UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Bell & Howell Company) Docket Nos. TSCA-V-C-033,
) 034, 035
Respondent)

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1. Toxic Substances Control Act - PCBs - PCB penalty policy entitled to weight in determining appropriate penalty.

2. Toxic Substances Control Act - PCBs - Manufacturer's nameplate on transformers indicating a PCB dielectric fluid is not a substitute for a PCB mark.

3. Toxic Substances Control Act - PCBs - Fact that a transformer has a nameplate indicating it contains a PCB dielectric fluid is sufficient to establish that transformer is a PCB transformer absent some showing by Respondent that nameplate does not accurately state the kind of dielectric fluid in the transformer.

4. Toxic Substances Control Act - PCBs - Asserted difficulty of finding PCB rule in Federal Register rejected as a defense in mitigation of penalty.

5. Toxic Substances Control Act - PCBs - Penalty of $7,500 assessed for failure to mark PCB transformers.

6. Toxic Substances Control Act - PCBs - Respondent's asset ledger and operating and service manuals held not to satisfy the PCB recordkeeping requirements.

7. Toxic Substances Control Act - PCBs - That Respondent after inspection in September 1980, started keeping records on its PCBs and preparing the annual document is given little weight in assessing penalty when envidence shows that Respondent had done nothing with respect to keeping records until it was inspected.

8. Toxic Substances Control Act - PCBs - Penalty of $5,250 assessed for failure to prepare annual document for 1978 and 1979. Evidence showed that transformers, which accounted for bulk of PCBs involved, were all in active service.

Appearances:

Craig A. Benedict and Linda Szemprick, United States Environmental Protection Agency, Region V, Chicago, Illinois, for Complainant.

Louis M. Rundio, Sr., McDermott, Will & Emery, Chicago, Illinois, for Respondent.

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violations of a rule promulgated under Section 6(e) of the Act, 15 U.S.C. 2605(e), governing the manufacturing, processing, distribution, and use of polychlorinated biphenyls ("PCB rule"), 40 CFR, Part 761.[1/] Three separate complaints were issued against Respondent Bell and Howell Company. The first complaint (TSCA-V-C-033) alleged that Respondent

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1/ Section 16(a) of the Act, 15 U.S.C. 2615(a), provides in pertinent part, as follows:

(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 subjection, constitute a separate violation of section 15.

Section 15 of the Act, 15 U.S.C. 2614, provides in pertinent part, that "it shall be unlawful for any person to (1) fail or refuse to comply with . . . (B) any requirement prescribed by section . . . 6 [15 U.S.C. 2605], or (c) any rule promulgated under section . . . 6 or . . . (3) fail or refuse to (a) establish or maintain records . . . as required by this Act or a rule promulgated thereunder; . . ."

at its facility at 6500 North McCormick Road, Chicago, Illinois, had failed to develop and maintain records required by the PCB rule. A penalty of $1,000 was requested. The second complaint (TSCA-V-C-034) alleged that Respondent at its facility at 2411 Howard Street, Evanston, Illinois, had improperly disposed of PCBs, and had failed to develop and maintain records required by the PCB rule. A penalty of $10,000 was requested for the violations of the recordkeeping requirements, and no penalty for the disposal violation. The third complaint (TSCA-V-C-035) alleged that Respondent at its facility at 7100 N. McCormick Road, Chicago, Illinois, had not dated a container in which PCB contaminated material had been stored, had improperly disposed of PCBs, had failed to properly mark its PCBs, and had failed to develop and maintain the records required by the PCB rule. A penalty of $10,000 was requested for the marking violation, and of $10,000 for the recordkeeping violation. No penalty was requested for the dating or disposal violations.

Respondent answered each of the complaints and denied the violations and alleged that the imposition of any penalty in each case was unwarranted and improper. A hearing on the charges in the complaints was requested.

The three cases were consolidated by order of the Chief Administative Law Judge. The complaint's covering the violations alleged to have been found at the facilities at 2411 Howard Street, Evanston, Illinois, and 7100 N. McCormick Road, Chicago, Illinois, were subsequently amended to charge that Respondent had either improperly disposed of PCBs at these facilities or in the alternative had failed to use PCBs in a totally enclosed manner as required by the PCB rule. No additional penalties were requested. Respondent denied the amended charges.

A hearing was held in Chicago, Illinois, on October 26, 1982. Following the hearing, the parties submitted briefs on the legal and factual issues. On consideration of the entire record and the briefs submitted by the parties, a penalty of $12,750 is assessed. All proposed findings of fact inconsistent wit this decision are rejected.

Findings of Fact

1. Respondent Bell and Howell Company, has facilities in the Chicago, Illinois, area pertinent to this proceeding which are located at 6800 North McCormick Road, Chicago, Illinois ("Lincolnwood South" facility), 7100 North McCormick Road, Chicago, Illinois ("Lincolnwood North" facility), and 2411 Howard Street, Evanston, Illinois ("Hibband" facility) (admitted in Respondent's answers).

