on whether the stains could have been from something other than the transformers, Mr. Price stated, "It would lead you very close. There's nothing around to leak off of it or anything else. That's where it was from, from the transformer" (Tr. 25). Mr. Price's observations were supported by photographs which documented these stains on and near all the transformers (C-1, Attachment No. 6, Photos Nos. 1-4). Thus, Complainant has presented persuasive evidence that the fluid on the external surface and near the transformers was from the inside of the transformers. Accordingly, on the basis of this evidence, a sufficient nexus has been established that the stains on and near the transformers were PCB's, See In re Samsonite Corporation, TSCA Appeal 87-6 (CJO, December 26, 1989) at 4-5. This inference is even more compelling, since Respondent has not produced any evidence suggesting that the stains were from anything other than fluid inside the transformers.

Despite the finding that PCB's leaked from the transformers, under the holding of City of Detroit Respondent is not necessarily liable for the uncontrolled discharges. Respondent points to City of Detroit, and argues that it cannot be liable for any disposal when there is no evidence

establishing the leaks occurred while it owned the facility. Thus, it cannot be deemed to be the party who caused the disposal. Further, a person who merely owns the property is not subject to the disposal regulations.

Respondent's interpretation of City of Detroit is not entirely correct. It is true that a mere property owner who did not own the PCB's or cause the disposal is not liable, even if the owner did not inspect the property before purchase, Id. at 23-24. On the other hand, the absence of evidence on when the leaks occurred does not free Respondent of liability. To remedy the difficulty in establishing causation in every instance of an uncontrolled discharge, the Chief Judicial Officer enlisted the following rebuttable presumption: if PCB's are found on a piece of property so as to raise the inference that an uncontrolled discharge has occurred, then it must be presumed that the present owner caused the uncontrolled discharge that deposited the PCB's there, City of Detroit, at 25. Thus, to meet its prima facie case and shift the burden of production to Respondent, Complainant need only show that PCB's were found in a state of improper disposal, Id. at 26. Here, Complainant has met its prima facie case by furnishing evidence that PCB's had leaked on the external surface of the transformers and on the ground beneath them.

In order to show that it was not responsible for the discharge, the present owner can rebut the presumption by demonstrating that it is more likely or equally likely that another person or persons caused the uncontrolled discharge, Id. at 26-27. The presumption can be rebutted in some cases simply by showing what happened on the present owner's property during its tenure, which rules out the possibility that the spill occurred after the present owner acquired title, Id. at 28. Respondent purchased the facility in March of 1986 from an unnamed party. Respondent's sole witness, Mr. Edward Allen, the Chief Harbor Engineer for the City of Long

Beach, explained that in December of 1989, the facility was vacant and inaccessible due to a fence surrounding the facility (Tr. 76). Further, there were security officers from the Harbor Department patrolling the building (Tr. 77). Notwithstanding this testimony, the record is completely empty concerning what occurred at the facility from March of 1986 until December of 1989. Thus, for over three years, Respondent has not produced any evidence which eliminates any significant possibility that a spill occurred during its tenure.

Even if a leak may have occurred during its tenure, Respondent can still rebut the presumption by showing that it is more likely or equally likely that the leak happened before it acquired the facility, City of Detroit at 28. While Respondent states that the facility was used originally as an automobile production plant from the 1920's to the mid-1950's, Respondent has neither identified the previous owner nor what use was made of the facility. Respondent merely recounts that the Ford Motor Company sold the property to private owners who made a variety of uses of it through March 1986 (Resp't Am. Answer p. 9, ¶ 30). This scant presentation hardly suggests that it is more likely or equally likely that a leak happened before Respondent acquired the property.

On the other hand, Respondent mentions in its memorandum on City of Detroit that the Ford Motor Company installed PCB transformers (Resp't Mem., p. 2). Respondent also hints that the description of the leaks as being of a "long-term historical nature" establishes in and of itself that it is equally likely the spills occurred before Long Beach acquired the property (Resp't Mem., pp. 5-6).

On analysis, both these arguments fail. First, Respondent's presentation of Ford's PCB use does lend support for a leak possibly occurring when Ford owned the building. Unfortunately,

Respondent's empty showing of how the previous owner, as well as itself (until 1989), utilized the facility prevents Respondent from proving it is more or equally likely that a leak occurred prior to its ownership. Second, the fact that the leaks were old does not by itself overcome the presumption. These leaks could just have easily occurred anytime from 1986-1989, when Respondent owned the facility.

