UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Suburban Station,	)	Docket No. TSCA-III-40
	)	
Respondent	)	

1. Toxic Substances Control Act - PCB - In cleaning up PCBs disposed of prior to February 17, 1978, each container of waste generated during the clean-up is "removed from service" when it is filled, and if stored for more than 30-days after it is filled must be stored in a facility that complies with 761.65(b).

2. Toxic Substances Control Act - PCB - The owner of Suburban Station, Southeastern Pennsylvania Transporation Authority (SEPTA), which licensed the City of Philadelphia to make improvements in the Station as part of a project being constructed by the City, held not jointly and severally liable with the City for storage violations occuring during a clean-up of PCBs where the clean-up had been performed under the direction and control of the City and SEPTA was not involved in the clean-up.

3. Toxic Substances Control Act - PCB - The failure to provide proper containment for containers of PCBs generated during a clean-up which took ten months, while the containers were stored at the clean-up site, assessed a penalty as one single violation. Complainant's claim that the penalty should be assessed as three separate violations rejected because under the penalty guidelines multiple penalties are discretionary and Complainant had not shown that the single penalty was not an appropriate penalty.

Appearances:

Margaret M. Cardamone, United States Environmental Protection Agency, Region III, Philadelphia, PA, for Complainant.

Vincent J. Walsh, Jr., Southeastern Pennsylvania Transportation Authority, Philadelphia, PA, for Respondent.

William J. McManus, Assistant City Solicitor, City of Philadelphia, PA, for Respondent.

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a), to assess civil penalties for violation of a rule promulgated under section 6(e) of the Act, 15 U.S.C. 2605(e), regulating the manufacture, processing, distribution in commerce, use, disposal, storage and marking of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761. 1/ The administrative complaint issued by EPA Region III, charged that Respondents Southeastern Pennsylvania Transportation Authority, the City of Philadelphia and Penn Central Corporation improperly stored PCBs removed during a PCB cleanup at Suburban Station. A penalty of $45,000 was requested.

Penn Central Corporation on its unopposed motion was dismissed as a party to the proceeding. Respondents the City of Philadelphia and Southeastern Pennslyvania Transportation Authority answered, contesting both the violation and the appropriateness of the proposed penalty.

A hearing was held in Philadelphia, PA on April 3, 1984. Thereafter each party submitted proposed findings of fact, conclusions of law and a proposed order with a supporting brief. On consideration of the entire record and the submissions of the parties, a penalty of $15,000 is assessed against Respondent the City of Philadelphia. The complaint is dismissed against Respondent Southeastern Pennsylvania Transportation

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1/ Section 16(a) provides in pertinent part as follows: "(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 violation continues shall, for the purposes of this subsection, constitute a separate violation of section 15."

TSCA, section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under section . . . 6."

Authority. The findings, conclusions and reasons for the assessment of this penalty follow. All proposed findings and conclusions inconsistent with this decision are rejected.

Findings of Fact

1. Respondent Southeastern Pennsylvania Transportation Authority ("SEPTA") is a transportation authority authorized under Article III of the Pennsylvania Urban Mass Transportation Law, 55 P.S. Sec. 600-301, et. seq. SEPTA is the owner of Suburban Station located at 16th Street and John F. Kennedy Boulevard, Philadelphia, Pennsylvania. SEPTA has operated commuter rail services into Suburban Station since January 1, 1983. Stipulation of the parties, Transcript ("Tr.") 2.

2. Respondent, the City of Philadelphia ("City"), is a city of the first class located in the Commonwealth of Pennsylvania. The City under a grant from the U.S. Urban Mass Transportation Administration is constructing a project known as the Center City Commuter Connection. This work involved major construction in and the renovation of Suburban Station. Tr. 136; Stipulation, Tr. 3.

