

6/17/80

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
324 East 11 Street  
Kansas City, Missouri 64106

IN THE MATTER OF:

Briggs and Stratton Corporation  
Wauwatosa  
West Allis  
Milwaukee

} DOCKET No. TSCA-V-C-001  
                    -002  
                    -003  
} -----  
} Marvin E. Jones  
} Administrative Law Judge

INITIAL DECISION

This proceeding concerns three administrative civil penalty actions, above-styled, under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. Section 2615(a), hereinafter "TSCA"), consolidated for hearing upon Respondent's motion, which were instituted by complaints issued by the Director, Enforcement Division, U.S. Environmental Protection Agency, Region V, Chicago, Illinois.

Complaint -001 alleges violations of the Polychlorinated Biphenyls (hereinafter "PCBs") disposal and marking regulations (40 CFR 761, 43 FR 7150, February 17, 1978), and charges the Respondent, Briggs and Stratton Corporation, with violations at its Corporate Service Center on 124th Street in Wauwatosa, Wisconsin. This facility, in the record occasionally referred to as the Burleigh Plant, will be hereinafter referred to as "Wauwatosa". Complaint -001 consists of three counts, charging Respondent with: 1) failure to implement required safeguards in storing PCBs for disposal, in that subject area used to store PCB articles did not (a) have adequate roof and walls to prevent rainwater from reaching the stored PCB articles, or (b) have adequate floor or curbing to satisfy 40 CFR 761.42(b)(1)(ii and iv); 2) failure to place required warning labels on items containing PCBs in violation of 40 CFR 761.20; and 3) failure to develop and maintain records on disposition of PCBs as required by 40 CFR 761.45. The Complaint proposes a civil penalty in the amount of \$35,000 for these violations.

Complaint -002 alleges violations of the PCB disposal and marking regulations at Respondent's foundry operation at 68th Street in West Allis,

Wisconsin (which plant will be hereinafter referred to as "West Allis"), in three counts, as follows: 1) failure to comply with 40 CFR 761.42 in storing PCBs for disposal in violation of 40 CFR 761.10(c)(4); 2) failure to place required warning labels on items containing PCBs; and 3) failure to develop and maintain records on disposition of PCBs as required by 40 CFR 761.45. The Complaint proposes a civil penalty in the amount of \$35,000 for these violations.

Complaint -003 alleges violations of the PCB disposal and marking regulations at Respondent's West Plant on 132nd Street in Milwaukee, Wisconsin, which plant will be hereinafter referred to as "Milwaukee". Complaint -003 originally consisted of two counts, charging the Respondent with: 1) failure to place required warning labels on an item containing PCBs; and 2) failure to develop and maintain records on PCB items as required by 40 CFR 761.45. At the prehearing conference the Complainant withdrew the first count. On the remaining count a penalty of \$5,000 is proposed.

Following its First Defense (its answer to the Complaint), Respondent pleaded identical affirmative defenses, in each of the three cases, alleging:

SECOND: That the Complaint fails to state facts upon which a penalty may be assessed since it includes no statement indicating the appropriateness of the proposed penalty as required by 40 CFR 22.14(a)(5).

THIRD: (1) That any violations were inadvertent and temporary...and the result of oversight by Respondent's employees and confusion between electrical and environmental employees of Respondent.

(2) That Respondent has a history of compliance with environmental laws and no history of past violations, or charges of such excepting one citation for \$225 to which Respondent pleaded no contest. (that) Respondent, prior to April 1979, substituted non-PCB fluid in all its die cast machines and instituted PCB disposal tracking procedures in cooperation with the Wisconsin Department of Natural Resources.

(3) Promptly following the EPA inspections in April 1979, Respondent complied with TSCA requirements by: preparing and distributing

a PCB compliance program to all Briggs and Stratton facilities, sampling and analyzing the dielectric fluid in all transformers, obtaining and distributing EPA-approved PCB stickers and labeling capacitors and transformers, preparing an appropriate storage area, and developing inventories and completing reports.

FOURTH: Respondent's Fourth Defense, raising constitutional issues, was ordered, by the undersigned, to be stricken at a prehearing conference held on February 21, 1980.

The parties exchanged prehearing materials by mail on December 5, 1979, a procedure provided in lieu of a prehearing conference by Section 22.19(e) of the Interim Rules of Practice. A prehearing conference, requested by the parties, was held on February 21, 1980, at which a further exchange of prehearing information was effected. A hearing was held on March 11, 12 and 13, 1980, at which Complainant was represented by Thomas W. Daggett and Donald S. Rothschild, Attorneys, Enforcement Division, US Environmental Protection Agency Region V, Chicago, Illinois; and Respondent was represented by Charles Q. Kamps and Mary Pat Koesterer, Attorneys, Quarles and Brady, Milwaukee, Wisconsin. Complainant presented three witnesses and five witnesses were called by the Respondent. Numerous exhibits were received in evidence.

The Toxic Substances Control Act (the Act) and regulations promulgated pursuant thereto provide, in pertinent part, as follows:

THE ACT

SEC. 6<sup>1/</sup> REGULATIDN OF HAZARDOUS CHEMICAL SUBSTANCES AND MIXTURES.

- (a) SCOPE OF REGULATION. If the Administrator finds..that the...use, or disposal, of a chemical substance or mixture...presents or will present an unreasonable risk of injury to health or the environment, (he) shall by rule (require)...:
- (3) ...that each substance...or any article containing such substance...be marked... . The form and content of such warnings and instructions shall be prescribed by the Administrator.

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<sup>1/</sup> 15 USC 2605

- (6) (regulation of)...any manner or method of disposal of such substance...by...person who uses, or disposes of, it... .
- (e) POLYCHLORINATED BIPHENYLS (PCBs).
- (1) ...the Administrator shall promulgate rules to--
  - (A) prescribe methods for the disposal of PCBs, and
  - (B) require PCBs to be marked with clear and adequate warnings...
- (5) This subsection does not limit the authority of the Administrator...to take action respecting any PCB.

SEC. 15<sup>2/</sup> PROHIBITED ACTS.

It shall be unlawful for any person to--

- (1) fail or refuse to comply with...(B) any requirement prescribed by Section 5 or 6, or (C) any rule promulgated or order issued under Section 5 or 6;
- (s) fail or refuse to (A) establish or maintain records.--.

SEC. 16<sup>3/</sup> PENALTIES.

- (a) CIVIL.--(1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15.
- (2)(A) A civil penalty for a violation of Section 15 shall be assessed by the Administrator...
- (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation(s), and with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

The Rules of Practice, Section 22.27, 40 CFR, provide:

**Subpart E—Initial Decision and Motion To Reopen a Hearing**

§ 22.27 Initial decision.

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(b) *Amount of civil penalty.* The presiding officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines published under the act. The presiding officer may increase or

decrease the assessed penalty from the amount proposed to be assessed in the complaint.

(c) *Effect of initial decision.* The initial decision of the presiding officer shall become the final order of the Administrator within forty-five (45) days after its receipt by the hearing clerk and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the initial decision.

REGULATIONS<sup>4/</sup>

§761.2 Definitions.

