9/24/93

UNITED STATES OF AMERICA

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
LITTON INDUSTRIES, INC., IAS TURNING MACHINES DIVISION,	)	**Docket No. TSCA-I-89-1042**
	)	
Respondent	)	

Respondent found in violation of Section 15 of the Toxic Substances Control Act, 15 U.S.C. § 2614 and is liable for the assessment of a civil penalty in the amount of $36,000 for failure to properly mark PCB (Polychlorinated Biphenyls) Items and the means of access to those items and for failing to properly store for disposal certain PCB Items.

INITIAL DECISION AND ORDER

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: September 24, 1993

Appearances:

For Complainant:

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For Respondent:

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INTRODUCTION

This is a proceeding brought pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2615(a), to assess civil penalties for violations of regulations promulgated thereunder. The U.S. Environmental Protection Agency (sometimes complainant or EPA) in its administrative complaint alleges nine counts against Litton Industries, Inc., IAS Turning Machines Division (Respondent).

The first three counts of the complaint are alleged marking violations in contravention of 40 C.F.R. § 761.45(a) and 40 C.F.R. § 761.40(j). These sections provide as follows:

> 40 C.F.R. § 761.45(a)
>
> (a) Large PCB Mark-M$_1$. Mark M$_1$ shall be shown as in Figure 1, letters and striping on a white or yellow background and shall be sufficiently durable to equal or exceed the life (including storage for disposal) of the PCB Article, PCB Equipment, or PCB Container. The size of the mark shall be at least 15.25 cm (6 inches) on each side. If the PCB Article or PCB Equipment is too small to accommodate this size, the mark may be reduced in size proportionally down to a minimum of 5 cm (2 inches) on each side.
>
> 40 C.F.R. § 761.40(j)[1]
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> (j) PCB Transformer location shall be marked as follows:

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[1] This requirement is further clarified in 40 C.F.R. § 761.40(j)(3) as follows:

Any mark placed in accordance with the requirements of this section must be placed in the locations described in paragraph (j)(1) of this section and in a manner that can be easily read by emergency personnel fighting a fire involving this equipment.

> (1) Except as provided in paragraph (j)(2) of this section, as of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates or manhole covers, to a PCB Transformer must be marked with the mark M^L as required by paragraph (a) of this section.

Specifically, the first count concerns the alleged improper marking of three PCB (Polychlorinated Biphenyls) transformers housed in a brick containment area in Building W of respondent's facility located in New Britain, Connecticut. The count alleges that the area lacked the large PCB mark described in 40 C.F.R. §761.45(a) and required by 40 C.F.R. § 761.40(j).

The second and third counts concern the same marking violations of 40 C.F.R. §§ 761.45(a) and 761.40(j). Count II involves two PCB transformers housed on the northwest side of Building Y. Count III addresses one PCB transformer located on the southeast side of Building U. The complaint alleges that both of these transformer locations lack the large PCB mark required by TSCA.

Count IV of the complaint alleges that six PCB capacitors located in Building P and S were removed from service but were not marked with the large PCB mark as required by 40 C.F.R. §§ 761.45(a) and 761.40(a)(5). Section 761.40(a)(5) reads as follows:

> (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.
>
> (5) PCB Large Low Voltage Capacitors at the time of removal from use;

Count IV also alleges that the six aforementioned capacitors were stored for disposal in an area which had not been marked with the large PCB Mark as required by 40 C.F.R. § 761.40 (a)(10). This section of the regulations reads as follows:

> (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_1 throughout this subpart.
>
> (10) Each storage area used to store PCBs and PCB Items for disposal.

Count V is a storage violation alleging that the six PCB capacitors described in Count IV of the complaint were stored for disposal but were not marked with the initial date of storage as required by 40 C.F.R. § 761.65(c)(8), which reads, in pertinent part, as follows:

> This section applies to the storage for disposal of PCBs at concentrations of 50 ppm or greater.
>
> (8) PCB Articles and PCB Containers shall be dated on the article or container when they are placed in storage. The storage shall be managed so that the PCB Articles and PCB Containers can be located by the date they entered storage . . . .

Count VI is another storage violation dealing with the same six capacitors in Count IV. It alleges that the area where the capacitors were stored failed to meet the structural requirements of 40 C.F.R. § 761.65(b) in that the Building P & S storage area lacked an adequate floor with continuous curbing of at least six inches in height. In pertinent part, this regulation reads:

> (b) Except as provided in paragraph (c) of this section, after July 1, 1978, owners or

> operators of any facilities used for the storage of PCBs and PCB Items designated for disposal shall comply with the following requirements:
>
> (1) The facilities shall meet the following criteria:
>
> (ii) An adequate floor which has continuous curbing with a minimum six inch high curb . . . .
> (iv) Floors and curbing constructed of continuous smooth and impervious materials, such as Portland cement concrete or steel, to prevent or minimize penetration of PCBs; . . .

Count VII alleges a marking violation concerning another set of six PCB capacitors located in Building T. It avers that the capacitors were removed from service but were not marked with the large PCB mark as described in 40 C.F.R. § 761.45(a) and required by 40 C.F.R. § 761.40(a)(5). In addition, this count also alleges that the area where these capacitors were stored in Building T had not been marked with the large PCB mark as required by 40 C.F.R. § 761.40(a)(10).

