



- (3) ...that each substance...or any article containing such substance...be marked... . The form and content of such warnings and instructions shall be prescribed by the Administrator.
- (6) (regulation of)...any manner or method of disposal of such substance...by...person who uses, or disposes of, it... .
- (e) POLYCHLORINATED BIPHENYLS (PCBs).
- (1) ...the Administrator shall promulgate rules to--
  - (A) prescribe methods for the disposal of PCBs, and
  - (B) require PCBs to be marked with clear and adequate warnings...
- (5) This subsection does not limit the authority of the Administrator...to take action respecting any PCB.

SEC. 15<sup>2/</sup> PROHIBITED ACTS.

It shall be unlawful for any person to--

- (1) fail or refuse to comply with...
  - (B) any requirement prescribed by Section 5 or 6, or
  - (C) any rule promulgated or order issued under Section 5 or 6;
- (3) fail or refuse to
  - (A) establish or maintain records.

SEC. 16<sup>3/</sup> PENALTIES.

- (a) CIVIL.--(1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of Section 15.
- (2)(A) A civil penalty for a violation of Section 15 shall be assessed by the Administrator...
- (B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation(s), and with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

The Rules of Practice, Section 22.27, 40 CFR, provide:

**Subpart E—Initial Decision and  
Motion To Reopen a Hearing**

§ 22.27 Initial decision.

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(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. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Administrator within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings or (2) the Administrator elects, sua sponte, to review the initial decision.

**REGULATIONS <sup>4/</sup>**

§ 761.2 Definitions.

For the purpose of this part:

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(t) "PCB Article" means any manufactured article, other than a PCB Container that contains PCBs and whose surface(s) has been in direct contact with PCBs. "PCB Article" includes capacitors, transformers, electric motors, pumps, pipes and any other manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the PCB Article.

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(v) "PCB Container" means any package, can, bottle, bag, barrel, drum, tank, or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs.

\*\*\*

(x) "PCB Item" is defined as any PCB Article, PCB Article Container, PCB Container, or PCB Equipment, that deliberately or unintentionally contains or has as a part of it any PCB or PCBs at a concentration of 50 ppm or greater.

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(ff) "Storage for disposal" means temporary storage of PCBs that have been designated for disposal.

<sup>4/</sup> Sections cited, unless otherwise indicated, are from 40 CFR.

### Subpart B—Disposal of PCBs and PCB Items

**NOTE:** This subpart does not require removal of PCBs and PCB Items from service and disposal earlier than would normally be the case. However, when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) and PCB Items which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this subpart. This subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they must be disposed of in accordance with this subpart. Other subparts are directed to the manufacture, processing, distribution in commerce, and use of PCBs and may result in some cases in disposal at an earlier date than would otherwise occur.

#### § 761.10 Disposal requirements.

(a) **PCBs.** (1) Except as provided in paragraphs (a)(2), (3), (4), and (5) of this section, PCBs must be disposed of in an incinerator which complies with Annex I.

(2) Mineral oil dielectric fluid from PCB-Contaminated Transformers containing a PCB concentration of 50 ppm or greater, but less than 500 ppm, must be disposed of in one of the following:

(i) In an incinerator that complies with Annex I § 761.40;

(ii) In a chemical waste landfill that complies with Annex II § 761.41 if information is provided to the owner or operator of the chemical waste landfill that shows that the mineral oil dielectric fluid does not exceed 500 ppm PCB and is not an ignitable waste as described in § 761.41 (b) (8) (iii) of Annex II;

(iii) In a high efficiency boiler provided that:

(A) The boiler complies with the following criteria:

(1) The boiler is rated at a minimum of 50 million BTU hours;

(2) If the boiler uses natural gas or oil as the primary fuel, the carbon monoxide concentration in the stack is 50 ppm or less and the excess oxygen is at least three (3) percent when PCBs are being burned;

(3) If the boiler uses coal as the primary fuel, the carbon monoxide concentration in the stack is 100 ppm or less and the excess oxygen is at least three (3) percent when PCBs are being burned;

(4) The mineral oil dielectric fluid does not comprise more than ten (10) percent (on a volume basis) of the total fuel feed rate;

(5) The mineral oil dielectric fluid is not fed into the boiler unless the boiler is operating at its normal operating temperature (this prohibits feeding these fluids during either start up or shut down operations);

(6) The owner or operator of the boiler:

(i) Continuously monitors and records the carbon monoxide concentration and excess oxygen percentage in the stack gas while burning mineral oil dielectric fluid; or

(ii) If the boiler will burn less than 30,000 gallons of mineral oil dielectric fluid per year, measures and records the carbon monoxide concentration and excess oxygen percentage in the stack gas at regular intervals of no longer than 60 minutes while burning mineral oil dielectric fluid.

(7) The primary fuel feed rates, mineral oil dielectric fluid feed rates, and total quantities of both primary fuel and mineral oil dielectric fluid fed to the boiler are measured and recorded at regular intervals of no longer than 15 minutes while burning mineral oil dielectric fluid.

(8) The carbon monoxide concentration and the excess oxygen percentage are checked at least once every hour that mineral oil dielectric fluid is burned. If either measurement falls below the levels specified in this rule, the flow of mineral oil dielectric fluid to the boiler shall be stopped immediately.

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(d) **Spills.** (1) Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs.

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### Subpart C—Marking of PCBs and PCB Items

#### § 761.20 Marking requirements.

(a) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in Annex V—§ 761.44(a). The mark illustrated in Figure 1 is referred to as M<sub>1</sub> throughout this subpart.

(1) PCB Containers;

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(10) Each storage area used to store PCBs and PCB Items for disposal.

### Subpart E—List of Annexes

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#### ANNEX III

#### § 761.42 Storage for disposal.

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(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:

(i) Adequate roof and walls to prevent rain water from reaching the stored PCBs and PCB Items;

(ii) An adequate floor which has continuous curbing with a minimum six inch high curb. The floor and curbing must provide a containment volume equal to at least two times the internal volume of the largest PCB Article or PCB Container stored therein or 25 percent of the total internal volume of all PCB Articles or PCB Containers stored therein, whichever is greater;

(iii) No drain valves, floor drains, expansion joints, sewer lines, or other openings that would permit liquids to flow from the curbed area;

(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; and

(v) Not located at a site that is below the 100-year flood water elevation.

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(5) All PCB Articles and PCB Containers in storage shall be checked for leaks at least once every 30 days. Any leaking PCB Articles and PCB Containers and their contents shall be transferred immediately to properly marked non-leaking containers. Any spilled or leaked materials shall be immediately cleaned up, using sorbents or other adequate means, and the PCB-contaminated materials and residues shall be disposed of in accordance with § 761.10(a)(4).

\*\*\*

(7) Storage containers for liquid PCBs can be larger than the containers specified in paragraph (c)(6) above provided that:

(i) The containers are designed, constructed, and operated in compliance with Occupational Safety and Health Standards, 29 CFR 1910.106, *Flammable and combustible liquids*. Before using these containers for storing PCBs, the design of the containers must be reviewed to determine the effect on the structural safety of the containers that will result from placing liquids with the specific gravity of PCBs into the containers (see 29 CFR 1910.106(b)(1)(f)).

