UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

SPITZER GREAT LAKES LTD., COMPANY, **DOCKET NO. TSCA-V-C-082-92**

Respondent

ORDER GRANTING MOTION FOR ACCELERATED DECISION ON PENALTY

ISSUE AND INITIAL DECISION 1/

This is a civil administrative proceeding instituted pursuant to § 16 (a) of the Toxic Substances Control Act, 15 U.S.C. § 2615 (a). On May 25, 1995, in an accelerated decision, it was held that respondent was liable for all the violations of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. §§ 2601-2692 (1996), alleged in the complaint. Order Granting Motion for Accelerated Decision, decided May 25, 1995. 2/ On November 19, 1996, the complainant moved for an accelerated decision on the remaining issue of what penalty should result from respondent's violations of TSCA. The penalty issue is being considered in an accelerated decision pursuant to § 22.20 (a) of the Rules of Practice, 40 C.F.R. § 22.20 (a) (1996), because the parties jointly agreed that, as required by § 22.20, "no genuine issue of material fact exists" about the penalty. 3/

Penalties under TSCA are governed by § 2615 (a). Subpart (1) provides that violations of the TSCA statute and rules are subject to a civil penalty in an amount not to exceed $25,000 for each violation. Under subpart (2) (B) the amount of penalty is determined by taking into consideration "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 VIOLATIONS: THEIR NATURE, CIRCUMSTANCES, EXTENT AND GRAVITY

In December 1986, the respondent purchased a place of business at 400 Colorado Avenue, Lorain, Ohio from the American Ship Building Company. Included in the purchase was equipment that included transformers, capacitors and switching equipment. When EPA inspectors went to respondent's place of business on August 17 and 18, 1990 to determine whether respondent was complying with Part 761, 40 C.F.R. Part 761 (1996), of the rules governing polychlorinated biphenyls (PCBs) manufacturing, processing, distribution in commerce, and use prohibitions, respondent gave the inspectors records documenting that respondent had been in possession of five PCB transformers at its place of business that had been disposed of. They were:

a. Westinghouse # YAR97801 100% PCB

b. Westinghouse # YAR97791 100% PCB

c. Westinghouse # 2850542 19,356 ppm PCB

d. Westinghouse # 21586-1 27,323 ppm PCB

e. Westinghouse # 21586-3 17,347 ppm PCB.

Respondent agreed to let Kelly Salvage & Steel, Inc. drain the oil from the transformers and remove them from the Colorado Avenue property. In March and April of 1990, Kelly Salvage & Steel drained the oil from the transformers into 55-gallon drums. Sometimes, the Kelly workers identified on the drum which transformer the oil in the drum came from. The oil filled drums were left at respondent's place of business but the transformers were removed by Kelly Salvage & Steel, apparently to its scrap yard.

Although, in August, 1990, the transformers were no longer at respondent's facility, there were ten 55-gallon drums that were labeled which contained dielectric fluid, 105 unlabeled 55-gallon drums which also contained dielectric fluid, one oil switch, and 12 capacitors, Westinghouse Type FP, 75 KV Style 4xl339, which each contained 1.36 kg (3 lbs.) or more of dielectric fluid; and each of which would operate at 2,000 volts (a.c. or d.c.) or above.

During the inspection, the respondent provided the inspectors documents that indicated that the 12 capacitors each contained over 500 ppm PCB. The inspectors found that five of the ten labeled drums indicated that the

dielectric fluid came from transformer Westinghouse # YAR97801 and the other five labeled drums indicated that the dielectric fluid came from transformer Westinghouse # YAR97791. The oil in the unlabeled drums was untested at the time of the inspection, as was the oil in the switch. It has been found that the foregoing equipment and containers were PCB items as defined by § 761.3, 40 C.F.R. § 761.3 (1996), and that they were located in an unenclosed and uncovered area in respondent's facility at 400 Colorado Avenue, where they rested on ground consisting of gravel, dirt and weeds. Untested equipment, such as that found by the inspectors at the respondent's facility, is assumed to be PCB contaminated if their PCB concentration is unknown pursuant to the definition of "PCB-Contaminated Electrical Equipment" in § 761.3 of the rules. None of the equipment was being used by respondent in August, 1990.