Count VIII is a storage violation alleging that the six PCB capacitors located in Building T were stored for disposal but not marked with the initial date of storage as required by 40 C.F.R. §761.65(c)(8).

The final count of this complaint, Count IX, alleges that the six PCB capacitors located in Building T were improperly stored for disposal in violation of 40 C.F.R. § 761.65(b) in that the storage area lacked an adequate floor with continuous curbing at least six inches high and lacked a floor surface constructed of continuous, smooth and impervious material.

Complainant seeks a total civil penalty of $36,000.00. The specific penalty amount for each of the alleged violations is as follows:

Count I	(marking)	:	$13,000.00
Count II	(marking)	:	$13,000.00
Count III	(marking)	:	$ 3,000.00
Count IV	(marking)	:	$ 1,500.00
Count V	(storage)	:	$ 500.00
Count VI	(storage)	:	$ 1,500.00
Count VII	(marking)	:	$ 1,500.00
Count VIII	(storage)	:	$ 500.00
Count IX	(storage)	:	$ 1,500.00
Total			$36,000.00

In its answer, respondent stated that it lacked knowledge and information sufficient to form a belief as to the truth of the allegations made in Count I of the complaint. Respondent denied the allegations made in Counts II through IX of the complaint. Respondent further contests the amount of the proposed penalty, listed several affirmative defenses and requested a hearing on all issues raised by the complaint and answer in this proceeding.

To be determined here is whether or not the allegations raised in the complaint are supported by a preponderance of the evidence.[2] "Preponderance of the evidence" is the degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

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[2] The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides, in pertinent part, that: "Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the undersigned Administrative Law Judge (ALJ). Further, it is not required that the ALJ engage in the unnecessary herculean task of deciding every single issue raised in the proceedings. It is sufficient that there be a resolution of only those major questions necessary for a decision.

FINDINGS OF FACT

Based upon a review of the evidence, the following are the findings of fact.[3] Respondent owns and operates a facility known as the New Britain Machine Division located at South Street, New Britain, Connecticut. Stipulation 3 of Joint Exhibit 1 ("Stip. para. 3") On September 27, 1988[4] Frank Bartolomeo (Bartolomeo) and Tom Riscassi (Riscassi), both employees of the Connecticut Department of Environmental Protection (DEP), inspected Respondent's facility. (Stip. para. 4) They are Field Inspectors for the DEP and at the time of the inspection were affiliated with the PCB Toxics Section of the DEP Hazardous Waste Management Unit. (Tr. 20, 118) They were met at respondent's facility by William Lindsay, the plant engineer. Bartolomeo presented credentials

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[3] The findings necessarily embrace an evaluation of the credibility of the witnesses testifying on particular issues. This involves more than merely observing the demeanor of a witness. It also encompasses an evaluation of their testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. Wright & Miller, Federal Practice and Procedure: Civil, § 2586 (1971).

[4] Unless indicated otherwise, all dates hereinafter are for the year 1988.

issued to him by the EPA which recite that he is a "duly designated representative of the Administrator of the U.S. Environmental Protection Agency." The credential states that Bartolomeo is authorized to conduct inspections under Section 11 of TSCA. (CX 1; Tr. 34) Riscassi presented his Connecticut DEP identification card to Lindsay and Bartolomeo also gave him his business card. (CX 8; Tr. 23-24, 119)

Before proceeding, the inspectors informed Lindsay that they wished to conduct a PCB inspection under TSCA. Bartolomeo presented an "EPA-Toxic Substances Control Act Notice of Inspection." This form was further annotated with the inscription "PCB Inspection." Lindsay signed this form as agent for Litton. A TSCA Inspection Confidentiality Notice was also signed by Lindsay at this time. (CX 2,3; Tr. 24-28) It was made clear to Lindsay that the purpose of the inspection was to inspect the PCB equipment at the facility. The inspection also was to include observations of an underground storage tank designed to collect overflow from a PCB transformer. (Tr 29-30, 132, 148) A PCB Annual Summary Document form was presented to the inspectors documenting the PCB equipment at the facility. Entry to the facility was never refused or raised as an issue by Lindsay. There was no indication of confusion as to the purpose of the inspection. (CX 10; Tr. 31,33)

During the inspection, three PCB transformers were in service at Building W. The serial numbers for these transformers are: 6910092; 6910093; 6910094. They were located within a locked brick building with a heavy metal door with no windows, and could not be

seen from the outside. Lindsay was asked to provide access to the building but replied that he did not have a key to the enclosure. (Stip. para. 5; CX 9; Tr. 42-44) Respondent's PCB annual Summary Document indicates that transformers numbered 6910092, 6910093 and 6910094 at Building W contained 653, 942 and 742 parts per million (ppm), respectively, of PCBs. There were no large PCB marks observed at the time of the inspection on either the door to Building W or any other area around the enclosure to indicate the presence of PCBs. (Tr. 44)