(ii) The owners or operators of any facility using containers described in paragraph (i) above shall prepare and implement a Spill Prevention Control and Countermeasure (SPCC) Plan as described in Part 112 of this title. In complying with 40 CFR Part 112, the owner or operator shall read "oil(s)" as "PCB(s)" whenever it appears. The exemptions for storage capacity, 40 CFR 112.1(d)(2), and the amendment of SPCC plans by the Regional Administrator, 40 CFR 112.4, shall not apply unless some fraction of the liquids stored in the container are oils as defined by section 311 of the Clean Water Act.

(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. Storage containers provided in paragraph (c)(7) above shall have a record that includes for each batch of PCBs the quantity of the batch and date the batch was added to the container. The record shall also include the date, quantity, and disposition of any batch of PCBs removed from the container.

(9) Owners or operators of storage facilities shall establish and maintain records as provided in Annex VI.

ANNEX VI

§ 761.45 Records and monitoring.

(a) *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 Container(s) 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. The following information for each facility shall be included in the annual document:

(1) The dates when PCBs and PCB Items are removed from service, are placed into storage for disposal, and are placed into transport for disposal. The quantities of the PCBs and PCB Items shall be indicated . . .

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(2) For PCBs and PCB Items removed from service, the location of the initial disposal or storage facility and the name of the owner or operator of the facility.

(3) Total quantities of PCBs and PCB Items remaining in service at the end of the calendar year . . .

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(b) *Disposal and storage facilities.* Each owner or operator of a facility (including high efficiency boiler operations) used for the storage or disposal of PCBs and PCB Items shall by July 1, 1979 and each July 1 thereafter prepare and maintain a document that includes the information required in paragraphs (b)(1) thru (4) below for PCBs and PCB Items that were handled at the facility during the previous calendar year.

Said Complaint, as amended, states said charges in four Counts,  
to wit:

Count 1 alleges that tests of samples of soil, standing oil deposits and debris from floor sweepings, taken by EPA personnel during inspections on May 21, 1980, and August 8, 1980, revealed various levels of PCBs, indicating uncontrolled discharges, which are illegal disposals under Section 761.10(d)(1), and violate Section 761.10(a) and Section 15 of the Act.

Count 2 alleges that said inspections revealed that Respondent stored, for disposal, PCB liquids in old transformers and in 55-gallon drums in its "work pit" area and that said PCB "articles" and "containers" were not dated to indicate when they were placed in storage - a violation of Section 761.42(c)(8); that Respondent placed transformer flushings,

containing over 500 parts per million (ppm) in its old building which did not meet diking requirements for long term storage in violation of Section 762.41(b)(1); that none of the drums aforesaid were dated to indicate when they were removed from service or placed in storage for disposal in violation of Section 761.42(c)(8); that bulk storage tanks, "PCB containers" (761.2(v)), contained PCB levels exceeding 500 ppm and did not meet the storage requirements of Section 761.42(b) and (c); that Respondent violated 40 CFR 761.42(c)(7) in that it had not prepared nor implemented a Spill Prevention Control and Countermeasure Plan (SPCC) for its long-term, temporary or bulk storage facilities; and that Respondent had failed to check said "PCB articles and containers" for leaks (Section 761.42(c)(5)) and that such failures violated Section 15 of the Act.

Count 3 alleges that, on inspection, Respondent's work pit and new building storage areas contained "PCB items" (Section 761.2(x)); that bulk storage tanks ("PCB containers" under 40 CFR 761.2(v)) contained high levels of PCBs; that said items and containers violated Section 761.20(a) in that they were not properly marked; and that such failures violated Section 15 of the Act.

Count 4 alleges that Respondent's inventory of its service transformer (work pit area) failed to show the total weight of PCBs contained herein; that records of PCB quantities in bulk storage tanks were not maintained, and, though Respondent was then storing "well over 45 kilograms of PCBs" at its facility, it failed to prepare an annual document for either the years 1978 or 1979, which failures violate Section 761.45(a) and Section 15 of the Act.

Complainant proposed that \$35,000 should be assessed against Respondent for the violations so alleged.

In its Answer, incorporated, by reference, in its Answer to the Amended Complaint, Respondent generally denies, because of lack of information sufficient to form a belief, that: (a) samples, alleged in paragraph 3 of Count 1, contained levels of PCB; (b) that it caused the alleged release or spills of PCBs into the open environment. It further generally denies the allegations contained in Counts 2, 3 and 4 of the Complaint; and contends that the penalties proposed are inappropriate based on the nature, circumstances, extent and gravity of the violations alleged as well as Respondent's ability to pay and its history of prior violations. It does not respond to the allegations in the Complaint (Count 1, paragraphs 1 and 2), alleging that the U.S. EPA and Ohio EPA conducted inspections, respectively, on May 21, 1980 and August 8, 1980, at which times samples were taken at Respondent's subject facility. Therefore, said allegations are deemed admitted (40 CFR 22.15(d)).

In its Answer to the Amended Complaint, Respondent admits the allegations in amended paragraph 4, Count 2 of the Complaint that 47 fifty-five gallon drums were stored in its new building, built to provide additional storage for PCB items; and states that metal trays had, at the time of the said inspections, been ordered, to provide spill protection; that said trays had not then arrived, but that such trays, providing more than 25% spill capacity, were in place three to four weeks subsequently.

Further, responding to allegations in paragraph 6 of Count II (that drums containing PCBs were placed in a non-diked area), it admits the

allegation that ten 55-gallon drums had been placed several feet from the pit area in its old buildings, and states that said drums were normally stored in the pit which provided adequate storage and were removed from the pit, temporarily, for a period of less than 24 hours.

A prehearing conference was held in Columbus, Ohio, on September 17, 1981, which was attended by attorneys for the Respondent and Complainant's attorney, a preliminary report of which was prepared and distributed to the parties on September 22, 1981. At said conference, Respondent announced its position that the presence of PCBs, at the sites sampled, antedated the effective date of the pertinent regulations (April 18, 1978), and that in order for Complainant to make a prima facie case, it should be required to sustain the burden of proving that the PCBs found by the said inspections resulted from spills or disposals occurring on or after April 18, 1978.<sup>5/</sup> Complainant, on the date of the conference, filed its Motion opposing Respondent's said defense, for the reason that it had not been pleaded, and was waived; and, alternately, prayed for a ruling that such matter, if properly pleaded, was a defense, affirmative in nature, and that Respondent had the burden of proving, if so, that the PCBs found by the inspection resulted from spills or disposals prior to April 18, 1978. By my Order of October 7, 1981, I ruled that, so long as Complainant received adequate and timely notice of same, factual allegations or contentions not expressly contained in a pleading were not waived and that the party so contending

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<sup>5/</sup> The first regulation for PCBs was the disposal and marking rule published on February 17, 1978, with an effective date of April 18, 1978 (43 FR 7150). The effective date of the Act is January 1, 1977 (see 15 US 2601, note). It is clear, on this record, that Respondent contends that PCBs found by the inspections were present prior to any date when it became subject to the sanctions of either the Act or Regulations.

would be permitted to prove such matters at the hearing; that Respondent, under 40 CFR 22.24, has the burden of proving "any defense to the allegations set forth in the Complaint", and that the claim that the presence of subject PCBs antedated the effective date of the Act was an affirmative defense which must be proved by Respondent. <sup>6/</sup> The Toxic Substances Control Act (TSCA) is clearly remedial <sup>7/</sup> legislation and Respondent's claim that it is not within the purview of same is an affirmative defense. (See Rachbach versus Cogswell, 547 F2d 502,505 (10th Cir.1976), citing Schmidtke v. Conesa, 141 F2d 634 at 635.)

