UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	*	
	*	
CELOTEX CORPORATION (THE),	*	Docket No. TSCA-V-022-88
	*	
Respondent	*	

TSCA - Burden of Proof - Where the Agency presents a prima facie establishing the violations alleged in the Complaint and the Respondent presents no evidence in rebuttal thereof, the Court will make a finding that the violations occurred.

TSCA - Violations - Based upon the evidence presented by the Agency in this case, the Court found the Respondent had violated the counts alleged in the Complaint.

TSCA - Penalty Calculations - Where the Agency and the Respondent had executed a Consent Agreement and Final Order (CAFO) in regard to a prior Complaint which stated that the Agency was prohibited from using such CAFO for any purpose in any future litigation, the Agency's use thereof to increase the gravity-based penaltiy calculation in this case was improper and the proposed penalties were reduced accordingly.

Appearances

For Complainant:

Jane D. Woolums
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Jennifer Costanza
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondent:

John L. Parker
John L. Parker and Associates, Ltd.
39 South LaSalle Street, Suite 1420
Chicago, Illinois 60603

Before

Thomas B. Yost
Administrative Law Judge

INITIAL DECISION

This case is before me base upon an Amended Complaint issued on July 12, 1988 by Mr. William Sander, Director Environmental Services Division, United States Environmental Protection Agency (EPA), Region V, Chicago, Illinois, a civil administrative action instituted pursuant to 16(a) of the Toxic Substances Control Act ("TSCA" or the "Act"), 15 U.S.C. § 2601 et seq., 15 U.S.C. § 2615(a) and §§ 22.01(a)(5) and 22.13 of the Consolidated Rules of Practice governing the administrative assessment of the civil penalties and revocation or the suspension of licenses, 40 CFR §§ 22.01(a)(5), 22.13.

The Polychlorinated Biphenyls (PCBs) disposal and marking regulations were lawfully promulgated pursuant to § 6 of TSCA, 15 U.S.C § 2605 on February 17, 1978 (43 FR 7150). The PCBs manufacturing, processing, distribution in Commerce and use regulations (PCB Rule) were lawfully promulgated on May 31, 1979 (44 FR 31514), and incorporated disposal and marking regulations. The PCB Rule was subsequently amended in partially recodified at 40 CFR Part 761.

On May 7, 1987, a representative of EPA inspected Respondent's facility located at 2226 West Clarke Street, Peoria, Illinois to determine compliance with the PCB Rule. At the time of the inspection, Respondent had three PCB transformers, six PCB large capacitors, and four PCB containers in storage. 40 CFR § 761.3 defines such transformers, capacitors, containers as PCB items.

The Complaint alleges the following violations on the part of the Respondent.

40 CFR §761.180(a) requires, inter alia that each owner/operator of the facility 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 capacitors, develop and maintain records on the disposition of PCBs and PCB items. These records shall form the basis of annual PCB documents, prepared by each facility by July 1, covering the previous calendar year. The Respondent was required to comply with the recordkeeping parts of the PCB Rule beginning July 2, 1978.

At the time of the inspection the Respondent had not developed and maintained annual records on the disposition of its PCB items from calendars years 1982 to 1985. Respondent's failure to develop and maintain PCB records constitutes a violation of 40 CFR § 761.180(a) and of § 15 of TSCA 15 U.S.C. § 2614.

Count II of the Complaint alleges that 40 CFR, Part 761, Interim Measures Program, Appendix B (III), 46 FR, 16090, (March 10, 1981), and subsequently codified as amended at 40 CFR § 761.30(a)(1), requires that beginning May 11, 1981, a visual inspection of each PCB transformer in use or stored for reuse be performed at least once every three months. Commencing August 10, 1981, records of transformer inspections and maintenance history shall be

maintained at least three years after disposing of the PCB transformers.

Respondent failed to conduct inspections and develop a maintenance history on its three PCB transformers for the years 1982 to 1987.

40 CFR § 761.30(a)(1)(vi) requires that PCB transformers, in use or storage for reuse, be registered with fire response personnel with primary jurisdiction by December 1, 1985.

Respondent failed to register its three PCB transformers with fire response personnel with primary jurisdiction by December 1, 1985.