For the purpose of this part:

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(c) "Capacitor" means a device for accumulating and holding a charge of electricity consisting of conducting surfaces separated by a dielectric. Types of capacitors are as follows:

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(2) "Large High Voltage Capacitor" means a capacitor which contains 1.35 kg (3 lbs.) or more of dielectric fluid and which operates at 2000 volts a.c. or above.

(3) "Large Low Voltage Capacitor" means a capacitor which contains 1.35 kg (3 lbs.) or more of dielectric fluid and which operates below 2000 volts A.C.

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(k) "Leak" or "leaking" means any instance in which a PCB article, PCB container, or PCB equipment has any PCB chemical substance or PCB mixture on any portion of its external surface.

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(n) "Marked" means the marking of PCB's, PCB's storage areas and transport vehicles by means of applying a legible mark by painting, fixation of an adhesive label, or other method that meets the requirements of this regulation.

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(q) "PCB" and "PCB's" mean one or more of the following: "PCB Chemical Substance", "PCB Mixture", "PCB Article", "PCB Equipment", and "PCB Container."

(r) "PCB Article" means any manufactured item, other than a PCB container, whose surface(s) has been in direct contact with a PCB chemical substance or a PCB mixture, and includes capacitors, transformers, electric motors, pumps, and pipes.

(s) "PCB Article Container" means any package, can, bottle, bag, barrel, drum, tank or other device used to contain PCB articles or PCB equipment, and whose surface(s) has not been in direct contact with a PCB chemical substance or PCB mixture.

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(u) "PCB Container" means any package, can, bottle, bag, barrel, drum, tank, or other device used to contain a PCB chemical substance, PCB mixture, or PCB article, and whose surface(s) has been in direct contact with a PCB chemical substance or PCB mixture.

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(w) "PCB Mixture" means any mixture which contains 0.05 percent (on a dry weight basis) or greater of a PCB chemical substance, and any mixture which contains less than 0.05 percent PCB chemical substance because of any dilution of a mixture containing more than 0.05 percent PCB chemical substance. This definition includes, but is not limited to, dielectric fluid and contaminated solvents, oils, waste oils, other chemicals, rags, soil, paints, debris, sludge, slurries, dredge spoils, and materials contaminated as a result of spills. <sup>5/</sup>

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(z) "Storage for Disposal" means temporary storage of PCB's that have been designated for disposal.

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§761.10 Disposal requirements.

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(c) (4) Storage of PCB articles—except for a PCB article described in subparagraph (2) (ii) of this paragraph, any PCB article shall be stored in accordance with Annex III prior to disposal. <sup>6/</sup>

<sup>4/</sup> Promulgated February 17, 1978 at 43 FR 7150 et seq., effective April 18, 1978. The current regulations, 40 CFR Part 761, were promulgated May 31, 1979 at 44 FR 31514 et seq., effective date July 2, 1979 and thus were not in effect at the time of the inspection of Respondent's facilities in April 1979.

<sup>5/</sup> .05 percent is equivalent of 500 p.p.m. This rule was modified in the current regulations to decrease the lower limit of the definition from 500 p.p.m. to 50 p.p.m. (See Note 4, hereinabove).

<sup>6/</sup> Annex III is Section 761.42, Storage for Disposal.

§ 761.42 Storage for disposal.

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(b) Except as provided in paragraph (c) of this section, after July 1, 1978, owners or operators of any facilities used for the storage of PCB's designated for disposal shall comply with the following requirements:

(1) Such facilities shall have:

(i) An adequate roof and walls to prevent rain water from reaching the stored PCB's.

(ii) An adequate floor which has continuous curbing with a minimum six inch high curb. Such floor and curbing must provide a containment volume equal to at least two times the internal volume of the largest PCB article or PCB container stored therein or 25 percent of the total internal volume of all PCB equipment or containers stored therein, whichever is greater.

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(iv) Floors and curbing constructed of continuous smooth and impervious materials such as Portland cement concrete or steel to prevent or minimize penetration of PCB chemical substances or mixtures.

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§ 761.20 Marking requirements.

(a) The following marking requirements shall apply:

(i) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in Annex V—Section 761.44(a): The mark illustrated in Figure 1 is referred to as M<sub>1</sub> throughout this subpart.

(ii) PCB containers:

(iii) PCB transformers at the time of manufacture, at the time of distribution in commerce if not already labeled, and at the time of removal from use if not already labeled.

(iv) PCB large high voltage capacitors at the time of manufacture, at the time of distribution in commerce if not already labeled, and at the time of removal from use if not already labeled.

(v) Equipment containing a PCB transformer or a PCB large high voltage capacitor at the time of manufacture, at the time of distribution in commerce if not already labeled, and at the time of removal of the equipment from use if not already labeled.

(vi) PCB large low voltage capacitors at the time of removal from use.

(vii) Electric motors using PCB coolants.

(viii) Hydraulic machinery using PCB hydraulic fluid.

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(ix) PCB article containers containing articles or equipment that must be marked under provisions (i) through (viii) above.

(x) Each storage area used to store PCB's for disposal.

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(3) As of January 1, 1979, the following PCB's shall be marked with mark M<sub>1</sub> as described in Annex V—section 761.44(a):

(i) All transformers not marked under paragraph (1) of this section;

(ii) All large high voltage capacitors not marked under paragraph (1) of this section in accordance with one of the following methods:

(A) each individual capacitor is to be marked with mark M<sub>1</sub>, or

(B) if one or more PCB large high voltage capacitors are installed in a protected location as on a power pole, or structure, or behind a fence; the pole, structure, or fence is to be marked with mark M<sub>1</sub> and a record or procedure identifying the PCB capacitors is to be maintained by the owner or operator at the protected location.

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§ 761.45 Records and monitoring.

(a) PCB's in service or projected for disposal. Beginning July 2, 1978, each owner or operator of a facility containing at least 45 kilograms (99.4 pounds) of PCB chemical substances or PCB mixtures contained in a PCB container or PCB containers, or one or more PCB transformers, or 50 or more PCB large high or low voltage capacitors shall develop and maintain records on the disposition of PCB's. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year. Owners or operators with more than one facility which contains PCB's in the quantities described above may maintain the records and documents at a single location, provided the identity of this location is available at each facility containing PCB's that is normally manned for 8 hours a day.

On consideration of the record made herein, including the transcript of the testimony, the exhibits received, the proposed findings of fact and conclusions of law, briefs, and arguments submitted by counsel, I make and find the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

COMPLAINT -001, Wauwatosa

1. The Respondent, Briggs and Stratton Corporation, maintains a place of business at 3300 North 124th Street, in Wauwatosa, Wisconsin.
2. On April 18 and 19, 1979, an inspection was conducted at this facility by the US Environmental Protection Agency (EPA), after written Notice of Inspection was provided to Respondent, to determine compliance with the PCB Disposal and Marking Regulations, 40 CFR 761 (1978).
3. Participants in the inspection were Mr. Wayne Kaiser, an employee of EPA Region V, and Messrs. Michael Calhoun and Hal Bryson, employees of Versar, Inc., which at the time of the inspection, was under contract to EPA to perform inspections concerning the use of PCBs.
4. At the time of the inspection on April 18 and 19, nine capacitors, containing PCB dielectric fluid, were being stored on a loading dock at Wauwatosa awaiting disposal.
5. Said capacitors each contained in excess of three pounds of PCB dielectric fluid and a total of approximately 200 pounds of PCB.
6. Four of the nine capacitors were ruptured and leaking and a drum, containing the four ruptured capacitors, was damaged, laying on its side, and leaking fluid from the ruptured capacitors out onto the loading dock.
7. The fluid from the capacitors contained in excess of 500 parts per million PCB.