Yet, the most damaging aspect to overcoming the presumption is Respondent's own admissions concerning PCB use. First, the facility representatives stated that some of the transformers were energized, and as a result, the inspector could not get too near them (Tr. 17). Second, in its answer to the amended complaint, Respondent admitted that the PCB transformer was in service during the inspection (Resp't Am. Answer, p. 2, ¶ 4).

Hence, Respondent's own admissions support the presumption.

Accordingly, in light of the evidence presented, it is found that Respondent has failed to rebut the presumption, and is liable for the disposal of PCB's from its PCB transformer and six contaminated PCB transformers.

IV. DETERMINATION OF PENALTY

Having concluded that Respondent is liable for the alleged violations stated herein, it is necessary to determine the appropriate penalty. Under Section 16(a)(2)(B) of TSCA, any penalty determination requires consideration of the "nature, circumstances, extent and gravity of the violation." This results in the "gravity-based penalty" (GBP). Following a GBP determination, the next step under Section 16(a)(2)(B), is to consider any adjustments to the GBP based upon the situation of the violator, such as, ability to pay, culpability and other factors as justice may

require. Under 40 C.F.R. § 22.27(b), the Presiding Judge is also required to consider any applicable penalty guidelines, however, these guidelines are not binding upon him.

The framework establishing penalties for violations of the PCB regulations was set forth in the Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59,770 (September 10, 1980) (1980 Guidelines). However, since the complaint was issued in September 1990, the governing penalty policy is the 1990 Revised PCB Penalty Policy (Penalty Policy or Policy) dated April 9, 1990. Under the Policy, the GBP is calculated from a matrix which takes into account both the probability of harm caused by the violation (i.e., circumstance) and the extent of the potential damage from the violation (i.e., extent). Moreover, the statutory mandate to consider the nature of the violation is already factored into this matrix calculation, 45 Fed. Reg. 59,778 (September 10, 1980).

A. Count I

Count I involves a use violation of the PCB regulations. Complainant asserts that this violation is a circumstance level 2 "major" use violation of "significant" extent. Under the Penalty Policy the failure to register a PCB transformer with the local fire jurisdiction is classified as a "major" use violation and considered to be a level 2 circumstance (Policy, pp. 10-11). Extent of potential damage is determined by the amount of PCB's involved in the violation. Because the amount of PCB's in Respondent's transformer was found to contain 280 gallons, this quantity places Respondent in the "significant" extent category (Policy, p. 4). Accordingly, plotting the level 2 circumstance on the vertical axis, in conjunction with the significant extent on the horizontal axis, yields a penalty of $13,000 (Policy, p. 9).

Respondent contends that classifying this count as a "major" use violation is incorrect. In Respondent's opinion, the Penalty Policy classifies a use violation as "minor" when the fire department or adjacent landowners are aware of the transformer location, even if no registration has been supplied. Respondent's argument is misplaced. The Penalty Policy acknowledges that a "minor" use violation includes a situation where one has failed to provide complete registration, but the fire department or the adjacent building owners are aware of the transformer locations (emphasis added) (Policy, p. 11). However, as admitted, supra, at p. 14, Respondent has not provided any registration to the fire department. Thus, Respondent cannot qualify for this "minor" use classification. For count I, Complainant's GBP determination of $13,000 is deemed proper.

B. Counts II and III

These counts concern marking violations of the PCB regulations. The extent of the violation falls under the "significant" category again, because the same 280 gallon transformer is involved here. Complainant also proposes that both counts are circumstance level 2 "major" marking violations. The Penalty Policy defines a "major" marking violation as:

> [A] situation where there is no indication to someone unfamiliar with PCB's that PCB's are present, such as failure to label the access to a PCB Transformer or failure to label the transformer.

(Policy, p. 11).

Respondent argues that any of its marking violations is a circumstance level 5 "minor" marking violation. The basis for Respondent's argument is that a warning was present on the door providing access to the transformer. As such, this warning provided adequate notice of PCB's being present. The Penalty Policy defines a "minor" marking violation as:

> [S]ituations in which some requirements of the rule have not been followed, but there is sufficient indication that PCB's are present and the PCB items can be identified.

(Policy, p. 12).

First, Respondent's argument regarding count II is without merit. Respondent has admitted that its PCB transformer contained no mark whatsoever. Yet, Respondent still insists that notice of PCB's for its transformer was provided by placing a sign on the door. A mark on the means of access does not provide adequate notice of PCB's being present for the independent requirement of marking PCB transformers, See In re Pacific Refining Company, TSCA Appeal No. 94-1 (EAB, October 19, 1994) at 7. Accordingly, with no mark at all on the transformer, this count is properly assessed under the rubric of a circumstance level 2 "major" marking violation. Thus, the GBP for count II is $13,000.