3. The City discovered that the track bed and adjacent areas in Suburban Station where the construction and renovation work would be done were extensively contaminated with PCBs, apparently as a result of PCBs having leaked from train transformers onto the track beds over a period of many years. Samples taken from various locations in the work site showed concentrations of PCBs ranging from 720 ppm to 530,000 ppm. Complainant's Exh. 5; Complainant's Exh. 6, p. 1; Complainant's Exh. 8, Attach. A.

4. In March 1982, at the City's request, representatives of the EPA met with representatives of the City to discuss decontaminating Suburban Station of PCBs. Tr. 7-9, 35.

5. At the meeting, the City was told that once the PCB contamination was disturbed the PCBs would have to be stored, marked and disposed of in accordance with the PCB regulations. A copy of the PCB regulations was given to the City. Tr. 8-9.

6. On August 24, 1982, the EPA met with the City to again discuss the decontamination of Suburban Station. One item discussed was the storage of the cleaned-up PCBs until they were disposed of. The EPA told the City that under the PCB regulations the temporary storage of PCBs without curbing could not exceed 30 days. 2/ Tr. 18, 72-73.

7. As a follow-up to the August 24th meeting, EPA representatives, Christopher Pilla, Edward Cohen and Roland Shrecongost, on September 9, 1982, made an inspection of Suburban Station. The inspection had been arranged with Thomas Burns, the City's resident engineer for the Suburban Station renovations, who was present at the inspection. Tr. 19, 97, 107.

8. Mr. Pilla on the September 9 inspection saw a number of drums of PCB waste material stored on the platforms in areas which were not curbed. He told Mr. Burns that the regulation required that drums stored for more than 30-days must be stored in a curbed area. He also suggested that as an alternative to curbing the City could use metal catchpans for containment. Tr. 20, 43-44, 77, 103.

2/ See the storage for disposal requirements, 40 C.F.R. 761.65, which in the testimony is referred to under its former numbering, 40 C.F.R. 761.42. Effective May 6, 1982, the PCB Ban Rule was renumbered without any substantive changes. 47 Fed. Reg. 19526 (May 6, 1982). References in this opinion will be to the present numbering.

9. On October 26, 1982, the City wrote to the EPA about its progress in the PCB cleanup at Suburban Station. With respect to the drums of PCB waste, the City stated as follows:

> Approximately 450 drums containing PCB waste were generated by the clean-up. . . . [T]hese drums will be expeditiously removed from the Station and transported to SCA Services' hazardous waste facility in Model City, New York for final disposal. Our analysis has determined that all the waste can be considered solid for purposes of disposal.

Complainant's Exh. 7, Attach. 4.

10. On February 28, 1983, the EPA received a complaint from a private citizen that drums of PCBs were located on a publicly accessible train platform at Suburban Station (Tr. 22, 39, 53; Complainant's Exh. 7, p. 1).

11. Mr. Pilla called Mr. Burns and arranged to inspect Suburban Station on March 1, 1983. On that day, Mr. Pilla saw about 200 drums of PCB material on platform No. 3. The area was not curbed and the drums were not contained in metal catchpans. Tr. 23, 32; Complainant's Exh. 7, p. 2.

12. At the March 1st inspection Mr. Pilla was handed a letter from the City dated March 1, 1983, stating that 500 drums of PCB solid waste and construction debris had been generated by the cleanup of the Station and were being assembled for transportation to an approved PCB landfill. It was further stated that the drums were scheduled to be removed from the Station over the weekend of March 12-13. Tr. 29-30; Complainant's Exh. 7, Attach. 3.

13. Mr. Pilla inspected Suburban Station again on March 13, 1983. All drums of PCB waste had been removed from the Station. He also in-

spected the underplatform areas where the drums had been stored. None of these storage areas had any curbing nor was there evidence of any metal catchpans having been used. Tr. 31, 56; Complainant's Exh. 7, p. 2.

14. The approximately 500 drums of PCB contaminated material collected during the Suburban Station cleanup were filled between May 1982 and February 1983 (Tr. 43, 98-100).