Respondent, in his Brief, questions the legality of the inspection on August 8, 1980, by an employee of the Ohio EPA (OEAP), in that no written notice was given the owner as was done preceding the U.S. EPA inspection on May 21, 1980. Question is also raised concerning the handling of the samples within the Chain of Custody; and Respondent further contends that samples taken were "not representative". He again contends that the releases and spills, on which the charges are based, existed prior to April 18, 1978, the date of the Act<sup>8/</sup>; that the presence of PCBs found in the tank area resulted from construction activity in that area which precipitated and caused movement to the surface of "old deposits"; that it failed to date the PCBs which allegedly were in storage from dates unknown but prior to the effective date

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<sup>6/</sup> The general rule is that where a matter is peculiarly within the knowledge or control of party, the burden is upon him to prove it. See U.S. v. Bull S.S. Line, 146 FS 210, affd 274F2d 877(1957); and cases cited Modern Federal Practice Digest, Evidence, Section 90 et seq.

<sup>7/</sup> The purpose and intent of TSCA, in providing for the assessment of civil penalties, is to achieve compliance with the Act, so that the distribution, use and disposal of toxic substances, particularly PCBs, will not present an unreasonable risk of injury to the (public) health and environment (15 USCA §2601(a)). Such remedial legislation must be liberally construed to effectuate its purpose and the intent and expressed policy of Congress (Tcherepin versus Knight, 88 Sct 548, 389 US 332, 19 L.Ed. 564(1967); Illareo v. Frawley, 426 FS 1132 (1977)).

<sup>8/</sup> See note 5, supra.

of the Act; joins issue concerning the allegation concerning samples of PCBs contained in "any of the bulk storage tanks"; controverts the charge that Respondent did not check for leaks; and contends that since "items" in an area were marked, the requirement of "marking the area" is satisfied.

On consideration of the record made herein, including the transcript of the testimony, the exhibits received, the proposed findings of fact and conclusions of law, briefs, and arguments submitted by Counsel, I make and find the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Respondent, Electric Service Company (ESC), is an Ohio Corporation, which at all times relevant to this action, maintained its sole place of business at 5335 Hetzel Street, Cincinnati, Ohio, where it has handled transformer oil containing PCBs since 1951 (T.251).

2. On May 21, 1980, an inspection of ESC was conducted by U.S. EPA to determine compliance with PCB marking and disposal regulations at which time seven samples were taken from outdoor soil and standing oil deposits and from debris inside an ESC building; four of the seven samples contained PCBs at levels exceeding 50 parts per million (ppm)(T.109; Ex. C-1).

3. Samples number 80TS 47S03 (S03) taken from a one-square-foot pool of oil, located in a slight ground depression adjacent to ESC's large mineral oil bulk tanks, contained 12,600 ppm PCB (T.99; Ex. C-1, Appendix A).

4. That said pool of oil, containing 12,600 ppm PCB, was discharged a short time prior to May 21, 1980, was evident from the fact it had not percolated into the soil (T.224; T.101; Ex. C-15).

5. Sample number 80TS47S04 (S04), taken from wet soil in an oil-soaked area near the site of the pool of oil from which sample S03 was taken, contained 550,000 ppm PCB (T.102; Ex. C-1, Appendix A).
6. That the discharge of oil containing 550,000 ppm PCB occurred at a time shortly before May 21, 1980 is evidenced by the fact it had not been absorbed by or percolated into the soil (T.223; T.103).
7. Heavy construction machinery had been operated in the area, where samples S03 and S04 were taken, prior to and after May 21, 1980, and had "disturbed the soil" in the area surrounding the area from which the samples were taken (T.268).
8. Rain fell in Cincinnati on May 19 and May 20, 1980 (T.267).
9. Sample S05 was taken inside the facility from a pile of dust and debris, which pile was swept up by Respondent's (ESC's) employee, using a broom, and contained 1,100 ppm of PCB. The employee placed the dust and debris into a drum marked as containing PCBs (Ex. C-1; T.104-5; T.302-3).
10. Sample S07 contained 264 ppm PCB; it was taken beneath ESC's outdoor vacuum pump vent, approximately one foot from the sidewalk leading to the entrance of the main office (T.107).
11. PCBs are very stable and do not degrade (T.227).
12. Sample S05 indicates that PCBs are "prevalent in the work place" and that a recent discharge had not been cleaned up (T.225).
13. Sample S07, taken from a small depression, containing wet soil, beneath ESC's exhaust pipe for a degassing pump, was a fresh discharge (T.107; T.224).

14. The May 21, 1980, inspection revealed that ESC's work pit, used to store, for disposal, PCB fluids with levels exceeding 500 ppm, was not marked as a PCB storage area; that a second area, located in the new building used to store, for disposal, 47 55-gallon drums of such PCB fluids, was not marked as a PCB storage area; that a third area, adjacent to said work pit, used to store, for disposal, ten 55-gallon drums of such PCB fluids, was not marked as a PCB storage area; and that ESC's outdoor small bulk tanks were not marked as containing PCBs nor was the area marked as a PCB storage area (T.109-117; T.282-3).

15. At the time of the May 21, 1980 inspection, ESC stored PCB fluids for disposal with levels over 500 ppm in five old transformer casings and several 55-gallon drums. These transformer casings and drums were located in Respondent's work pit in its "old building" (Ex. C-1, T.109-110; T.274).

16. Said transformer casing and 55-gallon drums were not dated to show when they were placed in storage, nor were they managed so that they could be located by the date they were placed in storage (Ex. C-1, T. 109-110; T. 274).

17. A second area in ESC's new building, used to store for disposal 47 55-gallon drums of PCBs fluids with levels over 500 ppm, had no dike or other secondary containment of any sort by which to prevent PCB spills from entering the workplace. Steel trays for diking said drums had been ordered, but were not then in place. They had been received and were being utilized for diking at the time of the August 8, 1980, inspection (T.277).

18. Said 47 55-gallon drums were not dated to show when they were placed in storage, nor were they managed so they could be located by the date they were placed in storage (T.111-112; T.274).

19. At the time of the May 21, 1980, inspection, ESC's new building was still under construction. Said 47 55-gallon PCB drums were stored in a large room which was open and accessible to the outside environment. Construction workers, and at least one dog belonging to construction personnel, were present in this area (T.112-113; T.276; Ex. C-18).

20. Had a spill occurred in said second storage area, PCBs at over 500 ppm could have reached the out-of-doors environment (T.113).