8. The loading dock area where said capacitors were stored had no curbing and did not have walls other than a back wall. The area had only a partially overhanging roof, which, with the one wall, was not adequate to prevent rain water from reaching the stored PCB capacitors.

9. The capacitors stored for disposal on the loading dock were not transferred to a storage area designed to satisfy regulatory requirements until September 10, 1979.

10. Some of these capacitors had been removed from service since 1978.

11. It is admitted by Respondent that, at the time of the inspection on April 18 and 19, 1979, it maintained in service several transformers at Wauwatosa that contained dielectric fluid containing over 500 parts per million PCB, that were not marked as required by the PCB disposal and marking regulations.

12. The inspectors located seven PCB transformers at the facility, six of which each contained 3920 pounds of PCB, and the seventh contained 4210 pounds of PCB.

13. Respondent admits that, at the time of the inspection, it maintained in service at Wauwatosa several large high-voltage capacitors containing PCB dielectric fluid that were not marked as required by the PCB disposal and marking regulations.

14. The inspectors found a total of 36 large high-voltage PCB capacitors in service at the facility.

15. Respondent admits that, at the time of the inspection, it maintained several large high-voltage capacitors, that had been removed from service, at Wauwatosa, that had not been marked as required by the PCB disposal and marking regulations.



16. The inspectors found seven of the above-mentioned PCB capacitors removed from service.

17. Respondent admits that, at the time of the inspection, it maintained several large low-voltage capacitors, that had been removed from service, at said facility, that had not been marked as required by the PCB disposal and marking regulations.

18. The inspectors found two of said large low-voltage capacitors removed from service.

19. Respondent admits that, at the time of the inspection, it maintained several containers holding PCBs and PCB equipment removed from service at Wauwatosa that were not marked as required by the PCB disposal and marking regulations.

20. The afore-mentioned containers had approximately 200 pounds of PCBs stored in them at the time of the inspection.

21. Respondent admits that, at the time of the inspection, it maintained at Wauwatosa an area that was used to store PCBs and PCB articles for disposal, and that this area was not marked as required by the PCB disposal and marking regulations.

22. In the entire time that they were at Wauwatosa, the inspectors did not find any piece of PCB equipment or any PCB container that contained the mark required, for such items, by the PCB disposal and marking regulations.

23. No one on Respondent's staff ever placed any sort of cautionary PCB marking, whether the specific mark required by federal law or otherwise, on any of Respondent's electrical equipment containing PCB prior to the April 1979 inspection.

24. Respondent undertook to correct its failure to properly mark the aforementioned unmarked large high-voltage PCB capacitors, the large low-

voltage PCB capacitors, and the unmarked PCB containers, and to develop an area to hold PCB items for disposal in May or June 1979 and its efforts were on-going from the time of said undertaking until on or near September 20, 1979 to properly mark and remove said items to an appropriate storage area and to assemble information to put together an annual document.

25. At the time of the inspection on April 18 and 19, 1979, Respondent maintained seven transformers at Wauwatosa containing dielectric fluids with PCB at a concentration in excess of 500 parts per million, and in addition, Respondent was there storing in excess of 100 pounds of PCBs in PCB containers.

26. The annual document that Respondent eventually completed for Wauwatosa, dated September 1979, indicates that there are 273 large high- and low-voltage PCB capacitors at said facility.

27. Respondent did not acquire any piece of PCB equipment after April 1979.

28. Respondent maintained in excess of 50 large high- and low-voltage PCB capacitors at Wauwatosa at the time of the April 18-19, 1979 inspection.

29. At the time of the inspection, Complainant's inspector asked members of Respondent's staff to allow him to review any records that Respondent kept on PCBs at Wauwatosa.

30. Upon reviewing the records that the Respondent had, the inspector discovered that there were no records pertaining to the following:

a. the dates of removal from service for the PCB equipment stored for disposal on the loading dock.

b. the dates that the capacitors on the loading dock had been placed in storage for disposal.

- c. the number of capacitors stored for disposal.
- d. the total weight of PCBs in containers in storage for disposal.
- e. the total number of PCB transformers then and there in service.
- f. the total weight of PCBs contained in PCB transformers.
- g. the total number of PCB large high- and low-voltage capacitors.

31. Respondent was unable to use the records it had as of April 1979 as the basis for its annual document, but rather was required to inventory and identify many of the additional PCB items before producing an annual document.

32. As indicated on the face of the documents, the annual document for the PCB storage area (Exhibit C-19, segment entitled "PCB Storage at Burleigh Plant", 5 pages), the 1978 annual document for Wauwatosa overall (Exhibit C-19, segment entitled "PCB Report, Briggs and Stratton Corporation, Burleigh Plant, for year Jan. 1-Dec. 31, 1979", one page) and the inventory that formed the basis of said annual document for Wauwatosa (Exhibit C-19, segment entitled "Inventory of Electrical Equipment containing PCB Fluids, Briggs and Stratton Corporation, 124th Street Plant", 20 pages) were completed in September 1979.

33. Respondent furnished only approximate dates (i.e., 1978 - 1979) as the dates that 14 PCB large capacitors were "removed from service" at Wauwatosa indicating a necessity of speculation as to the actual dates of their removal from service. (Exhibit C-19, page entitled "PCB Report, Briggs and Stratton Corporation, Burleigh Plant, for year Jan. 1-Dec. 31, 1979").

COMPLAINT -002, West Allis

34. Respondent, Briggs and Stratton Corporation, maintains a place of business at 1708 South 68 Street in West Allis, Wisconsin.

35. On or about April 20, 1979, an inspection was conducted, after proper notice, at "West Allis" by the US Environmental Protection Agency (EPA, to determine compliance with the PCB Disposal and Marking regulations, 40 CFR 761, 43 FR 7150 (February 17, 1978).

36. Participants in said inspection were Mr. Wayne Kaiser, an employee of EPA Region V and Messrs. Michael Calhoun and Hal Bryson, employees of Versar, Inc., which company was under contract to the EPA to perform inspections concerning the use of PCBs.

37. At the time of the inspection on April 20, 1979, Respondent maintained at West Allis an induction furnace that was not in service.

38. Said induction furnace was three or four years old; it had repeated operational problems.

39. The Briggs and Stratton representative appointed to escort the inspectors around West Allis was Mr. Shawley, the electrician with the longest tenure at the plant.

40. Upon inquiry, Mr. Shawley indicated to the inspectors that the Respondent was "going to get rid of" said induction furnace.