15. SEPTA as owner of Suburban Station granted to the City a license to come upon the Station property to do the construction and renovation work for the Center City Commuter Connection project. It was the City however, which obtained the federal grant to fund the project and contracted for the work to carry it out including the clean-up of PCBs at Suburban Station. The City selected and engaged the services of the contractor to do the PCB clean-up and decided what the work would include. Tr. 103, 109, 133, 136-37; Stipulation, Tr. 2-3; Complainant's Exh. 8.

Discussion and Conclusions

The specific storage violations charged in the complaint were that drums of PCB waste material designated for disposal had been stored in facilities which did not have proper curbing, and which were below the 100-year flood water elevation. The charge that the PCB drums were stored below the 100-year flood water elevation, however, was withdrawn at the beginning of the hearing. 3/ Consequently the only violation remaining to be considered is whether there was a violation of the requirement that the drums should have been stored in facilities having continuous curbing at least six inches high.

3/ Tr. 3-4.

See 40 C.F.R. 761.65(b)(1)(ii). The record also disclosed that in lieu of continous curbing, the EPA would have accepted the use of metal catchpans as an alternative means of providing containment. 4/ It is not disputed that the PCB drums were not stored either in a facility with continuous curbing or on metal catchpans.

The EPA's position with respect to the violation is straightforward. There was no obligation to clean up the PCBs on the track beds and adjacent areas since they were "historical" PCBs, i.e., had been in place prior to February 17, 1978, the date of publication of the original PCB Disposal and Marking Rule. 5/ Each container of PCBs resulting from the clean up, however, and stored for disposal, according to 40 C.F.R. 761.60(a)(6) and (c)(3), must be stored in a facility that complies with 761.65(b), unless it is "temporarily" stored for no more than 30 days from the date of its removal from service.

The City's position appears to be that the governing date for the storage requirements is when the clean-up was completed and all the PCB filled drums were removed from the decontamination site for a shipment to a disposal site. It relies upon a note placed as a preamble to the storage and disposal regulations under Subpart D which reads in pertinent part as follows:

> NOTE: This Subpart [D] does not require removal of PCBs and PCB Items from service and disposal earlier than would normally be the case. However, when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) and PCB Items

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4/ Findings of Fact No. 9, supra.

5/ See 43 Fed. Reg. 7150. The disposal and marking requirements were subsequently incorporated into the final PCB Ban Rule. See 44 Fed. Reg. 31514 (May 31, 1979).

> which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this subpart. This subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they must be disposed of in accordance with this subpart. * * *

The City argues that the decontamination site at Suburban Station is a "disposal site" under the definition of "disposal" in the PCB Ban Rule (40 C.F.R. 761.3(b)). Accordingly, the City claims that as long as the PCB filled drums remained on the decontamination site they were considered to be in service and not subject to the storage for disposal requirements. Such an interpretation rests upon reading considerably more into the note than is justified by its wording.

For purposes of this decision it can be assumed that the decontamination site is a "disposal site" within the meaning of the note. The language in the note referring to the removal of PCBs "from service", however, can also refer to the cleaning up of the PCBs by scraping, degreasing, washing, etc. from the surfaces where they had been deposited. 6/ In fact, this would be the most obvious way to read the note. It would seem that PCBs are usually placed in a disposal site to be permanently disposed of there. Under the note, then, they would be considered to remain in service as long as they were undisturbed. In any event, the lack of merit in the City's argument is demonstrated by the fact that under the City's

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6/ The parties themselves characterize the cleaning up of the PCBs as the removal of PCBs. See Complainant's Exh. 7, Attachment 2, where the City in writing to the EPA in October 1982, says, "[the contractor] has recently successfully completed its clean-up efforts at the Station. In the areas that were cleaned, 95-99 percent of the PCBs that were present have been removed." The "removal" referred to was obviously to the clean-up of the PCB material itself and not to the shipment of the drums, since the drums were still being stored at the station.

