UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
EMPLOYERS INSURANCE COMPANY OF WAUSAU,	)	Docket No. TSCA-V-C-62-90
	)	
and	)	
	)	
GROUP EIGHT TECHNOLOGY, INC.,	)	Docket No. TSCA-V-C-66-90
	)	
Respondents	)	

INITIAL DECISION

(Issued September 29, 1995)

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I. Summary of Decision

Seven hundred gallons of PCB-contaminated transformer fluid were sent from a site owned by Group Eight Technologies, Incorporated ("Group 8") in Wyandotte, Michigan to CIW's Company ("CIW") oil recycling facility in Romulus, Michigan. This shipment contaminated several of CIW's storage tanks. After recycling, it was redistributed to users as non-contaminated oil.

The Complainant, EPA, alleges that the disposal of the transformer fluid violated an EPA regulation which requires that PCBs at concentrations of 50 ppm (parts per million) or greater must be disposed of by incineration.[1] The EPA also alleges that its PCB storage regulations were violated.[2]

The Complainant brings five counts of storage violations against Group 8, one count of improper disposal against Group 8, and one count of improper disposal against Group 8's insurance carrier, Employers Insurance Company of Wausau ("Wausau").

Group 8 is liable for the disposal and storage violations that have been alleged with respect to one transformer. Wausau did not engage in the disposal of the transformers. Accordingly, the charge against it is dismissed.

Complainant requests that a penalty of $76,000 be assessed against Group 8. This decision assesses a $58,000 penalty.

II. Key Findings and Conclusions Related To Penalty Policy Guidelines

1. To "consider" penalty guidelines as that term is used in EPA rule 40 C.F.R. § 22.27 (b), does not mean to adopt them and to adhere to their terms, deviating from them only upon a special showing.

2. Penalty policies serve merely as "an indication of an agency's current position on a particular regulatory issue." U.S. Telephone Ass'n. v. Federal Communications Commission, 28 F.3d 1232 (D.C.Cir. 1994).

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[1] 40 C.F.R. § 761.60, issued pursuant to the Toxic Substance Control Act, 15 U.S.C. § 2614.

[2] 40 C.F.R. §§ 761.65 (a), 761.65 (b)(1), 761.65 (c)(8), 761.40(a)(2) and 761.40 (a)(10).

3. If the Complainant chooses to rely on the PCB penalty policy guidelines, it must, through its evidence, support the assumptions, findings, and conclusions on which that policy rests. From an evidentiary standpoint, no presumption of validity attaches to an agency policy statement.

4. "When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." Pacific Gas & Elec. Co. v. Federal Power Commission, 506 F. 2d. 33, 38 (D.C. Cir. 1974).

5. The evidentiary support and rationale for many of the findings and conclusions made in the PCB penalty guidelines are missing from this record. The testimony of the EPA witness amounted to filling in the blanks of the PCB penalty matrix--a penalty formulation with no evidentiary support.

6. In adjudicative proceedings, agency action must be supported by "reliable, probative, and substantial evidence." Administrative Procedure Act, 5 U. S. C. § 556 (d). That evidence cannot be supplied by the agency itself in rendering its decision. It must be found in the record.

7. The EPA may choose to initiate rulemaking proceedings as an alternative to the formidable task of supporting its existing penalty policies in individual cases. The EPA may benefit from the collective input of the commenting public in designing an approach to penalty assessments perhaps more flexible that its existing approach, while still faithful to the purposes of the statutes.

III. Background

The ensuing detailed account of the chain of events surrounding this dispute provides the backdrop for an understanding of the parties' arguments and the discussion and analysis of the issues which follow.

On August 1, 1987, Group 8 purchased several lots of real property from Grand Machining Company ("Grand Machining" or "Wyandotte Grand"). Among these lots was an industrial building located at 2246 Third Street, Wyandotte, Michigan ("the property" or "the site"). Accompanying the sale, Grand Machining assigned its insurance policy for the property to Group 8. Three weeks later, on August 24, 1987, the building was completely destroyed by fire.

Several pieces of equipment including seven transformers were left on the premises by Wyandotte Grand. According to a rider to the land contract, Grand Machining left these pieces of equipment on the premises for temporary storage. They were to be auctioned by December 31, 1987, or removed by Wyandotte Grand within a reasonable time thereafter. If they were not removed Group 8 would have the right to remove them. Wausau's Trial Exhibit ("WTE") No. 1, Par. 5.

Upon notification of the loss, counsel for Wausau informed Bernard Schrott, President of Group 8, by letter dated September 1, 1987, that "[b]ecause of conditions found to exist at the fire damaged premises, it is necessary to undertake removal of three electric transformers in order to protect the public and the environment from the possibility that the contents of the transformers might be released. Accordingly, the company has made arrangements, on your behalf, to have a certified pollution control company undertake the proper disposal of these items." Complainant's Trial Exhibit ("CTE") No. 2. By writing dated that same day, Schrott gave Wausau authorization "to have Marine Pollution Control ['MPC'] remove the transformer, [and to] transport and dispose of the three (3) P.C.B.'s." CTE No. 3.

MPC removed the Standard transformers # R20552, # R26697, and # R20554 and sent them to Environmental Quality Laboratories, Incorporated ("EQL"), which performed the actual chemical analysis. CTE No. 4. The three transformers were then returned to the site in October, 1987. CTE No. 5. The test results showed non-regulated levels of PCBs for six samples that were taken. CTE No. 23.

Each test result appears individually. But, the test results do not identify from which transformers the six samples were taken. As a result, there is a dispute as to the source of the six samples. EPA maintains that they were taken from the three Standard transformers. Wausau argues that three samples came from the three Standard transformers taken off-site and the other three samples were taken from the three Westinghouse transformers while on-site.[3]

On November 1, 1987, Sclafani Trucking, Inc. ("Sclafani") sent a proposal to Schrott to do demolition work at the site. WTE No. 5. The November 1, 1987 letter does not specifically

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[3] The record is unclear as to whether three of the six samples were taken from the Westinghouse transformers while on site. However, as the discussion later will show, the charges against the Respondents can be resolved without a ruling as to whether the Westinghouse transformers were included in the six samples.

mention transformers or the number of transformers covered by the proposal. However, Sclafani's letter of December 15, 1987 to Wausau's adjuster, Howard Aidenbaum, makes clear that the earlier proposal's reference to demolition included the removal of three transformers. CTE No. 6.

On December 1, 1987, Schrott sent a letter to Sclafani enclosing a copy of EQL's test results on the transformers and authorized Sclafani to "dispose of them as you wish." WTE No. 7.

Apparently, believing that only the three Standard transformers had been tested, Sclafani, in his December 15, 1987, letter to Aidenbaum, stated that he had discovered four additional transformers--three (Westinghouse # 6542893, # 6542892, and # 6542891) in an elevator shaft and the fourth (Niagara # 39233) separated from the rest "on the ground on the Cedar St. side of the building"--all with undetermined "disposal status." CTE No. 6. Sclafani added, "[i]f you like, I can arrange to have these transformers tested and if they test positive, arrange to have them disposed of in a lawful manner." Id. There is no indication in this record that Wausau responded.

No clean up progress was made at the site for over a year. Some of the delays were caused by Group 8's obligation to give Grand Machining the opportunity to remove their equipment. WTE No. 3. As Sclafani explained in a November 1, 1988 letter to Schrott: "As you [Schrott] know progress has been slowed at the 2246 Third St. site for a number of reasons, including court ordered work stoppages, waiting for decisions on the basement fate, and removal of the presses from the premises." WTE No. 15.

The City of Wyandotte issued a demolition permit, good for six months, on January 29, 1988 to Group 8. The permit expired without progress and, by the end of 1988, the City of Wyandotte ordered a hearing to determine whether the city should assume the clean up and assess the costs to Group 8. WTE No. 17.

On January 10, 1989, City Engineer Mark Kowalewski, requested that the Michigan Department of Natural Resources ("MDNR") conduct an on-site inspection for potential TSCA violations. The next day the inspection took place. State Inspector Charles Cooper found seven transformers. Six were located together close to the fence along the Orange Street side of the property. Cooper reported that the three Westinghouse transformers "appeared to be leaking or had leaked in the recent past." Cooper reported that three of the other six found together were standard transformers and were not leaking. Cooper also identified one transformer with the nameplate Niagara # 39233 containing 236 gallons of Askarel--an oil with ultra-high concentrations of PCBs. The Niagara transformer was found "alongside the fence running adjacent to Fourth Street." It was not leaking. MDNR No. 1, pp. 2-3.

At this time, there were no "M_L" marks on any of the transformers. Id. p.4.[4] Soil samples were taken from beneath the three leaking Westinghouse transformers. The soil samples revealed non-regulated, but traceable levels of PCBs (Aroclor 1260) in the soil beneath all three Westinghouse transformers and Standard transformer # R20552. MDNR No. 1 attachment p.1. Copies of the report were sent to EPA Region V offices and to Kowalewski of the City of Wyandotte on February 21, 1989.

As a result of the MDNR test results, Terence Bonace, Environmental Scientist, EPA Region V, wrote to Schrott on March 20, 1989 stating that "[o]ne of these transformers is a PCB transformer [and that the] other six are mineral oil transformers, [several of which are] considered to be PCB contaminated under 40 C.F.R. §761.3, [and are] leaking oil onto the ground." CTE No. 14.

On March 29, 1989, City Engineer Kowalewski informed Schrott that the property had been declared a nuisance and that the city would take steps to secure, clean and remove hazardous materials if Group 8 refused its final administrative request. WTE No. 19.

Just prior to these developments, on February 21, 1989, K & D Environmental Services, Inc. ("K&D") sent a proposal to Sclafani to "pump out six transformers" as well as other industrial oils left on site. WTE No. 18. A copy of the proposal was also sent to Group 8 and Wausau's adjuster Aidenbaum. At a meeting with K&D and Sclafani on April 5, 1989, Aidenbaum approved payment for the removal, transport and disposal or treatment of the transformer fluids as estimated by K&D in its February 21, 1989 proposal. CTE No. 1, ¶ 13.

On April 10, 1989, Aidenbaum wrote to Bonace stating that, "I have now received a copy of your March 20, letter to our insured president, Bernard Schrott", and that "[s]amples were being taken by K&D Industrial Services, Incorporated, who was indicated to be an acceptable contractor by Anthony Pitts of the DNR." CTE No. 19. He did not address Bonace's specific contentions that at least several transformers were considered to be PCB contaminated.

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4 A large PCB mark, known as "M_L", is required under 40 C.F.R. § 761.40(a)(2) and (a)(10) to appear on PCB transformers and storage areas used to store PCBs and PCB items for disposal. It warns that PCBs, a toxic environmental contaminant, are present and that special handling and disposal in accordance with EPA regulations are required.

Four days later, on April 14, 1989, the disposal commenced. The MDNR issued a Hazardous Waste Manifest to Sclafani, for the drainage of 700 gallons of "other oil." WTE No. 21. K&D then proceeded to pump out all seven transformers, CTE No. 9, and transported the oil to CIW to be recycled. CTE No. 12.

Having authorized payment for the work, Aidenbaum paid for it on April 28, 1989 with a check made out to Group 8, Globe Midwest Adjusters Inc. (Group 8's public adjuster), Sclafani, and K&D as partial payment for "hazardous waste removal." CTE No. 22.

CIW sent Group 8's 700 gallons of oil through its waste recycling system and deposited the recycled oil into its main storage tanks. After one of CIW's customers discovered that its newly purchased oil contained PCBs, CIW shut down its operation on May 17, 1989. However, by that time, CIW had already delivered nine shipments totaling 59,950 gallons of PCB-contaminated oil to its customers. MDNR No. 3. CIW had 160,000 gallons of PCB waste oil remaining on site with a PCB concentration of over 500 ppm. Id. CIW abandoned the facility and the U.S. EPA Superfund came to maintain the site. Tr. 78.

CIW retained Dihydro Analytical Services ("Dihydro") to test Group 8's transformers. On May 22, 1989, Dihydro ran the tests. The results were as follows: the Niagara transformer contained 700,000 ppm PCBs, the Westinghouse # 6542893 contained 180 ppm PCBs, the Westinghouse # 6542891 contained 310 ppm PCBs, and the remaining four (the three Standard transformers and Westinghouse # 6542892) transformers contained non-regulated levels of PCBs. CTE No. 25.