41. At the time of the re-inspection on February 20, 1980, said induction furnace was still not in service and was located near a door leading to the outside.

42. Recent negotiations between Respondent and the manufacturer of the furnace have led to an agreement to take back the furnace, but not the electrical equipment (i.e., the capacitors).

43. Respondent's Chief Chemist and Environmental Engineer stated (T 388) that, at the time of the April 1979 inspection, there was no area anywhere at West Allis, including the area where the capacitors were actually found, that was designated to meet the standards of the PCB disposal and marking regulations for the storage of PCB items.

44. Respondent admits that, at the time of the inspection on April 20, 1979, it maintained in service at West Allis at least one transformer that contained PCB dielectric fluid that was not marked as required by the PCB disposal and marking regulations.

45. One Allis-Chalmers transformer, located in a rooftop substation, contained 5265 pounds of PCB.

46. Testing by Respondent of the fluid in said transformer as of May 3, 1979 revealed that it contained 890,000 parts per million PCB.

47. Respondent tested the fluids contained in two additional transformers at this facility, referred to as Wagner transformers, on May 3, 1979. Respondent's analysis then revealed that these transformers contained 55,000 parts per million PCB and 940,000 parts per million PCB respectively.

48. Both of said Wagner transformers had contained 129 gallons of PCB at one time.

49. Respondent's records indicated that only one 129 gallon transformer had been retrofilled with non-PCB fluid.

50. The high percentage of PCBs in the other Wagner transformer, i.e. 94 percent, indicates the improbability that said transformer was ever retrofilled with non-PCB fluid.

51. Neither of said Wagner transformers were marked with the PCB cautionary label specified in the PCB disposal and marking regulations, nor with any sort of manufacturer's cautionary PCB label, at the time of the April 1979 inspection.

52. Each of the Wagner transformers contain 668.2 kilograms (1470 pounds) of fluid.

53. Respondent admits that, at the time of the April 20, 1979 inspection, it maintained in service at West Allis several large high-voltage capacitors, containing PCB dielectric fluid, in an overhead bank. No mark was visible on the capacitors or the bank as was required by the PCB disposal and marking regulations.

54. Respondent admits that, at the time of the inspection, it maintained in service at said facility at least one large high-voltage capacitor containing PCB dielectric fluid on a pole outside substation 10. Neither the capacitors nor the pole were marked as required by the PCB disposal and marking regulations.

55. At the time of the inspection, Respondent maintained at West Allis 20 large low-voltage capacitors in an induction furnace which capacitors, along with the induction furnace, had been removed from use.

56. Said 20 PCB capacitors were not marked with the PCB cautionary label required by the PCB disposal and marking regulations.

57. The EPA Inspection revealed that none of the equipment, nor any storage area, at West Allis, was marked with the PCB cautionary label specified in the PCB disposal and marking regulations.

58. At the time of the inspection on April 20, 1979, Respondent maintained at least one transformer at West Allis containing dielectric fluids with an excess of 500 parts per million PCB.

59. There were at least two transformers at West Allis containing PCB fluids at the time of subject inspection containing a total of 6735 pounds of PCBs.

60. Respondent admits that, at the time of the inspection on April 20, 1979, it maintained at West Allis at least 50 large high- and low-voltage

capacitors containing dielectric fluids with an excess of 500 parts per million PCB.

61. The annual document of Respondent for West Allis, dated September 28, 1979, indicates that there are 75 PCB capacitors and three PCB transformers in service at the facility.

62. PCB equipment appearing on the annual document was present at West Allis at the time of the April 1979 inspection.

63. The only records Respondent maintained on PCBs and PCB equipment at West Allis on April 20, 1979, were records on the servicing of the transformers, documenting the topping off or refilling of fluids in the transformers; there were no records on the total number of PCB large high- and low-voltage capacitors then and there in service, nor records on the dates that the PCB capacitors in the induction furnace had been removed from service.

64. Respondent was unable to use the records it had as of April 1979 as the basis for its annual document and was required to inventory and identify additional PCB items before producing an annual document, dated September 25, 1979 (see Exhibit C-19).

COMPLAINT -003, Milwaukee

65. Respondent, Briggs and Stratton Corporation, maintains a place of business at 2560 North 32 Street in Milwaukee, Wisconsin ("Milwaukee").

66. On April 19, 1979, an inspection was conducted after proper notice at Milwaukee by US Environmental Protection Agency (EPA) to determine compliance with the PCB disposal and marking regulations 40 CFR 761, 43 FR 7150 (February 17, 1978).

67. Participants in the inspection were Mr. Wayne Kaiser, an employee of EPA Region V and Messrs. Michael Calhoun and Hal Bryson, employees of Versar, Inc. which was under contract to the EPA to perform inspections to determine compliance with the PCB disposal and marking regulations.

68. During the April 1979 inspection, Complainant's inspector located a transformer (referred to as "Maloney" transformer, T 517) at Milwaukee that he identified as containing PCB based upon density information contained on the transformer's nameplate; which he read as stating that the transformer contained 100 gallons of fluid (T 145) weighing 1200 pounds. Respondent's Exhibit 35 shows that said Maloney mineral oil transformer nameplate actually states that said transformer contains 160 gallons of oil with a weight of 1200 pounds, indicating a weight of 7.5 pounds per gallon.

69. PCB fluids are within the range of 10 to 12 pounds per gallon; other fluids weight less per gallon.

COMPLAINTS -001, -002 and -003

70. The term polychlorinated biphenyl (PCB) is used for a group of related chemicals (i.e. isomers) which have different numbers of chlorines on two rings of carbon atoms. The PCBs currently in use are "commercial mixtures" containing various percentages of these isomers.

71. Different "commercial mixtures" of PCB have the same qualitative toxic effects, but some are stronger toxicants, and some are more persistent.



72. The particular "commercial mixtures" of PCBs that are typically found in transformers and capacitors have been studied, and found to have detrimental health effects; including the following:

- a. they affect reproduction and cause liver damage in rodents.
- b. they cause skin problems in monkeys similar to those that have been observed in humans.
- c. even in very low concentrations, they severely affect reproduction in minks and certain primates.
- d. in tests on humans, they have been shown to cause abnormal liver functioning.
- e. human workers exposed for long periods of time have shown increased serum lipid levels, a condition that is believed to be linked to the development of arteriosclerosis.
- f. preliminary studies have found an excess of cancer of the pancreas and melanocarcinoma in human workers exposed to PCB mixtures.

73. An added problem with PCBs is their persistence in the body; they can accumulate in the fatty tissue, and be very hard to get rid of.

74. The body establishes an equilibrium with the chemical, so that when there is an accumulation of PCB in the fatty tissue, some PCB will also be in other organs such as the liver.

75. The persistence of PCBs aggravates problems resulting from discharge of PCBs into the environment by risking the contamination of the food chain.

76. Studies have shown that men exposed to PCBs at work can inadvertently contaminate their families with residues that come home on their clothes.

77. Studies have shown that women who have been exposed to PCBs excrete the chemical in milk.

78. The acute (i.e. short term) toxicity of PCBs is low, so people exposed to PCB would probably not notice symptoms that would alert them to danger.