interpretation the PCB drums could have been stored indefinitely at the site, which would have been tantamount to permitting their disposal at other than at an EPA approved facility. The City, however, never questioned that the drums had to be eventually disposed of at an EPA approved facility. 7/

I find, accordingly, that the storage requirements became applicable once the PCBs were removed by scraping, degreasing, washing, etc. from the surfaces where they lay. 8/

Section 761.65(c)(1) of the regulations, however, permits the temporary storage of certain PCB items for up to 30 days without complying with the storage requirements, provided that there is attached to the item a notation indicating the date it was removed from service. The pertinent language is as follows:

> (c)(1) The following PCB Items may be stored temporarily in an area that does not comply with the requirements of paragraph (b) of this section for up to thirty days from the date of their removal from service, provided that a notation is attached to the PCB Item or a PCB Container (containing the item) indicating the date the item was removed from service:
> (i) Non-leaking PCB Articles and PCB Equipment;
> (ii) Leaking PCB Articles and PCB Equipment if the PCB Items are placed in a non-leaking PCB Container that contains sufficient sorbent materials to absorb any liquid PCBs remaining in the PCB Items;

7/ Although the City first considered entombment of the PCBs at a specially constructed facility at the Station, it finally decided against this, apparently because of the difficulty of obtaining EPA approval of the procedure. Tr. 71-72.

8/ The clearest application of the note would be to the obligation to redispose of PCBs which had been disposed of prior to the publication of the PCB regulations. A study of the legislative history of the note indicates that the language of the note relied on by the City had its origin in just such a situation. See 43 Fed. Reg. 33918-919 (August 2, 1978).

> (iii) PCB Containers containing non-liquid PCBs such as contaminated soil, rags, and debris; and
> (iv) PCB Containers containing liquid PCBs at a concentration between 50 and 500 ppm, provided a Spill Prevention, Control and Countermeasure Plan has been prepared for the temporary storage area in accordance with 40 CFR Part 112. In addition, each container must bear a notation that indicates that the liquid in the drum do not exceed 500 ppm PCB.

It is to be noted that the temporary storage permitted is for the PCB containers filled with the PCB material rather than for the material itself. It is assumed, however, or at least no one has argued to the contrary, that in cleaning up PCBs, the PCB material, as part of the clean-up, can be put into containers with the containers then becoming subject to the 30-day temporary storage rule.

SEPTA argues that the regulation in speaking of removal from service uses terms appropriate to a group of containers, i.e., "their removal from service", and that, therefore, it was intended that where a number of containers are filled in a clean-up which continues over a period of time, the 30-day storage period starts to run from the date the last container is filled. Under this construction there would have been no violation since the containers were shipped for disposal within 30-days after the last container was filled. The logical reading, however, is that the plural "their" in the phase "their removal from service" simply refers generally to the several different kinds of PCB items, PCB containers being only one such item, for which temporary storage is permitted, and that that particular provision was not intended to deal with determining the date on which any particular item was removed from service.

SEPTA's interpretation is also questionable because the result of permitting the storage of containers in a substandard storage area for 8 to 10 months, seems totally inconsistent with the entire thrust of the regulation which is to limit temporary storage to 30-days. This is even more apparent when one examines the legislative history of the regulation.

The original marking and disposal rule permitted the temporary storage only of PCB articles and equipment if they were non-leaking or in non-leaking containers. 9/ PCB articles and equipment are manufactured items other than containers such as transformers, or capacitors or electric equipment. 10/ When the PCB Ban Rule was issued, the regulation was amended to permit the temporary storage of PCB containers of non-liquid wastes and of liquids with low concentrations (50-500 ppm) of PCBS. With respect to containers of non-liquid wastes, it was explained that their temporary storage was permitted because such containers do not pose any greater hazard than non-leaking containers of leaking articles. 11/ With an article like a transformer or capacitor there would usually be no question of the date when it is removed from service, the word service being given its normal meaning of being in-use. This appears to be the meaning that "service" also has in the phrase "in service" in the preamble to Subpart D. It is obvious,

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9/ Marking and disposal rule, section 761.42(c)(1), 43 Fed. Reg. 7162 (February 17, 1978), as amended by 43 Fed. Reg. 33198 (August 2, 1978). Section 761.42 along with the other provisions of the marking and disposal rule was incorporated with modifications and amendments into the PCB Ban Rule. Supra, n 5. Section 761.42 was redesignated 761.65 at 47 Fed. Reg. 19527 (1982).