During the inspection, two PCB transformers were in service on the northwest side of Building Y. The serial numbers for these transformers are B682737 and B682736. These transformers contained 693 and 697 ppm of PCBs, respectively. They were located inside a chain link fence, and there was no PCB mark on the fence surrounding these transformers. There were PCB marks on the transformers themselves, but they were not visible from the exterior of the enclosure. In addition, those marks are not visible from where Bartolomeo took the photograph of the enclosure, marked CX-4. (Stip. para. 6; CX 9, 10; Tr. 50, 52-53)

During the inspection one PCB transformer was in service on the southeast side of Building U. The serial number for this transformer is 8171283. This transformer contained 520 ppm of PCBs. This transformer was located within a locked chain link fence. There was no PCB mark located on the fence or the door of the enclosure. (Stip. para. 7; CX 10; Tr. 55-56) Also, six PCB large low voltage capacitors in Building P & S had not been marked

with the large PCB mark described in 40 C.F.R. § 761.45(a). These same capacitors were located in an area which had not been marked with the large PCB mark described in 40 C.F.R. § 761.45(a). They were not marked with a date, and were located in an area which lacked adequate flooring with continuous curbing a minimum of six inches high. (Stip. paras. 8, 9, 10 and 11)

The inspection proceeded to Building P & S where there was discovered a capacitor bank containing six PCB capacitors. This capacitor bank was listed on Litton's PCB Annual Summary Document as being located in Building P & S with a serial number listed as 59880. (CX 10 at 2; Tr. 58-60, 125) Bartolomeo observed that there were disconnected wires on the girder next to the capacitors. When asked about this bank of capacitors, Lindsay stated that electricians had "taken them down." In addition, he stated that they had been taken "off-line for disposal." (CX 7 at 3; Tr. 60, 62)

Testifying at the hearing was Clark Tewksberry (Tewksberry), an electrician in the employ of respondent. In reference to the capacitor bank in Building P & S, he testified that he "took the capacitor down" during the week of October 16, 1988. At the time that this work was completed, these capacitors were not energized, they were not connected to the "bus-line" and there was disconnected wire hanging down below the capacitor bank. This capacitor bank had been disconnected from its power source prior to the week of October 16, 1988. Tewksberry physically removed this capacitor bank from the mezzanine where it had been installed. Any

one of "eight, nine, ten, eleven electricians" could have removed this capacitor bank from its power source prior to his ultimate physical removal of the capacitor bank. (Tr. 216, 226-227)

The six large low voltage capacitors located in Building P & S had not been marked with the PCB mark described in 40 C.F.R. § 761.459(a). The Building P & S capacitors were located in an area which had not been marked with the PCB mark described in 40 C.F.R. § 761.45(a). The capacitors had not been marked with a date when they were taken out of service. The capacitors were located in an area which lacked adequate flooring with a continuous curb a minimum of six inches in height. (Stip. para. 8-11; Tr. 66)

Bartolomeo observed in Building T another bank of six large low voltage capacitors, which were located within a cage and supported by an angle iron. Building T at the time of this inspection was empty of all machinery and water leaking from the roof had damaged the floor. Lindsay explained to Bartolomeo that the building was no longer used for machining purposes and was to be torn down or sold. (Tr. 63, 72)

While evidence is incomplete as to whether or not the capacitors found in Building T by the inspectors were actually energized and storing current at the time of the inspection, it is found for the purposes of this decision that these capacitors were not in use at the time of the inspection on September 27, 1988; they served no useful purpose in that there existed no equipment in Building T for which the capacitors could have provided electricity. Additionally, Lindsay was also planning on having

these capacitors disposed of by a contractor at the time of the inspection. (RX 3; Tr. 73, 219, 239) These six capacitors discovered during the inspection of Building T were large low voltage capacitors which had not been marked with the PCB mark described in 40 C.F.R. § 761.45(a). They were located in an area which had not been marked with the PCB mark described in 40 C.F.R. § 761.45(a). They were not marked with any date. They were also located in an area which lacked an adequate floor with continuous curbing at least six inches high made of continuous, smooth and impervious material as required by 40 C.F.R. § 761.40(a). (Stip. para. 12-15; Tr. 70, 72)

The central issue, with regards to the capacitors in the complaint (Counts IV through IX), is whether the PCB capacitors observed by the inspectors during the subject inspection had been stored for disposal or placed into storage prior to disposal. Further, Counts IV and VII of the complaint require a determination concerning whether the capacitors observed by the inspectors had been "removed from use" prior to the inspection of Respondent's facility. Respondent argues strongly on this point and has offered much in the way of testimony to support its contention that the capacitors in question were not removed from use or stored for disposal, and for good reason. If found that these capacitors were still in use at the time of the inspection, there would be no liability for Counts IV through IX of the complaint. PCB large low voltage capacitors are not required to be marked with the PCB mark while in use, 43 Fed. Reg. 7150, 7153 (February 17, 1978), and

there is no requirement for dating such capacitors or for storing them in an adequate facility while in use. In fact, the parties have stipulated to all of the facts necessary to find liability on Counts IV through IX of the complaint if it is found that the PCB capacitors discovered in Building P & S and in Building T are shown to have been removed from use and stored for disposal on or before the date of the inspection, September 27, 1988. (Stip. paras. 8-15)