On June 6 and 9, 1989, Patricia Spitzley, Environmental Quality Analyst for the MDNR, conducted an inspection of Group 8's premises in response to a request from the EPA. She observed seven transformers on the northwest corner of 4th and Cedar Streets. Samples taken during this inspection from post-drainage residue found in the Niagara transformer showed 5400 ppm and a sample from the soil directly beneath the Niagara transformer showed 290,000 ppm. Soil samples taken from oil stains around the other six transformers showed no regulated levels of PCBs present. MDNR No. 2, pp. 4-5.

IV. Discussion and Findings

A. Whether Regulated Levels of PCBs Were Present

"[C]omplainant has the burden of going forward and proving that the violation occurred as set forth in the complaint." 40 C.F.R. § 22.24. It must affirmatively establish that regulated levels of PCBs were present and were mishandled.

EPA charges Wausau and Group 8 for violations pertaining to three transformers: Niagara # 39233, Westinghouse # 6542893 and Westinghouse # 6542891. Complainant does not contend that Westinghouse transformer # 6542892, or Standard transformers # R20552, # R26697, or # R20554 contained regulated levels of PCBs.

For the reasons stated below, I find that EPA has established that the Niagara transformer contained PCB levels above 500 ppm. With regard to Westinghouse transformers # 6542893 and # 6542891, EPA has not established the presence of regulated levels of PCBs.

Both MDNR inspectors, Charles Cooper and Patricia Spitzley, in two separate inspections of the site before (January 1989, MDNR No. 1) and after (June 1989, MDNR No. 2) the draining of the transformers noted the name plate "Askarel" on the front of the Niagara transformer. "Askarel" is an industry term for dilectric fluid containing concentrated levels of PCBs. Tr. 347, 369. In the June inspection (after the units had been drained) MDNR soil samples taken from beneath the Niagara transformer revealed 290,000 ppm while samples of post-drainage residue from within the transformer revealed 5400 ppm. MDNR No. 2, p. 5. There appears to be no issue raised by any party that the Niagara transformer contained regulated levels of PCBs.

There remains the issue as to whether the Complainant has proved its allegation that the two Westinghouse transformers # 6542893 and # 6542891 contained regulated levels of PCBs. Recall that the tests run by the MDNR showed no regulated PCB levels either before (MDNR No. 1, attachment) or after (MDNR No. 2, p. 5 and attachment) the draining and disposal of the transformers. Complainant bases its conclusions on the one test run by Dihydro based on samples taken from the transformer carcasses after they were drained.

The Dihydro test results were given to MDNR's inspector Spitzley at her June inspection of CIW's facilities. Tr. 370. No investigation was made to confirm the validity of the testing procedures that were used or the results that were obtained. Complainant appears to know little about the Dihydro test that it relies upon and sponsors as CTE 25. On cross-examination concerning Dihydro's testing EPA's witness Bonner testified as follows:

> Tr. 502
>
> Q. Now, Ms. Spitzley [the MDNR inspector] you recall from her testimony, because I believe you were in the courtroom, said she could not get samples from the six transformers when she went to the site. Remember that testimony?

A. Yes.

Q. Do you have any idea how these samples, shown by Exhibit 25 [the Dihydro test results] were obtained, when Ms. Spitzley said she could not even get any?

A. I could make some guesses.

Q. I don't want you to do that. I'm asking if you know how these samples were obtained?

A. No.

Tr. 510

Q. Do you know what the sampling protocol that was in existence at the time the samples were taken?

A. By those who collected the samples, no.

Q. You don't even know who collected the samples, do you?

A. Not offhand.

Q. Were you provided any backup analytical data for these samples?

A. I don't know.

Q. Have you seen any?

A. I can't recall any.

Q. Were you provided with any Aroclors noted on the report or anywhere else?

A. I can't recall.

Q. There's none showing on the report, are there?

A. On this report, no.

Ms. Spitzley, the only other witness sponsored by EPA, could also shed little light on the Dihydro tests which form the sole foundation for EPA's charges. On cross-examination Ms. Spitzley professed the same lack of knowledge with CIW's test as did Bonner.

Tr. 112

Q. Now, concerning this sampling event that's at least represented by this report, the sampling date of May 22, 1989, do you know how the samples were taken?

A. No, I do not.

Q. You did not participate in that in any way, did you?

A. No, I did not.

Q. Do you have any information about the sampling protocol that was followed?

A. No, I do not.

Q. Do you know if a sampling protocol was followed?

A. No, I do not.

Q. Are you aware of any backup analytical data for this report, Exhibit # 25?

A. No, I do not.

Q. And on this report there's no aroclor noted, is that right?

A. That's correct.

The Complainant made no attempt to reconcile Dihydro's test results with the results of MDNR's two tests which showed no regulated levels of PCBs. The EPA never adequately explained why it chose to rely on Dihydro's test, a private test commissioned and paid for by CIW (Tr. 369) about which it knew virtually nothing, rather than the two tests run by the MDNR. This is particularly troubling because it was at the EPA's request that the MDNR performed the second of its two tests in June of 1989. Tr. 352. It was also the EPA that relied on MDNR's first test in January 1989, to advise Schrott about the transformers on his property. Tr. 347-50 (Bonace's March 20, 1989 letter).

On their face, the MDNR's test results support a finding that the origin of the PCB contamination of CIW's facilities was the Niagara transformer. These results contain more detail as to the identification of the PCBs through a molecule known as an Aroclor. Tr. 556-558.

The MDNR inspection in January, 1989 indicated non-regulated levels of Aroclor 1260 PCBs in the soils beneath all three Westinghouse transformers and Standard transformer # R20552.

MDNR No. 1, attachment. MDNR's second inspection in June, 1989 indicated regulated levels of Aroclor 1254 PCBs both in the soil beneath the Niagara transformer and from the residue within it. It also revealed non-regulated levels of both Aroclor 1254 and 1260 PCBs in the soil beneath Westinghouse # 6542893 and # 6542891. MDNR No. 2. Dihydro's test results do not indicate specific Aroclors, and provide no evidentiary support either way. MDNR's inspection of the CIW facility, where the improper disposal occurred, revealed regulated levels of only Aroclor 1254 PCBs. MDNR No. 3.

Two possibilities may serve to explain this anomaly. Either the two Westinghouse transformers contained Aroclor 1254 PCBs, or the soil beneath them became contaminated with the fluid from the Niagara transformer.

As to the former, there is no evidence to show that the Westinghouse transformers contained regulated levels of Aroclor 1254. To the contrary, the evidence suggests that the PCBs in these transformers were below the regulatory threshold. The record shows that soil samples taken from beneath the two Westinghouse transformers at issue contained unregulated levels of Aroclor 1254 before and after their draining. MDNR Nos. 1 and 2. EPA fails to rebut the Aroclor tracing results by argument or evidence.

The possibility of cross-contamination appears likely. The record indicates that the Niagara transformer was moved on various occasions. It was initially located "outside the Cedar Street side of the building," CTE No. 6, was moved to the "fence along Orange Street," MDNR No. 1 at pp. 2-3, and sometime between January and June 1989, was moved again "near the remaining six transformers." MDNR No. 2 at p.4. Given the extreme concentrations contained in the Niagara transformer, the slight concentrations of Aroclor 1254 PCBs found in the soil beneath Westinghouse # 6542893 & # 6542891, (MDNR No. 2, attachment) and the movement of the Niagara transformer towards the other two, I find that cross-contamination may serve to explain Dihydro's test results. Finally, EPA's witness Spitzley admitted on cross-examination that the cause of the contamination at the CIW facility, may have been the Niagara transformer (Tr. 136):

> Q. So it would appear from looking at Exhibit # 2 MDNR, Exhibit # 3 MDNR, that the cause of the contamination at the CIW facility was the Niagara transformer, isn't that right?
>
> A. That's correct.
>
> Q. And that's shown because the same consistent marking of 1254 appears with the Niagara transformer, correct?

A. That's correct.

Q. And similarly, it would appear that the other six transformers did not cause the contamination at the CIW facility because the 1260 aroclor with which they're associated is all at a no detect level, isn't that correct? Looking at this exhibit here, MDNR #3.

A. 1260 was not detected, that is correct.

Q. Now, again, this report marked as Government Exhibit 25, doesn't assist us in that determination at all because there's no aroclor markings on this report, isn't that right?

A. That's correct.

In the final analysis it is EPA's burden to establish, by a preponderance of the evidence, the existence of regulated levels of PCBs in the two Westinghouse transformers. Its evidence falls far short of meeting this standard. The EPA knows little, if anything, about the Dihydro test upon which it relies. Who took the samples from the carcasses that had been drained? How were the samples taken? Did the sampling conform to accepted sampling protocol? What measures were taken to insure the samples were not contaminated? What measures were taken to insure that cross-contamination had not occurred between the Niagara transformer and the Westinghouse transformers? What were the testing techniques used by Dihydro? Do those techniques follow proper testing protocol? These are just some of the questions left unanswered by the EPA. In these circumstances, I find that the Complainant has not met its burden of establishing that Westinghouse transformers # 6542893 & # 6542891 were regulated under TSCA.[5]

Although many of these same questions may be raised as to the MDNR's testing procedures, it is not the Respondents' obligation to support and defend the MDNR tests. On their face, the MDNR tests show that neither Westinghouse transformer had regulated levels of PCBs in the soil beneath them. To sustain its position, EPA must defend the Dihydro tests upon which it relies. It is also EPA's responsibility to reconcile or

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[5] Wausau relies on the testimony of its expert, George Sheperd to challenge the validity of Dihydro's sampling methods. However, much of that testimony was based solely on depositions that were rejected and not admitted into evidence. Accordingly, that testimony has no evidentiary value.

otherwise explain the MDNR and Dihydro apparent divergent test results. It failed to do either.

B. Storage-Related Violations

The surviving portions of the counts against Group 8 as they pertain to the improper storage of the Niagara transformer, are as follows:

Count I	40 C.F.R. § 761.65(a)	Failure to dispose of 1 PCB transformer within one year of its placement in storage.
Count II	40 C.F.R. § 761.65(b)(1)	Failure to store 1 PCB transformer in a facility with a roof, walls, impervious floor and 6" continuous curbing.
Count III	40 C.F.R. § 761.65(c)(8)	Failure to mark 1 PCB transformer with the date it was placed into storage.
Count IV	40 C.F.R. § 761.40(a)(2)	Failure to mark 1 PCB transformer with an "M_L" stamp.
Count V	40 C.F.R. § 761.40(a)(10)	Failure to mark a PCB storage area with an "M_L" stamp.

Under the Toxic Substance Control Act (TSCA), 15 U.S.C. § 26.14, while Congress required PCBs and their uses to be regulated, it did not specifically define the community to be regulated. Complainant's position is that the PCB Rules apply to all persons who manufacture, process, distribute in commerce, use or dispose of PCBs or PCB Items. Group 8 argues that because it did not own the Niagara transformer it cannot be liable under TSCA for its improper storage.

40 C.F.R. Part 761 is divided into separate subsections each dealing with various aspects of PCB handling.[6] Relying on these PCB handling activities (as opposed to other criteria such as ownership), the Environmental Appeals Board gave a rough guideline as to who is affected by TSCA in In the Matter of Nello Santacroce & Dominic Fanelli D/B/A Gilroy Associates, TSCA Appeal

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6 Subpart A - General; Subpart B - Manufacturing, Processing, Distribution in Commerce and Use of PCBs and PCB Items; Subpart C - Marking of PCBs and PCB Items; Subpart D - Storage and Disposal; Subpart E - Exemptions; Subpart G - PCB Spill Clean Up Policy; Subpart J - General Records and Reports; Subpart K - PCB Waste Disposal Records and Reports.

No. 92-6 (Mar. 25, 1993). The Board reasoned that "the regulations on use apply to those who use PCBs; the regulations on storage apply to those who store PCBs; and the regulations on disposal apply to those who dispose of PCBs." Gilroy, at 10 (citing *In re* City of Detroit, TSCA Appeal No. 89-5 (Feb. 6, 1991) at 15).