2. On September 5, 1980, EPA inspectors visited Respondent's Lincolnwood North facility for the purpose of inspecting Respondent's compliance with the PCB regulations. Transcript of proceedings ("Tr.") 80-81, Complainant's Ex. 8 at 2.

3. On meeting with Respondent's representatives, the EPA inspectors were informed generally that the Lincolnwood North facility had a large number of transformers containing PCB dielectric fluid (Tr. 82).

4. In response to the EPA inspector's request to see PCB equipment at the facility, Respondent's representatives directed the inspectors to four transformers bearing nameplates disclosing that they contained either Askarel or Pyranol, which are trade names for dielectric fluid having 500 parts per million ("ppm") or more PCBs.[2/] None of these four transformers were marked

2/ By pretrial order dated January 5, 1982, I took official notice that Askarel and Pyranol are trade names for transformer dielectric fluid having 500 parts per million (ppm) or more PCBs. Respondent has not shown these facts to have been erroneously noticed.

with the PCB mark which under the PCB rule must be affixed to all "PCB transformers" (i.e. transformers which contain 500 ppm or more of PCBs), 40 CFR 761.20(a) (redesignated as 761.40(a)).[3/] Tr. 86, 88-90; Complainant's Ex. 8 at 2-3.

5. The inspectors were also shown a storage area in which was stored a 55-gallon drum said to contain PCB contaminated rags, gloves, and clean-up materials. This drum also was not marked with the PCB mark or dated as required by the PCB rule, 40 CFR 761.42(c)(8) (redesignated as 761.65(c)(8)), Tr. 86-87; Complainant's Ex 8 at 2-3.

6. In order to make their inspection, the EPA inspectors asked to see Respondent's records on Respondent's PCB equipment for the three facilities involved in this proceeding. Respondent was unable to produce any records of its PCB items and had not prepared the annual document of its PCB equipment which was required by 40 CFR 761.45 (redesignated as 761.80). Tr. 84-85, 103; Complainant's Ex. 8 at 2.

7. Without the annual document, or records showing the number of PCB items on hand, and the quantity of PCB they contained, the EPA inspectors concluded that it was not possible to complete the inspection (Tr. 85, 134; Complainant's Ex. 8 at 2). Accordingly, the EPA inspectors arranged to return on September 10, 1980. The inspectors requested that at that time they be furnished with a complete record of Respondent's PCB items for all three facilities. Tr. 91, 103, 109; Complainant's Ex. 8 at 2.

3/ The PCB rule was recodified in 1982, without substantive changes being made. See 47 Fed. Reg. 19526 (May 6, 1982), as corrected by 47 Fed. Reg. 37360 (August 25, 1982). To make the references to the rule consistent with the complaint and briefs, the numbering prior to recodification is cited with the redesignated number following in parenthesis. The definition of PCB transformers as transformers containing 500 ppm PCBs or greater is found at 40 CFR 761.2(y) (redesignated as 761.3(y).

8. On resuming their inspection of Respondent's Lincolnwood North facility on September 10, 1980, the EPA inspectors were given a handwritten inventory showing that Respondent had 32 transformers at that facility, filled with a total of 5003 gallons or 23,295 kilograms (kgs.) of PCB dielectric fluid (Askarel or Pyranol). This inventory bore the date 9-8-80. The EPA inspectors were also given a handwritten inventory showing that Respondent had 5 transformers at its Hibband facility containing a total of 1195 gallons, or 6192 kgs., of PCB dielectric fluid (either Askarel or Pyranol). This inventory had also been prepared between September 5 and September 10, 1980. Complainant's Exs. 3, 4, 8 (Inspectors Report No. 1 at 2-1-4, and Inspectors Report No. 2 at 2-1-4); Tr. 91-92, 107-8. No inventory was given with respect to transformers located at Respondent's Lincolnwood South facility, even though Respondent on September 10, 1980, had one PCB transformer at that facility filled with 187 gallons, or 969 kgs., of Pyranol. Complainant's Ex. 8 at 4; Tr. 102.

9. Between September 5 and September 10, Respondent had marked the various PCB items at its three facilities with the PCB mark. None of these items had been properly marked prior to September 5, 1980. Tr. 161, 229-30.

10. Other than the handwritten inventories given to the EPA inspectors on September 10, 1980, Respondent produced no other records, or any annual report for its PCB items either on September 10, 1983, or on a subsequent inspection of Respondent's Hibband facility on September 23, 1980.

11. The first annual document prepared by Respondent for its PCB items was an annual document covering 1980, and completed on June 6, 1981 (Complainant's Ex. 5).

Discussion and Conclusions and Penalty.

The proceedings concern the assessment of an appropriate penalty for Respondent's marking and recordkeeping violations. As for the other violations charged in the complaint, those dealing with the improper disposal of PCBs or in the alternative failure to use a PCB item in a manner other than totally enclosed, relate to the leakage of transformer fluid which was observed during the inspections. By agreement of the parties, these charges have been dropped by the EPA, with the EPA reserving the right to introduce evidence regarding the leakage of transformer fluids to support the penalty it proposes for the marking and recordkeeping violations.[4/] The claim that Respondent did not date a container of PCB contaminated materials has not been dropped, but Complainant seeks no penalty for this violation, arguing instead that it should also be considered in determining the appropriate penalty for the marking and recordkeeping violations.