Respondent's failure to conduct inspections of its PCB transformers and maintain records of such inspections and to register its PCB transformers with fire response personnel with primary jurisdiction by December 1, 1985, constitutes violations of 40 CFR, Part 761, Appendix B (III), Interim Measures Program, 40 CFR § 761.30(a)(1)(vi), (ix) and (xii), and Section 15 of TSCA, 15 U.S.C. § 2614.

Count III states that owners and operators of any facilities used for the storage of PCBs or PCB items designated for disposal shall comply with the requirements of 40 CFR § 761.65(b).

40 CFR § 761.30(a)(2)(vi) requires that any dielectric fluid containing 50 ppm or greater PCB used for servicing transformers be stored in accordance with the storage for

disposal requirements of § 761.65.

Respondent had, at the time of the inspection, PCB capacitors in storage for disposal.

Respondent had, at the time of the inspection, one five-gallon container of PCB dielectric fluid (pyranol) in storage.

Respondent stored five PCB capacitors and the container of PCB dielectric fluid in a facility that did not comply with the requirements of 40 CFR § 761.65(b). Respondent's failure to store PCB items in a proper storage facility is a violation of 40 CFR § 761.65(b) and of § 15 of TSCA, 15 U.S.C. § 2614.

Count IV of the Complaint states that 40 CFR § 761.40(a)(1)(3)(5)(10)(j) require that PCB containers, PCB large capacitors at the time of removal from use PCB storage areas and the means of access to PCB transformers be marked with a PCB label as described in § 761.45(a). Complainant alleges that at the time of the inspection Respondent's four PCB containers and five PCB large capacitors all in storage for disposal, that PCB storage area, and the means of access to three PCB transformers were not marked with a PCB label. Such failure constitutes a violation of the above-cited regulations.

The Complaint suggested the assessment of the following Civil Penalty for the above-mentioned violations as follows.

improper recordkeeping, $9,600; improper storage, $2,400; improper use, $17,550, improper marking,

$16,000, for a total of $45,550.

FACTUAL BACKGROUND

The basis for the above-described Complaint had it genesis in an inspection of the premises on May 7, 1987 by Marie T. White, Environmental Scientist employed by EPA. The objectives of the inspection were to document the facility's handling, storage, and disposal practices and to determine its compliance with the PCB regulations 40 CFR Part 761.

The Celotex Corporation previously manufactured roofing parts from fiber glass, however, all operations at the this plant had been shut down since January 9, 1982. There are currently two employees on the premises, one being Mr. Streeper, the maintenance foreman and a security guard. After presenting her EPA credentials and indulging in a short preliminary conversation concerning the reasons for her presence on the facilities, Ms. White began her inspection of the facilities. This inspection revealed that the facility currently has two in-service PCB contaminated transformers, one spare PCB contaminated transformer, one in-service non-PCB transformers, and one spare PCB capacitors. All of this equipment was structurally sound and non-leaking, and the PCB capacitor was marked with the ML and non-PCB transformer had been purchased new in 1980.

All of the above-mentioned PCB items were stored in Substation 5B, which is an outside fenced-in area. The fence was not marked with the M_L label, however it was locked at all times. Contained in the fenced-in structure were two steel containers

which differ in size but are similar in structure. One steel was container yellow and the other steel was brown.

The yellow container contained one large transformer. Ms. White could not read any nameplate information on this transformer, however she observed that the yellow container was marked with the M_L label. The brown container contained one general electric transformer, five large capacitors and one five-gallon can of pyranol, one five-gallon can of unidentified fluid and one 50 pound drum of PCB contaminated dirt. The five-gallon can of pyranol, when lifted and shaken by Mr. Streeper, appeared to contained approximately one-gallon of fluid and the other five-gallon can, when likewise inspected, appeared to 100 % full. The PCB items inside the brown container and the brown container itself were not marked with the M_L label.

Ms. White also observed that there were PCB Wagner NoFlamol transformers and storage for disposal. Each PCB transformers was sitting on a pallet covered with plastic and was non-leaking. In addition, each PCB transformer contained 187 gallons of fluid and was marked with ML label.