Examining the evidence surrounding the six PCB capacitors in Building P & S observed by the inspectors during the inspection, there is some agreement between the parties. It has been stipulated that the capacitors had not been marked with the requisite PCB mark as described in 40 C.F.R. § 761.45(a). (Stip. para. 8) These capacitors were located in an area which lacked a PCB mark described in 40 C.F.R. § 761.40(10). (Stip. para. 9) It is also stipulated that these capacitors had not been marked with a date that they were removed from use. (Stip. para. 10) Finally, the parties have stipulated that these capacitors were located in an area which lacked an adequate floor. (Stip. para. 11)

During the inspection of Building P & S, a capacitor bank was found next to a girder on the floor of the mezzanine level. This capacitor bank was listed on Litton's PCB Annual Summary Document as being located at Building P & S/Column B-23, and was described as possessing serial number 59880. (CX 10 at 2; Tr. 58-60, 125) When asked about these capacitor's, Lindsay told the inspectors that the electricians had "taken them down," and that they had been taken "off-line for disposal." (CX 7 at 3; Tr. 63) While this

testimony was elicited from complainant's witness, it is uncontroverted by respondent. To be noted at this juncture is that respondent did not offer the testimony of Lindsay, although he was listed as a material witness for respondent in its prehearing exchange. It was disclosed at the hearing that for "various legal reasons, tactical reasons," that he would not be called to testify. (Tr. 257)

To be recalled is that Tewksberry stated that he "took the capacitor down" (in Building P & S) during the week ending October 16, 1988. Respondent apparently offers this testimony to show that the actual storage for disposal of these capacitors did not occur until after the inspection on September 27. However, Tewksberry testified further that at the time of his removal of the capacitors from this location that the capacitor bank was not energized. When Tewksberry testified to taking down these capacitors, he meant that he physically removed them from the mezzanine. Also to be recalled is that he stated that any one of "eight, nine, ten, eleven electricians" could have removed the capacitors from the bus-line prior to when he took them down from the mezzanine. (Tr. 226-227, 232) Respondent contends that it was on the date that Tewksberry removed these capacitors from the mezzanine that the storage for disposal and marking requirements became effective. This argument is inconsistent with the evidence. The only probative evidence introduced on this point comes from Bartolomeo and Riscassi that these capacitors appeared to be off

line on the date of the inspection and that Lindsay represented to them that this was the case.

EPA must prove by the preponderance of the evidence that PCB equipment was permanently out of service and that it was not intended for reuse. In re Transformers Unlimited Corp., Docket No.PCB-79-003 (Decision and Order, March 20 1981) at 3-7. See also, In re Cotter Corp., Schwartzwalder Uranium Mine, Docket No. PCB-81-004 (Initial Decision, March 21, 1984) at 27-28, penalty affirmed, TSCA Appeal No. 84-1 (April 16, 1985); In re Liberty Light & Power, TSCA No. VI-8 (Initial Decision, April 7, 1981) at 5-6 (the "historic and physical facts," that the capacitors had been abandoned on a concrete slab and testimony that the capacitors had "little or no use" in the facility's system, showed that the operator intended to dispose of the equipment) at 6, affirmed, TSCA Appeal No. 81-4 (Final Decision, October 27, 1981). EPA has met the burden of proof by showing that the PCB equipment at issue had exceeded its useful life and that the operator intended to dispose of this equipment. It is found that the capacitors located in Building P & S were removed from service prior to the inspection date of September 27, 1988; that respondent failed to meet the requirements for marking these capacitors and the means of access to the area where these capacitors were stored with the PCB mark described in 40 C.F.R. §§ 761.40 and 761.45(a); that these capacitors had not been marked with the date that they were placed in storage after their useful life had been exceeded, 40 C.F.R. § 761.65(c)(8); and that these capacitors were stored pending their

ultimate disposal in an area which lacked an adequate floor. 40 C.F.R. § 761.65(b).

The next issue is the PCB capacitors which were located in Building T at the time of the inspection. These were located within a cage and were supported by a piece of angle iron. Building T was empty of machinery, the roof was damaged and water was leaking into the building and damaging the wood block floor. Lindsay represented to Bartolomeo that the building was no longer in use for machining processes, and that it would either be torn down or sold. (Tr. 68,73) The evidence is confused concerning whether the Building T capacitors were still connected to wiring and storing current at the time of the inspection. Tewksberry testified that he physically removed capacitors from shelves in Building T on October 16. In order to have accomplished this task he would have had to "shut the disconnect off," "pull your fuses," "take the pipe out and take the capacitor down." He could not recall whether the capacitors were "energized" at the time that he physically removed them from the building. (Tr. 219, 221) Respondent also offered the testimony of George Streib (Streib) to illuminate the matter. His testimony was unpersuasive as to any facts in this regard. He stated that there is no purpose in capacitors "storing current" if they are not supplying electricity to machinery connected to this power supply. (Tr. 262) To be noted is that there was no machinery in Building T to draw electricity from this power source. Streib also stated that "as far as I can remember," the capacitors were energized up to their removal.