The marking and recordkeeping violations themselves are not disputed. What Respondent does dispute is the penalty for these violations. Complainant proposes a penalty of $10,000 for Respondent's failure to mark the transformers at the Lincolnwood North facility, a penalty of $10,000 for its failure to have an annual document for 1978 and 1979 at this facility, a penalty of $10,000 for its failure to have an annual document for 1978 and 1979 for its Hibband facility, and a penalty of $1,000 for its failure to have an annual document for 1978 and 1979 for its Lincolnwood South facility. The total proposed penalty comes to $31,000.

4/ Tr. 44. Accordingly, Count I of the amended complaint in Case No. TSCA-V-034, and Count I of the amended complaint in Case No. TSCA-V-035, are dismissed with prejudice.

Respondent contends that the violations were only technical at best, were promptly remedied, and that a nominal penalty of $500 is warranted.

TSCA Section 16(a), 15 USC 2615(a)(1), provides that persons violating TSCA or rules issued thereunder shall be liable for a civil penalty in an amount not to exceed $25,000 for each such violation, and each day such violation continues shall constitute a separate violation. Section 16(a)(2)(B), 15 USC 2615(a)(2)(B), provides as follows with respect to assessing the amount of the penalty:

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

The EPA's office of enforcement has issued guidelines for the assessment of civil penalties under Section 16, supplemented by a PCB penalty policy, to aid EPA enforcement personnel to assess appropriate penalties (hereafter collectively referred to as "PC Penalty Policy").[5/] The purpose of having such a general penalty system is stated to be "to assure that TSCA civil penalties be assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCAviolations."[6/] These certainly are unexceptionable goals in carrying out a civil penalty policy and seem to be consistent with Section 16. The rules of practice which govern these proceedings provide with respect

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5/ See 45 Fed. Reg. 59770 - 59783 (September 10, 1980). The guidelines start at 59770, with the PCB penalty policy supplementing these guidelines beginning at 59776.

6/ 45 Fed. Reg. at 59770.

to my assessment of a penalty that I must consider these guidelines and further that if I assess a penalty different in amount from the penalty proposed in the complaint (which should also be the penalty recommended in the PCB penalty policy), I must give my reasons for doing so.[7/] Thus, I am, in effect, required to give deference to the PCB penalty policy but I am not bound to follow it and can assess a different penalty if I have reason to regard the penalty recommended by the PCB penalty policy as inappropriate. Such a requirement seems entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate.[8/]

Accordingly, then, consideration will be given to determining whether the $31,000 penalty recommended by Complainant conforms to the PCB penalty policy and if it does, whether it is appropriate under the facts in this case, and makes due allowance for those factors which the statute says must be considered.

7/ 40 CFR 22.27(b).

8/ See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Respondent early in this proceeding requested that I withdraw arguing that the requirement that I consider the guidelines will deprive Respondent of a fair and impartial hearing, and that in a prehearing letter I had sent out to accomplish some of the purposes of a prehearing conference, I had indicated I would consider the guidelines by requesting Complainant to show how the proposed penalty conforms to the PCB penalty policy. I denied the request stating that my ability to render a fair and impartial judgement would not be affected because I was free to assess a penalty different from that recommended by the guidelines,and complaint, if I had reason to regard the recommended penalty as inappropriate. See report of prehearing conference dated February 24, 1982. Respondent moved before the Administrator to disqualify me on similar grounds, which motion is still pending. See Tr. 44-45.

The Marking Violation

In line with the allegations of the complaints in this proceeding, Complainant seeks a penalty for the four unmarked transformers found at the Lincolnwood North facility on the September 5th inspection. Under the PCB penalty policy the statutory factors of the nature, extent and circumstances of PCB violations are treated as bearing upon the gravity of the violation. All four factors are incorporated in two components, the extent of potential damage (measured by the quantity of PCBs involved), and the probability of such damage, to determine an initial "gravity based" penalty. This gravity based penalty can then be adjusted upwards or downwards as merited by consideration of the other statutory factors, i.e., culpability, history of violations, ability to pay, ability to continue in business, and such other matters as justice may require.[9/] Complainant argues that $10,000 is the appropriate gravity based penalty under the PCB penalty policy for the failure to mark the four transformers, given the quantity of PCBs involved (over 1700 kgs.) and the probability of damages created by the absence of a proper mark.[10/] Complainant would recognize no factors which would

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9/ 45 Fed. Reg. at 5977.