79. It is the chronic toxicity of PCBs and their buildup in the environment, that justifies their rigorous control.

80. Respondent has been, without question, one of the largest industrial users of polychlorinated biphenyls in the United States.

81. Because Respondent was such a large user of PCBs, Complainant sent Respondent a letter in 1976 expressing Complainant's concern over the hazards of the chemical, and requesting information from Respondent on the use and handling of PCBs in its operations.

82. After the PCB disposal and marking regulations that are the subject of this proceeding became effective, Complainant forwarded to Respondent a letter (Exhibit C-9) explaining the requirements of the regulations, and requesting Respondent to voluntarily comply with these requirements. The letter pointed out, however, that compliance was mandatory, and the failure to comply could result in the imposition of penalties. This letter was received by Respondent in April or May 1978, nearly a year before the inspections that led to this enforcement proceeding.

83. Respondent is a large corporation, having gross sales in 1979 of between \$500,000,000 and \$600,000,000.

84. The Respondent employs in excess of 11,000 people in six manufacturing facilities.

85. Respondent's payroll is approximately \$5,500,000 per week.

86. In Respondent's corporate structure, full responsibility for complying with all environmental laws was delegated to the head of the laboratory.

87. This is the only laboratory maintained by Respondent, and is responsible for all analyses on any production related issues in any of Respondent's six facilities.

88. Of Respondent's 11,000 employees, six are assigned to the laboratory.

89. Prior to the April 1979 inspection, no one on Respondent's staff placed any cautionary PCB label, whether the one required by the regulations or any other version, on any piece of electrical equipment at the Briggs and Stratton facilities.

90. Prior to the April 1979 inspection, no one on Respondent's staff had made any attempt to keep records of PCB equipment at the Briggs and Stratton facilities so as to conform to the PCB regulations.

91. Prior to the April 1979 inspection, Respondent had no PCB storage area at any of its facilities designed to meet the requirements for such storage areas.

92. Respondent has been fined in the past for failure to comply with environmental requirements.

93. Respondent was chosen as one of the first to have inspection for compliance with these regulations because they were such a large user of PCBs.

94. The 35 full PCB compliance inspections that have been conducted to date in Region V have revealed an alarmingly high rate of non-compliance. However, the companies, in most instances, have taken some steps to comply while not completely satisfying the regulations.

95. Respondent's executive vice president agreed that additional violations by Respondent are unlikely and that this fact is attributable more to the instant enforcement action seeking civil penalties than to its attitude of voluntary compliance.

96. Witness Simon (T 314) testified that effective compliance will not be achieved if each industry must be first inspected before compliance because full PCB compliance inspection of the 3000 industries in Region V would take an estimated 60 years.

CONCLUSIONS OF LAW

COMPLAINT - 001 Wauwatosa

Respondent, Briggs and Stratton Corporation, has violated Section 15 of TSCA (15 USC 2614) and the following regulations, to-wit:

1. 40 CFR 761.10(c)(4), 1978, by storing PCB articles for disposal in a manner not in accordance with the requirements of 40 CFR 761.42.
2. 40 CFR 761.20(a)(3)(i), (1978), by failing to mark PCB transformers in accordance with 40 CFR 761.44 (Marking formats).
3. 40 CFR 761.20(a)(3)(ii), (1978), by failing to mark large high-voltage PCB capacitors in service in accordance with 40 CFR 761.44.
4. 40 CFR 761.20(a)(1)(iii), (1978), by failing to mark large high-voltage capacitors in storage for disposal in accordance with 40 CFR 761.44.
5. 40 CFR 761.20(a)(1)(v) by failing to mark large low-voltage PCB capacitors in storage for disposal in accordance with 40 CFR 761.44.
6. 40 CFR 761.20(a)(1)(i) and (a)(1)(ix), (1978), by failing to mark containers holding PCBs and PCB equipment stored for disposal in accordance with 40 CFR 761.44.
7. 40 CFR 761.20(a)(1)(x), (1978), by maintaining PCBs and PCB equipment in storage for disposal in an area that was not marked in accordance with 40 CFR 761.44.
8. 40 CFR 761.45(a) by failing to maintain records on the disposition of PCBs and PCB items adequate to form the basis for the preparation of an annual document, with data prescribed by the regulation, by July 1, 1979.

COMPLAINT - 002, West Allis

Respondent, Briggs and Stratton Corporation, has violated Section 15 of TSCA (15 USC 2614) and the following regulations, to-wit:

9. 40 CFR 761.10(c)(4) and 40 CFR 761.10(b)(5), (1978), by storing PCB articles for disposal in a manner not in accordance with the requirements of 40 CFR 761.42.

10. 40 CFR 761.20(a)(3)(i), (1978), by failing to mark PCB transformers in accordance with 40 CFR 761.44 (marking formats).

11. 40 CFR 761.20(a)(3)(ii), (1978), by failing to mark large high-voltage PCB capacitors in service in accordance with 40 CFR 761.44.

12. 40 CFR 761.20(a)(1)(v), (1978), by failing to mark large low-voltage PCB capacitors that had been removed from use in accordance with 40 CFR 761.44.

13. 40 CFR 761.20(a)(1)(x), (1978), by maintaining large low-voltage PCB capacitors that had been removed from use and were in storage for disposal in an area that was not marked in accordance with 40 CFR 761.44.

14. 40 CFR 761.45(a) by failing to maintain records on the disposition of PCBs and PCB items adequate to form the basis for the preparation of an annual document with data prescribed by the regulation, by July 1, 1979.

COMPLAINT - 003, Milwaukee

15. At the prehearing conference on February 21, 1980, Complainant withdrew Count 1 of the instant Complaint, TSCA-V-C-003, in accordance with the Rules of Practice here applicable, 43 FR 22.14(d).

16. On this record, the transformer, referred to in Count 2 of the Complaint, did not contain dielectric fluid with PCB content in excess of 500 parts per million, and therefore the requirement that Respondent develop and maintain records on the disposition of PCB at Milwaukee was not triggered. (See 40 CFR 761.45(a)).

17. Complainant's Motion to amend said Complaint on February 21, 1980 was properly refused as not being at a time sufficiently in advance of the Adjudicatory Hearing, which began on March 11, 1980, to afford Respondent ample and timely notice of the nature, character and extent of, nor adequate time to prepare its defense to the violations thereby sought to be alleged.

18. On this record, there being no proof of the essential elements of the violation charged, no civil penalty should be assessed, as proposed by Complainant, for failure to maintain records at Milwaukee.

CONCLUSIONS OF LAW AND DISCUSSION

Respondent's Appendix to Brief

With its Brief accompanying its Proposed Findings of Fact and Conclusions of Law, Respondent has filed its Appendix A presenting complaints concerning about 40 different companies, involving proposed penalties and settlement figures ranging from \$5,000 to \$131,000. The companies vary greatly in their size and include various businesses as well as several municipalities and utility companies. Respondent's suggestion that EPA's "practice in like cases" must control the amount of the penalty, at best, begs the question and is an effort at over-simplification carried to its extreme. Appendix A simply reveals no case or cases that can be considered a "case like Briggs and Stratton". Such a criterion defies definition. Consideration of all of the statutory factors, pertaining to the subject violation as well as to the violator, must be fully utilized in each individual case. It is further apparent that each of the factors provided by the statute requires the careful consideration of all facts revealed by the record and that a variance in the facts will modify various findings with respect to the violation as well as the violator.