(Tr. 260) In addition, we have the testimony of Bartolomeo who stated that Lindsay had told him that he was planning to have these capacitors disposed of by a contractor. (Rx 3; Tr. 73)

Most telling, however, is that respondent was contracting with Electrical Wholesalers Inc., for, among other things, the removal of "all (PCB) capacitors." (RX 3) The date of this letter agreement is June 3, 1988. A full three months prior to the date of the inspection by Bartolomeo and Riscassi. This document shows clearly the intent of respondent as early as June of 1988 to dispose of these capacitors (as well as the other capacitors and several transformers on site). This equipment was certainly being held for disposal at the time of the inspection. Respondent's attempts to color the picture otherwise are unpersuasive. Disposal means:

> Disposal means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items. 40 C.F.R. § 761.3
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> Storage for disposal means temporary storage of PCBs that have been designated for disposal. 40 C.F.R. § 761.3

It is clear that the useful life of the capacitors in Building T had been terminated. The work commenced by Strieb in the days after the inspection was merely the very end of the termination of the useful life of these capacitors, not the beginning of it. To find otherwise would have the effect of emasculating the statute.

Under respondent's proposed reading of the TSCA, PCB Items could be stored indefinitely without having to comply with any of the marking and other storage for disposal requirements, simply by leaving those PCB items in place.

It is found that the capacitors located in Building T were removed from service prior to the inspection date of September 27, 1988.

DISCUSSION AND CONCLUSIONS OF LAW

The inspection conducted by Bartolomeo and Riscassi on September 27 was authorized under section 11 of TSCA and conducted in accordance with the TSCA. Bartolomeo was a duly authorized representative of the EPA Administrator as described in section 11 of TSCA at the time of the inspection. As stated previously in the October 25, 1990 order striking respondent's third and fourth affirmative defenses, there existed no confusion concerning the purpose of inspecting respondent's facility on September 27, 1988 and that Bartolomeo was a duly authorized representative of the EPA Administrator.

The subject inspection uncovered a number of PCB contaminated electrical equipment located on the premises of respondent's facility. Counts I, II and III of the complaint allege that respondent failed to place PCB marks at the entrance to the three separate transformer locations on the property. Regarding Count I, the evidence shows that three PCB transformers located in Building W were in use at the time of the inspection service. The level of

PCBs in these transformers was in excess of 500 ppm.[5] Bartolomeo testified that these transformers were located within a brick, windowless building with a solid steel entrance door. More importantly, the evidence was that there existed no PCB mark at the means of entrance to this building to warn of the presence of PCB materials inside. No evidence has been offered by respondent to controvert this testimony.

Count II deals with two PCB transformers (each containing PCBs in excess of 500 ppm) which were located within a chain link fence on respondent's facility. These transformers were located on the northwest side of Building Y. Again complainant offered uncontroverted testimony, through the person of Bartolomeo, that the means of access to this fence enclosure did not have the required PCB mark displayed on it.

Concerning Count III, a single transformer containing over 500 ppm of PCBs was located within a chain link fence enclosure on the southeast side of Building U. Bartolomeo again offered undisputed testimony that no PCB mark was displayed on the means of access to this fence enclosure.

Respondent did produce some evidence to indicate that the PCB transformers which are the subject of Counts II and III of the complaint (and which were located outdoors in chain link enclosures) did have PCB marks displayed on the transformers themselves. This does not free respondent from the requirement to

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[5] A "PCB Transformer" is defined as any transformer that contains 500 ppm PCB or greater. 40 C.F.R. § 761.3.

properly mark the PCB transformer locations. The marking of PCB transformers is required by 40 C.F.R. § 761.40(a)(2) and (c)(1). These are separate regulatory requirements from the provision of 40 C.F.R. § 761.40(j) which requires the marking of PCB transformer locations. The PCB regulations do not suggest that "locations" do not need to be marked if the "transformers" themselves are marked. Rather, the plain intent of the regulations is that both the means of transformer as well as its location must be marked with the PCB mark.

Robert McConnell (McConnell) is an inspector and case development officer with EPA. He testified at the hearing concerning the reasons why both the transformers and their locations are required to be marked. (Tr. 156, 64-65) It is instructive to review this reasoning here. McConnell explained that the marking of PCB transformer locations at the means of access as required by 40 C.F.R. § 761.40(j) is done to notify fire personnel that a PCB transformer may be involved in a fire. Such fires release PCBs as well as toxic by-products of incomplete combustion such as dioxins and dibenzofurans.[6] The regulatory intent is clear in this regard, and 40 C.F.R. § 761.40 (j) states that the location must be marked ". . . in a manner that can be easily read by emergency response personnel fighting a fire involving this equipment." McConnell explained that in the event of a fire, PCB marks on a transformer itself may not have the

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[6] See, Transformer Fire Rules Amendments to the PCB regulations at 50 Fed. Reg. 29170 et seq. (July 17, 1985).

desired effect of forewarning fire personnel under circumstances of darkness, smoke, or where high temperatures had melted a PCB mark from a transformer. The fact that the PCB transformers that are the subject of Counts I, II and III of the complaint may or may not have been themselves marked with a PCB mark is of no import in arriving at a decision in this matter. This issue is not the subject of this complaint. What is at issue herein is whether the transformer locations have been marked with the requisite PCB mark. It was found that they have not. It is now concluded that respondent has failed to mark the means of access to PCB transformers with the large PCB mark described in 40 C.F.R. 761.45(a) and required by 40 C.F.R. § 761.40(j) for Counts I, II and III of the complaint.