Count I TSCA rule § 761.180 (a), 40 C.F.R. § 761.180 (a) (1 996), requires that respondent develop and maintain records on the disposition of PCBs and PCB items when it is using or storing, at one time, at least 45 kilograms of PCBs contained in PCB containers, or one or more PCB transformers, or 50 or more PCB large capacitors at its facility. PCB documents had to be prepared by July 1 for the previous calendar year and had to be maintained for at least five years after the facility ceased using or storing PCBs and PCB items. Respondent was found to have been using or storing the PCB items identified by the inspectors during the calendar years 1989, 1988, and 1987. It did not maintain or develop complete records on the disposition of the PCB items and did not have annual PCB documents for 1987-1989. Because respondent did not maintain the required records, it was found in the decision already issued on liability to have violated § 761.180 (a) of the rules and § 2614 of TSCA. Order Granting Motion for Accelerated Decision, decided May 25, 1995.

Complainant argues that in order to determine the extent of respondent's violation and how large a penalty should be assessed against respondent for violating the TSCA rules, the agency should first determine what quantity of PCBs were involved in the violation. Complainant urges that the greater the quantity of PCBs in a violation, the greater the degree and likelihood of harm from the violation. (Complainant does not argue that all violations which have an equal quantity of PCBs are of equal seriousness. Those violations where PCBs are improperly disposed of which either cause, or have a high potential to cause, direct harm to public health and safety, it would find more serious and assess a higher penalty.) Violations are assessed on a scale that ranges from "minor" to "significant" to "major" extent. 4/ The respondent has adopted the complainant's method or system of analysis of the violations but respondent

reaches a different conclusion when it applies the complainant's system of analysis.

Complainant points out that in this case the EPA inspectors found, in August of 1990, 55-gallon drums at respondent's facility in which Kelly Salvage & Steel had put transformer oil from the five transformers which it removed in March and April, 1990. Complainant estimates that at a minimum the amount of oil transferred from the transformers to the barrels found by the inspectors was 1,045 gallons with high PCB concentrations. Complainant argues that the failure to keep records about this many gallons with a high PCB concentration is a violation of the record rule to a significant extent.

Complainant believes that respondent's failure to maintain records on the disposition of PCBs and PCB items that were to form the basis of the annual PCB documents, pursuant to 40 C. F. R. § 761.180 (a), resulted in the respondent directly harming the public by hiding from the public record its disposition of PCB transformers and dielectric fluid. Complainant points out that the disposition of the transformers was discovered only after a complaint was made to the Ohio EPA by a member of the public. It is the complainant's position that the circumstances of this violation was a "level 4" in presenting a serious circumstance, on a scale of 1-6, with one being the most serious circumstance. Complainant maintains that respondent's failure to keep the written log of its activities involving PCBs prevented EPA officials from tracing the disposition of PCBs and insuring proper disposal of PCBs so that further contamination of the envirorunent could be prevented.

Complainant urges that the three violations found in Count I should result in a penalty of $18,000. Respondent has not disputed the complainant's estimate of the amount of dielectric fluid that was removed from the transformers and it has not disputed respondent's claim that the fluid contained a high concentration of PCBs. Moreover, when the finding was made that it did not keep a written annual document log on PCB disposition for 1987, 1988, and 1989, it did not contest the finding. With regard to Count I, respondent has not urged that the penalty sought for the violations in Count I is not warranted. For the reasons stated by the complainant, the respondent will be assessed $18,000 for the three violations of § 761.180 (a). Without a record about the handling and disposition of PCBs, there can be no accountability by those who are entrusted with handling items that cause harm to human health and to the environment. That was particularly the case here where transformers were disposed of without notice to authorities and in a manner contrary to the rules. It is not known what damage this may have done because no record was made of their disposition.

Moreover, this was not just a single violation; the respondent failed to keep records for three years.

Count II TSCA rule § 761.30 (a) (1) (ix), 40 C.F.R. § 761.30 (a) (1) (ix) (1996), required that respondent conduct a visual inspection once every three months of each PCB transformer in use or stored, unless the PCB transformer had been tested and found to have less than 60,000 ppm PCBs, in which case it needed to be inspected only every 12 months, pursuant to § 761.30 (a) (1) (xiii) (B). The records of inspection and maintenance had to be maintained for three years after disposing of any PCB transformer and made available to EPA inspectors. From December 1986 to March 1990, respondent had the five transformers which it identified to the inspectors in use or stored. For transformers (a) Westinghouse # YAR97801 and (b) Westinghouse # YAR97791, respondent had no records documenting any visual inspection and maintenance history for the Fourth Quarter of 1988, all of 1989 and the First Quarter of 1990. For the remaining three transformers, (c) Westinghouse # 2850542, (d) Westinghouse # 21586-1 and (e) Westinghouse # 21586-3, respondent had no records for 1989 documenting visual inspection and maintenance history. This failure violated rule § 761.30 (a) (1) (xii) and § 2614 of TSCA.