Liability under TSCA is not established merely on the basis of ownership. As explained in Gilroy, liability for storage violations attaches under TSCA not because of legal ownership of a regulated item *per se*, but because of a party's role as a storer of PCBs.[7]

Group 8 argues that it merely owned the land on which the transformers were stored. According to Group 8 that is not a basis for liability. Group 8 cites In the Matter of Suburban Station, Docket No. TSCA-III-40 (September 4, 1984). There Southeastern Pennsylvania Transportation Authority (SEPTA) was held not liable for PCB storage violations despite owning and operating commuter rail services at a railroad yard where PCBs were stored. The City of Philadelphia was constructing a commuter project and renovating at the yard pursuant to a federal grant when it discovered PCB contamination. The City contracted for the clean up of PCBs and made decisions with respect to how the clean up was carried out. The City was held liable for improper storage. SEPTA merely licensed the City to renovate and to perform construction at the site. It received copies of the City's correspondence with regard to the clean up. That correspondence did not indicate that the City had consulted or discussed the matters with SEPTA. Suburban Station, slip. op. at 14-15. Group 8, in contrast, contracted with Wyandotte Grand for the storage of equipment, which included the transformers. Accordingly, Suburban Station provides no support for Group 8's claim.

The issue here is whether Group 8 became a storer of PCB Items by agreeing to allow Wyandotte Grand's "equipment" to be stored on Group 8's land. I find that it did. Group 8 contracted with Wyandotte Grand to store the Niagara transformer on Group 8's property as per the land contract rider agreement. WTE No. 1. As a result of that agreement, Group 8 assumed the duties of a storer. One cannot contractually allow a party to store regulated substances on its property and then turn a blind-eye to the conditions and manner of storage. Moreover, as previously observed, pursuant to the rider to its contract with Grand Machinery, Group 8 assumed control over the transformers

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7 This decision does not and need not reach the issue as to whether the equipment left on the premises by Wyandotte Grand became the property of Group 8 via abandonment or other legal transfer.

sometime after December 31, 1987, because they had not been removed by Grand Machinery.

C. Disposal Violations

Group 8 and Wausau are alleged to have violated 40 C.F.R. § 761.60 by failing to dispose of PCBs with a concentration greater than 50 ppm in an incinerator which complies with 40 C.F.R. § 761.70. According to the Complainant, the Respondents' participation in the removal and transport of the liquids from the seven transformers on Group 8's property to CIW's oil recycling facility, constitutes "disposal" as that term is defined in 40 C.F.R. § 761.3. "Disposal" is defined to include "actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs or PCB Items."

1. It Was the Other Guy

Both Wausau and Group 8 are cited by the EPA for the parts they allegedly played in the disposal of regulated PCBs. Wausau contends that, by virtue of its role as insurer, it cannot be held liable under TSCA. Wausau says that, as an insurer, it was not acting on its own behalf, but rather the behalf of Group 8, the insured. Wausau takes considerable pains to emphasize that it was merely performing the traditional role of an insurance company--that is to indemnify the insured for a loss. According to Wausau, it always acted with the consent of Group 8. Group 8, on the other hand, argues that Wausau made the decisions regarding disposal and that Group 8 should be absolved of liability.

2. Group 8's Conduct

Schrott, President of Group 8, approved the initial testing of the three Standard transformers, CTE No. 3. He received correspondence from EPA (CTE No. 14), the City of Wyandotte (WTE Nos. 2, 4, 6, 9, 10, 12, & 13), the Mayor of Wyandotte (WTE No. 14), and sent letters to and received letters from Sclafani Trucking (CTE No. 24, WTE Nos. 5, 7, 15, & 21), making reference to the transformers and/or hazardous condition of the property. Suffice to say, the record is replete with references to Group 8's knowledge of the potential hazardous nature of the conditions of his property including the existence of the transformers. Sometime prior to disposal Schrott hired Globe Midwest, a Public Adjusting company, to further represent Group 8's interests. CTE No. 22. It is clear that Schrott was not dependent upon Wausau to ensure that Group 8's interests were being pursued.

Schrott contracted with Sclafani who, in turn, subcontracted K&D to drain and remove the fluids from six (6) transformers. WTE Nos. 5, 7, 11 & 15, CTE No. 1, par. 6-15. Some fifteen months prior to K&D's drainage and removal of the transformer

fluids, Wausau's adjuster sent Schrott a letter. The letter, dated November 30, 1987, made clear that Wausau had not hired Sclafani and that (consistent with its insurance policy) it was only agreeing to make payment. WTE No. 29.

K&D's drainage and transport of the PCB-contaminated Niagara transformer fluids (along with the fluids from the other six transformers) to a recycling facility (CTE Nos. 8, 9, & 12) constitute improper disposal. Because of Group 8's involvement in the drainage and removal of the Niagara transformer's fluids, it is accountable and responsible for their safe and proper disposal. Certainly where electrical transformers are concerned, there is a reasonable expectation that PCBs might be present. Accordingly, those who authorize and approve the disposal of them are held to constructive knowledge of the requirements of TSCA and EPA's regulations thereunder.

Similar to its argument related to the storage violations, Group 8 argues that it did not own the Niagara transformer and therefore cannot be held liable for any PCB violations. Group 8 cites In the Matter of Mexico Feed & Seed Company, et al., Docket Nos. TSCA-VII-84-T-312 and TSCA-VII-84-T-323 (October 25, 1985). In that case, charges of improper disposal of PCBs against J. F. Covington, a lessor, were dismissed when the lessee's underground tanks of waste oil leaked PCBs into the surrounding soil. In the words of Judge Jones, "[TSCA] does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor and therefore, [there] is no logical or legal basis for holding respondent . . . responsible for violations committed by the lessee under the theory of vicarious liability." Mexico Feed & Seed, Slip Op. at 25.

Respondent also cites a similar case, In the Matter of George J. Huth, et al., Docket No. TSCA-V-C-196 (June 2, 1986). There Judge Nissen dismissed charges of improper disposal as against the record owner of the property, Joyce Nichols, where lessee's storage tanks leaked PCBs into the surrounding soil. The resultant violations occurred and were discovered by the EPA in the course of an investigation before she acquired title to the property.

In both cases property owners, not causing or contributing to a disposal violation, were not liable under TSCA purely by virtue of their ownership status.

However, the facts here are significantly different from both Mexico Feed & Seed and George J. Huth. Both cited cases involved the passive seepage of PCBs from underground storage tanks into adjacent soil. The property owners did not actively dispose of PCBs or contract for their disposal. Here Schrott contracted with K&D and Sclafani for the drainage and removal of transformers, and unlike J. F. Covington and Joyce Nichols,

actively participated in the disposal of regulated items. Group 8 "took actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs or PCB items", as disposal is defined in the regulations. As a result, Group 8 became a disposer of PCBs.

3. Wausau's Conduct

The nature of Wausau's participation in the disposal process will now be examined.

The evidence shows that under its insurance contract with Group 8, Wausau agreed only to pay or guarantee payment for debris removal of fire damaged property. Tr. 650-655, WTE Nos. 26 and 29. The insurance contract was Wausau's promise to pay for losses covered by the contract. Insurance did not shift responsibility from Group 8 to Wausau to remove and to dispose of the transformers. Nor did it obligate Wausau to pay for transformers that were not fire damaged. There is no evidence to show that the Niagara transformer was fire damaged. Accordingly, Wausau would have been under no obligation to pay for its removal. Tr. 648-650.

This question remains: did Wausau take independent action (separate and apart from its insurance contract with Group 8) to contract for, or otherwise cause, the removal and disposal of the Niagara transformer?

The record fails to show such an agreement or conduct. The drainage and removal of the Niagara transformer was performed by K&D (WTE No.23) pursuant to an agreement it had reached with Sclafani. CTE No.1 par. 11-15, CTE No. 7, WTE No. 15. There is no evidence that Wausau authorized or caused the drainage and removal of the Niagara transformer.

Complainant contends that Wausau's "participation in the removal and transport of the liquids from the seven transformers on the Property, to CIW's oil recycling facility, constitutes 'actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs or PCB Items,' under 40 C.F.R. ¶ 761.3." As evidence of Wausau's involvement in the disposal process, Complainant refers to Wausau's request for cost estimates from K&D for the disposal work and its agreement to pay K&D a reasonable dollar amount for the disposal.

Wausau's actions are precisely those to be expected from an insurer attempting to minimize the cost to itself and ultimately to its policyholders. Wausau's request for cost estimates and its agreement to pay a reasonable amount were consistent with its role as an insurer. Wausau did not became a disposer of PCBs by virtue of fulfilling the traditional role of an insurer to reimburse for policy losses.

Complainant refers to a September 1, 1987 letter in which Wausau said that it had made arrangements "on your [Group 8] behalf" to test and remove three fire damaged transformers from the premises. According to the Complainant, this constitutes evidence of Wausau's participation in the disposal.

Complainant's argument fails for several reasons. Wausau did not take unilateral action to test and remove these three transformers. On September 1, 1987 Wausau sought and received the following written authorization from Schrott: "This will authorize Wausau Insurance Companies to have Marine Pollution Control remove the transformer, transport and dispose of the three (3) P.C.B.'s. Wausau is further authorized to make payment directly to Marine Pollution Control." CTE No. 3. This authorization from Schrott placed Wausau in the role of an agent acting solely on behalf of its insured, Group 8.

Marine Pollution Control's testing showed that the transformers tested did not contain regulated levels of PCBs. The Niagara transformer containing the regulated levels of PCBs was not subject to Wausau's September 1 letter. The Niagara transformer was not discovered apparently until sometime later (CTE No. 6) and, in any event, was not tested by MPC.

Further, Wausau did not become involved in the disposal of the Niagara transformer because it responded to the Bonace letter sent to Schrott. The Bonace letter to Schrott dated March 20, 1989 (a copy of which was sent to Wausau) describes the seven transformers on Group 8's property and advises Schrott of the EPA regulations related to PCBs. CTE No. 14. Wausau's April 10, 1989 letter to Bonace merely relayed what it believed to be the then current status of the removal. CTE No. 19. Wausau did not assume, dictate, or control any aspect of the testing and removal process by virtue of its letter.

Nor could Wausau become liable as a disposer of PCBs merely because it had knowledge of Bonace's letter to Schrott. Wausau was under no duty to take any specific action based on Bonace's letter. Bonace's letter requested no specific response other than "[p]lease keep me informed of any actions you [Schrott] take involving these transformers."

In sum, under its contract with Group 8, Wausau was obligated to pay only for the removal of fire damaged property covered under the contract. And, independent of that contract, Wausau took no action affecting the draining and removal of the Niagara transformer. Wausau's actions were consistent with its duty to indemnify and consistent with the insured's authorization.

D. Criteria for Setting Penalty Levels

Failing to comply with a regulation promulgated under section 6 of TSCA, 15 U.S.C. § 2605, is a prohibited act under section 15 of TSCA, 15 U.S.C. § 2614, for which a civil penalty may be assessed under Section 16 of TSCA, 15 U.S.C. § 2615. The maximum civil penalty is $ 25,000 for each violation. In determining the amount of a civil penalty, the statute says that the nature, circumstances, extent, and gravity of the violation should be taken into account. With respect to the violator, the EPA must also consider its ability to pay, the effect on its ability to continue to do business, any history of prior such violations, the degree of culpability, and other matters as justice may require. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

The EPA's Rules of Practice, 40 C.F.R. § 22.27(b), state that the judge "must consider any civil penalty guidelines issued under the Act." However, they do not require the judge to calculate the penalty according to the strictures and parameters set forth in a penalty policy. To "consider" penalty guidelines does not mean to adopt them and to adhere to their terms, deviating from them only upon a special showing. Indeed, if that were the case, penalty policies would be viewed by the courts as tantamount to agency rules which must meet the notice and comment requirements of the Administrative Procedure Act ("APA"). 5 U.S.C. Sec. 553 (b)(3)(A). Such penalty guidelines could not be applied because the public was never given notice and the opportunity to comment and express their views as to what they may perceive to be the fairest and most equitable approach to setting penalty levels.

In U.S. Telephone Ass'n v. Federal Communications Commission, 28 F.3d 1232 (D.C. Cir. 1994) the court set aside a penalty schedule of the FCC for noncompliance with the APA notice and comment procedure. The FCC's penalty schedule established base forfeiture amounts for each type of violation calculated as a percentage of the statutory maximum. It also provided for adjustments to the base amounts depending on various mitigating or aggravating factors. The adjustment factors mirrored those set forth in Section 503(b) of the Communications Act of 1934 which instructs the FCC to "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history

of prior offenses, ability to pay, and such other matters as justice may require."[8]

The FCC argued that the penalty schedule was merely a policy statement and not a rule. The distinction is a critical one. If the penalty schedule served as a statement of agency policy, the policy could be adopted without notice and comment from the affected public. If the penalty schedule served as a rule, then it could not be applied unless the public had an opportunity to express its views via the notice and comment procedure required by the APA.