The nature, circumstances, extent and gravity of the violations complained of in the cases reviewed in said Appendix A is not developed fully nor do the complaints establish, on their face, the degree of culpability of the violator. It is apparent that careful consideration of any one of the single factors mentioned in the Act might well transform a violation into one more or less grave than would otherwise be the case. I conclude that, if uniformity is to be achieved, it must be reached by the consideration of the factors in the Act and each of them, in light of the record evidence presented at a hearing. Placing a price tag on a violation without adequate consideration of the factors pertaining to the violation as well as the violator is not only contrary to express provisions of the Act, but tends to defeat rather than



advance the purpose of the Act in prescribing the assessment of civil penalties. The singular purpose sought is to achieve compliance with regulations governing the use and handling of PCBs which clearly present a hazard to man and the environment.

#### Penalties

Respondent has contended throughout this proceeding that the penalties sought are "penal"--that the Toxic Substances Control Act (TSCA), Section 16(a) prescribes a punishment for past violations; however, I find the reverse to be true. The penalties here sought are civil or remedial, assessed for the regulatory purpose of achieving future compliance with the Act by Respondent and others similarly situated.

As was stated in Belsinger v D.C. (1969), 295 F.S. 159:

"The offense here was not a criminal offense but a regulatory one. In regulatory offenses, the public interest outweighs an individual interest. Thus, for sake of adequate public protection it is necessary to hold the licensee to that standard of conduct which will insure result."

See also U.S. v Dotterweich (1943), 320 U.S. 277, 281; U.S. v Balint, et al, 258 U.S. 250, 42 S.Ct., 301 (1938).

Section 16(a) of the Act does not require that the violation be done "knowingly or wilfully", whereas Section 16(b), the subsection applying to criminal violations, does contain such terminology. It will be further observed that Section 16(a) of the Act provides that a civil penalty be sought for violations of Section 15. While monetary penalties have traditionally been regarded as a form of criminal punishment, their collection as a civil remedy is widely accepted, and where collection of the penalty is to be effectuated through a "distinctly civil procedure", congressional intent to impose a civil rather than criminal sanction is clear. [Helvering v Mitchell, 303 U.S. 391, 58 S.Ct., 630 (1938). Also see U.S. v Eureka Pipe Line Company, 401 F.S. 934 (1975)], Eureka holds that where the purpose of the civil penalty is to regulate the

activity involved, the monetary penalties imposed for infractions of federal statutes have often been viewed as civil rather than criminal. See further 1 Davis, Section 8.16, page 594, Note 1, and again Section 2.13, at page 133, where it is stated that administrative agencies do not impose criminal penalties. I find that the civil penalty here sought is not penal in nature as contended by Respondent. No arbitrary penal sum is provided by the Act. Rather the civil penalty, here sought, is remedial in nature as it seeks to prevent the violations complained of and like violations from being repeated. While the sum, when penal, is predetermined, the civil penalty, of a remedial nature, is fixed at an amount which is dependent on attendant circumstances and adequate to achieve future compliance with the regulations previously violated.

#### Pleadings

A Motion to Dismiss this case was filed by Respondent earlier in the proceeding complaining, particularly, that the Complaint failed to include a statement indicating the appropriateness of the penalties therein proposed. On denying the Motion, I found that each of the Complaints included a statement giving adequate notice of charges against Respondent, including a statement of the factors considered in determining the proposed penalty, which factors are those expressly provided in the Act, Section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B). In administrative proceedings the pleadings are required only to serve notice of the nature of the charges sufficient to enable the Respondent to prepare his defense. The question is not the adequacy of pleading, but the fairness of the whole procedure. In administrative proceedings, adjudication may be based on facts arising subsequent, as well as prior, to the filing of the Complaint [see Curtis Wright Corporation v NLRB, 347 F.2<sup>d</sup> 61, 73 (16), (1965)]. Professor Davis states, 1 Davis, Section 8.D4, page 523;

"The most important characteristic of pleadings in the administrative process is their unimportance."

He further states that a theory of pleading based on common law thinking has no

place in administrative proceedings, citing Sisia v Fleming, 183 F.S. 194, 201, which holds that pleadings do not limit the proof and that the decision should be based on evidence in the record. [See also Akers Motor Lines, Inc., v U.S. (1968), 286 F.S. 213, 225 (11)]. In NLRB v Johnson, 322 F.2<sup>d</sup>, 216, 220 (5) (1963) the holding turned on whether the issue was fully litigated. The court stated "if so, the Respondent can't be heard to complain of lack of opportunity to meet the charges against it even though the Complaint be found lacking for a Complaint may be amended to conform to proof adduced on the hearing". In NLRB v Mackey Supply Company, 304 U.S., 1.c. 350, 58 S.Ct., 1.c. 912-13, the Court stated:

"While Respondent was entitled to know the basis of the Complaint against it, and to explain its conduct in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify (its action)."

I conclude that the record in the instant case supports such a finding and reject Respondent's objections to findings proposed by Complainant and amply supported by the record.

With respect to Complaint -003 (Milwaukee), the above authorities are pertinent. Complainant's offered amendment to said Complaint was refused because it was offered at a prehearing conference requested by the parties on February 21, 1980, only 19 days prior to the Hearing on March 11, 1980. I then found that to permit the amendment at a time so close to the date of Hearing, where it conceivably opened a broad additional area of inquiry, in a case whose complexities were already apparent, would saddle Respondent with an unfair burden. Without regard to the adequacy of the pleading the essential requirement of timeliness was lacking. I here conclude that refusal of said amendment was proper.

#### Intention

The Respondent further pleaded as an affirmative defense that any violations were inadvertent and temporary, and the result of oversight by its

employees. I consider this as a claim that the violation was not intentional. Referring again to the Act, Section 16(a), it will be noted that intention is not an element of the violation. (U.S. v Dotterweich, supra; U.S. v Balint, et al, supra; and U.S. v Shapiro (1974) 491 F.2<sup>d</sup> 335). The words "wilfully" and "knowingly" which appear in Section 16(b) (Criminal Penalties) are absent from the provisions for civil penalties in Section 16(a). Whereas intention is not an element of the violation to be proved, intention or the lack thereof can and should be considered in determining the gravity of the violation, from the aspect of the conduct of the respondent. (Pem Kote Paint Co., I.D. No. 88455, EPA Region IV, March 26, 1974.) Respondent also points out that it has a history of compliance with environmental laws and no history of past violations or charges of such excepting one citation for which it voluntarily paid a penalty of \$225, after pleading "no contest". Also it states that it has cooperated in correcting the violations alleged in the Complaint. This aspect is commendable and such facts, when shown by the record, are appropriately and favorably considered in determining the appropriate penalty to be assessed as provided in the Act, Section 16(a)(2)(B). Such facts are not defensive for the reasons hereinbefore stated. Also to be considered in fixing the penalty would be the further affirmative pleading of Respondent where it states that it complied with TSCA requirements, following the EPA inspection in April 1979, by preparing and implementing a PCB compliance program for all of its facilities.