10/ The inventory furnished by Respondent showed that the four unmarked transformers (a 500 KVA unit located in Building No. 1-Center, and three 167 KVA units in Building No. 1-South) contained a total of 330 gallons of Pyranol (Complainants Ex. 3; Complainant's Ex. 8 at 3). Using a conversion rate of 5.18 kgs. per gallon (Complainant's Ex. 8, Compliance Inspection Report No. 1 at 2-1-4), the amount of PCBs totalled 1709.4 kgs. A violation involving 1000 to 5000 kgs. of PCB is classified as "significant" in extent of potential damage. Complainant places the violation in level 3 in probability of damage (out of a scale ranging from 1 to 6, with 1 being the highest), which according to the penalty schedule in the PCB penalty policy would call for a penalty of $10,000. See 45 Fed. Reg. at 59777.

justify mitigating this penalty, and indeed argues that it is emminently reasonable since that the record disclosed that Respondent had not properly marked any of the 38 PCB transformers at its Chicago area facilities.[11/]

The EPA mark contains a warning that PCBs are present, and must be specially handled and disposed of, and also provides a reporting point in the event of an accident or spill.[12/] There can be no doubt of the importance of the PCB mark in insuring that PCBs will be properly handled and disposed of so as not to injure health or the environment.[13/]

Respondent in attempting to minimize the violations argues that since the transformers had nameplates indicating that they contained Pyranol or Askarel, which are trade names for PCB dielectric fluid, persons would be warned that the transformers did contain PCBs. A similar argument was made

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11/ Complainant would also point to Respondent's failure to mark the 48 capacitors at its Lincolnwood North facility as evidence of Respondent's general disregard of the PCB rule's marking requirements. Brief at 4. The evidence as to the status of these capacitors under the PCB rule, however, is inconclusive. The PCB rule requires only that large capacitors be marked. 40 CFR 761.20 (redesignated as 761.40); Complainant's Ex. 7 at 23. A large capacitor is defined as one containing 1.36 kgs. (3 lbs.) or more of dielectric fluid. 40 CFR 761.2(d) (redesignated as 761.3(d)). Respondent's capacitors each appeared to contain about one-fourth gallon of fluid (Complainant's Ex. 5). By Respondent's calculations, 6410 gallons of PCB oil equalled 36,344 kgs. (Complainant's Ex. 5). Under this ratio, one gallon would be equal to 5.669 kgs., and one-fourth gallon to 1.417 kgs., making Respondent's capacitors large capacitors. Respondent, however, points to the fact that the EPA inspector in his report used a ratio of 5.18 kgs. per gallon (see Complainant's Ex. 8, Inspection Report No. 1 at 2-1-4), according to which the capacitors would contain only 1.295 kgs. of fluid, and would not have to be marked. Because of this inconsistency in the evidence, Respondent's capacitors are not considered as being covered by the marking requirements.

12/ See 40 CFR 761.44 (redesignated as 761.45).

13/ The importance of the marking of PCBs in the regulatory scheme is shown by the fact that markings of PCBs is specifically required by the statute. See TSCA, Section 6 (e)(1)(B).

in the case of Briggs & Stratton Corp., TSCA Appeal No. 81-1, (February 4, 1981), and rejected by the Judicial Officer for the obvious reason that the manufacturer's nameplate does not like the EPA-approved mark contain instructions about the proper disposal of PCBs. Briggs & Stratton Corp., supra at 29. Nor does the nameplate like the EPA-approved mark contain a clear and unmistakable warning that PCBs are a toxic environmental contaminant requiring special handling so that all persons who do come into contact with leaks or spills from the transformers will not only know that PCBs are present but they will act to avoid any injury to themselves or to the environment.[14/] Respondent may possibly know that PCBs must be carefully handled, but if it did, it does not appear to have disseminated information about the careful handling of PCBs to its employees.[15/] Finally, while, as Respondent argues, Respondent's employees who participated in the inspection knew that its transformers contained PCBs, it does not follow from this that all employees who would be exposed to any leaked or spilled fluid from the transformers would know without the presence of the PCB mark that the fluid is a PCB fluid. Consequently, Respondent's claim that the presence of the manufacturer's label makes the violation less serious is found to be without merit.

Respondent further argues that no harm resulted from its failure to affix the proper label, because Respondent in any event did observe the special handling and disposal requirements. Respondent points to its having placed PCB cleanup materials in a steel drum and storing the drum in a proper storage area. This shows some attention to the PCB rule, but

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14/ Workers exposed to PCBs must avoid skin contact with and ingestion of PCBs by wearing protective clothing and by washing their hands and removing contaminated clothing. See the preamble to the EPA's proposed PCB disposal and marking rule, 42 Fed. Reg. 26564, 26566 (May 24, 1977), a document of which I may take official notice, 44 U.S.C. 1507. See also Complainant's Ex. 7 at 36-37.

15/ Tr. 161, 172-73.

does not address the risk created by the absence of an EPA-approved mark that employees who did encounter any PCBs, would not be aware that they were being exposed to a chemical which required special handling. Nor is it mere speculation to find that there was such a risk. That transformers do leak is demonstrated by the fact that the EPA inspectors found several leaking transformers during their inspection.[16/] Also, the EPA notes in the preamble to its PCB rule that routine servicing of transformers may result in some exposure.[17/]

The PCB penalty policy bases the size of the penalty on the probability of harm inherent in the violation. Whether harm actually resulted is not considered as a factor.[18/] This approach seems emminently reasonable. To reduce a penalty because no harm occurred would be tantamount to rewarding a violator because of what may well be simply its good fortune in escaping the consequences of its violations, and such a policy would certainly not encourage compliance with the rule. Hence, the penalty will be assessed according to the probability of damage as indicated by the record in this proceeding.