10/ Marking and disposal rule, sections 761.2(r),(v), 43 Fed. Reg. at 7157. These definitions are now found in 761.3(t), (w).

11/ 44 Fed. Reg. 31523-524 (May 31, 1979).

however, that the words "in service" cannot be used in the same sense when applied to the subsequently added containers of contaminated soil and debris. The reasonable interpretation is that the 30-day period is to be determined by reference to the date the container is filled with soil and debris, and SEPTA's argument, in fact, assumes as much. Where SEPTA's argument fails is in attempting to give the words "in service" a technical meaning that would prolong the period beyond 30-days for individual containers because the clean-up took several months. No reason appears and none is offered by SEPTA as to why each container of the 500 ultimately used to hold all of the clean-up material, once it was filled, could not within 30-days either have been placed in a proper storage facility or shipped for disposal. Such treatment would have been clearly within the intendment of the rule, as expressed in the legislative history, that no PCB item (i.e., the filled container) could be temporarily stored for more than 30 days. On the other hand, under SEPTA's interpretation, the risk of of potential harm created by having PCBs stored in substandard facilities would be increased by allowing the temporary storage of containers for several months, a result plainly contrary to what was intended by the regulation.

I find, accordingly, that each container containing PCBs generated by the clean-up, could be temporarily stored for only 30-days from the date it was filled with PCBs. A container stored for a longer period had to be

stored in an area meeting the requirements of 761.65(b). 12/ The record shows that containers filled with PCBs from the clean-up were stored for more than 30-days in areas that were not curbed as required by 761.65(b)(ii). 13/ Nor were such containers placed on metal catchpans, which would have been an acceptable alternative to curbing. 14/

It is also argued by SEPTA that curbing is required only if liquid wastes are being stored, and none of the containers contained liquids. The EPA takes issue with SEPTA's characterization of its wastes as non-liquid, citing the testimony of Mr. Shrecongost that some of the containers may have held sludge which he described as "solid, fairly wet material." 15/ All waste generated in the clean-up, however, appears to have been sufficiently solid in nature that it could be disposed of as solid waste. 16/ In any event, no distinction is made in 761.65(b), between the diking requirements for containers of liquid PCBs and containers of non-liquid PCBs. Where the plain language is clear, there is no need to go beyond the words to interpret the regulation, unless the words are at variance with the policy of the regulation as a whole. Estate of Cowser v. Commissioner of Internal Revenue, 736 F.2d 1168, 1171

12/ Not decided in this case is when the 30-day temporary storage period runs in the case of containers which are intermittently filled with PCBs over a period of time. Under these circumstances the 30-days could well run from the date PCBs are first placed in the container. It is unnecessary to consider that question, however, because there is no evidence in the record to indicate either that any container was being filled gradually rather than all at once, or that, if it were, it would have made any difference in the finding of violation.

13/ Findings of Fact Nos. 8, 13.

14/ Finding of Fact No. 8.

15/ Tr. 70, 84.

16/ Complainant's Exh. 7, Attach. 4.

Requiring diking to contain possible spills of non-liquid as well as liquid PCBs does not appear to be at variance with the policy of the regulation as a whole.

Finally, both the City and SEPTA fault the EPA for not giving notice that the containers were improperly stored when the EPA inspected Suburban Station on September 9, 1982. The City claims that it was prejudiced by not being told at that time that its containers were illegally stored for if it had been, the necessity for this present action could have been avoided.