#### Constitutional Objection

I find that Respondent's pleading denominated as its fourth defense, raising constitutional issues, was properly stricken at the prehearing conference.

CIVIL PENALTY

I.

Section 16(a) of the Act provides that a civil penalty shall be assessed against any person who violates Section 15<sup>7/</sup> (PROHIBITED ACTS); that the violator shall be liable in an amount not to exceed \$25,000 for each such violation; and that each day such violation continues shall constitute a separate violation.

Section 16(a)(2)(B) provides that, in determining the amount of a civil penalty, the following facts shall be taken into account:

- (1) the nature, circumstances, extent and gravity of each such violation; and
- (2) with respect to the violator
  - (a) ability to pay;
  - (b) effect on ability to continue in business;
  - (c) any history of prior such violations;
  - (d) the degree of culpability; and
  - (e) such other matters as justice may require.

Three different complaints filed against Respondent were consolidated for hearing, at Respondent's request. Each complaint pertained to a different situs of operation. We have referred herein to said separate operations, respectively, as Wauwatosa (001), West Allis (002), and Milwaukee (003).

II. Wauwatosa

The nature, circumstances and the extent of the violations by Respondent are detailed by the statements contained in my Findings numbers 4 through 33, supra, page 7 through 11.

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<sup>7/</sup> The texts of the pertinent parts of the Sections, here referred to, are more fully set forth, supra, page 3, of this decision.

III.

The gravity of such violations is considered in light of the regulatory purpose pronounced by the Act and the Regulations promulgated pursuant to the Act. 43 FR 7150 states, in pertinent part, under "Summary":

"...The intent of these regulations (prescribing disposal and marking requirement for PCBs) is to protect the environment from further contamination by PCBs resulting from improper handling and disposal of PCBs."

and, under "Definitions":

"Disposal is defined very broadly to include any action that may be related to the ultimate disposition of (PCBs...). An accidental or intentional release of (PCBs...), including spills, is considered to be an act of disposal."

IV.

At the time of the subject inspection in April 1979, at Wauwatosa, four capacitors had been placed in a drum, which was overturned and damaged after being reportedly struck by a fork lift. The testimony and photographic exhibits evidence that PCB fluid from the ruptured capacitors had leaked into the drum, and as a result of the upset, had spilled onto the dock from the drum. A second drum, near the first, contained the other five capacitors (4 McGraw and 1 small G.E.) which had ruptured while in service and had been so stored for disposal.

V.

In considering the toxicity of PCB's (most obvious from even the briefest inspection of the Act and regulations) the importance of compliance with the marking and disposal regulations and a general and well-organized program for compliance is readily apparent.

VI.

The term "loading dock" (at Wauwatosa) suggests that, while not used by the general public, the area, even with a congestion of

equipment and materials, will be frequented by employees of Respondent. There was material, found to have PCB content in excess of 500 parts per million, on the floor in proximity of the overturned drum, which was so situated that tracking was possible and certainly conceivable--more conceivable because of the fact that neither the items, container, nor area bore marking which complied with subject regulations and that the view of said floor area was obscured to some extent by equipment and materials on the dock. Tracking of the material would become more likely with the movement of items, all mobile, within the area.

VII.

It is further apparent that the aforesaid hazard was enlarged by the condition of the storage area. Walls, roof and curbing, which were absent from the area, would have provided a means of foreclosing any possibility that rainwater would reach the affected area and in turn carry off PCBs.

VIII.

"Marking" is defined as the marking of PCBs, etc., by means of applying a legible mark...that meets the requirements of...regulation. From the evidence, exhibits and pleadings, I find that the following PCB articles (at Wauwatosa) were not properly marked:

1. Seven PCB transformers, in service.
2. Thirty-six high-voltage PCB capacitors, in service.
3. Seven large high-voltage capacitors, removed from service.
4. Two large low-voltage capacitors, removed from service.
5. Several containers holding PCBs and PCB equipment, removed from service.

Further, the area used to store PCBs and PCB articles for disposal were not marked. Respondent suggests that, even though their presence is fortuitous and not due to the efforts of Respondent or its employees, manufacturer's markings and cautionary labels should be considered "marking"

sufficient to satisfy the requirements of the regulations. It is obvious that there was no uniformity in design or appearance of said markings. To be adequate and effective, a "warning" should attract the attention, even of a less attentive person, and be readily recognizable for what it purports to be, and give notice of the hazard present. The situation presented is very analogous to legal "notice"--if inadequate, ineffective, or unrecognizable, it is not a notice at all.

IX.

I also find that Respondent failed to develop and maintain records as required by the Act and the Regulations (See Finding No. 30, page 10, supra).

Respondent was not without recorded data concerning most of the PCB articles but much information vital to the preparation of an annual document was lacking to the extent that an inventory was required to locate and identify certain PCB items. This violation, in and of itself, may appear trivial, but a multiplicity of such violations will obviously frustrate the scheme of regulation which is essential to the management and control of the existing great amount of PCBs and their hazard. (See Wickard v Filburn, 317 U.S. 111, 63 S. Ct. 82).

X.

The Rules and Regulations prescribing the disposal and marking requirements were published in the Federal Register February 17, 1978 (43 FR 7150 et seq.) with an effective date of April 18, 1978. In addition to such constructive notice, Respondent received a six-page letter from the Administrator of EPA Region V (Complainant's Exhibit 9) affording actual notice of the PCB marking and disposal regulations. Respondent's Executive Vice President (T 505), Mr. Socks, acknowledged said letter was received by their Executive, Mr. Sheeley, who forwarded it to Mr. Socks who in turn forwarded it to Mr. Bernshine, then Respondent's Environmental Engineer.



XI.

I have considered each of the factors prescribed in Section 16(a)(2)(B), more fully set forth in paragraph I. hereof, in conjunction with the facts as revealed by the record relevant to the violations by Respondent at Wauwatosa.

As to the violation itself, the condition of the loading dock which occasioned the spill of PCB liquid from the drum containing PCB articles exemplifies the result of a failure to fully appreciate and act with respect to the dangerous toxicity of PCB and the hazards experienced by the careless handling of it. The consequences could have been, and conceivably are, much worse than shown by the record. Considering solely the nature of the violation, the fact that the record reveals no injuries that resulted from such handling, cannot completely dispel speculation that because of the chronic character of PCB, significant injury can or will be occasioned at some time in the future. Only in the consideration of possibilities hazarded by the violation can we adequately envision the hazard to man and the threat of further PCB contamination to the environment--and only by this consideration can we fully perceive the gravity attendant.

As to the gravity of Respondent's conduct, the loading dock was not frequented by great numbers of the general public, but traffic apparently was limited to employees. This circumstance serves to reduce the seriousness of an otherwise dangerous condition. I do not find Respondent's violation appreciably aggravated by prior such violations; however, the degree of culpability with respect to its disregard of regulations governing the handling and disposal of PCBs is considered significant. This is appreciably mitigated by its formation and execution of a compliance program subsequent to subject inspection.