The ALJ now turns to the PCB capacitors found at respondent's facility during the inspection. By stipulation, the capacitors at issue are "PCB large low voltage capacitors." (Stip. para. 8, 12) As such, all of the capacitors at issue are subject to the marking requirements of 40 C.F.R. § 761.40 (a)(5) and (a)(10) and the storage requirements 40 C.F.R. § 761.65 (b) and (c)(8). Counts IV, V and VI of the complaint allege violations of regulations on the marking, dating and storage of PCB large low voltage capacitors located in Building P & S. Counts VII, VIII and IX allege similar violations with respect to PCB large low voltage capacitors in Building T.

The regulatory requirement to mark PCB large low voltage capacitors with the PCB mark, the subject of Counts IV and VII of

the complaint, arises at the time the capacitors are removed from use. 40 C.F.R. § 761.40(a)(5) Counts IV and VII deal with marking of the area in which PCB capacitors are stored for disposal with the PCB mark. 40 C.F.R. § 761.40(a)(10) Counts V and VIII of the complaint concern respondent's failure to date PCB capacitors when they are placed in storage prior to disposal. 40 C.F.R. § 761.60(b)(6), 65(c)(8).[7] Finally, Counts VI and IX address respondent's failure to insure that storage areas used to store PCB items designated for disposal are required to have an adequate floor with a minimum six inch high curb. 40 C.F.R. § 761.65(b)(1)[8]

It is concluded that respondent failed to meet the requirements for marking the capacitors as well as the means of access to the area where these capacitors were stored for disposal with the PCB mark in violation of 40 C.F.R. §§ 761.40 and 761.45(a). It is also concluded that respondent is in violation of 40 C.F.R. § 761.65(c)(8) for the reason that the capacitors had not been marked with the date that they were placed in storage for disposal; and that respondent also violated 40 C.F.R. § 761.65(b) because the capacitors were stored in an area lacking adequate flooring.

Having found liability as to all counts against respondent, the proposed penalty is addressed.

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[7] These regulations deal with "PCB Articles," which are defined at 40 C.F.R. § 761.3 to include capacitors.

[8] "PCB Items" are defined to include PCB Articles. "PCB Articles" in turn are defined to include capacitors. 40 C.F.R. § 761.3

THE PENALTY

The pertinent provision of TSCA, section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), provides as follows:

> (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.

These considerations are explained further and amplified upon in EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA (Guidelines). EPA issued these Guidelines in two parts: a general TSCA Civil Penalty System (CPS) and a PCB Penalty Policy, 45 Fed. Reg. 59770 and 45 Fed. Reg. 59776 (September 10, 1980). The general TSCA CPS sets forth a general penalty assessment policy which is designed to establish standardized definitions and applications of the statutory factors that section 16(a)(2)(B) of TSCA requires the Administrator to consider in assessing a penalty. It also provides the general framework within which the specific penalty guidelines of the PCB Penalty Policy were developed. Under the CPS, penalties are determined in two stages, 45 Fed. Reg. 59777 (September 10, 1980).

First, there is the "gravity-based penalty" (GBP). This factor is calculated based upon the "nature" of the violation; the "extent" of environmental harm that could result from a given violation; and the "circumstances" of the violation. These factors

are incorporated in a matrix from which the amount of GBP is calculated. The vertical portion of the matrix entitled "Circumstances (Probability of Damages)" consists of three categories, the "High Range, Mid Range and Low Range." The horizontal portion of the matrix bears the rubric "Extent of Potential Damage" and also has three classifications: "A-Major, B-Significant and C-Minor." Second, after the GBP has been determined, it is adjusted upward or downward in consideration of the remaining statutory factors, they are: "culpability; history of such violations; ability to pay; ability to continue in business; and such other matters as justice may require."

The guidance contained in the PCB Penalty Policy incorporates the approach used in the general guidelines in the TSCA CPS. In calculating the GBP under the PCB Penalty Policy, the "nature" factor is the same for all violations because all violations of Part 761 are chemical control violations. Therefore, to calculate the GBP for PCB violations, one considers the remaining two factors: (1) the "extent" of the environmental harm, which is determined by the amount and concentration of the PCB materials which are the subject of the proceedings; and (2) the "circumstances" or "probability for damage" which is determined in eight categories of violation type, for example, "marking" violations or "use" violations.