21. A third area adjacent to the work pit, used to store for disposal ten 55-gallon drums of such PCB fluids, with levels over 500 ppm, had no dike or other secondary containment which would prevent PCB spills from entering the workplace. Said storage was temporary and removal from permanent storage in a work pit was to give workers access to a large transformer being repaired (Ex. C-1; T.110-111; T.277-278).

22. The 1,100 ppm PCB sample (S05) was taken in close proximity to ESC's third PCB storage area. Had said drums been in an area with secondary containment, the 1,100 ppm discharge would probably not have reached the general workplace, in that ESC attributes the presence of PCBs to a "leak" (T.111; T.302).

23. The ten 55-gallon drums containing 500 ppm PCB fluids were not dated to show when they were placed in storage, nor were they managed so that they could be located by the date they were placed in storage (Ex. C-1, T.110; T.277).

24. Mr. Mondron, ESC manager, admitted to the Inspector that he knew that dikes were required for PCB storage areas. He has had actual knowledge of the Act and regulations governing PCBs since the latter part of 1979 (T.114; T.318-319).

25. On May 21, 1980, ESC maintained eight large bulk oil tanks outdoors (two of which were subsequently found to contain PCBs over 500 ppm). These tanks did not have secondary containment (T.115).

26. Since well before 1978 and at all times continuing through the March, 1982, formal hearing, ESC has stored well over 45 kilograms or 99.4 pounds of PCB and at least one PCB transformer at its facility (T.117; T.285; Ex. C-20).

27. At the time of the May 21, 1980, inspection, upon asking to see each and every PCB Annual Document that had been prepared by ESC, the Inspector was presented with four loose, unstapled pieces of paper which aggregately contained four short paragraphs. The first page stated it was a "beginning inventory" (T.118; Ex. C-20).

28. Of the PCBs or PCB items mentioned in this "beginning inventory", the following information was not addressed:

a. There was no listing of what year, or years, the inventory was for (T.119; Ex. C-20).

b. There was no listing of any dates when the PCBs were removed from service, nor when they were placed into storage for disposal (Ex.C-20).

c. There was no listing of any individual PCB containers, nor any description of their contents (i.e., fluids, contaminated debris, etc.) (Ex. C-20).

d. There was no listing of the weight in kilograms for each PCB transformer (Ex. C-20).

e. There was no listing as of July 2, 1978, of the number of PCB transformers at the ESC facility (Ex. C-20).

29. The following information was not included in Respondent's "beginning inventory":

a. There was no description or listing of the ten 55-gallon PCB containers located near the work pit nor the several 55-gallon PCB drums in the work pit (Ex. C-20; Ex. C-1, T.220).

b. There was no mention or listing of the PCBs stored in some of ESC's outdoor bulk storage tanks (Ex. C-20; Ex. C-1, Appendix C).

30. On August 8, 1980, a second inspection was conducted by Ohio EPA, under the authority of the Ohio Water Pollution Control Act, Chapter 6111 (T.161), to investigate the possibility that PCBs were entering groundwater from soil contamination (T.161).

31. The Inspector Mark Torf (T.162) testified that he telephoned ESC prior to the inspection of August 8, 1980, identified himself and stated his position with the OEPA; that he indicated the things he wished to inspect and received directions in reaching the facility by ESC's manager, Mr. Mondron. Mr. Mondron denied receiving such advance notice (T.261-262).

32. Inspector Torf gave no written notice of the August 8, 1980, inspection, but identified himself as being with OEPA, stated his reason for being at the facility and what he wished to see, whereupon he received cooperation and assistance from Mr. Mondron in taking samples (T.162; T.262).

33. At the time of the August 8, 1980, inspection, Mr. Torf took a sample of soil near ESC's outdoor bulk storage tanks (T.164; Ex. C-1, Appendix D), which sample, number 9, contained 6074 ppm PCB (Ex. C-3b; Ex. C-14).

34. At the time of the August 8, 1980, inspection, ESC's bulk tanks, numbers 5 and 7, were not marked as containing PCBs, and the area in which these tanks were located was not marked as a PCB storage area (Ex. C-1; T.283).

35. At the time of the August 8, 1980, inspection, Mr. Torf inspected and sampled each of ESC's outdoor large and small bulk storage tanks (T.164).

36. The four small bulk tanks contained oil ranging in quantity from "greater than several inches" to one-quarter full (T.180).

37. The sample taken from tank number 5 contained 2,984 ppm PCB (T.164; Ex. C-14; Ex. C-3b; Ex. C-1, Appendix C and D).

38. The sample taken from tank number 7 contained 1,173 ppm PCB (T.164; Ex. C-14; Ex. C-3b; Ex. C-1, Appendix C and D).

39. The Inspector was advised that oil in tanks numbers 5 and 7 came from transformers drained at ESC (T.164).

40. No dike or any other form of secondary containment was around any of ESC's outdoor bulk storage tanks (T.163).

41. Tanks 5 and 7 each had a capacity of 735 gallons and had not been used for at least eight years prior to the August 8, 1980, inspection and contained only oil residues estimated at "20 gallons or so" (T.280).

42. ESC's manager had never considered whether said tanks contained PCBs; consequently, no Spill Prevention Control and Countermeasure (SPCC) Plan was prepared or instituted (T.281).

43. On April 10, 1981, U.S. EPA technical and legal personnel met with ESC attorneys (no ESC personnel had been brought) for the purpose of discussing cleanup (T.227; T.331). During this meeting, ESC was informed of the following:

a. U.S. EPA strongly recommended outside consultants be employed because of serious doubts that ESC had the technical competence to adequately perform the cleanup without professional guidance.

b. Cleanup of the PCB contamination was expected to be conducted down to background levels.

c. U.S. EPA Region V PCB coordinator, Dr. Simon, could be contacted to answer questions or provide technical advice on the cleanup at any time (T.228; T.229).

44. ESC performed a cleanup using its regular personnel, none of whom had had training in how to perform a PCB or hazardous waste cleanup or in safety procedures to be utilized; however, ESC's manager talked to the staff at Cincinnati Gas and Electric Company, people who had been responsible for like cleanups and also talked to Dr. Howard from Howard Labs on taking samples and so forth. (T.331-2).

45. Oil containing PCB, which percolates into the soil, steadily dilutes as migration continues; concentrations of 35 and 14 ppm PCB remain in the soil in the location where the 12,600 and 550,000 ppm PCB surface discharge was identified by the U.S. EPA (T.232-234; Ex. C-25).

46. A third inspection, conducted pursuant to TSCA, was conducted by OEPA on February 11, 1982. No outdoor samples were taken because of snow on the ground, but a sample of dirt and debris was taken from inside the ESC facility (T.169; T-356). It was then that sample number 4 was taken and found to contain 833.7 ppm PCB (T.170; Ex. C-11).

47. During ESC's partial cleanup of its outdoor yard, three small bulk storage tanks were filled with contaminated soil taken from the immediate area, and moved inside the new building (T.171; T.302).

48. ESC's small bulk tanks are a minimum of 14 years old (T.270 and 250).

49. After bringing them inside, ESC provided no secondary containment for said PCB containers (T.171).

50. At the time of the third inspection, ESC had installed no secondary containment nor prepared an SPCC plan for its large bulk oil tanks remaining outside (T.172; Ex. C-11; Ex. C-21).