Second, while Respondent's argument concerning count III has some merit, it also is rejected. Although Respondent contends that there was a sign on the means of access to the transformer, Respondent has failed to demonstrate the sign gave notice of PCB's being present. Mr. Allen identified this door, displayed in R-1, as the means of access to the main vault. However, when questioned concerning what the sign appears to be, he stated, "Well, it appears to be a sign. I can't tell what it says" (Tr. 81). Other than identifying some sign, Respondent produced no evidence regarding what the sign depicted. A "minor" marking violation requires that there be some indication that PCB's are present, even if not conforming exactly to the regulation. No such showing has been established in this case. Accordingly, this count is also properly viewed as a circumstance level 2 "major" marking violation, and thus, a GBP of $13,000.

C. Counts IV-X

For counts IV through X, involving improper disposal of PCB's, Complainant classified these counts as a circumstance level 1 "major" disposal violation of "minor" extent. Under the Policy, a circumstance level 1 "major" disposal includes any significant uncontrolled discharge of PCB's, such as leaks or spills, from a PCB item (Policy, p. 10). For extent of the violation, Mr. Price listed the size of all the spills from the transformers in square feet (C-1, pp. 16-17). Because all the spills were less than 20 square feet, the Penalty Policy classifies the extent as "minor" (Policy, p. 6). Referring to the matrix, a level 1 circumstance of "minor" extent yields a GBP of $5,000. Since Respondent did not dispute the GBP determination of $5,000, it is accepted as being correct.

The total GBP is therefore $74,000. Before turning to the adjustment factors, the 1980 Guidelines allowed a downward adjustment of up to 25% where a violation, while of "significant" extent, is so close to the borderline separating "minor" violations that the penalty seems disproportionately high, 45 Fed. Reg. 59,776 (September 10, 1980). Although the 1990 Penalty Policy does not mention this downward adjustment, it is concluded that this adjustment is still applicable since the 1990 Penalty Policy incorporates the same framework for distinguishing between "significant and minor" extent of a violation, See 45 Fed. Reg. 59,777-8 (September 10, 1980); (Policy, p. 4). The PCB transformer, which exceeded the "minor" extent limit by only 61 gallons, fits within this adjustment. Only counts I through III are implicated by this reduction, and the GBP for each of these counts will be reduced by 15%. Therefore, the penalty for counts I through III will be reduced to $11,050. Accordingly, the total GBP is now $68,150.

After calculating the GBP, the next step is adjusting the GBP based upon the statutory factors, if applicable. The sole consideration which warrants comment is the "attitude" of the

violator which falls under the rubric of "other factors that justice may require." The attitude of the violator focuses on: good faith efforts to comply with the applicable regulations; the promptness of the violator's corrective actions; and any actions taken to minimize harm to the environment (Policy, p. 17).

After the inspection of its facility, Respondent acted promptly to correct its violations. First, approximately three weeks after the inspection, Respondent instituted remedial measures for counts I through III by registering its PCB transformer with the Long Beach Fire Department and ordering the mark M_L to be placed on the transformer and means of access (R-3; R-4). Second, the record reflects that Respondent had removed all the transformers from its facility before the complaint was even issued (Tr. 79).

The record also establishes that the probability of harm to the environment was remote. The facility was isolated from the surrounding area by fencing and the highway (R-2; Tr. 76). It was also vacant and patrolled by the Harbor Department (Tr. 76-77). Further, at the time of the inspection, Respondent was in the planning process of removing the transformers and demolishing the facility (Tr. 77). Both the removal of transformers and the demolition of the facility were completed by September 1990 (Tr. 80).

For this factor, the Policy suggests that the maximum downward adjustment of 15% is generally appropriate if the violations are halted immediately and steps are taken to rectify the situation (Policy, p. 17). Accordingly, in light of Long Beach's attitude above, a further downward adjustment of 15% is warranted. Therefore, under all the circumstances a penalty of $57,928 is considered proper.

ORDER[10]

Pursuant to the Toxic Substances Control Act Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), a civil penalty of $57,928 is assessed against City of Long Beach, Port of Long Beach. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in full amount payable to the Treasurer, United States of America, at the following address:

Regional Hearing Clerk
U.S. EPA, Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

_____
Daniel M. Head
Administrative Law Judge

Dated: _____

[10] Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the EAB elects, sua sponte, to review this decision, it shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).