The FCC claimed that it retained discretion to depart from the standards of the policy statement in specific applications and that, therefore, it was not a binding rule. The Court noted that the FCC, "mindful of this precedent [ie., cases citing the APA notice and comment requirement for the adoption of substantive rules] labeled the standards as a policy statement and reiterated 12 times [in the policy statement] that it retained discretion to depart from the standards in specific applications."

The court disagreed with the FCC's labeling and looked to the reality of what had been happening. It held that the penalty schedule was not a policy statement because the FCC had consistently applied it as though it were a rule. The language of the court in characterizing the "policy statement" is noteworthy. It is repeated here.

> The difficulty we see in the Commission's position is that the appendix affixed to the short "policy statement" sets forth a detailed schedule of penalties applicable to specific infractions as well as the appropriate adjustments for particular situations. It is rather hard to imagine an agency wishing to publish such an exhaustive framework for sanctions if it did not intend to use that framework to cabin its discretion. Indeed, no agency to our knowledge has ever claimed that such a schedule of fines was a policy statement. It simply does not fit the paradigm of a policy statement, namely, an indication of an

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[8] Note the striking similarity between TSCA and the Communications statute with respect to the factors to be considered in setting penalty levels. The only difference between the two statutes is that TSCA includes one additional factor not found in the FCC statute--the effect of the penalty on the violator's ability to do business.

> agency's current position on a particular regulatory issue.

It follows then from the teachings of the court in U.S. Telephone Ass'n. and the cases cited therein, that the PCB penalty policy, if viewed as a policy statement, serves merely as "an indication of an agency's current position on a particular regulatory issue." If the agency chooses to rely on that policy in setting a penalty, it must, through its evidence, support the findings, assumptions and determinations on which that policy rests. In terms of evidentiary value, no presumption of validity attaches to an agency policy statement. For "[w]hen the agency applies the policy [statement] in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." (emphasis added). Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d. 33, 38 (D.C. Cir. 1974).

Of course, if viewed as a rule, the PCB penalty policy would fail the APA notice and comment requirement and, like a policy statement, it would have no binding evidentiary effect. As the D.C. Circuit observed in Pacific Gas, 506 F.2d. 38,

> [a]n administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. (footnote omitted).

This decision does not address whether the PCB penalty policy is being used by the agency as a rule. There is no need to do so for purposes of this decision. Whether the PCB penalty policy is viewed as an invalid rule (because it fails to meet the APA notice and comment requirements) or as a policy statement, the consequences of either for evidentiary purposes are the same--the determination of the proper penalty level must rest on the evidence presented. For purposes of this decision, however, it is assumed that the PCB penalty policy is a policy statement.

E. The Evidence Related To Penalty Levels

That the EPA witness relied exclusively on the penalty policy in arriving at his recommended penalty level is clear. On direct examination the following exchanges between EPA's counsel and his witness occurred:

Tr. 353

Q. In the course of preparing these complaints, did you have an occasion to calculate a penalty for both Respondent Group Eight and Wausau ?

A. Yes, I did.

Q. And did you consult any guidance or assistance of any internal EPA document with regard to calculating that penalty ?

A. Yes, I used the Polychlorinated Biphenyls Penalty Policy of April 9, 1990.

Tr. 354

Q. What is the significance of this document [penalty policy] to the work you have been doing in the PCB unit ?

A. This is the document I would use for developing penalties for PCB complaints.

When asked by counsel to explain how he arrived at the penalty level in the complaint, the witness merely recounted how he applied the gravity-based matrix, and other criteria set forth in the twenty-page policy statement. Tr.354-373.

At this point it may be helpful for an understanding of the discussion which follows to see the gravity-based matrix as it appears in the PCB policy statement. It is shown below.

GRAVITY BASED PENALTY MATRIX

Circumstances (probability of damages)	Extent of Potential Damage		
	A - Major	B - Significant	C - Minor
High Range			
Level 1	$25,000	$17,000	$5,000
Level 2	20,000	13,000	3,000
Medium Range			
Level 3	15,000	10,000	1,500
Level 4	10,000	6,000	1,000
Low Range			
Level 5	5,000	3,000	500
Level 6	2,000	1,300	200

To appreciate fully the detail, and comprehensive nature of PCB penalty policy, it is reproduced as Attachment A to this decision.

According to the PCB penalty policy, the gravity-based matrix is intended to address the nature, extent, and circumstances of the violations--three of the factors identified in TSCA. However, the evidentiary support and rationale for many of the findings and conclusions made in the policy statement with respect to the factors making up the matrix are missing from this

record. Recall that, if the government intends to apply a policy (as contrasted with a policy adopted and imbedded in a rule) the government must support that policy just as if the policy never existed. Pacific Gas & Electric, supra. The EPA failed to do so in this case.

For example, with regard to the disposal violation, the EPA witness applied the 1990 penalty policy as if it were a rule. No support was given for the policy itself. Nor were the facts and circumstances underlying the formulation of the policy shown to be applicable to this case. The following testimony was presented by EPA to support the gravity-based penalty applicable to Group 8 for the improper disposal violation:

> Tr. 355-356
>
> Q. And could you tell us how you did that [assess a penalty for improper disposal] using the Penalty Policy?
>
> A. Okay. The first thing to do is to develop the Gravity Based Penalty using the penalty matrix and extent and circumstances. The circumstances which are found on page 10 and 11 describe major disposal as a level 1 violation. Extent, which involves the amount of material in a particular violation for disposal violations is found on Page 6 and 7. Since the situation with Wausau involved greater than 25 gallons, quite a bit more than 25 gallons of PCB fluid, that violation is of major extent. When you refer to the matrix on Page 9 you see that major extent, level 1 is a $25,000 penalty.
>
> * * * *
>
> JUDGE LOTIS: Level 1 relates to -- I see. You viewed this as a major disposal.
>
> THE WITNESS: Yes.
>
> JUDGE LOTIS: That was because why?
>
> THE WITNESS: All PCB violations are considered to be the most serious at level 1 and there is really no alternative for disposal. There is a minor disposal in which a PCB article has a small leak on the surface.
>
> JUDGE LOTIS: This was a level 1 for what reason?
>
> THE WITNESS: Because PCB oil was taken out of a transformer and shipped for disposal to a facility that was not designed to handle PCB disposal.

Tr. 363-364

Q. With regard to that violation [improper disposal assessed against Group 8], was your calculation of the Gravity Base component of the penalty the same as you testified to in Wausau?

A. Yes, it is.

According to the PCB penalty policy, "the Agency has structured the extent portion of the penalty policy to approximate the costs of disposal and cleanup and to remove any economic incentives to violate the rules. The violator will not only pay a penalty for violations, the violator will also pay any additional costs necessary to come into compliance." CTE No. 20, p.7.

While the EPA witness relied on the extent portion of the matrix, he made no attempt to support the stated rationale of the policy quoted above. No evidence has been presented as to the approximate costs associated with disposal and cleanup which would give rise to the indicated penalty levels shown in the matrix. No evidence has been presented to support the division of the penalty levels based on the three categories in the policy statement (Major, Significant, and Minor). No costs or other evidence has been presented to explain and support the penalties shown in the matrix associated with each of these categories. No evidence has been presented to show that economic incentives to violate the rules vary in accordance with these three categories. No evidence has been presented to show that the three extent levels chosen have any relationship to the removal of economic incentives to violate the rules. Nor has it been shown how the extent portion of the matrix relates to the violator "pay[ing] any additional costs necessary to come into compliance."

The second portion of the PCB penalty policy matrix is referred to as the "circumstance level". There are 6 circumstance levels and, in combination with the 3 extent levels, they provide for a total of 18 different penalty amounts. According to the PCB penalty policy, the circumstance level "reflects its [a violation's] probability of causing harm to the public." CTE No. 20, p.9.

The circumstance levels in the matrix fare no better than the extent levels in terms of their evidentiary support. There is no evidence to show how the six circumstance levels reflect a violation's probability of causing harm to the public. Further, there is no support for the 18 penalty levels associated with the combination of circumstance and extent levels of the matrix.

The EPA witness never justified or explained the rationale of the policy which establishes a matrix-based penalty then

considers adjustments to that penalty after reviewing the other statutory criteria. This creates an unexplained dichotomy among the statutory factors in setting penalties. The extent and circumstances of the violation carry a matrix-based penalty, but the other statutory factors are only considered by way of adjustments to that penalty. On its face, and in its application, this may appear to skew or given greater weight to three statutory criteria--nature, extent and circumstances--and lesser value and consideration to the other statutory criteria. This is not to suggest that rationale may not exist for such treatment. I find only that such rationale is missing from this record.

The EPA witness also failed to relate how the particular facts in this case fit the underlying rationale of the policy statement. For example, the witness merely recited the policy statement in concluding that "major disposal" is a "level 1," or highest penalty category. Because the penalty policy says that all PCB disposal violations are considered the most serious, "level 1," or "level 3" for minor surface leaks, ergo, according to the EPA witness, they are so. No explanation is given as to why there should only be a first and third circumstance level for disposal violations. The witness did not specify the facts which compel this particular disposal violation to be in the highest penalty level with regard to the circumstances factor. The testimony of the EPA witness amounted to filling in the blanks of the PCB penalty matrix--a penalty formulation with no evidentiary support.

After a gravity-based penalty level is set by reference to the matrix, the next step according to the PCB penalty policy is to determine whether there should be any adjustments to the gravity-based penalty based on consideration of the other factors mentioned in TSCA--culpability, history of prior such violations, ability to pay and to continue in business, and other matters as justice may require.

The EPA witness found no grounds for making any adjustments to the matrix-derived penalty. As with the matrix, the witness once again confined himself to viewing the entire matter of adjustments in the manner dictated by the policy statement. And, once again, no evidentiary support is provided to justify the standards and principles imbedded in that policy. See Attachment A, pages 15-20, for the complete policy statement assessment of these non-matrixed factors and how they should be applied. Unfortunately, there is no evidentiary foundation which would compel their use in the precise manner prescribed.

For example, the PCB penalty policy describes various levels of adjustments to the gravity-derived penalty to take account of the other statutory criteria as shown below:

culpability--25% up or down,
history of prior violations--25%, 50%, and 100% up,
other factors as justice may require--described by the policy as (1) attitude--maximum 15% adjustment up or down (2) voluntary disclosure--25% and a possible additional 15% for a total of 40% down, and (3) economic benefit of non-compliance--up to the $25,000 statutory limitation.

Because the witness decided to make no adjustments to the matrix-based penalty after considering these other statutory factors, the derivation of these adjustment percentages, their propriety, and their lack of evidentiary roots need not be addressed.

In summary, the EPA witness applied the PCB penalty policy but provided no evidentiary support for the underpinnings of the matrix-based penalty on which he relies. This is not to suggest that the PCB penalty policy could not be defended. But, here the witness did not approach his proffered evidence "as if the policy never existed." Rather, the policy was the witness' evidence.

It is not for the decisionmaker to supply the explanation and rationale in defense of the PCB penalty policy. To do so would be to disregard rights guaranteed by the APA to persons in their dealings with the federal government. In adjudicative proceedings such as these, agency action must be supported by "reliable, probative, and substantial evidence" (Sec. 556 (d)). That evidence cannot be supplied by the agency itself in rendering its decision.[9] It must be found in the record. Further, a party's right "to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts" (id.) is effectively denied if the PCB penalty policy justification is found in the decision but not in the record.

In these circumstances the penalty assessed must rest on the evidence presented in light of the statutory criteria and without reference to the penalty policy.

EPA's task to present evidence in individual cases supporting the basis of its penalty policies would be formidable.

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9 A commonly acknowledged fact or scientific or technical fact that is within an agency's expertise may be subject to official notice, which is similar to judicial notice in federal court. Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991), rehearing denied, 954 F.2d 723. See also EPA's Consolidated Rules 40 C.F.R. § 22.22(f). But, an explanation and rationale for 24 pages of PCB penalty policy appearing for the first time in an EPA decision hardly fits the limited exception referred to in Rivera-Cruz and EPA Rule 22.22(f).