All of the above-stored PCB items located in Substation 5B were also in storage for disposal during the first inspection conducted November 3, 1981. These PCB items had, therefore, been in storage for longer than one year. This information was gained from the inspector's examination of prior reports and serial numbers on the transformers and thus she was able to positively identify them. The PCB transformers are not in an approved long-

term PCB storage facility and none of the PCB items were dated as to when they had placed in the storage for disposal.

The five-gallon can of unidentified fluid was identified at the first inspection as pyranol fluid and a the 55-gallon drum of unidentified materials at the first inspection as contained two, five-gallon cans of pyranol.

The company officials present could not provide the inspector with any annual reports, however, Mr. Parker, counsel for the corporation who was present during the inspection, indicated that if the facility had developed annual reports they could likely be currently be stored at the Tampa site. The company officials also indicated that no annual reports had been generated since the plant shut down in 1982. Mr. Streeper, the maintenance foreman, stated that once a month he checked all transformers for leaks but he does not maintain a written log of such inspections.

The second witness presented by EPA was Mr. Bonace who was a case-developer and whose function it is to review the case made by the field inspectors and review all other documents and data in the Agency records and determine what allegations should be placed in the Complaint and also was the person who calculated the penalties proposed in this matter. Mr. Bonace explained at great length the methodology used in calculating the proposed penalties alleged in the Complaint by using the Guidelines for Assessment Civil Penalties under $ 16 of the TSCA; PCB Penalty Policy dated Wednesday, September 10, 1980.

The Respondent put on only one witness; Mr. Lecil Colburn. He identified himself as being employed by the Jim Walter Corporation in the position of director of Environmental Affairs. It should be noted that Celotex Corporation is a wholly unsubsidiary of the Jim Walter Corporation. The witness was asked whether the Celotex Corporation sold the plant and equipment located Peoria was inspected by the EPA in 1987 and he indicated that it was sold in November of 1987. The Complaint was issued subsequent to the above-mentioned sale. That testimony on the part of Mr. Colburn constituted the entire case presented by Celotex Corporation in this preceding.

Mr. Colburn's testimony is entirely irrelevant since there is no question based on this record that at the time of the inspection the facilities were owned and operated by Celotex Corporation and the fact that they sold the facility before the Complaint was issued is of no material relevance and therefore I find that testimony to be without any substance or weight.

In its post-hearing briefs, the Respondent argued primarily that the Agency presented no evidence to prove that there were PCBs on the premises or that the capacitors and transformers contained any PCBs since no measurements were taken or samples of the content of the PCB articles obtained during the inspection. Mr. Parker, counsel for the Respondent also argues vigorously that the use of the 1982 Complaint which resulted in a signing of a Consent Order should not be admitted in this preceding and should not be used in any fashion by the Agency in calculating

the penalties proposed by the Agency. I will discuss that issue later. The balance of Respondent's arguments in its brief revealed a serious misunderstanding of the meaning of the regulations concerning PCBs and for the most part provide no valid legal defense to the allegations contained in the Complaint. As indicated above the Respondent presented no evidence at the hearing to rebut the allegations of the EPA witnesses as to the primary facts that make up the violations in this matter and therefore in that regard, failed to present any evidence and rebuttal to prima facie case made by the Agency at the hearing.

DISCUSSION

In its post-hearing brief the Respondent makes a strong argument about the fact that the Agency did not prove that any of the equipment found on its premises contained any PCBs since no samples were taken and that therefore the matter of Complaint should be dismissed. An examination of the applicable rules and regulations demonstrate that in this regard the Respondent's arguments are off-the-mark and invalid. As to the three Wagner NoFlamol transformers, the fact that the transformer has a nameplate indicating that it contains a PCB dielectric fluid is sufficiently 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, In the Matter of Bell & Howell, Docket No. TSCA-V-C-033-034-035 (February 3, 1983). During the May 7, 1987 inspection, the