It seems clear from the discussion which went on on September 9th, 1984, that the EPA inspector made known to the City's resident engineer, Mr. Burns, that the storage which the inspector observed did not meet the storage requirements for containment. 17/ What was not specifically pointed out was whether any of the containers observed had been stored for longer than 30 days. 18/ The EPA inspector apparently did not pursue this matter because the purpose of the inspection was not to find violations but to insure that the City was familiar with the regulatory requirements. 19/ Moreover, while the regulations were possibly not as crystal clear as they could have been, they were clear enough that the EPA inspectors could have reasonably assumed that the City understood that no container could be temporarily stored for more than 30-days after it was filled, unless the City said something to

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17/ See Tr. 19=20, 38, 41, 43-44, 77, 92. Mr. Burns stated that the discussion about catchpans may have taken place later (Tr. 103), but the testimony of the EPA inspectors seems to more accurately describe what was actually discussed.

18/ Tr. 44.

19/ Tr. 36.

indicate otherwise. There is no evidence here that the City during the September 9th inspection or before or afterwards, made known to the EPA that it read the regulation in the manner respondents have urged here, i.e., that diking or catchpans were not required so long as the containers remained on the disposal site or the clean-up was being carried on. 20/ The City cannot in good faith claim that it was misled where, as appears to be the case, it proceeded on an interpretation of the regulations that, for the reasons already noted was doubtful, to say the least, and without making any effort to clear the matter up with the EPA. Nor, under these circumstances, would the EPA be estopped from bringing a penalty action if it later found that the containers were not being stored in accordance with regulation requirements.

The Liability of SEPTA

The clean-up in this case which gave rise to the storage violation was done under the direction and control of the City. SEPTA is included in this proceeding as a respondent simply by viture of its being the owner of Suburban Station. These facts are not disputed. The EPA claims that since 761.65(b), states that "owners or operators" of a facility must comply with the storage requirement, SEPTA must be held jointly and severally liable with the City for the violations. It rests its position on the fact that owners and operators have been held jointly liable under similar wording in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), section 107a, 42 U.S.C. 9607(a), and in the Clean Water Act, section 311(g) of the Clean Water Act, 33 U.S.C. 1321(g). The

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20/ Mr. Burns the City's resident engineer did indicate that it would be impractical to store the drums in a concrete curbed area but there is no evidence that the City informed the EPA that the City did not intend to use metal catchpans.

cases cited under CERCLA, however, dealt with imposing joint and several liability on parties when the conduct of each party was a contributing factor in causing the violation. 21/ Here, SEPTA was responsible for insuring that the construction being done by the City would not endanger the passengers or unduly interfere with the operation of the trains. 22/ But it took no part in the decisions made by the City with respect to how the clean-up was done, and specifically to storing the containers without proper containment, and it is problematical to what extent SEPTA's responsibilities gave it any say in such decisions. The City did send copies of its correspondence to the EPA to SEPTA, but these do not indicate that the City had consulted or discussed the matters stated therein with SEPTA. The correspondence also indicated that the City was complying with the regulatory requirements so that there was no reason for SEPTA to believe that there was any need for action on its part if it's right of oversight gave it any authority to act. 23/ Under these circumstances, SEPTA's conduct cannot be said to have been a contributing factor in the violation. The case of United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982) under section 311 of the Clean Water Act cited by the EPA, at first glance seems more in point, since there the accident was caused solely by the negligence of the operator of a tug which collided with a tanker barge. The operator was operating the tug under a bareboat charter from the owner. The court, however, based its finding of joint liability on the definition in the statute of "owner or operator" as

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21/ SEE EPA's reply brief at 9.

22/ Tr. 137-38.