Approximately 1000 administrative penalty proceedings are pending. Considering its limited resources and the need to expedite cases, the EPA may choose the rulemaking alternative.

Rulemaking has advantages which may commend its use. It would allow the affected public to comment and to participate in the formulation of EPA's approach to penalties. The EPA may benefit from the collective input of the commenting public in designing an approach to penalty assessments perhaps more flexible than its present matrix-based formulary approach while still remaining faithful to the purposes of the statutes.

F. Findings of Liability and Penalties Associated with Storage Violations

There are certain matters common to all of the storage violations. I will consider those first.

Counts I through V all involve the same quantity of PCBs, namely the 236 gallons that was in the Niagara transformer. There was only one PCB transformer involved, which was located on a demolition site. The record does not show that anyone entered onto the site except representatives of the respondents, demolition workers, pollution control personnel, and employees of EPA, the MDNR and the City of Wyandotte. They were aware that industrial or hazardous wastes existed on the site, and would presumably take some precautions.[10] No evidence has been presented of extensive soil contamination or contamination of groundwater or surrounding property. Group 8 had no history of TSCA violations. It has not shown that it lacks ability to pay the proposed penalty. Nor has it shown that it would not be able to continue in business.

Other matters relevant to the penalty criteria listed in the statute and which are not common to all of the storage violations are considered below.

1. Count I

Under the rider provision number 5 of the Land Contract, Wyandotte Grand had "a reasonable time" to remove the Niagara transformer after December 31, 1987. If not removed, Group 8 "shall not object to the abandonment of any property contained in the building...[and] Group 8 shall have the right to scrap or otherwise remove said assets...." WTE No. 1.

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10 Hazardous industrial wastes, other than PCBs, existed at the Group 8 site and were also removed by K&D. They included waste oil from press pits and liquid from a plating tank. CTE 7, 9, 10; WTE 18, 20, 21, 22, 23.

The time between December 31, 1987, and the date the transformer was drained and removed is approximately a year and a half. Therefore, Group 8 is liable for failure to dispose of a PCB transformer within one year of its placement in storage, in violation of 40 C.F.R. § 761.65(a).

EPA proposed a penalty of $6,000, but did not mitigate the proposed penalty in consideration of Group 8's culpability. After hearing all of the evidence in this case, I am persuaded that some reduction should be made to account for Schrott's and Group 8's lack of knowledge with regard to the storage of the Niagara transformer. Schrott does not appear to have known that a PCB transformer existed on the site until he was contacted by Bonace in March 1989. Tr. 168; 347-349; CTE No. 14, 23. PCB tests taken on the transformers on site prior to that time showed non-regulated levels of PCBs. WTE No. 7.

Furthermore, the record shows that confusion and unusual circumstances existed with regard to who was in control of the transformers. Group 8's business had nothing to do with PCB transformers. When Group 8 first acquired the site, the transformers were not in its possession or control. Thereafter, Wausau, the insurance company which represented the previous owners' interests, made arrangements for the testing and removal of the three transformers known to exist on the site. CTE No. 2. Schrott was apparently confused as to who was in control of the transformers. Schrott testified that Aidenbaum told him to "stay out of it" and that, "These transformers don't have anything to do with you. I have already taken care of it. It's done." Tr. 170, 174, 177. Nevertheless, Schrott authorized the removal of three transformers from the site. CTE 3.

Moreover, some delays in progress of demolition and removal of wastes at the site occurred which were not due to Group 8's conduct. CTE No. 15. Therefore, Group 8 lacked control over the length of time the Niagara transformer was stored at the site. Under all these circumstances, an appropriate penalty for Group 8's failure to dispose of the PCB transformer within a year is $3000.

2. Counts II, IV and V

It is undisputed that the Niagara transformer was not stored in a facility with a roof, walls, impervious floor, and 6" continuous curbing. Consequently, Group 8 is liable for violating 40 C.F.R. § 761.65(b)(1), as alleged in Count II.

There is also no question that the Niagara transformer and the area in which it was stored were not marked with an M_L stamp. Group 8's failure to do so are violations of 40 C.F.R. §§

761.40(a)(2) and 761.40(a)(10). Accordingly, Group 8 is liable as alleged in Counts IV and V of the complaint.

With regard to Count II, it is noted that a large amount of oil with a high concentration of PCBs would be released directly into the soil if an accident had occurred. The evidence shows that there were visible oil stains around the Niagara transformer. CTE No. 27. As to culpability with regard to this violation, no mitigation is warranted. Group 8 should have known that a PCB transformer was being stored improperly, at least from the time when Bonace warned Schrott about the existence of the PCB transformer in March 1989, until it was removed.

The marking violations, Counts IV and V, created a hazardous condition for anyone who entered onto the site, where a PCB transformer and the area around it did not post any warning that a highly toxic chemical was present. Yet, it appears that the previous owner of the site also had not complied with the marking requirements. Group 8 apparently did not know that a PCB transformer existed on site until March 1989, and then it was expected to be removed from the site forthwith.

A significant penalty will be imposed for each of these three violations, but the mitigating facts (including those previously referred to as being common to all the storage violations) warrant penalties no greater than half of the maximum amount allowed under the statute. A penalty of $12,500 is therefore assessed for each of Counts II, IV and V.

3. Count III

Group 8 does not contest the allegation that the Niagara transformer was not marked with the date it was placed into storage. Accordingly, Group 8 is liable for violating 40 C.F.R. § 761.65(c)(8).

The nature of this violation, when viewed in context of the ongoing demolition and cleanup of the site and plans to remove the transformers, is not serious enough to warrant an extremely high penalty.

Moreover, Group 8 was not aware of the PCB transformer until after it was placed into storage for disposal. However, when Schrott was specifically notified of the existence of the PCB transformer and the storage and marking regulations, 40 C.F.R. Part 761, in Bonace's letter of March 20, 1989 (CTE No. 14), the marking requirement could have been complied with at that time. The transformer could have been marked with the date of January 1, 1988, which is the date that the transformer would be deemed abandoned by a third party purchaser, according to the rider to the Land Contract, and subject to removal. WTE No. 1.

Considering these facts, and the matters common to all of the storage violations in this proceeding, an appropriate penalty for Count III is $5,000.

G. Penalty for the Disposal Violation

As previously discussed, Group 8 is liable for its actions resulting in the improper disposal of PCBs, a violation of 40 C.F.R. § 761.60. Therefore, a civil penalty shall be assessed under section 16(a) of TSCA.

Complainant proposes assessing the maximum penalty allowable under that section, $25,000, for this violation. However, as with the penalties proposed for the other counts, EPA does not provide an adequate factual basis for this penalty. As noted in the discussion above, EPA did not provide evidentiary support for the circumstances of this violation. Nor did it support its policy of assessing the highest circumstance level for all disposal violations except surface leaks. Particularly with regard to the disposal violation, EPA has not met its burden of demonstrating that the proposed penalty is appropriate, as required by 40 C.F.R. § 22.24 ("The complainant has the burden of going forward with and of proving . . . that the proposed penalty . . . is appropriate").

As with the other counts, the Complainant applied the PCB penalty guidelines by rote as if they were an agency rule. And, as previously explained, no evidentiary support was provided to support those policy guidelines.

In light of all the circumstances present here, the maximum penalty permissible under TSCA is overly punitive. The proper role of penalties should be to act as a deterrent and not to punish for the sake of punishment. In re Pacific Refining Company, EPCRA Appeal No. 94-1 (Final Decision, December 6, 1994, Judge McCallum, dissenting) slip op. at 21. Here, EPA's proposed maximum penalty does not reflect the culpability of Group 8 and the unusual, unique and, indeed, confusing events surrounding the violation as revealed in the record.

For example, a law firm representing Wausau arranged for Marine Pollution Control to dispose of the three transformers known to exist at the site in September 1987, although Schrott authorized such disposal. CTE Nos. 2 & 3. There is evidence that Sclafani turned to Wausau rather than Group 8 for decision-making with regard to the transformers. CTE Nos. 6; Affidavit of Alan Sclafani ¶¶ 5, 6, 7, 8, 11, 12. Aidenbaum met with Sclafani and K&D on February 8, 1989 and April 5, 1989. Schrott testified that he was not invited to those meetings, that he did not know what K&D was hired to do, and that Aidenbaum asked him "to stay out of it." CTE No. 1, Tr. 176-177. By virtue of such statements made by its adjuster, Aidenbaum, a climate was created

whereby Schrott may have assumed, albeit mistakenly so, that Wausau was responsible for handling and disposing of the transformers at the site.

Correspondence to Schrott from Sclafani and K&D referred to testing of hazardous materials by K&D prior to removal. WTE Nos. 15, 18. Aidenbaum reported to the EPA that K&D was an acceptable contractor by the DNR, and that samples were being taken by K&D. CTE No. 19. Under these circumstances there was little to suggest to Group 8 that K&D qualifications were suspect and should be investigated.

Moreover, K&D was merely the subcontractor of Sclafani, so Group 8 was two steps removed from the actual improper disposal of PCBs. Group 8 lacked sophistication with respect to PCBs and their handling and disposal. Transformers were not a part of its business. The transformers were left on the property by a former owner who was supposed to have them removed, according to a written agreement. In these circumstances, Group 8's knowledge of or control over the possibility that oil from a PCB transformer would be disposed of improperly was less likely.

Considering the evidence in the record relevant to the factors listed in Section 16(a) of TSCA to determine the amount of civil penalty, an appropriate penalty for the disposal violation is $12,500.

V. <u>IT IS ORDERED</u> that:

1. A civil penalty in the amount of $58,000 be assessed against Respondent, Group 8 Technology, Inc..

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

   EPA - Region V
   (Regional Hearing Clerk)
   77 West Jackson Boulevard
   Chicago, IL 60604-3590

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 the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b)(c)(e).

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

Jon G. Lotis
Chief Administrative Law Judge

Dated: September 29, 1995
Washington, D.C.

ATTACHMENT A

POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

United States Environmental Protection Agency

April 9, 1990

POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

PCB PENALTY POLICY

INTRODUCTION

Background

In 1980, the Environmental Protection Agency (EPA) issued interim guidance for the determination of penalties for violations of the Polychlorinated Biphenyls (PCB) rules. That interim policy was published in the Federal Register on September 10, 1980, with a statement that the Agency would review its experience with the policy before issuing a final penalty policy.

Since developing the 1980 interim guidance, numerous PCB regulations have been promulgated, including but not limited to regulations for use in closed and controlled waste manufacturing processes, various use authorizations, incidental generation, regulations to address fires involving PCB electrical equipment, and the notification and manifesting of PCB waste activities. Amendments, interpretations and revisions to the interim guidance have also been developed. This revised penalty policy is intended to incorporate the enforcement-related provisions of all PCB rules and policy revisions to date, including the Notification and Manifesting Rule, and all future applicable rules.

The purpose of this PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations. This policy is immediately applicable and will be used to calculate penalties in all administrative actions concerning PCBs issued after the date of this policy, regardless of the date of the violation.

This policy implements a system for determining penalties in administrative civil actions brought pursuant to Section 16 of the Toxic Substances Control Act (TSCA). Penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- the "nature" of the violation,
- the "extent" of potential or actual environmental harm from a given violation, and
- the "circumstances" of the violation.

These factors are incorporated in a matrix which allows determination of the appropriate proposed GBP.

Once the GBP has been determined, upward or downward adjustments to the proposed penalty amount may be made in consideration of these other factors, either before issuance of a civil administrative complaint, or during settlement negotiations:

- o culpability,
- o history of such violations,
- o ability to pay,
- o ability to continue in business, and
- o other matters as justice may require, such as environmentally beneficial expenditures.

TSCA is a strict liability statute, and there is no requirement that a violator's conduct be willful or knowing for it to be found in violation of TSCA or its implementing regulations. The existence of a violation is to be determined without consideration of the particular culpability of a violator; this factor is to be considered only as an adjustment to the GBP. The initial GBP may increase, decrease, or remain the same when considering the violator's culpability as an adjustment to the proposed penalty.