inspector, Ms. White saw at the Substation 5, which was a fenced-in area that contained the PCB articles at question, three transformers bearing the serial numbers B9D1000, B9D1001 and B9D1002. Each of the transformers were nameplated as having been manufactured by the Wagner Electric Company and the name plates indicated that each transformer contained 287 gallons of NoFlamol dielectric fluid. The testimony of the witness, along with exhibits submitted in relation thereto, clearly show that NoFlamol is a tradename used by Wagner Electric Company to indicate dielectric fluid containing 600,000 parts per million (ppm). The Respondent, as indicated above, presented no evidence that NoFlamol is not a PCB fluid containing 600,000 ppm PCBs and further offered no evidence that the information on the nameplate is in any way incorrect. In as much as the Respondent presented no evidence to suggest that the information on the nameplate was inaccurate and improperly placed thereon, I find that the three NoFlamol transformers are PCB transformers. In addition to the nameplate information, the transformers were marked with the M_L PCB labels and pursuant to the regulations, all PCB transformers are required to be marked with the M_L label. The Respondent presented no evidence to suggest that the M_L labels were erroneously placed on the transformers or that the PCB content of the transformers were changed after Celotex marked them with the above-mentioned label. In fact, Celotex admitted that it never drained or retrofilled the transformers in question.

As to the six large capacitors observed by Ms. White during

her inspection, they too are PCB large capacitors. One of the capacitors was nameplated as a General Electric (GE) pyranol capacitor and the record indicates that pyranol is a tradename used by GE to indicated PCB fluid containing 100,000 ppm or greater PCBs. In addition, the GE large capacitor was also marked with the M_L label. I, therefore, find that the GE large capacitor is a PCB large capacitor as defined by the regulations, since the Respondent made no showing or presented no evidence to suggest that the nameplate information was incorrect or that the M_L label was erroneously placed thereon.

The other five large capacitors, which were located in the brown tank in Substation 5B are also PCB large capacitors. It is the policy of the Agency to presume that unmarked large capacitors are PCB capacitors. This presumption is based on the fact that vast majority of capacitors manufactured before July 1, 1978, contained PCB fluid in concentrations in excess of 500 PPM. After July 1, 1978, any manufacturer of Large/Low Voltage capacitors which did not contain PCBs was required to label such capacitors as not containing PCBs. 40 CFR § 761.40(g). In instances where the EPA does not know the date of manufacture, the PCB content of a capacitor, and the capacitor is not marked with a tradename or any label indicating whether it is PCB or non-PCB, they presume that the capacitor is a PCB capacitor based on the above-mentioned factors. Also pursuant to 40 CFR § 761.3, oil-filled electrically equipment for which the PCB concentration is unknown shall be presumed to be PCB contaminated electrically

equipment containing to 50 to 499 ppm PCBs. Based on the above-mentioned factors and the fact that the Respondent presented no evidence as to the manufacture or contents of the capacitors, they must be determined to be PCB capacitors and I so find.

As to the five-gallon drum, the term PCB container is defined as "any package, can, bottle, barrel, drum, tank or other device that contains PCBs or PCB articles and whose surface has been in direct contact with PCBs." 40 CFR § 761.3. During the inspection, the inspector observed a five-gallon drum with a red and white label identifying the contents as "transformer pyranol." The drum as discussed above contained approximately one gallon of fluid. As above-indicated, pyranol is a tradename for dielectric fluid containing 100,000 ppm or more PCBs. Absent any evidence to the contrary, therefore must be presumed that the five-gallon drum is a PCB container and I so find.

As to the alleged violation of the recordkeeping requirements of the PCB rule, 40 CFR § 761.170(a) requires that for PCBs and PCB items in service or projected for disposal:

> "Beginning July 2, 1978, each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4) pounds) of PCBs contained in PCB containers or one or more PCB transformers, or 50 or more PCB Large High or Low Voltage capacitors shall develop and maintain records on the disposition of PCBs and PCB items. These records shall form the basis of an annual document prepared for each facility by July 1, covering the previous calendar year."

As stated above, Celotex had stored at the Peoria facility three PCB transformers. Each of which contained 287 gallons of NoFlamol, a PCB dielectric fluid. The PCB fluid weighed approximately 11.7 pounds per gallon, or 3,358 pounds per

transformer. Therefore, Celotex is clearly subject to the recordkeeping requirements of the above-stated regulations.