The absence of the EPA approved mark does create the potential that spills from Respondent's transformers, which could involve a large quantity of

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16/ Tr. 96, 109-111, Complainant's Ex. 8 at 3, and PCB compliance Inspection Report No. 1 at 2-1-4.

17/ See 44 Fed. Reg. 31531.

18/ PCB penalty policy, 45 Fed. Reg. at 59777. See also TSCA Civil Penalty Guidelines of which the penalty policy is a part, 45 Fed. Reg. at 59772.

PCBs, would not be properly handled or cleaned up, and that transformers containing a large quantity of PCBs would not be properly disposed of. The greatest risk of exposure would appear to be to small quantities of PCBs leaking from the transformers.[19/] Respondent, also, was not completely oblivious to the PCB rule requirements. Since it had properly stored some PCB cleanup materials, the possibility that it would use the required care in cleaning up spills or leaks or in disposing of its transformers, cannot be entirely dismissed.

On the other hand, Respondent's conduct has not been such as would justify the assumption that there was only a minimal risk of harm. The record in this case shows that the absence of proper marks on the four transformers named in the complaint resulted from Respondent's complete disregard of the marking requirements, since none of Respondent's 38 transformers in its three facilities had the EPA-approved mark.[20/] Respondent claims that it had affixed labels to the other transformers but discovered that the labels were incorrect. Respondent has given no details about the format of these labels which would show at least some compliance with the PCB rule, and Mr. Horn's explanation for not having the correct labels is unconvincing as evidence of a good faith effort to comply with

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19/ Complainant characterizes the leaks at the Hibband facility as "moderate." Brief at 24. The inspection report, however, referred to the leakage as being "very minor." Complainant's Ex. 8, Compliance Inspection Report No. 3 at 2-1-4.

20/ See Finding of Fact No. 9, *supra*.

the PCB rule.[21/] Also bearing upon Respondent's general lack of compliance with the PCB rule is its failure to maintain an annual document for its PCBs, a matter which is discussed further below, and its failure to comply with the EPA's requirements that the containers in which PCBs are stored must be dated and marked.[22/] In view of such evidence, the fact that Respondent did have some PCB cleanup material properly stored cannot be accepted as proof that Respondent always or even generally observed the special handling and disposal requirements, contrary to what Respondent appears to contend. Rather, the evidence is that Respondent's compliance with the PCB rule was haphazard at best.

The PCB marking requirements for Respondent's transformers have been in effect since January 1, 1979. Thus, for well over one year Respondent left its transformers unmarked, creating for the reasons already discussed, a real risk of injury to persons if not to the environment.[23/] In appraising the extent of the risk, account may also be taken of the undisputed evidence that it was not four transformers which were unmarked, but 38 transformers, containing a total of 6385 gallons of PCB, equal to over 33,000 kgs.

21/ Mr. Horn's explanation was that he did not personally take care of the labeling but delegated it to the maintenance department. He also seems to blame the mistake on the lack of clarity of the PCB rule. Tr. 163, 190-91, 192-93, 197-200. The rule, however, could not be clearer providing as it does an actual facsimile of the mark. 40 CFR 761.44, (redesignated as 761.45). Consequently, Respondent's failure to apply the proper mark, to say the least, shows a very careless or indifferent attitude toward meeting the PCB rule requirements.

22/ See Findings of Fact No. 5, supra.

23/ The only change in Respondent's inventory of its transformers since December 31, 1977, has been the possible addition of one transformer. Tr. 238.

Respondent states, nevertheless, that it was uncertain whether its transformers were PCB transformers (i.e., contained PCB at 500 ppm or greater). Respondent's uncertainty over its obligation to mark its transformers is unpersuasive as evidence justifying a minimal penalty, for the following reasons:

First, it is not disputed that Askarel or Pyranol are trade names for dielectric fluids containing 500 ppm PCBs or greater.[24/] The fact that a transformer has a nameplate indicating that it contains a PCB dielectric fluid is sufficient to establish that the transformer is a PCB transformer, absent some showing that the nameplate does not accurately state the kind of dielectric fluid in the transformer.[25/] Respondent, however, never attempted to show that the PCB content of its transformers labeled as containing Askarel or Pyranol had been changed by the addition of non-PCB mineral oil. Instead, it expressly agreed that it would not present such evidence.[26/] Accordingly, it is found that Respondent had no reasonable basis for believing that its transformers contained less than 500 ppm PCBs.

24/ These facts were officially noticed. See Order granting official notice in part dated January 5, 1982. Respondent has never questioned the facts noticed. In fact, PCB dielectric fluids are likely to contain PCBs well above the 500 ppm level, as Respondent itself recognized. See Respondent's Procedure and Information Bulletin, Complainant's Ex. 6 at 2.