I find that an appropriate civil penalty to be assessed for Respondent's failure to properly store PCB articles for disposal, in violation of 40 CFR 761.10(c)(4) (1978) and 40 CFR 761.42, is . . . . \$12,000.00

I find that Respondent's failure to properly mark PCB articles, PCB containers and area containing such articles and containers, in violation of 40 CFR 761.20 (1978) warrants the assessment of a civil penalty in the sum of . . . . . \$7,500.00

I further find that Respondent's failure to adequately develop and maintain records on the maintenance and disposition of PCBs, sufficient to form the basis for its annual document, in violation of 40 CFR 761.45 (1978), warrants the assessment of a civil penalty in the sum of . . . . . \$2,000.00

XII. West Allis

A. I incorporate, as part of this paragraph XII of my Civil Penalty Discussion, pertinent parts of paragraphs I, III, V, VIII, IX and X.

B. The nature, circumstances and extent of the violations by Respondent, at West Allis, (a foundry) are detailed by my Findings of Fact Numbers 34 through 64, supra, pages 12 through 15.

XIII.

At the time of the inspection on April 20, 1979, Respondent maintained an induction furnace which was not in service, and its Senior Electrician, Mr. Shawley, stated Respondent was going to "get rid of it". The manufacturer later agreed to take back the furnace, but the capacitors were not returned. Respondent's decision, apparently contingent on the settlement with the manufacturer was that the capacitors would be "cannibalized" and used on another furnace of similar design at Grey Iron Foundry (T 488). Prior to the April 1979 inspection, Respondent had no area (T 388) designed for storage of PCB items, which complied with 40 CFR 761.42. I find that the induction furnace and capacitors were stored for disposal in a manner not in accordance with said regulation.

XIV.

I find the following PCB articles (at West Allis) were not properly marked at the time of the April 1979 inspection:

1. One Allis Chalmers transformer (roof substation), in service.
2. Two Wagner transformers, in service.
3. Seventy-five PCB capacitors, in service
4. Twenty PCB capacitors, removed from service.

Further, the area in which was stored the induction furnace containing the 20 PCB capacitors was not properly marked.

XV.

I find that Respondent failed to develop and maintain records (at West Allis) as required by the Act and the regulations (See Findings 63 and 64). I have hereinabove adopted, and made a part hereof, of my comments, in pertinent part, contained in paragraph IX, supra.

XVI.

On consideration of the facts evidenced in the record and the factors set forth in paragraph I. hereof, I find and recommend that the following civil penalties be assessed for the violations of Respondent at West Allis:

For Respondent's failure to properly store PCB articles for disposal, in accordance with the requirements of 40 CFR 761.42, pursuant to 40 CFR 761.10(c)(4) and 40 CFR 761.10(b)(5) . . . . . \$5,000.00

For Respondent's failure to properly mark PCB articles in service, PCB articles removed from service, and the area containing said articles removed from service . . . . . \$5,000.00

For respondent's failure to adequately develop and maintain records on the maintenance and disposition of PCBs<sup>8/</sup>, . . . . . \$2,000.00

XVII. Milwaukee

I have concluded that no civil penalty should be assessed for failure to develop and maintain records at Milwaukee (see Conclusions of Law numbered 15 through 18, supra, page 23.)

XVIII.

Section 16(a) of the Act provides that a civil penalty may be assessed...for each violation...and that each day the violation continues shall be considered a separate violation. A civil penalty as stated, supra, is characterized as remedial or regulatory and is assessed for the singular purpose of achieving compliance with the Act. The provisions that "each day a violation continues" shall be considered a separate violation is clearly intended as a means of discouraging recalcitrance by making its practice uneconomical. Complainant urges that said violations continued for some four to five months following the April 1979 inspection.

As Dr. Simon (T 309) testified, Respondent is, without question, one of the largest industrial users of PCBs. Its operation is extensive including two foundries in Milwaukee in addition to a complex of plants, in

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<sup>8/</sup> I reject Respondent's contention that the violations for failure to maintain and develop records at both Wauwatosa and West Allis constitute but one assessable offense. The test to be applied in determining the question is whether proof of facts are required to prove one violation which is not required to prove any other. If so, the violations are not identical. On this record, the violations concern two distinctly different operations--different plants--different locations. Manifestly the violations were not identical. [See Ianelli v U.S., 420 US 770, 1.c. 795, 95 S.Ct. 1284, 1.c. 1293 (6), 1975; citing Blockburger v U.S., 284 US 289, 52 S.Ct. 180 (1932). See also Tesconia v Hunter, 151 F.2<sup>d</sup> 589 (1945).]

Respondent characterizes the allegation of a violation of the record keeping requirement in each of the three cases, here considered, as an effort at "tripling" the proposed penalty. It is not only illogical, but contrary to the Act, to suggest that whether Respondent violates the Act at one or at all six of its plants, the penalty to be assessed should be the same.

two states, at the various locations heretofore mentioned. Following the inspections in April 1979, Respondent undertook (soon after the April 1979 inspection) and completed the task (in September 1979) of programming, sampling, preparing storage areas, marking PCB articles, completing its inventory and updating its records sufficiently to prepare and submit its annual report. A re-inspection revealed that the effort was thorough and done in a manner and to an extent sufficient to bring its operation substantially in compliance with the Act and the regulations.

I find that Respondent's effort to achieve compliance was on-going, following the inspection, and that no recalcitrance is evident, for which reason I do not find the assessment of such additional penalties warranted.

On consideration of the facts in the record and the foregoing conclusions reached and in accordance with the criteria set forth in the Act, I recommend the adoption by the Administrator of the following

PROPOSED FINAL ORDERS<sup>9/</sup>

Case No. TSCA-V-C-001

1. Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615), a civil penalty in the total sum of \$21,500.00 is hereby assessed against BRIGGS AND STRATTON CORPORATION, a Delaware Corporation, for violations of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk a Cashier's or Certified Check payable to the United States of America.

<sup>9/</sup> 40 CFR 22.27(c) provides that the instant Initial Decision shall become the Final Order of the Administrator within 45 days after its receipt by the Hearing Clerk and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision

Case No. TSCA-V-C-002

1. Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615), a civil penalty in the total sum of \$12,000.00 is hereby assessed against BRIGGS AND STRATTON CORPORATION, a Delaware Corporation, for violations of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk a Cashier's or Certified Check payable to the United States of America.

Case No. TSCA-V-C-003

1. No civil penalty shall be assessed against the Respondent herein.

JUNE 17, 1980

  
ALJ

Case No. TSCA-V-C-002

1. Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615), a civil penalty in the total sum of \$12,000.00 is hereby assessed against BRIGGS AND STRATTON CORPORATION, a Delaware Corporation, for violations of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk a Cashier's or Certified Check payable to the United States of America.

Case No. TSCA-V-C-003

1. No civil penalty shall be assessed against the Respondent herein.

JUNE 17, 1980

*Narvus Jones*  
ALJ