51. During the February 11, 1982, inspection, Mr. Torf asked to see all PCB annual documents for 1978, 1979 and 1980; ESC had not prepared or maintained any such documents beyond the "beginning inventory", presented to the U.S. EPA inspector almost two years earlier, except for one piece of paper which said "1980 - no change in inventory" (T.174-5; T.353).

52. At the time of the February 11, 1982, inspection, on advice of counsel, ESC would not allow Mr. Torf to have Xerox copies of the PCB annual records. Several days later, ESC's attorney called Mr. Torf and asked what documents he would have liked to have had copies of. At that time, Mr. Torf asked for copies of all of ESC's PCB annual documents (T.354-356).

53. The dust and debris swept up during the U.S. EPA May 21, 1980, inspection was put in a drum and labeled but was not included on ESC's records shown to Inspector Torf at said February, 1982, inspection (T.302-3; T.174).

54. ESC presented no evidence that it has prepared PCB annual documents for 1978 and 1979 beyond its "beginning inventory", nor was evidence presented that it has prepared a PCB annual document for 1980, nor was evidence presented that ESC intends to prepare and maintain such annual documents.

55. As early as 1977, besides seeing in the newspaper that PCBs were considered "harmful" (T.317) and hearing rumors regarding possible dangers of PCBs (T.325), the management of ESC (T.322) received a letter from Monsanto Chemical Co. stating it had stopped manufacture of PCBs (T.324) and warning of the possible dangers inherent in their handling and use (T.325).

56. On June 6, 1978, ESC received a detailed U.S. EPA advisory letter written in laymen's terms which informed the Company of the specific TSCA requirements and the dangers to human health and the environment associated with PCBs. A copy of the actual regulations was included (T.219; Ex. C-23 and 24).

57. Around the time that the TSCA Regulations were first published, Mr. Mondron, ESC Manager, attended a meeting of the Electrical Apparatus Association in St. Louis, where the TSCA requirements were discussed and

where he and others in attendance were apprised of the specific health risks and danger to the environment believed to be associated with PCBs (T.318-319).

58. Despite having been informed in 1977 by the manufacturer that PCBs were hazardous, ESC exerted no precaution in handling PCBs prior to the TSCA Regulations. ESC employees were not warned of the dangers of PCBs at any time prior to the U.S. EPA advisory letter which was received in June of 1978 (T.263, 319, 323).

59. ESC's present manager, Mr. Mondron, succeeded one Tom Evans, who died in 1974 or 1975. Evans, during his service as Manager, had the responsibility of keeping abreast of product information such as the hazardous character of PCBs (T.322).

60. Inspectors Young and Torf, during the course of their respective inspections, gained the impression from Mr. Mondron that he was skeptical concerning representations that PCBs presented a danger to the environment and public health (T.121; T.176).

61. As of fiscal year ending December 31, 1980, ESC had unrestricted Retained Earnings of \$284,210; for the three-year period ending in 1980, its Net Income, after payment of substantial amounts as salaries and before Depreciation, was \$141,184, from Gross Sales exceeding one million dollars per annum (Ex. C-26).

62. On May 21, 1980, the said facilities of Respondent (ESC) were the subject of an inspection conducted by Ms. Marian Young, U.S. EPA Environmental Protection Specialist (T.15), pursuant to the Act (T.16), at which time ESC was presented with a written Notice of Inspection (T.16). Three oil samples, taken with a pipette and squeeze bulb, were placed in a vial; one soil sample and three debris samples were taken with an

aluminum scoop and placed in wide-mouth jars. Each sample container, "accompanied by Chain of Custody records" (T.24), had a tag or label which showed the sample number, date of collection and bore the inspector's initials (T.21), was "taped closed in a secure manner with the official sample seal" (T.23) which was "properly filled out" (T.24). Said Chain of Custody record was signed and dated by said inspector on May 23, 1980 (T.19), which document (Ex. C-3a) was created in the normal course of business of U.S. EPA (T.20).

63. William Sargent, Jr., Shipping and Receiving Clerk and Sample Custodian for EPA, whose duties were to receive samples for shipping and then contract for their shipment, on May 23, 1980, received the aforementioned samples from Inspector Young, signed said Exhibit 3-A and stored said samples in a locked refrigerator until their shipment, on June 30, 1980 (T.26), via Purolator Courier (T.26, 33), to the Pesticide and Toxic Substance Branch of the National Enforcement Investigation Center in Denver, Colorado (T.31).

64. During the period of Sargent's custody as aforesaid, the condition and appearance of the samples were maintained. Their shipment was in a 48-quart ice chest, filled with styrofoam chips, into which said samples were placed after being wrapped in plastic or styrofoam sheets (T.30). Filament tape was used to seal the top of the chest.

65. On or about July 1, 1980, Dean Franklin Hills, Chief of the Pesticide Toxic Substance Branch of said National Enforcement Investigation Center, received said shipment (T.33) described hereinbefore. Said samples appeared undisturbed and had not been tampered with (T.34); the identifying

label, on each container packed in said ice chest, was intact (T.47); and said samples were placed in a sample custody closet until they were analyzed. At all said times, said Chain of Custody was maintained (T.34).

66. Complainant's Exhibit 3a (reflecting the Chain of Custody from the date and time the samples were taken until their analysis) and Complainant's Exhibit 6 (the report of analysis of said samples) were received in evidence without objection (T.36; 53).

67. On August 8, 1980, pursuant to Ohio Revised Code, Chapter 6111, Section 6111.05, and on February 11, 1982, pursuant to the subject Act (TSCA), Mark Torf, employee of OEPA, made inspections as found in Findings 30 -32 and 46, supra. During said inspections, the taking of samples, maintainence of a Chain of Custody of samples from the date and time they were taken until their analysis by Ohio Department of Public Health Laboratory on August 12, 1980 (T.58), adhered to the policies for the handling and securing of samples described with respect to EPA samples taken May 21, 1980. Mr. Torf controlled the samples while at ESC's facility, locked them in his truck while transporting them to the OEPA Laboratory in Columbus, Ohio, and personally delivered and transferred them to authorized persons at the said Lab (T.57). In each instance, said samples were handed to one Frank McNulty, who maintained the Chain of Custody (T.57; 60; Ex. C-12; Ex. C-3B; T.73) until completion of analysis of said samples (T.76; Ex. C-11).

68. The said analyses of the samples taken May 21, 1980, performed by the Pesticide and Toxic Substance Branch of the National Enforcement Investigation Center in Denver, Colorado, and the analyses of the samples

taken August 8, 1980, performed by the Ohio Department of Health Laboratory, were performed in the usual course of business and by scientifically acceptable analytical methods (T.34-35; T.47-48; T.74-75; 40 CFR 761.2(dd); Complainant's Exhibits 3a, 3b, 6, 11, and 12).