As discussed above in the section entitled "Factual Background," the Respondent was unable to produce any annual documents and Mr. Parker, counsel for the Respondent who accompanied the inspector on her tour, stated that the documents might be stored in the Tampa, Florida facility. Ms. White requested that the company send her the annual that were located in Tampa. As of this date, no one representing Celotex has sent the annual documents to them. Based on the evidence produced at the hearing and the exhibits associated therewith, coupled with the Respondent failure to produce any testimony or to in any way explained its inability to produced the annual documents, I find that they have violated 40 CFR § 761.180(a) by failing to develop and maintain annual documents on a disposition of PCB and PCB items.

40 CFR § 761.30(a)(1)(vi) states that "as of December 1, 1985, all PCB transformers, including PCB transformers and storage for reuse must be registered with fire response personnel with primary jurisdiction..."

As I have previously found the Respondent stored at Peoria facility three PCB transformers, which were in storage for reuse. Therefore Celotex was subject to the fire department registration requirement of the PCB Rules.

During the May 7, 1987 inspection, Mr. Streeper admitted to Ms. White that Celotex had not registered its PCB transformers

with the Peoria Fire Department (PFD), which is the fire response personnel organization with primary jurisdiction. This statement on the part of Mr. Streeper was later verified by a letter to the PFD asking them to search all of their records to see whether it contained any indication that Celotex had registered its transformers with the fire department. Complainants Exhibit 10, which is a letter from the PFD states that they had no record of Celotex ever having registered the transformers with them at any time. Based on the above information and the Respondent's failure to produce any testimony to the contrary, I find that the Respondent, by such failure, violated 40 CFR § 761.30(a)(1)(vi).

40 CFR § 761.30(a)(1)(ix) requires that PCB transformers in use or stored for reuse must be visually inspected for leaks at least once every three months. The regulations also require that records of such inspection and maintenance history be maintained at least three years after disposing of the transformers. During the inspection, Mr. Streeper told the inspector that he had checked all electrical equipment for leaks each month, but admitted he had not kept records of the inspections or maintenance histories. As of this date, the Respondent has not provided the Agency with any records of inspections. Consequently, Celotex's failure to maintain records of inspections constitutes a violation of the above-cited regulation.

As to the marking violations required by the PCB Rule, 40 CFR § 761.40 states in pertinent part:

(a) each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in § 761.45(a): The mark illustrated in Figure 1 is referred to as M_L throughout this subpart.

(1) PCB containers; ...

(3) PCB Large High Voltage capacitors at the time of manufacture, at the time of distribution in commerce if not already marked, and at the time of removal from use if not marked; ...

(5) Large Low Voltage capacitors at the time of removal from use; ...

(10) each storage area used to store PCBs and PCB items for disposal ...

(c) as of January 1, 1979, the following PCB Articles shall be marked with the mark M_L ...

(2) all PCB Large High Voltage capacitors not marked under paragraph (a) of this section ...

(j) as of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access... to a PCB transformer must be marked M_L. The mark must be faced so that it can be easily read by fireman fighting a fire involving this equipment.

In this regard during the May 7 inspection, Ms. White observed that a PCB container, five PCB large capacitors and a fence surrounding Substation 5b in which PCBs and PCB items were stored were not marked with the M_L label. Consequently, I find that the Respondent's failure to mark these PCB items and the fence surrounding Substation 5B with the ML label constitutes a violation of 40 CFR § 761.40.

THE PENALTIES

The factors that must be considered in the assessment of the civil penalty are stated in § 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation 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.

40 CFR § 22.27(b) provides, in pertinent part:

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.

To assist the Agency in developing a uniform National Penalty Policy, such a policy was promulgated in the Federal Register dated Wednesday, September 10, 1980. The penalty policy allows a penalty to be assessed using the gravity-based penalty matrix. The amount determined is then increased or decreased by applicable "adjustment factors." These factors include culpability, history of prior violations, government cleanup costs, economic benefits of non-compliance, and ability to pay and/or ability to continue in business.