25/ The question of the probative value to be accorded the transformer's nameplate was first considered by me in this proceeding in my order denying Complainant's motion for an accellerated decision, issued on January 25, 1982. I then held that the presence of a PCB nameplate is sufficiently persuasive to make a prima facie case that the transformer is a PCB transformer, so as to put on Respondent the burden of producing credible evidence to show the contrary. I further said that it was not unreasonable to place such a burden on Respondent since it would be the one naturally possessed of relevant evidence as to changes in the transformer's dielectric fluid. See order denying motion for accellerated decision at 4-5. See also Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F. 2d 872, 881 (D.C. Cir. 1972).

26/ See agreement of counsel, Tr. 43-44.

Second, any doubts Respondent may have had about whether its transformers contained PCBs of 500 ppm or greater could have been easily resolved so as not to violate the PCB rule. Respondent could have tested the dielectric fluid to determine its PCB content, but never appears to have done so.[27/] In lieu of testing, Respondent could have simply assumed that its transformers were PCB transformers and marked them. In fact this seems to be precisely what Respondent did following the EPA's inspection.

Respondent's representatives in explaining why the transformers had not been properly marked before the inspection testified that they did not know about the PCB rule's requirements prior to the inspection and did not understand the requirements.[28/] Respondent in its brief also contends that the EPA is at fault for Respondent's lack of detailed knowledge about the PCB rule.[29/] Publication in the Federal Register, however, was sufficient to put Respondent on notice of the PCB rule's requirements. Respondent is as accountable for knowing about the rules and regulations in the Federal Register which apply to its business, as it is for knowing about the laws which do so.[30/] At first glance, Respondent's complaint about the difficulty

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27/ See. Tr. 183

28/ See Tr. 170, 196-98 (Horn); 206-07 (Weigand).

29/ Respondent's brief at 15.

30/ See 44 U.S.C. 1507. In Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947), the Supreme Court stated, "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."

of finding the PCB regulations in the massive amount of information in the Federal Register, may have some superficial appeal as demonstrating Respondent's lack of culpability. It is entirely unpersuasive, however, under the circumstances of this case. Respondent is a large corporation presumably experienced in knowing how to keep up with the numerous laws it is subject to.[31/] Here, Respondent admittedly knew that its transformers contained some PCBs, which should have alerted it to the relevancy of the PCB regulations, and there were four prominent notices published by the EPA relating to the regulation of PCBs.[32/] Indeed, Mr. Weigand, Respondent's vice president responsible for advising on health and safety regulations, was himself unsure as to how much Respondent's personnel actually knew about the requirements of the PCB rule.[33/] In sum, Respondent's argument that it is less culpable than it would be if the EPA had specifically informed it of the PCB rule's requirements, must be rejected. Not only would acceptance of such a claim be in derogation of the law which specifically provides that publication of a document in the Federal Register is sufficient notice of the

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31/ See Tr. 224

32/ See proposed PCB marking and disposal rule, 42 Fed. Reg. 26564 (May 23, 1977); final PCB marking and disposal rule, 43 Fed. Reg. 7151 (February 17, 1978); proposed final PCB ban rule, 43 Fed. Reg. 24802 (June 7, 1978); final PCB ban rule, 44 Fed. Reg. 31514 (May 31, 1979).

33/ See Tr. 229. The testimony of Mr. Horn, Respondent's electrician in charge of maintaining the transformers at the Lincolnwood North and Hibband facilities, as to his knowledge about the PCB rule prior to the September 5th inspection is so contradictory as to provide no clue whatever to what he actually knew. See Tr. 191-197.

contents of the document to a person subject to or affected by it, but the claim appears to be more a convenient excuse than the real reason for Respondent's non-compliance with the PCB rule.

As to Respondent's dificulty in understanding the marking requirements, so far as it did know about the PCB rule, although on their face the requirements seem clear enough, Respondent could have turned for clarification to the preamble of the rule in which the EPA explained its regulations. 34/ Respondent could also have asked the EPA for advice instead of sitting back and waiting for the EPA to advise it.

Accordingly, taking account of the nature, circumstances, extent and gravity of the violation, the degree of culpability, and such other matters as justice would require be considered in determining the penalty, I find that the appropriate penalty to be assessed for the marking violation under the circumstances of this case is $7,500. 35/ A penalty in this amount is merited not only as being appropriate to the violation committed but also to serve as a deterrent against further violations.

34/ The final ban rule contained a detailed explanation of the EPA's marking requirements, because of the change in the rule brought about by regulating transformers that contained 50 to 500 ppm PCBs, as well as transformers that contained 500 ppm PCBs or greater. See 44 Fed. Reg. 31517-518, 31521. The preamble to a rule is an authoritative aid in construing a regulation. See Wiggins Bros., Inc. v. Dept. of Energy, 677 F. 2d 77, 88 (Temp. Emer. Ct. App., 1982).

35/ Respondent has not raised any defense putting in issue either its ability to pay a penalty or the effect a penalty would have on its ability to continue in business.