CONCLUSIONS OF LAW

1. The said samples taken by U.S. EPA on May 21, 1980, and by OEPA on August 8, 1980, were obtained by use of proper sampling methodology and were representative of the contents of the pools and containers sampled (Facts 62, 67).
2. The Chain of Custody of said samples was continuously and properly maintained throughout the periods from the times the samples were obtained until their analysis (Facts 62, 63, 64, 65, 66, and 67).
3. The analyses, performed on said samples in the usual course of their business by properly qualified and experienced technicians at official establishments, existing for the purpose of performing such analyses, by scientifically acceptably analytical methods, are entitled, on this record, to acceptance; and the same were properly received in evidence without objection (Fact 68; T. 53, T. 91).
4. Respondent, ESC, has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulations:
  - a. 40 CFR §761.10(a) and (d)(1) for the improper disposal of 12,600 ppm PCB.
  - b. 40 CFR §761.10(a) and (d)(1) for the improper disposal of 550,000 ppm PCB.

c. 40 CFR §761.10(a) and (d)(1) for the improper disposal of 1,100 ppm PCB.

d. 40 CFR §761.10(a) and (d)(1) for the improper disposal of 264 ppm PCB.

5. Where a discharge of over 50 ppm PCB occurs, contamination which, through the process of dilution, reduces the level to below 50 ppm, is still regulated by the TSCA regulations. See 40 CFR §761.1(b).

6. ESC continues in violation of Section 15 of TSCA, 15 U.S.C. §2614, because the violations addressed in 4(a) and (b) above remain, in regulated levels, in the outdoor environment.

7. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulations:

a. 40 CFR §761.20(a)(10) for its failure to mark its work pit PCB storage area.

b. 40 CFR §761.20(a)(10) for its failure to mark its new building PCB storage area.

c. 40 CFR §761.20(a)(10) for its failure to mark its PCB storage area located adjacent to the work pit.

d. 40 CFR §761.20(a)(1) and (a)(10) for its failure to mark its PCB bulk storage tanks and PCB storage tank area.

8. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following violations:

a. 40 CFR §761.42(c)(8) for its failure to date any of its PCB transformers and drums to indicate when they were placed in storage for disposal, or to manage these PCB items so that they could be located by their date of entrance to the storage area.

b. 40 CFR §761.42(b)(1) for its failure to provide secondary containment for 47 55-gallon containers of over 500 ppm PCB stored for disposal in its second (new building) PCB storage area.

c. 40 CFR §761.42(b)(1) for its failure to provide secondary containment for 10 55-gallon containers of over 500 ppm PCB stored for disposal adjacent to the work pit in its third PCB storage area.

9. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulation:

a. 40 CFR §761.45(a) for its failure to prepare adequate records and to maintain an annual PCB document for 1978.

10. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulation:

a. 40 CFR §761.10(a) and (d)(1) for the improper disposal of 6074 ppm PCB.

11. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulation:

a. 40 CFR §761.20(a)(1) and (10) for its failure to mark its outdoor bulk tank PCB containers and PCB storage area.

12. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulation:

a. 40 CFR §761.42(b)(1) for its failure to provide secondary containment for its bulk PCB containers.

13. ESC has violated Section 15 of TSCA, 15 U.S.C. §2614 and the following regulation:

a. 40 CFR §761.45(a) for its failure to prepare adequate records and to maintain annual PCB documents for 1979 and 1980.

14. On this record, ESC has the ability to pay a civil penalty of \$47,500, as provided in the FINAL ORDER, hereinbelow proposed and the payment thereof will not seriously affect its ability to continue in business (Exhibit C-26; Fact 61).

## DISCUSSION

### Improper Disposal

The testimony of the witnesses who took samples, as well as those who shared custody of them, up to and including those witnesses who performed the analyses, was taken out of the hearing of other witnesses at the request of the Respondent. The record reflects that the handling of the samples was properly accomplished with considerable forethought, as demonstrated by Exhibits and as set forth in the Findings of Facts, Nos. 62-69, supra.

The essential inquiry to be here made is whether the samples were, at the time of analysis, representative of the material sampled. The official inspection manual (Respondent Exhibit 4) and Sampler's Procedure for Hazardous Waste Streams (Respondent Exhibit 5) are directory merely. They are guides which provide a check list of possible action necessary to maintain the samples' integrity. The facts and circumstances of each case determine what measures must be utilized to assure that the representative character of a particular sample is maintained. In the instant case, the inquiry concerned the amount of PCB present in the samples taken. PCBs are non-degradable (Fact 11; T.227). Therefore, the persistent inquiry by Respondent regarding whether each sample was covered with a plastic bag after being contained, sealed and tagged, or whether same were refrigerated, was here inappropriate and irrelevant.

Samples identified as S03 and S04 (containing 12,600 and 550,000 ppm, respectively) and S04 (containing 264 ppm PCB) were taken from pools of standing liquid. I agree with the testimony of Dr. Simon that, had these wet deposits been on the ground for more than a short period of time, they would have percolated beneath the surface. Further testimony of Respondent support this obvious conclusion for the reason that when the cleanup, instituted by Respondent several months later, was undertaken, the ground at the sites from which the samples were taken was dry. Expert testimony is unnecessary to support a conclusion that is obvious (Brubaker v. Board of Education, 502 F.2d 973 (CA Ill., 1974)).

Respondent sponsored testimony that the area, from which said samples were taken, was a site where construction activity had disturbed the soil. Deposits of PCBs were present, they contend, which had resulted from operations occurring prior to 1978--and as early as 1951; their theory is that the movement of the earth for the construction caused movement to the surface of portions of the PCBs deposited at an early date and that this accounts for the PCBs detected and sampled during the said inspection of May 21, 1980. Even under this hypothesis, which involves a considerable amount of speculation, Respondent has shown no justification for inaction or disregard of the said conditions as established by the inspection. Once removal of the material from the disposal site was evident, Respondent then had the duty <sup>9/</sup> to dispose of same in accordance with the Regulations, Subpart B (see note preceding 40 CFR 761.10(a)). More importantly, the

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9/ U.S. v. Shapiro, 491 F.2d 335,337(2)(1974); U.S. v. Parfait Powder Puff Co., Inc. 163 F.2d 1008, 1009(2), (CA7, 1947), and cases cited therein. Respondent is responsible for the violation even where consciousness of such is totally wanting, as TSCA is legislation in aid of maintenance of a public policy existing for protection of members of the general public from exposure to hazards of PCBs.

burden is on Respondent to prove the presence of said PCBs antedated the effective date of the Regulations, April 18, 1978, and I find the testimony in this respect to fall short of establishing that fact. The bare testimony offered that there were no possible sources for discharges in the area is inadequate to establish the facts necessary to prove the point argued. Respondent cites In Re Allen Transport Co., where, on the basis of Stipulations of the parties, it was stipulated that the PCBs discussed were spilled prior to the effective date of the Act. The PCBs there detected resulted from leaching, or runoff, rather than from removal as here contended; therefore I do not find that case material. I conclude that Samples S03, S04 and S07 were uncontrolled discharges and improper disposals in violation of Section 15 of TSCA. The samples taken at the August 8, 1980, inspection, near ESC's outdoor bulk storage tanks (number 9) and from bulk tanks numbers 5 and 7 (Samples 5 and 7), were obviously evidence of uncontrolled discharges at ESC's facility. That their persistence was for only a short period of time prior to sampling is supported by the record; and their existence on Respondent's premises violates applicable regulations.