Penalties

The PCB regulations include a ban on the manufacture, processing, and distribution in commerce of PCBs, as well as requirements for proper use, storage, disposal, recordkeeping, and marking. EPA has several enforcement options available for dealing with PCB Rule violations. For minor violations, EPA's Regional offices will have the discretion to issue a Notice of Noncompliance. In many cases, EPA will issue civil administrative complaints, using this policy to calculate the appropriate civil penalty. In addition, Section 17 (a) of TSCA, 15 U.S.C. Sec. 2616(a), authorizes Federal district courts to issue injunctive relief to restrain violations of TSCA or the PCB rules. Finally, in some instances EPA may seek criminal sanctions, in accordance with Section 16(b) of TSCA, 15 U.S.C. Sec. 2615(b), for knowing or willful violations of TSCA or the PCB rules.

EXPLANATION OF THE POLICY

Chemical Control Nature of the Regulations

The PCB regulations reduce the chance that additional PCBs will enter the environment, and limit the harm to health and the environment when entry does occur. Therefore, these regulations are chemical control regulations, as defined by the TSCA Civil Penalty Policy. The definitions of the "extent" and "circumstances" categories below reflect the chemical control nature of these violations.

Extent

The greater the quantity of PCBs there is in a violation, the greater the degree and likelihood of harm from the conduct or activity violating the PCB rules. Therefore, the amount of PCB involved in a specific violation will determine whether the Major, Significant, or Minor extent category is used in assessing a penalty based on the GBP Matrix. Since the concentration of the PCBs involved in a violation will also affect the potential for harm, this factor must also be considered in determining which extent category is applicable.

1. Amount of Material Involved

For the purpose of this policy, violations of the PCB rules fall into two broad categories: non-disposal violations and disposal violations. Non-disposal violations include, but are not limited to, unauthorized use, failure to mark the access to PCB Transformers, failure to keep records, failure to provide adequate curbing at PCB storage areas, manufacturing PCBs without an exemption, and similar actions where the violator possesses PCBs that have not escaped into the environment. Disposal violations occur when PCBs are disposed of in a manner not permitted by the PCB regulations. Examples of such violations include, but are not limited to, the immediate release of PCBs from leaks or spills, or delayed release, such as when non-leaking PCB Equipment is improperly disposed of in a non-TSCA landfill. Because the degree of harm or potential harm is generally different for disposal and non-disposal violations, separate categories of extent are assigned, as described below.

a. Extent for Non-Disposal Violations

The regulations pertaining to non-disposal requirements such as use, storage, and manifesting of PCBs and PCB Items, reduce the potential for harm, help the Agency determine compliance, and track the movement of PCBs from use to disposal. For example, a major use of PCBs is in electrical transformers. The conditions for using transformers, such as inspection, keeping records of inspection, marking, and notification of fire response personnel and adjacent building owners, reduce the likelihood of improper disposal, minimize the potential harm from fires, and help the Agency determine a user's compliance. Similarly, the conditions for storing PCB liquids, PCB Articles such as transformers and capacitors, and PCB-contaminated soil, concrete, and debris help the Agency determine compliance and reduce the likelihood that PCB will escape into the environment. Compliance with the notification and manifesting requirements also serves these ends.

The only acceptable alternative to compliance with the non-disposal requirements of the PCB rules is lawful disposal. Accordingly, a fair penalty for violating the non-disposal requirements can be based on the cost of proper disposal of PCBs or PCB Items. This should provide adequate incentive to comply with the non-disposal requirements.

In cases involving non-disposal violations, the Agency will calculate the penalty using weight, or if unavailable, other units of measure that most closely fit the penalty scheme. For example, if PCB liquid is imported or manufactured, the penalty will be based on the weight of liquid. If PCBs unlawfully appear in a product, the penalty will be based on the weight of the

product, as adjusted for concentration. If weight is unavailable, other units may be used, such as the quantity of 55-gallon drums that the total production of the product would fill.

The following table identifies the quantities of PCBs that define the Minor, Significant, and Major extent categories. The Agency has set the upper limit of the Minor extent category at 1,200 kilograms (220 gallons) of PCB liquid, because it is approximately the amount contained in the average transformer. It should be noted that the primary unit of measure is weight, adjusted for concentration. Alternate measures include gallons for liquid, and 55-gallon drums for solids.

Minor Extent, Non-Disposal Violations

Unit	Amount Less Than
kilograms	1,200
gallons	220
Large Capacitors	50
55-gallon drums (solids)	15
Drained Transformers	5

Significant Extent, Non-Disposal Violations

Unit	Amount
kilograms	1,200 to 6,000
gallons	220 to 1,100
Large Capacitors	50 to 250
55-gallon drums (solids)	15 to 75
Drained Transformers	5 to 25

- **Major Extent, Non-Disposal Violations**

Unit	Amount More Than
kilograms	6,000
gallons	1,100
Large Capacitors	250
55-gallon drums (solids)	75
Drained Transformers	25

b. Extent for Disposal Violations

Improper disposal of PCB generally presents a greater risk of harm to human health and the environment than non-disposal violations. Also, it is usually more expensive on a per-gallon basis to clean an area contaminated by PCB, and to dispose of the contaminated materials, than it is to incinerate the liquid alone. Penalties for such disposal violations are based on the approximate cost of cleanup and disposal of the materials contaminated by PCB.

For example, fresh spills onto non-porous surfaces such as metal or tile can often be decontaminated by rinsing and washing. The cost of such decontamination, including the need to take wipe samples for verification, is the basis of the Minor disposal category for non-porous surfaces. Spills onto porous surfaces, such as concrete, often result in contamination to some depth, depending on many factors such as porosity, the rate of spillage, and the type of PCB liquid. For the purpose of determining extent, the Agency arrived at a disposal cost estimate based on a nominal depth of contamination of one-eighth inch of concrete, concrete being the most common porous surface involved. The cost of removing the concrete, taking wipe samples for verification, disposing of the contaminated material, and encapsulating the area is the basis of the Minor extent category for porous surfaces.

For soil, the Agency bases its cost estimate on a spill onto relatively level ground with a nominal depth of removal of 10 inches to obtain sufficient decontamination. This should cover spills on a range of soils from clays to sands. The square footage assigned for spills onto soil reflects the approximate cost of removal and disposal.

Where the contamination is measured in cubic feet, the extent quantity is based on the cost of incinerating contaminated soil and concrete. The Agency has used available data and experience suggesting that a gallon of PCB liquid could contaminate about 2 drums of soil or concrete, which have a known average cost of disposal. While actual costs may in some cases be less, particularly if the material is less dense than soil or is suitable for landfilling, the costs assumed in this policy are generally applicable and should provide adequate incentive for compliance.

There are, of course, possible disposal violations that do not correlate exactly to the quantities listed below, such as landfilling or surface disposal of PCB Large Capacitors or PCB Transformers. In such cases, it is presumed that improper disposal will ultimately result in leakage and environmental contamination. In the event that equipment containing PCBs is improperly disposed, the violator should be penalized on the basis of the amount of PCB contained in the equipment, regardless of whether the PCB was leaking at the time of discovery. Penalties for improper disposal of drained PCB Transformers can be reasonably assessed using the approximate cubic footage of the transformer. Penalties for improper abandonment of PCB-contaminated pipeline could be assessed by calculating the square footage of the interior surface. This should provide adequate incentive to comply with the disposal requirements for PCB and PCB-containing equipment and materials.

It should be noted that when known, the source kilograms or gallons will be used to determine the extent for disposal violations. Square and cubic footage, which are based on gallons as described in the preceding paragraphs, are to be used when the kilograms or gallons are unknown.

Minor Extent, Disposal Violations

Unit	Amount Less Than
kilograms	25
gallons	5
sq. ft.	625 (non-porous surface) 60 (soil) 20 (porous surface)
cu. ft.	60 (all materials)

Significant Extent, Disposal Violations

Unit	Amount
kilograms	25 to 125
gallons	5 to 25
sq. ft.	625 to 3,125 (non-porous surface) 60 to 300 (soil) 20 to 100 (porous surface)
cu. ft.	60 to 300 (all materials)

Major Extent, Disposal Violations

Unit	Amount More Than
kilograms	125
gallons	25
sq. ft.	3,125 (non-porous surface) 300 (soil) 100 (porous surface)
cu. ft.	300 (all materials)

For both disposal and non-disposal violations, the Agency has structured the extent portion of the penalty policy to approximate the costs of disposal and cleanup and to remove any economic incentives to violate the rules. The violator will not only pay a penalty for violations, the violator will also pay any additional costs necessary to come into compliance.

The Agency notes that the cost-based extent figures for disposal and non-disposal violations exclude some costs such as transporting response personnel and contaminated materials, and do not account for potential variations in spill scenarios that cause greater or lesser actual costs of cleanup. Also, actual costs may increase or decrease during the time this policy is in effect. However, the objective of the policy is not to estimate actual costs for a specific case, but to provide a sufficient and reasonable basis for calculating penalties that will encourage compliance with the PCB rules. The Agency believes that the quantities selected for each extent category accomplish this objective.

2. Converting Volume to Weight

For converting volume to weight, the Agency assumes the average density of PCB liquid to be approximately 12 lbs. per gallon. If the actual density of the fluid involved in a violation is known, then the actual density should be used.

3. Exceptions to Extent Category

Spills into Water. Spills into water create a substantial risk of human exposure, either directly from the water, or through the food chain. Also, since it is virtually impossible to remove all PCBs from surface or ground water once a spill occurs, environmental harm is assured. Therefore, where any improper disposal results in the contamination of surface or ground water, or any conduits leading to same, such as drains, ditches, and wells, the extent will always be considered Major, regardless of the amount and concentration.

Spills into Food and Feed. Spills into food and feed, if not quickly detected, will result in human exposure. Even if the problem is detected before humans (or animals) eat the contaminated food, it is likely that the cost of finding and destroying the contaminated products will be high. Where any improper disposal results in the contamination of food or feed, such as spills onto vegetable gardens, pastures, or food storage areas, the extent is always Major.

4. Concentration Adjustments

The Agency recognizes that the concentration of PCBs is relevant to the potential or actual harm from violating the PCB regulations. Obviously, a spill of high concentration PCBs puts more contaminants into the environment than a spill of low concentration PCBs. Nonetheless, because PCBs can be toxic at very low concentrations, a spill of a large amount of low concentration PCB material could cause widespread harm. Thus, a system that would reduce the total weight of PCB material involved in a spill in direct proportion to the concentration of that material would severely undermine the regulatory scheme, and result in penalties that may not reflect the harm or deter improper disposal.

To determine the extent of probable damage for a particular violation, the total amount of PCB material involved in an incident should be reduced by the following percentages.

Concentration (ppm)	Reduction of Amount (%)
1) 0 - 49	50
2) 50 - 499	30
3) 500 or above	None

5. Exceptions to Concentration Adjustment Calculation

The concentration adjustment factors are not used in the following circumstances:

Dispersed Use. The use of waste oil that contains detectable concentrations of PCBs for heat recovery in non-conforming boilers, or as a sealant, coating, or dust control agent, which is prohibited by 40 C.F.R. Section 761.20(d), is one situation where the concentration reduction would not apply. The Agency chose to prohibit these uses whenever any detectable level of PCBs are present because any such use of PCBs is likely to result in widespread environmental and health damage. Thus, allowing any reduction of the amount of PCBs used by virtue of low concentration would be contrary to the regulatory scheme.

Failure to Test. The concentration reduction does not apply where the violation is the failure to test liquid when required, such as the contents of a heat transfer system that has contained PCBs (40 C.F.R. Section 761.30(1)(1)) In such cases, the risk is that the fluid may contain a high concentration of PCB and that this material will continue to be used. These persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration.

Alternative Measure for Solids. The concentration adjustment shall not be used when the PCB material is measured by a measure for solids other than weight. These alternative measures, which include square footage, cubic footage, capacitors, drums, or drained transformers, were chosen to establish economic incentives for proper disposal. The cost of disposal of such materials is not dependent on their concentration of PCBs. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly.

Dilution. The concentration adjustment does not apply where the PCBs have been diluted in violation of the PCB rules.

Circumstances

The other variable for determining a penalty from the GBP Matrix is the circumstance of the violation, which reflects its probability of causing harm to human health or the environment. The circumstances are ranked high, medium, and low. Each of these ranges in turn has two different levels, for a total of six levels of circumstance, as shown on the GBP Matrix below. All violations of the PCB regulations fall into one of the circumstance categories identified in this policy.