The Recordkeeping and Annual Document Violation

The PCB rule requires Respondent, beginning July 2, 1978, to develop and maintain records in the disposition of PCBs and PCB items.[36/] These categories would include Respondent's PCB transformers, PCB capacitors and its stored containers of PCB contaminated material.[37/] The records are to form the basis of an annual document prepared for each facility by July 1, covering the previous calendar year. The records and the annual documents are to be maintained for at least five years after the facility ceases using or storing PCBs and PCB items. The annual document to be prepared from the records is to contain information about the quantities of PCBs and PCB items in service, removed from service, placed into storage for disposal, or placed into transport for disposal and certain other prescribed information.[38/]

The recordkeeping and annual document requirements were part of the PCB marking and disposal rule issued in February 1978, which rule was later incorporated in the final ban rule. In its preamble to the marking and disposal rule, the EPA said that the recordkeeping and annual document

36/ 40 CFR 761.45 (redesignated 761.80).

37/ See definitions of PCBs and PCB Items, 40 CFR 761.2(s), (X) (redesignated as 40 CFR 761.3(s), (X),). Respondent contends that its capacitors do not have to be referred to in the annual document because it has not been shown that they are PCB large capacitors. Brief at 14. Whether a capacitor is a large or small capacitor would be relevant only to the question of whether Respondent must maintain records and prepare an annual document. Here, the maintenance of records and preparation of an annual document for each facility is required by the fact that Respondent has one or more transformers at each facility. The annual document which must be prepared, however, pertains to all "PCBs and PCB Items." 40 CFR 761.45 (redesignated 40 CFR 761.80). Capacitors which contain PCBs are "PCB Items" within the meaning of the rule. 40 CFR 761.2(x).

38/ See 40 CFR 761.45.

requirements, "will assist the Agency in determining compliance with the regulation and should also assist owners and operators in maintaining effective inventory control and insuring timely disposal."[39/] In construing the requirement, the EPA has used similar language. Thus, in National Railroad Passenger Corp. (AMTRAK), TSCA Appeal No. 82-1 at 9 (April 27, 1982), it was stated that , "[t]he records required by the regulation are to be used by the owner as a basis for preparing an annual report, for insuring appropriate control and handling of PCBs and to assist the Agency in enforcement of the regulations."

It is not disputed that Respondent had prepared no annual report for 1978 and 1979. Respondent contends, however, that its asset ledger listing its assets for financial reporting purposes, and the operating and maintenance manuals which came with the transformers contained the information needed to prepare an annual document and, therefore, met the recordkeeping requirements of the PCB rule.[40/] Respondent contends, then, that its failure to have an annual report on hand on September 5, 1980, was only a de minimis violation, easily remedied by having available at the September 10th inspection a document containing essentially all the information needed for an annual document. There are several serious flaws in this argument.

39/ 42 Fed. Reg. 26570 (May 24, 1977). The preamble of a regulation can properly be consulted in determining the meaning of the regulation. Wiggins Bros., Inc. v. Dept. of Energy, 677 F. 2d 77, 88 (Temp. Emer. Ct. App. 1982). While in this case the statement was in the proposed rule, the final rule referred to the proposed rule, and discussed changes made in the final rule as a result of comments received on the proposed rule. Consequently, the preamble to the proposed rule is clearly a part of the legislative history of the rule, and recourse to it for purposes of construing the rule is proper. Since the preamble to the proposed rule was published in the Federal Register, I may also take official notice of its contents. 44 U.S.C. 1507.

40/ The asset ledger and operating and maintenance manuals are described at 219-220. Mr. Weigand admitted that these records were not kept for the specific purpose of complying with the PCB rules. Tr. 222.

In the first place, it has not been shown that the records would contain all the information required by the annual document for PCB items removed from service or stored for disposal. Respondent contends that it had accurately and completely kept track of the cleanup material in storage, but, this is without support in the record.41/ In fact, the annual document for the Lincolnwood North facility that Respondent ultimately produced for 1980, did not show either the date that PCBs in the 55-gallon drum were put into storage for disposal or the weight in kilograms of these PCBs.42/

Second, it is unclear whether the asset ledger or service and operating manuals could even "form the basis of an annual document" for Respondent's transformers.43/ If they could, presumably, Respondent would have been able to furnish annual documents for 1978 and 1979. Respondent, however, instead of producing an annual document for its PCB transformers for 1978 and 1979, had Mr. Weigand testify generally to the fact that in this two-year period there was an expansion program and one transformer could have been added.44/ No records were produced to support this testimony, even though according to

41/ Respondent's brief at 2, 6. Respondent cites the inspection report for the claim that the date the cleanup materials were placed in storage was available in Respondent's records. The report, however, appears to be based on what the EPA inspector was told and not on an actual inspection of any records. Tr. 84, 93.

42/ See Complainant's Ex. 5.

43/ See 40 CFR 761.45(a) (redesignated as 761.80(a)).

44/ Tr. 238-39.

Respondent the records were readily available and enabled Respondent to accurately and completely keep track of its PCB items.[45/]

Finally, it is to be noted that in producing the handwritten inventories requested by the EPA inspectors and ostensibly made up from Respondent's records, Respondent omitted the PCB transformer at its Lincolnwood South facility, which also raises doubts about how effective Respondent's records were in enabling Respondent to keep track of its transformers.