I reject ESC's attempt to discredit said Samples 5 and 7. It cites "In the Matter of Robert Ross & Sons, Inc. (Docket No. TSCA-V-C-008), 101 ALC 151", in support of its argument that the samples taken were not representative of the volume sampled. Said citation is inapposite in that the Ross case dealt with the sampling of contents of 17,000- and 80,000-gallon tanks, whereas here the volume sampled was some 20 gallons in a tank with a total capacity of 735 gallons. Further, the provision of 40 CFR 761.10(g)(2)(ii) was held to be inapplicable in Ross as "additions of PCBs in concentrations of 500 ppm or greater" was lacking. On this record,

such addition was made; part of all of the oil comprising the volumes in tanks 5 and 7 "came from transformers drained at ESC"(T.164). Since said tanks "had not been used for eight or nine years" (T.280), the transformers drained were manufactured prior to January 1, 1979, when the transformer coolant used contained over 500 ppm PCBs (T.317). (See 43 FR 24802 et seq., 1.c.24806, Preamble to Proposed Rules, June 7, 1978). In the premises, based on said samples and evidence corroborating the accuracy of their analyses, Complainant's insistence that the marking and disposal requirements were violated is amply supported on this record.

Sample S05, containing 1,100 ppm PCBs, was found in dust and debris on the floor in the middle of Respondent's workplace. Respondent's argument is that this 1,100 ppm PCB was the result of a "leak" which occurred in the course of work on the date of the May 21, 1980, inspection, and that a leak is not an uncontrolled, unlawful discharge, citing In Re Liberty Light & Power, 101 ALC 135 (1981). Complainant points out that the suggestion that the condition resulted from a "leak" is not supported by the record. Under Section 761.2(m), "leak" means any instance in which a PCB article or container...has any PCBs on any portion of its external surface. Section 761.10(d) states that "(1) Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs." A very different situation is here presented where the PCBs detected were not confined; there is no evidence as to the condition of the surface of the container, but the source is undetermined. PCBs were found in the debris and dust swept from the floor. It is obvious that the source of the PCBs detected was "uncontrolled". It is untenable to indulge in sheer speculation that a "leak" might have or could have occurred and conclude that the existing hazard was thereby justified.

The source of the PCBs and the length of time said condition persisted is not shown by this record. The condition was still unabated at the time of the re-inspection February, 1982.

Note No. 10, page 23 of Briggs (Final Decision, Appeal) characterizes the condition here considered:

"The record does not establish what quantity of PCB liquid spilled as a result of the accident, nor does the record establish how long the leaky condition was allowed to persist prior to its discovery by the EPA inspectors. (The) contention that only a 'miniscule' quantity of PCBs was spilled is rejected..."

More importantly, we are here administering remedial legislation, and as stated in Tcherepin v. Knight, 389 US 332, 88 S.Ct. 548(1967): "Remedial legislation should be construed broadly to effectuate its purpose and be given a liberal interpretation to achieve Congressional intent."

Further, an interpretation should be given which will uphold rather than frustrate or defeat the Act passed by the Congress of the United States. Any failure to apply adequate sanctions where the Act is violated will, in effect, invite violations in increasing numbers which could ultimately frustrate, if not defeat, the scheme of regulation contemplated by the Act. (Wickard v. Filburn, 317 US 111, 63 S.Ct. 82; In Re Russell Co. Labs, IF&R Docket No. VII-189C(1976).

It is in this view that I conclude that a violation here occurred, and on this record, that its occurrence was on or near the date of the May 21, 1980, inspection (see Respondent Reply Brief, page 3, paragraph 4).

#### Failure to Mark

It is admitted that none of Respondent's PCB storage areas or its PCB

bulk tanks were marked with U.S. EPA "warning" labels as required by Section 761.20 (T.282-283). Respondent's contention is that, since "every container in the areas referred to were marked", with the official mark required to be used, that this was, in effect, marking of the areas. The fallacy of Respondent's contention is apparent when we consider that the public, including Respondent's employees, will be better protected if the areas are marked along with the containers, in that notice of the toxic character will be given before, rather than subsequent to, entrance to the area. It is fundamental that a statute designed to protect the public must be construed in light of the legislative intent and purposes it sought to achieve. It is entitled to broad interpretations so that its public purposes may be fully effectuated. (See Marriott v. National Mutual Gas, CA 10, 1952, 195 Fed. 2d 462 at 466.) It cannot be expected that members of the public, or even the employees of Respondent, will, at all times, seek out labeling to determine if an area presents a hazard to them; rather, it is appropriate and desirable that such markings be so placed that any person within or approaching the area will be immediately apprised of the presence of PCBs. More importantly, 40 CFR Section 761.20(a)(10) directs that "each storage area used to store PCBs and PCB items for disposal" shall be marked. Respondent's failure to so mark said storage is clearly a violation of that subsection. The seriousness of such failure is mitigated, to some degree, by the presence of markings on the containers located within the area. It is noted, however, from this record, that said containers were marked at a time several months subsequent to the inspection of May 21, 1980.

#### Improper Storage

ESC admits that there were no dikes or other form of secondary containment

around three of the Company's four PCB storage areas (T.276-281), and further admits that, at the time of the May 21, 1980, inspection, there was no diking for 47 55-gallon drums stored in its new building, but, that within a period of "three or four weeks", steel trays were procured to afford diking for said drums. As the record reflects, no location at ESC, except the work pit, had any dike of any sort; said work pit was filled to capacity, and, therefore, no diking for the 47 55-gallon drum containers was afforded for some two years after the effective date of the applicable regulations. With respect to the ten 55-gallon containers not properly diked, and located outside the workpit, ESC testified that this was an instance where said drums were temporarily removed from the workpit, which removal occurred only once or twice a year for three or four hours.

This instance points up the importance of the requirement of dikes for even temporary storage of PCB liquids with concentrations over 500 ppm, as it was in this area that the PCB discharge of 1,100 ppm was detected by the said inspection of May 21, 1980. In considering the gravity of the violation charged, the "potential" for exposure of the public and the environment to the toxic effects of PCBs must be considered (as opposed to the probability of such an occurrence). (See Briggs & Stratton, TSCA-V-C-001, -002, -003, Initial Decision at 33; TSCA Appeal No. 81-1, at 23.) The pattern of ESC's practices, in this respect, lends further credence to the existence of subject violations where ESC seeks to establish that no possible source for same can be shown. Considering the numerous failures to properly mark and provide diking coupled with its failure to document the age and location of PCBs, it is not remarkable that the sources of some of the improper disposals are not or cannot be explained by ESC.

Failure to Prepare and Maintain Records and Prepare PCB Annual Document

Findings of Fact 27-29, supra, list the deficiencies of the PCB Annual Document and the inventory exhibited to the EPA inspectors in May, 1980. Facts 51 and 54 recount the persistence of such violations at the re-inspection by the OEPA inspector in February, 1982. The "beginning inventory" (Exhibit C-20), the only record produced, is patently incomplete and inadequate to provide the basis for annual documents. ESC clearly violated 40 CFR 761.45 as charged. The seriousness of the violation is apparent when it is recognized that the management and organization of PCBs moving in and out of subject facility is not sufficient to afford monitoring and handling of PCBs in a manner that avoidance of significant exposure (761.2(dd)) will be assured.