Respondent was required to inspect the two Westinghouse transformers on a quarterly basis because they were each over 60,000 ppm PCB. The remaining transformers were to be inspected on a yearly basis. See 40 C.F.R. § 761.30 (a) (1) (xiii) (B). Inspection and maintenance of PCB transformers, the complainant maintains, reduces the amount of PCBs released and the resultant PCB exposure by finding, stopping and cleaning up small leaks of dielectric fluid. Moreover, the complainant points out, the risk was greater here because the transformers were not properly stored as required by the rules. From 1988 to the first quarter of 1990, the record reflects that respondent failed to carry out the quarterly inspections during six quarters for the two transformers that, because of their high PCB content, required quarterly inspections. In addition, respondent had no records of annual inspections for the remaining three transformers for 1989.

Complainant urges that the violations alleged in Count II were rule violations to a significant extent because there were between 220 and 1,100 gallons of dielectric fluid in the transformers. Complainant maintains that the seriousness of the circumstances of these violations was 2 on the scale of 1-6. The penalty for Count II should be $13,000, or 52 % of the statutory amount of $25,000 for each of the four violations, complainant urges. Complainant proposes a penalty of $52,000 for the violations found in Count II.

Respondent urges that the quarterly inspections were done. Its argument comes too late, however, since it previously agreed with the finding --respondent described that finding as reasonably accurate-- that it did not inspect the transformers quarterly. Those findings cannot be altered without some explanation from the respondent about why it did not make that argument at the time its liability was being considered. Particularly here, where at the time the finding was made, the respondent represented that it reached the conclusion that the finding was reasonably accurate only after it had done a "thorough investigation" of the allegations in the complaint. Moreover, respondent agreed with complainant that this request for accelerated decision on the penalty was warranted because there were no material facts in dispute on which a penalty might be based.

Respondent has offered no acceptable reason for lowering complainant's proposal for assessing a penalty of $52,000 for violations found in Count II. The respondent concedes that the risk was high that the transformers might leak PCBs. Respondent points out that the transformers were rusted and weathered and posed a greater risk than the 55-gallon drums. In addition, the findings in this proceeding indicated that the respondent took no other steps to protect the environment from leaking PCBs by locating the transformers in a safe and secure area as the rules require. Respondent argues that the inspectors found no leaks, but that was not what the Ohio EPA inspectors' report, which is Exhibit 1 to complainant's request for accelerated decision, stated. The inspectors took four ground samples and only one of them indicated that PCBs were in the soil samples. The inspectors did not see the transformers and did not observe them for leaks. Moreover, there is no indication in the record that the transformers leaked or did not leak. The reason for inspecting the transformers was very necessary in this case and failure to do so was a serious breach of respondent's duty. The $52,000 penalty is warranted for the violations found in Count II.

Count III TSCA rule § 761.65 (b), 40 C.F.R. § 761.65 (b) (1996), requires that PCB and PCB items designated for disposal be stored in an area with adequate roof, walls, and continuous floor and curbing made from smooth impervious materials with no drain valves, floor drains, expansion joints, sewer lines or other openings. The inspectors found that in August of 1990, PCB and PCB items were located in an unenclosed and uncovered area at respondent's facility where they rested on ground consisting of gravel, dirt and weeds in violation of TSCA rule § 761.65 (b) and TSCA § 2614.

Complainant argues that respondent's violation of the storage requirements is a major violation of the rules. This is the case, it maintains, because the dielectric fluid exceeded 1,100 gallons, there was a high concentration of PCBs in the transformer oil, and respondent created a circumstance where a spill could not be contained and where PCBs could be exposed to precipitation and the overland flow of water. With regard to water, complainant points out there was a sewer drain 20 feet from the stored PCB items and the Black River. Respondent also maintains that there was risk of human contact by people using respondent's marina which is located at the Colorado Avenue facility. Because the circumstances were very serious, level 2, and the violation was major, complainant urges that the penalty for Count III should be 80% of the maximum, or $20,000.

Respondent does not dispute complainant's claim that failure to properly store PCB items was major but it maintains that it never intended to store the PCB items, that its real intention was to dispose of all the PCB items and that, in any event, it stored the dielectric fluid in solid 55-gallon drums. Complainant contradicts respondent's claim that it did not intend to store PCB items, which included 115 55-gallon drums, by pointing out that many of the PCB items found by the inspectors were on the property when it was purchased by respondent in December 1986.

The five transformers that are cited in the complaint were not removed until March or April of 1990, and by respondent's own admission, they were rusting and were a dangerous vessel for the large quantity of PCBs they held until they were drained and removed in March and April of 1990. The record findings indicate that respondent had no business function that required the PCB items but that it stored them on its property for as much as four years. Respondent has not provided any reasoned justification for lowering the penalty sought by the complainant. The respondent will be assessed $20,000 for the violations found in Count III.