23/ See Complainant's Exh. 7, Attach. 4.

meaning any person owning, operating or chartering a vessel. 24/ It then reasoned that this was intended to impose strict liability for recovering clean-up costs from oil spills against the owner and operator jointly, since such a construction would be more consistent with the legislative intent than permitting a vessel owner to insulate itself from liability through a charter to an impecunious and uninsured charterer. M/V Big Sam, supra, 681 F.2d at 438-39. Neither TSCA, nor the PCB Ban Rule, contain any definition of "owner or operator", which would indicate that the statute or regulation was intended to impose joint and several liability on owners of property without regard to whether they had in anyway caused the violation. Quite the contrary, to do so would seem inconsistent with the statutory requirement that the degree of the violator's culpability must be taken into account in determining the appropriate penalty. 25/ It would mean that an operator who committed the violation would be allowed to plead mitigating circumstances but the owner would be barred from pleading special mitigating circumstances that applied to him. Nothing either in the statue or regulations indicates that such unequal treatment of respondents was intended. Nor does it appear, as was true in the case of the Clean Water Act, that effective enforcement of the regulations requires that the owner of property be held liable with the operator even though the owner had no involvement in the violation. In order to impose strict liability on SEPTA for wrongs committed by its licensee, there must be an indication that Congress specifically intended

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24/ See Clean Water Act, section 311(a)(b), 33 U.S.C. 1321(a)(6).

25/ See TSCA, section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B).

this result. See Amoco Oil Co. v. Environmental Protection Agency, 543 543 F.2d 270 (D.C. Cir. 1976), (refusing to impose strict liability on the lessor of a retail gasoline station for violations of the unleaded gas regulations by the lessee). That indication of intent by Congress, or even by the Agency, is simply missing here.

Accordingly, the complaint is dismissed against SEPTA and no penalty is imposed.

The Penalty

The EPA's proposed penalty of $45,000 is derived from the PCB Penalty Policy issued as part of the Agency's guidelines for the assessment of civil penalties under TSCA, section 16. 26/ Using the GPB matrix contained there to determine a gravity based penalty, the EPA has classified the violation as a major storage violation (level three under the circumstances column) involving a major amount of non-liquid PCBs (100 or more 55-gallon drums). The gravity based penalty for a violation of that nature is $15,000. 27/ The EPA has then multiplied this penalty by what it terms three days of "documented violation", namely, the violation observed by the EPA's inspectors during their informal inspection on September 9th, the City's letter of October 26, 1982 (Complainant's Exh. 7, Attachment 4) disclosing that 450 drums had been accumulated, and the violations observed on the March 1, 1983 inspection. 28/

The City contends that the penalty calculation fails to comply with the PCB Penalty Policy in that no adjustment was made for culpability, history of violations, ability to pay, ability to continue in business and such other

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26/ 45 Fed. Reg. 59776 (September 10, 1980).

27/ See 45 Fed. Reg. at 59777.

28/ Complainant's main brief at 10.

matters as justice may require. The EPA correctly decided that no downward adjustment for any of these factors, which is presumably all the City is interested in, was required for the calculation of the gravity based penalty of $15,000. Since the penalty was designed to apply to first offenders, no downward adjustment for lack of prior violations would be merited. 29/ The guidelines also put the burden on a respondent to prove inability to pay or inability to continue in business. 30/ This is a reasonable requirement since the respondent would be the one possessed of the evidence of its financial condition. 31/ The City did not raise the issue of ability to pay in its answer and did not present any financial data indicating inability to pay at the hearing. So far as culpability is concerned, the guidelines would allow no adjustment downward where the violator had sufficient knowledge to recognize the hazard created by his conduct and had control over the situation to avoid committing the violation. 32/ There is no question here that the City knew that PCBs were a highly toxic substance. The City was also fully familiar with the requirements of the regulation and had the necessary control to provide proper storage for the drums. 33/ It was apparently disposed, however, to give the requirements a liberal interpretation so as to avoid the inconvenience or expense of having to provide containment for the drums while they were being stored at Suburban Station. The City cites its good faith

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29/ See 45 Fed. Reg. at 59773.