If the ALJ determines that the violation has occurred, he shall determine the dollar amount of the civil penalty to be assessed in accordance with the criteria set forth in TSCA, and he

must consider the civil penalty guidelines issued under TSCA. If the ALJ assesses a penalty different in amount from that proposed in the complaint, he shall set forth the specific reasons for any increase or decrease. 40 C.F.R. § 22.27(b)

One of the primary concerns of respondent is whether the distribution of the EPA guidance document entitled "Transformer Fires Rule Amendment to the Compliance Monitoring Strategy for TSCA § 6(e)" (attached to RX 10) (Fires Rule) constitutes a violation of the Administrative Procedure Act (APA), 5 U.S.C. §§551-559, or to respondent's due process rights. The answer is no to both questions. The evidence concerning the penalty and its calculation is clear. McConnell, a credible witness, who calculated the penalty, testified that he did not utilize the Fires Rule when arriving at the proposed penalty in this case. Further, the penalty policy relied upon by EPA in the formulation of the penalty is not a regulation. The penalty policy constitutes "interim guidance" for the determination of penalties for violations of the PCB regulations. 45 Fed. Reg. 59777 Its purpose is to provide consistency with the TSCA penalty criteria nationwide. It is not, however, binding upon respondents, presiding officers or the Administrator.

Respondent's assertion that In the Matter of U.S. Nameplate Company, Docket No. RCRA-84-H-0012, is precedential is in error. Nameplate is distinguishable on the grounds that it involved a regulation which is subject to notice and comment rule making procedures under the APA. Penalty policies, which are merely

guidance documents, are not subject to these provisions of the APA. The use by EPA of the Fires Rule promotes consistency in the application of TSCA penalties. It does not amend any regulation or subject respondent to any new regulatory requirement. In West Virginia Coal Association v. Reilly, 728 F. Supp. 1276, 1292 (S.D.W.Vir. 1989), it was held that the EPA policy on wastewater was interpretive rather than substantive since it was not promulgated pursuant to rule making powers and it merely expressed EPA's construction of statutes and already existing regulations. In addition, this document (Fires Rule) has no binding or legal enforcement mechanisms. In the Matter of Bell and Howell Co., (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983, at 18-19). Therefore, it is not a document subject to publication in the Federal Register under section 552(a)(1)(D) of the APA. Nguyen v. U.S., 824 F.2d 697, 701-702 (9th Cir. 1987).

Regardless of the use of the Fires Rule or any other policy documents in the complainant's calculation of the Penalty Policy, it remains the province of the ALJ to determine the appropriate penalty, if any, to be assessed against a respondent. The preponderance of the evidence is that the Fires Rule was not utilized by EPA in the determination of its proposed penalty in this case, and even if it were, there would be no prejudice to respondent. It is concluded that the use of the Fires Rule by the EPA does not adversely affect respondent under section 552(a)(1) of the APA.

Concerning Counts I, II and III of the complaint, all dealing with the improper marking of the means of access to PCB transformers, EPA has calculated the "circumstance" of the violation to be "unauthorized uses" under the PCB regulations (referred to as "improper uses" in the Penalty Policy). Complainant argues that this is the proper circumstance based on the regulatory history of the requirement as well as the gravity of the violations charged. An unauthorized use corresponds to level two on the matrix. This results in a higher penalty than would otherwise be derived by assigning these violations at circumstance level three. Complainant urges rightly that this is the proper approach to the calculation of this penalty. Regulations were published by the EPA on July 17, 1985 entitled "Polychlorinated Biphenyls in Electrical Transformers; Final Rule" 50 Fed. Reg. 29170 (also known as the Fires Rule). The preamble of this document clarifies the rule governing the "use" of PCBs by placing additional restrictions on the use of PCB transformers. One of the restrictions is the requirement that PCB transformer locations be marked at the means of access to indicate the presence of PCBs. The Fires Rule establishes this requirement as a precondition to the use of PCB transformers. Therefore, the failure of a party to properly mark the means of access to a PCB transformer results in the unauthorized use of that transformer. Respondent argues vehemently that this violation should properly be categorized as a marking violation, and thereby warrants a lower penalty amount. On the face of it, respondent might be assumed to be correct. Such is

not the case. The 1985 Fires Rule supersedes the 1980 Penalty Policy. If the Fires Rule had never been issued, respondent would most certainly have prevailed on this point. The 1985 Fires Rule has been issued and, as such, provides that the failure to properly mark the means of access to PCB transformers is to be classified as a "use" violation. We then look back to the 1980 Penalty Policy and see that it provides that for a "use" violation (i.e., the use of a PCB transformer in violation of any condition of authorization) the proper level is level two.

Complainant explains that captioning these counts as "marking" in the complaint was an "organization" of the various regulatory requirements involved in this case. The captioning of these counts is not a substantive criteria to be considered when calculating the proper penalty to be assessed. It is merely a label used to organize the complaint. This label is not relevant in the determination of the penalty. Therefore, the proper classification for the calculation of the penalty is that of a "Use" violation. EPA treats violations of the Fires Rule as posing a greater danger to public health and the environment than do marking violations. The evidence, proffered by McConnell, revealed that the "greater danger" lies in the fact that during a fire toxic substances, such as dioxin and furon, can be released. Therefore, a violation of the Fires Rule, including a failure to mark the means of access to PCB transformers, must be treated as a more serious violation of TSCA and results in a higher penalty than mere marking violations. The evidence is buttressed by the language contained in the

preamble of the Fires Rule[9] which speaks specifically about the need for proper notification of fire response personnel in the event of such fires, as well as the difficulties involved with cleaning up after such fires. The classifying of these violations as circumstance level two is consistent with TSCA section 16(a)(2)(B) requiring the consideration of the gravity of a violation when assessing a penalty. The failure of a party to mark PCB transformer locations presents a greater risk than a marking violation at level three, and should receive a higher penalty.