Count IV The inspectors found that none of the PCB articles and containers they observed contained the date when they were put in storage as is required by TSCA rule § 761.65 (c) (8), 40 C.F.R. § 761.65 (c) (8), and TSCA § 2614.

Under Count IV respondent was found to have failed to label the PCB items with the date they were placed in storage in violation of § 761.65 (c) (8). The date an item is placed in storage is important because items stored that are scheduled for disposal are required to be removed from storage and disposed of within one year pursuant to § 761.65 (a). These rules are designed to lower the

risk of environmental harm from PCB items. Complainant urges that because the amount of dielectric fluid in storage exceeded 1,100 gallons, the failure to label the PCB items with the date they were stored amounts to a major violation of the labeling rule. Complainant points out that there were 115 55-gallon barrels, 12 large capacitors, five transformers, all of which were undated. The record reflects that these PCB items were purchased by the respondent in 1986 with no intention of using them in its business. Complainant argues that on the basis of these facts, and on the basis that the seriousness of the circumstances was level 4, a penalty of $10,000 should be assessed.

Respondent responds that it did not place the PCB items in storage; it argues that they were already in storage when they were purchased by respondent in 1986. It also argues that the 115 barrels were not stored but were containers for disposing of the dielectric fluid which respondent intended to dispose of, not store. Complainant responds to this argument by noting that an unopposed finding has already been made in this proceeding that the PCB items were in storage. Respondent has provided no reason for disturbing that finding. Complainant has justified the $ 10,000 penalty it seeks for respondent's violations found in Count IV.

Counts V and VI The inspectors also found that respondent's 12 large high voltage capacitors and none of the 115 55-gallon drums were marked with the M_L label as required by § 761.40 (a) of the TSCA rules and § 2614 of TSCA. In addition, the inspectors found that the storage area for the PCB material was not marked with the M_L label as is required by § 761.40 (a).

Respondent did not label the PCB items and their storage area with the required M_L label. Had it done so, it would have indicated to anyone coming in contact with the PCB items that PCBs were present. Complainant urges that because of the large amount of dielectric fluid in storage, this too was a major violation. Complainant points out that labeling serves as notice to public health and safety officials and other persons who might come in contact with the PCB items, such as Kelly Salvage & Steel, the company that respondent permitted to remove the transformers. Complainant urges that respondent's violations in labeling should be assessed a $20,000 penalty for each of the rule violations. Complainant argues that the amount is justified because the violation is major in extent and level 2 in circumstance based on the facts of these violations.

Respondent argues that the PCB items were labeled. Again, this is contrary to the unrefuted observations of the inspectors and the unopposed findings made in

this proceeding. Respondent also argues that, apparently, fencing made the labeling unnecessary because access was difficult. Respondent does not indicate how fencing would protect public safety workers such as firemen or workers from Kelly Salvage & Steel, or respondent's employees, all of whom had to or might have had to come in contact with the PCB items without warning of their carcogenic nature, despite the existence of a fence. PCBs are carcinogenic and pose other risks to human health. TSCA is a recognition on the part of Congress that PCBs present a serious threat to the environment and human health. The threat is so serious that under TSCA the use of PCBs is to be phased out and existing PCBs are to be disposed of. The appropriate penalty for Count V is $20,000 and Count VI is $20,000.

Count VII Respondent also failed to comply with § 761.60 (b) (1), 40 C.F.R. § 761.60 (b)(1) (1996), when it disposed of the transformers. Section § 761.60 (b) (1) directs that transformers be disposed of in an incinerator or a chemical waste landfill after they are drained and flushed with a solvent in accordance with the rule. Kelly Salvage & Steel, Inc. drained the transformers, removed them from respondent's facility and delivered them to a Kelly's scrap yard which did not meet the disposition requirements of § 761.60 (b) (1), § 761.70 or § 761.75.

Complainant believes that Count VII should be assessed the full $25,000 maximum penalty because Kelly Salvage and Storage did not dispose of the transformers as required. Complainant premises its argument on the fact that the transformers before they were drained contained 1,045 gallons of PCB liquid in high concentration. This was a major violation, complainant argues, and the circumstances were in the high range or what complainant refers to as level 1 in raising a serious circumstance. Complainant maintains that there was a high probability of harm because the transformers were not marked for the people who drained and transported them. Additionally, it urges that their disposal in a non-approved way by transporting them over public roads to a scrap yard presents an opportunity for harm. Complainant also urges that an inference of harm should be found even where there is no evidence that there was harm.