30/ 45 Fed. Reg. at 59775.

31/ See Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F.2d 872, 881 (D.C. Cir. 1972).

32/ 45 Fed. Reg. at 59773.

33/ See Tr. 103-04, 108-09.

efforts in cleaning up Suburban Station and the considerable costs incurred in the effort. 34/ This makes even less understandable, the City's refusal to provide at least catchpans for the drums, particularly since the evidence indicates that this could have been accomplished by a simple change to the contract for the clean up. 35/ While the City may have honestly believed that it did not have to comply with the storage requirements, its position was not based on a reasonable interpretation of the regulations, especially since the City knew it was dealing with a highly toxic material. Consequently, the EPA was also justified in making no downward adjustment for culpability in the gravity based penalty.

A different question arises as to the tripling of the gravity based penalty by reason of there being what is described as three documented violations. While it is true that new drums were being added to the group of improperly stored drums, what is really involved here is a repeated course of conduct over a period of several months. In such cases, multiple penalties are not routinely assessed under the Penalty Policy but are made discretionary. 36/ As I read the guidelines, it is not sufficient for the EPA to show that the violation persisted over a period of time. The EPA must also show why in this case the gravity based penalty of $15,000 would not be an adequate penalty. The guidelines state that the purpose of the penalty system is to assure that TSCA civil penalties be assessed in a fair,

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34/ City's main brief at 3, where it points to having spent approximately $900,000 in direct costs and having incurred indirect costs in excess of $250,000.

35/ Tr. 103-04, 108-09.

36/ 45 Fed. Reg. at 59782.

uniform and consistent manner, that the penalties are appropriate for the violation committed, that economic incentives for violating TSCA are eliminated and that persons will be deterred from committing TSCA viola tions. 37/ Fairness, uniformity and consistency in application where the penalty is discretionary depend on the grounds asserted for assessing multiple penalties. The EPA, however, cites no ground other than that none of the drums of waste generated during the clean-up were properly stored. The guidelines, however, recognize that each separate act of a repeated course of conduct may not always merit multiple penalties for the viola-tion. 38/ Turning then to the other reasons that would dictate the need for multiple penalties, the principal grounds would seem to be to insure that the penalty be large enough so that economic incentives for violating TSCA are eliminated. The City by its actions here has demonstrated that it does try generally to comply with the law. Thus, this matter first came to the attention of the EPA, because the City called it upon discovering that it had a PCB problem at Suburban Station. 39/ Nor was the City unmindful of its obligation to properly clean-up the PCBs and dispose of them. The steps the City took to correct the problem were thorough so far as they went. This violation occurred because it would appear that the necessity for containing these drums while stored at the site was not as readily apparent as the dangers confronting the construction workers working in an area contaminated with PCBs. Whether or not the City regarded the storage of drums as important a safety consideration as removing PCBs from the construction site, however, is not the controlling factor. The purpose

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37/ 45 Fed. Reg. at 59770.

38/ 45 Fed. Reg. at 59783.

39/ Findings of Fact Nos. 3 and 4.

of the storage requirements is to guard against PCBs entering the environment through possible spills or accidents while they are in storage. The likelihood of spills or accidents occurring may seem quite remote, but the regulation has nevertheless made a policy decision as to what is required and should be complied with. On this record, it cannot be determined whether the City would have had to expend more or less than $15,000 to supply catchpans. Nevertheless, the $15,000 does seem a large enough sum to substantially diminish any economic gain the City might have realized by not complying, and to insure that the City will comply in the future with all PCB regulations. I find, accordingly, that the appropriate penalty is $15,000.

ORDER [40/]

Pursuant to section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of $15,000 is hereby assessed against Respondent The City of Philadelphia, for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Sept 4, 1984

40/ Unless an appeal is taken pursuant to section 22.30 of the rules of practice or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator (See 40 CFR 22.27(c)).