GRAVITY BASED PENALTY MATRIX

Circumstances (probability of damages)	Extent of Potential Damage		
	A - Major	B-Significant	C - Minor
High Range			
Level 1	$25,000	$17,000	$ 5,000
Level 2	20,000	13,000	3,000
Medium Range			
Level 3	15,000	10,000	1,500
Level 4	10,000	6,000	1,000
Low Range			
Level 5	5,000	3,000	500
Level 6	2,000	1,300	200

The different types of PCB violations within each of the circumstances (or degree of probability of damages) on the GBP Matrix are discussed below. Note that the adjectives "major, significant, and minor" as used in the circumstance levels are not related to those terms in the GBP Matrix.

High Range

Level one:

1) Major disposal. This includes any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations, including unauthorized export. Failure to comply with the conditions of a TSCA approval for PCB disposal or alternative treatment, other than recordkeeping, also constitutes a level 1 violation.

2) Manufacturing PCBs without an exemption or in violation of any condition of an exemption, including unauthorized import.

3) Unauthorized incidental generation of PCBs.

4) Major manifesting. Failure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors.

5) Refusal to permit entry of an EPA inspector, in violation of TSCA Section 15. The proposed penalty will be Major, level 1 when the Agency has reason to believe that PCBs existed at the time of refusal and that PCB violations could have disappeared between the time of refusal and inspection. A level 1, Significant or Minor extent may be appropriate if mitigating information is subsequently provided showing that the amount of PCBs present at the time of refusal warrants the reduction of extent. The penalty for refusal will only be applied when the statutory requirements of Section 11 of TSCA, 15 U.S.C. Section 2610 have been met, which are:

   a) presentation of proper credentials;
   b) written notice to owner, operator, or agent in charge showing scope of inspection;
   c) inspection attempted to be commenced and completed with reasonable promptness;
   d) inspection attempted to be conducted at reasonable times (daylight business hours), with reasonable limits, and in a reasonable manner.

Level two:

1) Processing PCBs without an exemption or in violation of any condition of an exemption.

2) Distribution in commerce of PCBs without an exemption or in violation of any condition of an exemption.

3) Major use. Unauthorized use of PCBs or using PCBs in violation of any condition of authorization. Examples of such violations include, but are not limited to:

   a. Failure to register PCB Transformers with the local fire jurisdiction or the building

owners within the required time.

b. Storage of combustible organic solvents or other combustible liquids in or near the transformer area.

c. Failure to report a fire-related incident.

d. Failure to inspect PCB Transformers or to keep records of such inspections.

4) Major marking. A major marking violation is a situation where there is no indication to someone unfamiliar with PCBs that PCBs are present, such as failure to label the access to a PCB Transformer or failure to label the transformer.

5) Major storage. A major storage violation means a situation where a significant portion of spilled material would not be contained in the event of an accident, or where PCBs could be exposed to precipitation or overland flow of water. Examples of such situations are storage in areas with: no roof; no curbing, curbing that is pervious to PCBs, or curbing that does not meet the volume or height requirements; non-continuous or no flooring, unsealed floor drains, or flooring that is pervious to PCBs.

Medium Range

Level three:

1) Major recordkeeping. No records, or major recordkeeping violations, at disposal facilities, including incinerators, high efficiency or industrial boilers, landfills and other approved alternate disposal facilities. No records, or major recordkeeping violations, by transporters or commercial storers. Major recordkeeping violations would include failure to keep records or substantial discrepancies in records on disposal process operating parameters, landfill disposal locations, or disposal quantities or dates, or incomplete records on the receipt, inventory, or disposition of waste by commercial storers.

2) Minor disposal. An example of a minor disposal violation is a leak in which a PCB Article has PCBs on any portion of its external surface, but the PCBs did not run off the surface.

3) Significant manifesting. This includes failure to prepare or submit an annual report or an exception report.

Level four:

1) Minor use violations. These include the following:

a. Failure to provide complete transformer registration, but the fire department or adjacent building owners are aware of the transformer locations.

b. Failure to remove combustible materials other than organic solvents or other combustible liquids.

c. Failure to conduct all required visual inspections, but where a significant percentage was conducted.

d. Incomplete records of PCB Transformer inspections such as omitting the inspector's name, or omitting the specific location of the leak on the transformer.

2) Minor storage. Examples of these violations are small cracks in an otherwise impervious floor or curbing, and failure to conduct all required visual inspections, but where a significant percentage was conducted. Storage of PCBs in excess of 1 year, including failure to date PCB Items placed in storage.

3) Significant recordkeeping. No records, or major recordkeeping violations, by persons who manufacture, process, or use PCBs, except commercial storers, transporters, and disposers. Major recordkeeping violations would include the absence of data on PCB Transformers, or the absence of records on any transfer of PCBs from the site.

Low Range

Level five:

1) Minor marking violations. These are situations in which some requirements of the rule have not been followed, but there is sufficient indication that PCBs are present and the PCB Items can be identified.

Level six:

1) Minor recordkeeping and manifesting. Examples of such violations are the occasional omission of minor data due to clerical error, or partially missing records where the person responsible can substantiate the correct records upon request.

2) Failure to label small capacitors, fluorescent light ballasts, or large low voltage capacitors with a "no PCBs" label as required by 40 C.F.R. Section 761.40(g).

PENALTY ASSESSMENT FOR MULTIPLE VIOLATIONS

When to Assess Multiple Violations

A penalty shall be assessed for each violation of the regulations, and for each separate location where violations occur. A violation of the regulations is defined as no compliance with any requirement of 40 C.F.R. Part 761, regardless of category or subpart. A separate location is any area where the violation presents a distinct risk to human health and the environment.

In short, penalties will be assessed as follows:

- o One count for each violation of the regulations, regardless of categories. For example, if a PCB Transformer is not marked, and the means of access is not marked, then there are two violations and two counts.

- o One count for each location that presents a separate and distinct risk. PCBs are in separate locations when they are in separate buildings or separate rooms. In large rooms, or outside, they are separate when they are at least 100 feet from any other PCBs. The EPA inspector shall determine whether a particular location is separate based on the above, and may consider other factors relevant to the risk associated with the violation and location.

Limits on Multiple Violations

Some acts of compliance are completely dependent on other acts, such as keeping records of transformer inspections. Thus, the lack of inspections will normally result in the lack of records of inspection. In such cases, only one violation should be charged, namely, failure to inspect.

Other acts of compliance affect a number of separate locations within a facility. For example, it takes a single act of compliance to register PCB Transformers with the fire department or adjacent building owners, regardless of the number of transformer locations. Thus, failure to register with the fire department is a single violative act per facility, as is the failure to register with an adjacent building owner.

Further, the Agency has determined that limits are appropriate for assessing penalties for violations of some periodic requirements, as follows:

- o A separate count shall be charged for each quarterly inspection or record of inspection missed, with the limitation of assessing up to 4 missed inspections or $250,000, whichever is less.

- o A separate count shall be charged for each annual document or annual inspection missed during the prior 3 years, and one count for all documents or inspections missed from years 4 and beyond.

ASSESSING PENALTIES FOR CONTINUING OR REPEAT VIOLATIONS

Under Section 16 of TSCA, the Agency has the discretion to assess civil penalties up to $25,000 per violation, with each day that a violation continues constituting a separate violation. Assessment of such per-day penalties is reserved for repeated acts, or acts that present considerable risk or harm, such as where someone improperly disposes of PCBs on more than one occasion, or when someone illegally imports PCBs on separate occasions. Each day of such violations is significant and warrants a separate penalty.

On the other hand, under the per-day principle, someone who stores an intact, 240-gallon PCB Transformer improperly for 30 days could be liable for $390,000, an excessive penalty in the absence of aggravating factors such as a history of violations or a risky storage environment. In such a case, the Agency would usually not assess penalties for each day of violation.

The Agency calculates penalties for continuing and repeat violations two different ways, either by combining the total quantity of PCBs involved during the period of the violation, or by multiplying the GBP by the number of days the violation occurred. To calculate the penalty using the former method, the Agency has developed the "proportional penalty calculation," whereby the penalty is proportional to the amount of material involved multiplied by the duration of the violation, subject to the limitation of $25,000 per day per violation. This method is usually reserved for continuing violations, and is explained in detail in appendix B. Using the latter method, the penalties are often larger than when proportional penalties are used. The Agency reserves the discretion to assess penalties using the latter method for repeated acts of violation, or when the circumstances, taking into consideration the seriousness of the violation or the severity of potential or actual environmental harm, warrant such penalties.

When the proportional penalty calculation yields more than $25,000 per day for any one violation, the penalty should be $25,000 per day for that violation, the maximum allowed by statute. The proportional penalty should be used in the same way as any other penalty derived from the GBP Matrix, i.e., the per-day penalty should be entered on line 1 of the TSCA Civil Penalty Assessment Worksheet (see appendix C). Regions should use the proportional penalty calculation as opposed to one day assessments for those violations where it can be documented that violations are continuing, such as failure to clean up after improper disposal of PCB. For violations that have not been corrected by the time of reinspection, EPA may either use the proportional penalty calculation or assess penalties on a per-day basis. Note that the proportional penalty method does not always result in smaller penalties than the per-day method. For large amounts of PCBs, it may be higher than a straight per-day multiplication of the GBP.

ADJUSTING THE GRAVITY BASED PENALTY

The GBP reflects the seriousness of the violation's threat to health and the environment. TSCA also requires the Agency to consider certain other factors in assessing the violator's conduct. These are culpability, history of similar violations, and ability to pay and to continue in business. In addition, the Act authorizes the Agency to use discretion in considering "other factors as justice may require." Under this last authorization, additional factors are considered and balanced: attitude; voluntary disclosure; the cost of the violation to the government; the economic benefits received by the violator due to his non-compliance; and the environmentally beneficial measures that a violator may perform in exchange for a reduction in penalty (see Settlement with Conditions). These factors are considered as follows.

Culpability

The two principal criteria for assessing culpability are (a) the violator's knowledge of the particular requirement and (b) the degree of the violator's control over the violative condition.

(a) The violator's knowledge. The lack of knowledge of a particular requirement does not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of the PCB rules. The test will be whether the violator knew or should have known of the relevant requirement or the possible dangers of his actions. As a general matter, any electric utility, and any company with PCBs, is deemed to have knowledge of all aspects of TSCA and the PCB regulations. Furthermore, a reduction in the penalty based on lack of knowledge can only occur when a reasonably prudent and responsible person would not have known that the conduct was dangerous or in violation of TSCA or the PCB regulations.

(b) Degree of control over the violation. The Agency expects PCBs to be handled prudently and that all reasonable measures will be taken to ensure compliance with the regulations. The Agency also expects that, when violations are discovered, the persons responsible for the facility or location will immediately take all necessary steps to come into compliance. Nevertheless, there may be situations where the violator is less than fully responsible for the violation's occurrence. For example, another person or company may have had some role in creating the violative condition and must therefore share the responsibility. Similarly, a discharge of PCBs into the environment can occur accidentally, even though the violator took prudent measures to avoid it. Such situations might warrant a reduction of penalties.

Three levels of culpability have been assigned for calculating penalties, as follows:

Level I:	The violation was willful. Adjust the GBP upward by 25 percent.
Level II:	The violator had (or should have had) knowledge or control. No adjustment to GBP.
Level III:	The violator lacked sufficient knowledge of the potential hazard created by his or another's conduct, and also lacked control over the situation to prevent occurrence of the violation. The violator's conduct was reasonably prudent and responsible. Adjust the GBP downward by 25 percent.

History of Prior Violations

The GBP Matrix is designed to apply to first offenders. Where a violator has demonstrated a history of "prior such" violations as stated in TSCA, the penalty will be adjusted upward to increase his motivation to comply. Also, repeat violators are penalized more severely because additional enforcement resources are spent on the same violator.

The Agency's policy is to consider only prior violations of TSCA or its rules, even though a violator could have a history of violations of other EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). Congress did not expressly state that it wanted the Agency to go beyond TSCA Section 15 prohibited acts in determining violation history.

The following considerations apply when evaluating a history of "prior such" violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in: a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; or the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint.

Violations litigated in the Federal courts, under the Act's imminent hazard (Section 7), specific enforcement and seizure (Section 17), and criminal (Section 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of noncompliance does not constitute a prior violation for the purposes of penalty assessment, since no opportunity has been given to contest the notice.