Respondent argues that the transformers were labeled with the M_L warning designation. The inspectors did not observe the transformers because they had already been removed from respondent's facility when the inspection took place. Respondent does not present reliable evidence that the transformers were labeled at the time of their removal. The best recollection would have been the statement of one of the workers who removed the oil and the transformers from respondent's facility. Respondent speculates that Kelly Salvage & Steel workers

knew that the transformers contained PCBs. Respondent argues that the proof of this assumption lies in the fact that the Kelly workers marked, in some cases, the 55-gallon barrels with numbers indicating which transformer the oil in the barrel came from. Respondent also urges that no harm was done to the environment because it believes that there was only a small quantity of PCB liquid in the transformers when they were transported to the Kelly Salvage & Steel scrap yard.

Respondent's arguments are based on speculation. It is not apparent that the transformers were labeled at the time they were drained and removed. The violation found in this count cites the fact that the Kelly workers did not follow the rule in removing the fluid from the transformers. They did not label the barrels in the which the PCB liquid was put with the M_L label, they did not rinse the transformers with a solvent and they did not dispose of the transformers in the required way. The most reasonable assumption is that the workers who removed the transformers did not know the dangers involved in what they were doing. It might be assumed that if the transformers had been properly labeled, the workers might have acted as the rule required. The method used by the respondent in removing the transformers is a major violation of the transformer removal rule. The removal of the five transformers was carried out in a manner that created a high risk to the environment and to the health of the persons who came in contact with them. The respondent is assessed $25,000 for the violations found in Count VII.

ABILITY TO PAY, EFFECT ON ABILITY TO CONTINUE TO DO BUSINESS, ANY HISTORY OF PRIOR VIOLATIONS, THE DEGREE OF CULPABILITY, AND OTHER MATTERS

The respondent's ability to pay was considered in a previous order. Memorandum Opinion and Order, released October 31, 1996. In that order it was found that the respondent's ability to pay would not be considered as a mitigating factor in this case because the respondent had refused to make relevant financial records available that would have permitted the complainant to test respondent's representation that it lacked the ability to pay a penalty. No claim has been made that the penalty sought will affect the respondent's ability to remain in business.

No claim has been made that the respondent has a history of prior violations. Complainant urges that the respondent is culpable as an entity that knew or should have known about the regulations that it violated. There is evidence that respondent knew it had an obligation under TSCA rules. Respondent points out that it arranged for the removal of the oil in the drums in early August

1990, as required by the rules, shortly before the Ohio EPA inspectors came to respondent's facility. Given its knowledge of the rules regarding PCBs, respondent offers no reasoned explanation why it did not comply with rules it was found to have violated. Respondent offers no information which would diminish its culpability. Neither party has asserted other matters that warrant consideration in determining the penalty in this proceeding. The complainant's suggested penalty is appropriate in this case. The total penalty to be paid by the respondent is $165,000.5/

ACCORDINGLY, IT IS ORDERED that the respondent, Spitzer Great Lakes Ltd., Company, is assessed a civil penalty of $165,000.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

The First National Bank of Chicago
EPA Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

Failure upon the part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision.

Edward J. Kuhlmann
Administrative Law Judge

January 24, 1997
Washington, D. C.

1/ 40 C.F.R. § 22.20(b) provides that "[i]f an accelerated decision... is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision. . . ." Richard R. Wagner, Esq. appeared on behalf of the complainant; Anthony B. Giardini, Esq. appeared on behalf of the respondent.

2/ Initially, respondent did not respond to complainant's motion for accelerated decision on the issue of liability on all counts until an order to show cause was issued on July 18, 1994. Respondent answered the order to show cause and represented that:

After doing a thorough investigation of the allegations contained in the Complaint, Respondent determined that the facts as set forth in the Complaint were reasonabl[y] accurate and that litigation over those facts would have been an unneccessary use of the Judge's time. Response of Spitzer Great Lakes Ltd. to Show Cause Order, filed August 9, 1994.

3/ The respondent filed a response to the motion on December 4, 1996. The complainant filed a reply to the respondent's response on December 16, 1996. The complainant also filed a motion to strike on December 5, 1996.

4/ Complainant's justification of its proposed penalty is based on EPA's Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990.

5/ The complainant moved to strike the affidavit of Alan Spitzer, which was attached to respondent's response to complainant's motion for accelerated decision on the penalty issue. In light of the findings and conclusions reached on the penalty issue, the motion is moot. The findings that were the basis for rulings made in this decision were made in the decision on liability.