To use the gravity-based penalty matrix, the "nature," "extent," and "circumstances" of the violation must be determined. Once these three factors are determined, the gravity-based penalty policy matrix is used to calculate a penalty which reflects the seriousness of the violations, and the threat to health and the environment. The PCB Penalty Policy specifically states that all violations of the PCB regulations

are deemed to be chemical control violations by their nature. Therefore, to use the gravity-based penalty matrix for a PCB violation, it is necessary only to determine the extent and circumstance of each violation and adjust the matrix penalty amount by the applicable adjustment factors.

In this case although the Complaint cites four alleged violations. By Motion dated May 3, 1989, the Complainant moved to dismiss Count III since later discovered evidence revealed that it should not have been included.

Before discussing the validity of the Agency's penalty calculations, it is necessary to discuss an issue that arose at the hearing and even prior thereto. As will be discussed later, the Agency increased all of the penalties it found in the matrix by a sizeable amount based on history of prior violations. In 1982 the Agency brought a Complaint against this Respondent which resulted in the signing of a Consent Agreement in 1983.

Paragraph six of the Consent Agreement states that: "the provisions of this Consent Agreement may not be used as an admission or any other type of evidence in any other administrative, civil, or criminal preceding by any party, or any court, or by any other person, corporation, or unit, or agency of government, or by multiple of combination thereof." The Complaint was then dismissed with prejudice. The Respondent vigorously argued that the use of this prior Complaint and settlement is in direct violation to the language to the Consent Agreement signed in 1983, because of the immediately above-

quoted language. The Agency argues that the use of and the mention of the 1982 Complaint and Consent Agreement were mutually altered by the fact that both the Agency and the Respondent made reference to such Complaint and Consent Agreement in their pre-hearing exchanges and motions. My recollection is that a copy of the Complaint and Consent Agreement were contained as part of the Complainant's Pre-Hearing Exchange as rationale for the ultimate penalty it calculated in this case. In a subsequent submittal the Respondent also referred to this document in a motion to dismiss or strike its use at the preceding. The Agency's position that the disclaimer contained in the Consent Agreement has been mutually waived by the parties action in this matter is not well-taken. Just because the Agency elected to use it does not constitute an acceptance of that use by the Respondent since the language contained therein was placed there for the sole benefit of the Respondent and therefore the fact that the Agency elected to use it does not constitute any implied agreement on the part of the Respondent that its introduction into the record was proper. The Agency also argues that if it is precluded from using this prior Complaint and Consent Agreement as a part of its penalty calculation, the Agency would be barred in every case from using such agreements in penalty calculations and therefore they would be required to not settle any cases but take every case to trial. I do not find this argument to be well-founded since I have examined several hundred consent agreements prepared the Agency and this is the first one I have ever read that

contained language similar to that appearing above. I am therefore of the opinion that the Agency, by its acceptance of such language in the Consent Agreement, is precluded from using the prior Complaint and Consent Agreement for purposes of penalty calculations and that consequently the penalties will be reduced by the amount added thereto by the Agency individual who calculated the penalty in this case.

In regard to the failure to develop and maintain annual documents the case developer determined the violation to be significant. He arrived at this determination based on 561 gallons of PCB fluid in the three PCB transformers on which Celotex failed to maintain annual records. He used the figure 187 rather than 287 gallons which was the actual contents of the transformers, because that was the figure used by the inspector in her Report of Inspection. When asked by the Court whether it would make any difference in his calculations if the 287-gallon number was used instead of the 187-gallon figure, he stated that it would not change his conclusion. The penalty policy assigns a significant extent to liquid amounts of 220 gallons or more but less than 1,100. No concentration reductions are applicable to this calculation since the transformers had PCB concentrations greater than 100,000 ppm. The record indicates that "NoFlamol" is a known PCB fluid containing 600,000 ppm PCB as indicated from the record. The Agency employee, Mr. Bonace, ascribed a circumstance level to the violation as level 4, major recordkeeping, because of the absence of any annual records for

the PCB transformers, containers, or capacitors. Using the penalty matrix found in the PCB Penalty Policy, a level 4 circumstance and a significant extent suggest a $6,000 gravity-based penalty.