(b) To be considered a "prior such" violation, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining history. If one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation. In most cases of violations by wholly- or partly-owned subsidiaries, the history of the parent corporation shall apply to its subsidiaries, and the subsidiaries to the parent, particularly when the parent has a majority share of ownership. The exception would be where two companies are held by the same parent corporation. The companies may not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors.

(d) If the "prior such" violation is of a non-PCB-related TSCA provision or regulation, then the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the "prior such" violation is of any PCB-related TSCA provision or regulation, the penalty should be upwardly adjusted by 50 percent for the first repetition and 100 percent for the second repetition.

Ability to Continue in Business

Normally, EPA will not seek a civil penalty that exceeds the violator's ability to pay and, therefore, to continue in business. The agency will assume that the respondent has the ability

to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. The respondent will be notified in the civil complaint of its right under the statute to a consideration of its ability to continue in business. Any alleged violator can raise the issue of its ability to pay and to continue in business in its answer to the civil complaint, or during the course of settlement negotiations.

If an alleged violator raises the inability to pay as a defense in its answer, or in the course of settlement negotiations, it shall present sufficient documentation to permit the Agency to establish such inability. Appropriate documents will include the following, as the Agency may request, and will be presented in the form used by the respondent in its ordinary course of business.

1. Tax returns;
2. Balance sheets;
3. Income statements;
4. Statements of changes in financial position;
5. Statements of operations;
6. Retained earnings statements;
7. Loan applications, financing agreements, security agreements;
8. Annual and quarterly reports to shareholders and the SEC, including 10 K reports;
9. Business services reports, such as Compusat, Dun and Bradstreet, or Value Line.

Such records are to be provided to the Agency at the respondent's expense and must conform to generally recognized accounting procedures. The Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay.

OTHER FACTORS AS JUSTICE MAY REQUIRE

Attitude

In assessing the violator's attitude, the Agency will look at the following factors: whether the violator is making good faith efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any actions taken to minimize harm to the environment caused by the violation.

This adjustment applies equally to companies that voluntarily disclose violations and to those that do not. A company would generally qualify for a downward adjustment of a maximum of 15% if it immediately halts the violative activity and takes steps to rectify the situation. An upward adjustment of a maximum of 15% may be justified where company officials continue the violative activity after being notified to stop, do not act in good faith, hinder EPA's progress, cause increased government expenditures, or are otherwise uncooperative.

Voluntary Disclosure

The Agency encourages voluntary disclosure of PCB violations. To be eligible for a penalty reduction for voluntary disclosure, a firm must make the disclosure prior to being notified of a pending inspection. The disclosure cannot be one that is required by the PCB regulations or that is made after EPA has received information relating to the alleged violation.

Penalty amounts for violations of PCB regulations will be reduced when the violations are voluntarily disclosed by the company. This penalty reduction is separate from and in addition to the penalty reduction for culpability and attitude. For PCB violations, the penalty reductions for voluntary disclosure are as follows:

Voluntary disclosure:	25%
Immediate disclosure within 30 days of discovery AND takes all required steps:	15%
Total	40%

The penalty reduction of 15 percent may be given to a company which reports the potential violation to EPA within 30 days of having reason to believe that they may be in violation, and if the company takes all steps reasonably expected or requested by EPA to mitigate the violation. This includes timely submission of information necessary for EPA to assess the violation. Timely submission means within 30 days or a time period agreed upon by EPA and the company. This reduction can be in addition to penalty reductions for environmental expenditures above and beyond that required by the law. This reduction is only applicable to companies which have voluntarily disclosed the violation and may be taken in addition to other adjustments.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the civil complaint. The civil complaint should state the original penalty and the reduced penalty and the reason for the reduction.

Cost of the Violation to the Government

There may be occasions where it is necessary for the Agency to mitigate the effects of a violation, such as the cleanup of a dangerous spill where the violator will not take timely action or the violator is unknown at the time. An adjustment factor not specified in the statute, but which the Agency feels justice requires, is reimbursement to the government for funds expended t investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. Where the government deems it

necessary to undertake clean-up, the government could recover funds which it expended in an administrative proceeding under Section 16 of TSCA.

Economic Benefit of Noncompliance

The GBP is designed for deterrence and is effective where there is no overriding financial incentive to violate the rules. In some cases, the GBP may not be sufficient to deter in the face of strong economic incentives to violate. Where a violation involves significant economic benefit, the Agency will assess penalties that remove any benefit, subject to the statutory limitation of $25,000 per day. This will be in addition to the GBP and any relevant adjustment factors.

Economic benefits can be gained by avoiding an expenditure. Economic benefits can also be gained by delaying an expenditure, whereby the violator gains an economic benefit because the firm, or nonprofit entity, earns a return on the money that should have been used for compliance. An example of an avoided cost is a spill into water, which may be impossible to clean up. Delayed expenditures that could result in significant gains may include, but are not limited to: failure to replace PCB Transformers or to install enhanced electrical protection; leaving PCBs in storage for disposal longer than 1 year; failure to provide adequate facilities for storage; failure to make necessary improvements to disposal facilities; failure to decontaminate an area after a spill; and failure to decontaminate or replace PCB-contaminated equipment in unauthorized use.

In applying the economic benefit component, the Agency will use the most likely presumptions and the best information available to the case development team. For example, in a case where a firm has PCB-contaminated equipment that is not authorized for use, the Agency need not estimate the cost of decontaminating the equipment or the economic value of the equipment to the firm. Instead, the Agency may simply determine the cost of replacing the subject equipment by contacting the equipment manufacturer, and calculate the benefit of the delayed replacement cost.

Settlement With Conditions

The Agency may choose to adjust a civil penalty assessed for a violation of the PCB regulations in exchange for specific environmentally beneficial actions performed by the respondent. The settlement of a case under terms which commit the respondent to perform specified acts in exchange for reducing a portion of the penalty is a "Settlement with Conditions."

Appendix A Using the GBP Matrix to Find a PCB Penalty

In order to determine a penalty for a specific PCB violation, the following steps should be followed:

1) Determine the violation. If more than one violation is involved, repeat the calculation in steps 2 through 8 for each violation.

2) Find which level the violation fits on the circumstance axis of the GBP Matrix.

3) Calculate the total amount of PCBs involved in the violation. If there are several materials involved which fall into different concentration ranges, do a separate calculation for each concentration.

4) Apply the concentration adjustment. Note the exceptions to use of the concentration adjustment.

5) If different concentration ranges are present, add up the figures from step 4.

6) Determine which extent category (Major, Significant, or Minor) is applicable to the amount from step 5.

7) Use the level from step 2 and the extent from step 6 to locate the penalty on the GBP Matrix (e.g., Level 3, Significant is $10,000).

8) Enter the amount from step 7 on line 1 of the Civil Penalty Assessment worksheet attached to the TSCA Civil Penalty Policy. Use that worksheet to complete the calculation of the penalty accounting for factors such as culpability, history of violations, economic benefit of noncompliance, etc.

Example: An inspection of Company X reveals that the following items are all stored for disposal in a room with discontinuous curbing:

Two transformers
Three capacitors
One 800-gallon tank of PCB liquid

All three capacitors are PCB Large Capacitors with a volume of 5 gallons each. One transformer contains 300 gallons, and is tested at 700 ppm. The second transformer contains 500 gallons, and is an askarel unit and therefore contains over 500 ppm PCBs. It is leaking, and 70 square feet of concrete is contaminated. The 800-gallon tank is not leaking and the liquid is tested at 200 ppm. The density of the fluid in the 300-gallon transformer and the 800-gallon tank is found to be 15 pounds per gallon, and the density of the 500-gallon askarel unit is 12 pounds per gallon.

1) Determine the violations; these are disposal and storage. Because there are two violations, a calculation is needed for each.

Calculation for Disposal Violation

2) Find the "circumstances" level. This is level 1, for disposal.

3) Find the total amount involved. Since the leakage contaminated 70 square feet concrete, no calculation is required to find the extent. (Note: where the quantity of PCB is known, the extent will always be based on weight in kilograms.)

4) Make concentration adjustment. No adjustment for alternative measure for solids.

5) Not applicable because spill was from a single source.

6) Determine extent category; 70 square feet of concrete (porous surface) is Significant.

7) Find penalty from matrix; Level 1, Significant = $17,000

8) Enter $17,000 on line 1 of the worksheet.

Calculation for Non-Disposal (Storage) Violation

2) Find "circumstances" level. Major storage (discontinuous curbing) is level 2.

3) Find total amount involved;

(a) Over 500 ppm:

(i) At 12 lbs/gal: One 500-gallon transformer
3 capacitors x 5 gal. ea. = 15 gallons
500 + 15 = 515 gal.
515 gal. x 12 lbs./gal. = 6,180 lbs.

(ii) At 8.5 lbs/gal: One 300-gallon transformer
300 gal. x 8.5 lbs./gal. = 2,550 lbs.

Subtotal: 6,180 lbs. + 2,555 lbs. = 8,730 lbs.
8,730 lbs. x .45 lbs./kg = 3,929 kg

(b) Under 500 ppm (7.5 lbs./gal. only): One 800-gallon tank

Subtotal: 800 gal. x 8.5 lbs./gal. = 6,800 lbs.
6,800 lbs. x .45 lbs./kg = 3,060 kg

4) Make concentration adjustment.

(a) The transformers were both over 500 ppm, therefore there is no adjustment. Total remains at 3,929 kg.

(b) The tankage was 200 ppm, which is under 500 ppm, but more than 49. Therefore, the quantity is reduced 30% as follows:
3,060 kg x (1.0 - .30) = 2,142 kg

5) Add figures from step 4.

3,929 kg + 2,142 kg = 6,071 kg

6) Determine extent category; 6,071 kg = Major (non-disposal)

7) Find the penalty from the matrix; Level 2, Significant = $20,000

8) Add $20,000 to line 1 of the worksheet.

$17,000 (disposal) + $20,000 (storage) = $37,000.

Appendix B Calculating Proportional Penalties

The proportional penalty is used for continuing violations. It is calculated by multiplying the quantity of PCBs involved by the number of days of the violation. The sum of the PCBs times the duration is the basis for calculating the GBP. The proportional penalty is calculated in the following manner:

1) Multiply the amount of PCBs involved in the violation (reduced by the concentration adjustment) by the number of days the violation continued.

2) If the amount from step 1 is less than or equal to two times the Major extent category, use this amount to determine the extent category and obtain a penalty from the GBP Matrix. If the amount from step 1 is greater than two times the Major extent category, proceed to step 3.

3) Divide the total amount from step 1 by the Major extent category limit. Multiply the result by the dollar amount in the Major category. This yields the proportional penalty.

4) Divide the total penalty by the number of days involved. Enter this amount on line 1 of the TSCA Civil Penalty Assessment Worksheet.

Examples

(a) 5 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

1) 5 kg of askarel, no concentration adjustment.
5 kg x 30 days = 150 kg

2) 150 kg is less than two times Major extent (Major = 125 kg). Therefore, penalty is for 150 kg (Major, level 1) = $25,000.

3) Not applicable.

4) $25,000 divided by 30 days = $833.33 per day.

(b) 20 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

1) 20 kg of askarel, no concentration adjustment.
20 kg x 30 days = 600 kg

2) 600 kg is more than two times Major extent (125 kg). Therefore, go to step 3.

3) 600 kg divided by 125 kg = 4.8
4.8 x $25,000 (Major, level 1) = $120,000

4) $120,000 divided by 30 days = $4,000 per day.

Appendix C Civil Penalty Assessment Worksheet

Name of Respondent: _____
Address of Respondent: _____
_____
_____

(1) Complaint I.D. Number: _____
(2) Date Complaint Issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1. Gravity Based Penalty (GBP) from matrix: $____
2. Percent increase or decrease for culpability: _____%
3. Percent increase for violation history: _____%
4. Add lines 2 and 3: _____%
5. Multiply GBP by percentage total on line 4: $____
6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage): $____
7. Enter line 6 amount or $25,000, whichever is less: $____
8. Multiply line 7 by the number of days or violations: $____
9. Government clean-up costs, if any: $____
10. Economic gains from non-compliance, if appropriate: $____
11. Add lines 8 through 10: $____
12. Total of other adjustments as justice may require: $____
13. Add (or subtract) line 12 to (from) line 11: $____

Note: Line 13 should be the proposed penalty for a given violation. The procedure is repeated for each violation.