It is concluded that the proposed penalties for Counts I, II and III of the complaint are consistent with section 16 of TSCA and the Penalty Policy and are therefore appropriate under the circumstances of this case. At circumstance level two, for significant extent, the matrix yields gravity-based penalties of $13,000 for Counts I and II. For Count III, circumstance level two, together with a minor extent, the appropriate gravity-based penalty is $3,000.

For Counts IV and VII of the complaint, the proposed penalty is $1,500. These violations were classified as "major marking" violations. The justification for this classification is that the absence of PCB marks on the capacitors and on the areas in which these capacitors were stored created the risk that a person or persons investigating the situation would be unaware that PCBs were present and unable to identify which items contained PCBs. The concern being that this failure to mark creates a high risk of

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[9] See 50 Fed. Reg. 29170 et seq. (July 17, 1985).

improper disposal. (Penalty Policy, 45 Fed. Reg. 59781) This concern is well founded. The plant engineer, Lindsay, was apparently unaware that these capacitors contained PCBs. (CX 7, at 2)

It is appropriate to classify these violations as "major marking" violations. As such, they fall into circumstance level three. In all, only 11.4 gallons of PCB fluids were involved in these Counts. This falls into the "minor" category. The resultant matrix value is $1,500 for each count.

Counts V and VIII deal with the failure of respondent to mark the capacitors with the initial date that they were placed in storage for disposal. This failure presents the risk that the PCB Items will be stored for longer than the maximum length of time required by statute and slightly increases the risk of an accidental spill. 45 Fed. Reg. 59781 This corresponds to a minor level of violation. Therefore, the appropriate gravity-based penalty for each of these counts is $500.

Counts VI and IX deal with the storage of PCB Items in an improper facility. The Penalty Policy ranks this violation at circumstance level three. The evidence presented on this point is clear and uncontroverted. The facilities for storing the PCB Items for disposal were inadequate. They did not possess the requisite flooring with a minimum six inch high curb. They were not constructed of continuous, smooth and impervious material and, with regards to Building T at least, the roof and walls were not adequate to keep rain water from reaching the stored PCB Items. At

a minor extent, the Penalty Policy matrix yields a gravity-based penalty of $1,500 for each count.

Concerning any appropriate adjustment factors in calculating the penalty, there are no prior violations of this statute by respondent. Culpability is placed at Level Two since respondent had "sufficient knowledge to recognize the hazards" and that it had "significant control over the situation to avoid committing the violation." 45 Fed. Reg. 59773. Inability to pay the proposed penalty has not been raised by respondent and there is no evidence in the record of this case to support such a claim. Similarly, there is no evidence that a penalty in the amount of $36,000 adversely affects respondent's ability to continue in business.

The one adjustment factor that is hotly contested by the parties is whether respondent is entitled to a credit against any civil penalty assessment due to its environmentally beneficial expenditures. This credit would fall under the adjustment category of "such other matters as justice may require." Complainant counters that the evidence was inconclusive as to the amounts spent by respondent in this regard, as well as for the reasons why respondent conducted this work. Under the Penalty Policy, a violator may earn credit for expenditures made for environmentally beneficial purposes above and beyond those required by law. In the instant case, there appears to be no evidence to support the conclusion that respondent's expenditures were made for environmentally beneficial purposes "above and beyond" those provided by law. The most that could be said from the evidence in

this case is that respondent made these expenditures for environmentally beneficial purposes required by law. The least that could be said for respondent's expenditures is that they were for another business purpose entirely. The preponderance of the evidence supports the latter view. The evidence shows that respondents were tearing down or demolishing Building T and remodeling Building P & S, and the removal of the PCB Items and transformers were undertaken solely to further those goals. In either event, respondent is not entitled to a credit for expenditures related to the removal of these PCBs and PCB Items.

Therefore, it is concluded that respondent is not entitled to any adjustments of the gravity-based penalty amount. The penalty for Counts I through IX is therefore $36,000.

ULTIMATE CONCLUSION AND ORDER

It is concluded that the preponderance of the evidence establishes that respondent violated section 15 of TSCA, 15 U.S.C. § 2614, and a condign penalty in this matter for each count is as follows:

Count I	$13,000
Count II	$13,000
Count III	$ 3,000
Count IV	$ 1,500
Count V	$ 500
Count VI	$ 1,500
Count VII	$ 1,500
Count VIII	$ 500
Count IX	$ 1,500
Total	$36,000

IT IS ORDERED[10] that:

1. A civil penalty in the amount of $36,000 be assessed against Respondent, Litton Industries, Inc. IAS Turning Machines Division.

2. 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 or cashier's check payable to Treasurer, United States of America, and mailed to:

EPA Region 1
(Regional Hearing Clerk)
P.O. Box 360197M
Pittsburgh, PA 15251

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

4. Failure upon part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in assessment of interest on the civil penalty. 31 U.S.C. § 3717; 40 C.F.R. §§ 102.13(b)(c)(e).

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 24, 1993

[10] Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).