Because of the history of prior violations, Mr. Bonace applied a 50% upward adjustment to the gravity-based penalty arriving at $9,000. An additional factor which is recognize under the penalty policy as an adjustment factor is entitled, "Attitude of the Violator." This provisions states that in assessing the violator's "attitude," the Agency will look at the following factors: whether the violator is making good faith efforts to comply with the appropriate regulations; the promptness of the violator's corrective action; and any assistance given EPA to minimize any harm to the environment caused by the violation." In this case, Mr. Bonace applied a 10% upward adjustment for attitude. He justified this adjustment based on his determination that Celotex had first-hand knowledge of the PCB regulations as evidence by the past Complaint and CAFO and that Celotex had control over the transformers. He also considered the fact that during the May, 1987 inspection, the inspector requested that Celotex send her additional documentation, which they never did. Also Celotex did not take any steps to correct any violations identified by the inspector, Ms. White, such as reconstruction of the annual documents following the May, 1987 inspection. Mr. Bonace reasoned that this failure to correct the violation showed bad faith and based

on his professional judgment, he decided that an upward penalty of 10% was appropriate. Although Mr. Bonace based his decision for a 10% upward adjustment in some part based on the prior Complaint, the other factors enumerated in the record, in my judgment, would substantiate a 10% upward adjustment in this case, and therefore I find that a penalty for the recordkeeping violations is $6,600.

As to the violations concerning the failure to register the transformer with the appropriate fire response personnel and the failure of the Respondent to make records of the quarterly inspections and maintenance history, the Agency concluded that a penalty of $17,550 was appropriate.

Mr. Bonace used the same rationale in his calculation of the penalty as described above concerning the amount of gallon each for the recordkeeping calculation. The circumstance of the violation is level 2 because failure to register the transformers with local fire officials is a violation is violation of the use condition of 40 CFR § 761.30. Using these determinations, the case developer arrived at a gravity-based penalty of $13,000. He then applied a 25% upward adjustment for history violations and a 10% upward adjustment for attitude on the same basis as explained above for the recordkeeping penalty. As explained above I will disallow the 25% upward adjustment for history violations, but based on the circumstance of this case, I feel that a 10% upward adjustment for attitude is proper under the circumstances, and therefore I find that a penalty for the above-described use

violations is $14,300.

As to the marking violations set forth in the Complaint, the case-developer used the same reasoning to arrive at a significant extent with no concentration reductions for the reasons discussed above in regard to the recordkkeeping violation. The circumstance violation is level 3, major marking, because a person unfamiliar with the situation would not know that PCBs are present. In this instance, there was no indication on the fence enclosing the area that there were PCBs present, and many of the capacitors and other PCB items were not marked as required.

Applying these determinations to the penalty matrix, Mr. Bonace arrived at a gravity-based penalty of $10,000. He then applied an upward adjustment factor of 50% for history of prior violations and a 10% adjustment for attitude based on the same reasoning as explained under the calculation for the recordkeeping penalty. I feel that the $10,000 penalty is appropriate and consistent with the mandates of the penalty policy and is proper and I also feel that under the circumstance of this case, 10% upward adjustment for attitude is likewise appropriate under the conditions and circumstance of this case.

I, therefore, find that the appropriate penalty for the marking violation is $11,000.

ORDER

The Respondent, Celotex Corporation, having been found to have violated TSCA and regulations promulgated in the particulars recited above, is assessed a penalty amount of **$31,900** in

according with § 16(a) of the Act. The payment of the full amount of the penalty shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States of America, to the following address within 60 days of receipt of this order: [1]

EPA - Region V
(Regional Hearing Clerk)
P. O. Box 70753
Chicago, IL 606731

Thomas B. Yost
Administrative Law Judge

Dated: 4/12/90

[1] In accordance with 40 CFR § 22.17(b), this Initial Decision will become the Final Order of the Administrator unless appealed in accordance with § 22.30 or unless the Administrator elects, sua sponte, to review the same as herein provided.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing **INITIAL DECISION** of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Beverly Shorty, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of sail **INITIAL DECISION** to all parties, she shall forward the original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said **INITIAL DECISION** TO THE to the Administrator.

Dated: April 12, 1990

Jo Ann Brown
Jo Ann Brown
Secretary, Hon. Thomas B. Yost