In sum, Respondent's argument that the asset ledgers and maintenance and operating manuals satisfy the recordkeeping requirements of the PCB rule is found to be unsupported by the record.

Respondent's failure to prepare annual documents for 1978 and 1979, or have adequate records for those years cannot be dismissed or glossed over as unimportant. The annual documents show the changes from year to year, and the maintenance of proper records provide a means for both Respondent and the EPA to verify that all changes in PCBs occurring in the period intervening between two annual documents are reflected in the current annual document. In this case, however, the EPA is simply being asked to rely on Respondent's undocumented recollection of the status and disposition of its PCB transformers and other PCBs for the period prior to 1980, a situation which the PCB rule was clearly intended to prevent.

45/ Respondent's brief at 6. Respondent cites Mr. Weigand's testimony to support its claim that Respondent had adequate records. The testimony refers to data sent by Respondent to its counsel over a two year period which were used in compiling the 1980 annual document. Tr. 213-15, 218-229. None of this data was provided, however.

Further, without an annual document showing the number of PCB transformers at each facility and their PCB contents, the EPA inspectors felt that they could not make a complete inspection on September 5.[46/] Respondent contends that the EPA inspectors were asking for an "inventory" of Respondent's PCB equipment when no such record was required by the rule.[47/] The argument, however, does not place in proper perspective the situation in which the EPA inspectors found themselves on their September 5 inspection. At a minimum, the EPA inspectors had the right to expect that they would be shown the latest annual document (for 1979) and the records that were used to compile it. Since Respondent did not produce any of this information, the inspectors reasonably requested that an inventory be prepared to assist them when they resumed their inspection.[48/]

Respondent to show its good faith put in evidence that it did prepare an annual report by 1980 on time and, has prepared an annual report for 1981, and also has prepared the quarterly reports required by the Interim Measures Program.[49/] Complainant contends that these reports are incomplete or were not prepared on time. It is not necessary to decide whether Complainant

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46/ See Complainant's Ex. 8 at 2. Respondent contends that the inspection on September 5 was not completed because a special corporate meeting for facility managers had been called at 2:30 P.M. Nevertheless, the inspection report as supplemented by Mr. Mortenson's testimony (Tr. 84-85), clearly indicates that the EPA inspectors considered themselves unable to complete their inspection without seeing some record of the total number of transformers at Respondent's facilities.

47/ Respondent's brief at 11-12.

48/ See Tr. 84-85, 109, 125; Complainant's Ex. 8 at 2.

49/ See 46 Fed. Reg. 16095 (March 10, 1981).

is correct because the evidence offered by Respondent to show its good faith after the inspection must be evaluated in light of the fact that Respondent did nothing in the way of keeping records until it was inspected.

Complainant's proposed penalty of $21,000 for the recordkeeping violations is based on an estimate of probable damage which I believe is not justified under the facts of this case.[50/] Here the transformers, which accounted for the bulk of the PCBs involved, were all in active service. The recordkeeping requirement appears to be directed mainly toward insuring that PCBs will be disposed of in accordance with the regulatory requirements, so that the potential for harm is likely to be greatest in situations where PCBs are being removed from service, or stored and disposed of without the maintenance of proper records. Here the gravity of the offense lies not so much in the potential for harm as in Respondent's neglect to carry out its responsibilities under the PCB rule. This does not mean that only a minimal penalty is justified under the circumstances of this case. As already noted, the recordkeeping requirements have the dual function of assisting both the EPA in enforcing the PCB rule and Respondent in complying with the rule.[51/] Respondent may have felt that the records and annual document were not important to it, but the importance of these records to EPA's inspectors has been clearly shown

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50/ Complainant based on the quantities of PCBs involved at each facility would classify the recordkeeping violations at the Lincolnwood North and Hibband facility as major violations and the violation at the Lincolnwood South facility as a minor violation. The probability of damage is placed at level 4.

51/ Supra at 21.

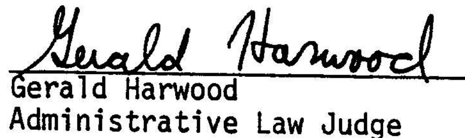
in this record. The penalty, accordingly, must be large enough to insure that Respondent will carefully adhere to the recordkeeping requirements from now on. I find, then, taking into account the pertinent statutory factors, that the appropriate penalty to be assessed for the recordkeeping violation is $5,250.[52/]

Accordingly it is, concluded that a total penalty of $12,750 should be assessed for the violations found in this case.

ORDER[53/]

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $12,750 is hereby assessed against Respondent Bell and Howell Company, 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
Administrative Law Judge

February 3, 1983

52/ This translates into $2,500 for each of the violations at the Lincolnwood North and Hibband facilities and $250 for the Lincolnwood South facility.

52/ 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/her own motion, the Initial Decision shall become the final order of the Administrator (See 40 CFR 22.27(c)).