OEPA Inspection August 8, 1980

On this record, Inspector Torf, employee of the Ohio EPA, made his inspection of August, 1980, under authority of the Ohio Revised Code, Chapter 6111, Section 6111.05. Said Section does not provide for service of written notice, as in the case of a U.S. EPA inspection, but does provide that such inspector shall have right of entry at reasonable times "upon any private or public property to inspect and investigate..." and "to examine records...".

Mr. Torf's re-inspection in February, 1982, was performed at the request and instance of U.S. EPA, and a written notice was given ESC as required by applicable federal regulation. On this record, Mr. Torf stated the reason and purpose for his August inspection, and received the cooperation and assistance of the ESC manager in inspecting the facility and taking samples.

The objection of ESC that the evidence given by Torf should be deemed inadmissible because no written notice was by him given prior to the inspection of August 8, 1980, is rejected.

Any and all contentions of the parties presented for the record have been considered and any suggestions, requests or arguments inconsistent with the foregoing Initial Decision are hereby denied.

#### CIVIL PENALTY

Section 16(a)(1)(B), set out on page 2, supra, provides that, in determining the amount of the civil penalty, factors relating first to the violation should be considered and then, factors denoting condition of the violator should be considered. The maximum civil penalty provided for each violation, and for each day such violation persists, is \$25,000. The character of the penalty authorized to be assessed, coupled with consideration of the violator's ability to pay, is indicative of the purpose of such assessment, i.e., achieving compliance with the Act and regulations. This instant record reflects instances, if not a pattern, of indifference, recalcitrance, unrestrained refutation and stubborn resistance to complying with the regulations in accord with their spirit and intent. Evidence of the attitude of ESC is exemplified by its failure and, indeed, its refusal, to prepare and maintain an inventory of the PCBs within its establishment and to prepare annual documents listing all PCBs by it controlled, along with the location and dates of acquisitions or dispositions of same. This omission, coupled with failure to mark the storage areas and containers, would appear to be the root cause of the conditions existing prior to and on the dates of the subject EPA inspections. It is obvious that the proper handling of PCBs, in conformity with applicable regulations, envisions an organized effort, which includes recordkeeping of resources handled and a

comprehension of the hazards dealt with. Such organized and informed effort appears essential if adequate compliance is to be achieved.

Exhibit C-20 is four loose pages, each with a short paragraph thereon, purporting to be a "Beginning Inventory", which was also adopted in successive years as representing an all-inclusive listing as well as the Annual Document required in July of 1978, 1979 and 1980. The exhibit is obviously only "the beginning OF an inventory," as it is, on this record, patently inadequate (Facts 28 and 29). Item: the dust and debris swept up, put in a drum and labeled, was not included therein. Item: the acquisition and sale of a transformer to Armco was not listed. These are two obvious omissions. Recordkeeping that is obviously incomplete and unreliable is tantamount to none at all.

Apparently, in reliance on argument by ESC Counsel that ESC is a small company and financially unable to pay a sizeable penalty, Complainant proposed a total civil penalty of \$35,000, broken down as follows:

<u>VIOLATION CHARGED</u>	<u>VIOLATIONS</u>		<u>PROPOSED PENALTY</u>
	<u>FOUND</u>	<u>ASSESSED</u>	
Improper Disposal	5	1	\$ 5,000
Failure to Mark	4 PCB Storage Areas	1	5,000
	2 Bulk Tanks	0	0
Improper Storage	4	1	15,000
Failure to Prepare Annual Document	3 Years	1 Year	10,000

Complainant (Brief, page 53) professes to have reduced penalties of \$90,000 to the \$35,000 proposed in the Complaint, considering the then prevailing impression concerning the ability of ESC to pay and other factors set

forth in the Act, Section 16(a)(1)(B). Consideration of such factors at that time would have taken into account the culpability evidenced by the extent and gravity of the violations shown by the inspection report; and would reasonably contemplate, prospectively, an ongoing effort to reduce the uncontrolled discharges to background levels; that ESC would prepare and maintain proper records and annual documents; remedy the failures to mark the areas and containers found unmarked; and to proceed with instituting such further measures, such as diking and spill prevention, which would assure that no unreasonable exposure of the public, and the environment, would longer remain. On this record, I find that the remedial action, reasonably to be contemplated, has not been accomplished; that an organized and informed effort, necessary to fully achieve compliance with the Act, has not been amply exerted.

For the reasons hereinabove set forth, I find that the penalties proposed are insufficient, and that an appropriate penalty to be assessed is \$47,500.

In conjunction with the proposed Order hereinafter appearing, I make the following recommendations:

That the Administrator agree to remit to ESC 50% of the penalty assessed in its Final Order if, within a reasonable but definite time, a sufficient showing is made, to the satisfaction of the Administrator, in addition to other measures calculated to effect compliance with the Act, that:

1. The requirements of 761.45 have been adhered to by ESC in the preparation and maintenance of accurate records, including an Annual Document as in said

regulation specified, so that information concerning the location, as well as the dates and volumes, including acquisitions and dispositions, of its PCBs, will be readily available at all times;

2. Any and all uncontrolled discharges on the premises of ESC have been abated and reduced to background levels, and, that in correcting such conditions, all necessary precautions have been taken to prevent exposure of members of the public, including ESC employees, to PCBs;

3. The marking, dating and diking provisions specified in 40 CFR 761.20 and 761.42 have been implemented throughout ESC's operation; that any PCBs or PCB items or containers, where the date of acquisition is unknown, are marked with an approximate date, so that its age and character is established and recorded.

On consideration of the facts in the record, the conclusions reached herein and in accordance with the criteria set forth in the Act, I recommend the adoption by the Administrator of the following

PROPOSED FINAL ORDER<sup>10/</sup>

1. Pursuant to Section 16(a) of the Toxic Substances Control Act (15 USC 2615(a)), a civil penalty in the total sum of \$47,500 is hereby assessed against Electric Service Company, an Ohio Corporation, for violations of the Act found herein;

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<sup>10/</sup> 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its receipt by the Hearing Clerk and without further proceedings unless (1) an appeal to the Administrator is taken from it by a part to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk a Cashier's or Certified Check payable to the United States of America.

DATE: Aug. 10, 1982



Marvin E. Jones  
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that the Original and four true copies of the foregoing Initial Decision were mailed via Certified Mail, Return Receipt Requested, to Ms. Mary Langer, Regional Hearing Clerk, U.S. Environmental Protection Agency, 230 South Dearborn, Chicago, Illinois 60604, who is requested, in accordance with 40 CFR 22.27, to forward a copy to all parties, and to send the Original, along with the record of the proceeding, to the Hearing Clerk, who will forward a copy of the Initial Decision to the Administrator.

DATE: Aug. 10, 1982



Mary Lou Clifton  
Secretary to Judge Marvin E. Jones