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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Niagara Transformer Corporation,	)	Docket No. II TSCA-PCB-81-0214
	)	
Respondent	)	

Toxic Substances Control Act - PCBs - Guidelines for the Assessment of Civil Penalties - Under all of the circumstances including Respondent's good faith and the probability of harm, PCB Penalty Policy (45 FR No. 177, September 10, 1980, at 59770, et seq.) was determined to be inapplicable and proposed penalty for violations of PCB rules calculated in accordance therewith was substantially reduced.

Appearance for Respondent:

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Initial Decision

This is a civil penalty proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). The proceeding was commenced by the issuance of a five-count complaint by the Director, Enforcement Division, EPA Region II, New York, New York, on August 7, 1981, charging Respondent, Niagara Transformer Corporation, with violations of the Act and regulations concerning the marking, handling and storage of polychlorinated biphenyls (PCBs).1/ A penalty totaling $50,000 was proposed to be assessed against Respondent. Respondent answered, admitting certain of the allegations and denying others and contesting the appropriateness of the penalty. A hearing on this matter was held in Buffalo, New York on May 10, 1983.

Based on the entire record including the briefs and proposed findings and conclusions of the parties, I find that the following facts are established:

1/ Section 2614 of the Act (15 U.S.C. 2614) provides in pertinent part:

> "It shall be unlawful for any person to - (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6; --."

PCB rules were issued under section 6(e) (15 U.S.C. 2605(e)).

Findings of Fact

1. Niagara Transformer Corporation (formerly Erie Electric Company) has been in the business of manufacturing and repairing PCB transformers since 1948 (Tr. 110-11). Manufacture of PCB transformers was discontinued in 1977 and repair of PCB transformers was discontinued in 1979. Respondent's business is apparently now chiefly the manufacture and repair of mineral oil transformers (Tr. 13).

2. Respondent's President is Mr. Fred Darby, who had no prior connection with the company, but assumed that position upon the death of his uncle in January 1979 (Tr. 154). Mr. Darby relied on Herman Gabel, Executive Vice President and General Manager, to keep him abreast of regulations and developments concerning the handling, storage and disposal of PCBs (Tr. 156).

3. Respondent maintains two facilities, offices and manufacturing or repair operations at 1747 Dale Road and a storage and repair facility at 1600 Seneca Street, Buffalo, New York (Tr. 15, 16).

4. On October 22, 1980, an inspection of Respondent's facilities was conducted by representatives of EPA, Dr. Arthur H. Gevirtz and Deborah Dalton (Tr. 13, 14). Dr. Gevirtz and Ms. Dalton met with Mr. Gabel, and

Mr. Darby. The visit was unannounced and officials of Respondent had no advance knowledge of the inspection (Tr. 41, 43, 112, 141).

5. Upon inquiry by the EPA representatives, Mr. Gabel produced some records purporting to be the annual document required by 40 CFR 761.45 (1980) for the period ending December 31, 1978, but was unable to locate the annual document for 1979 (Tr. 15). Mr. Gabel told the inspectors that he had the document for 1979, but could not locate it. He was informed in effect that it would be alright if the documents were mailed to them (EPA) (Tr. 46).

6. Dr. Gevirtz was shown and examined Respondent's inventory records relating to PCBs and Mr. Gabel furnished him a copy of each document he (Gevirtz) requested (Tr. 113-14). In Mr. Gabel's opinion, the data he had available was the information required to be kept in an annual document. He acknowledged, however, that he did not furnish Dr. Gevirtz a complete annual document at the time. Mr. Gabel testified that the data was maintained in handwritten form in a file drawer in his office and that each time there was a change [in the PCB inventory data] he was notified (Tr. 114-15). Respondent alleges that the inventory records included a detailed listing of the number of drums stored on a certain date, the number of gallons of liquid, the approximate parts per million and the calculated weight of PCB substance (Reply Brief at 4). The inventory record, however, (Respondent's Exh 22), which contains

known and assumed concentrations of PCBs (700,000 ppm in some drums and 2,600 ppm in other drums) and the weight of Askarel in kilograms per gallon together with total weights of PCBs in kilograms, is dated December 31, 1980, and consequently was not in existence at the time of the inspection. Mr. Gabel, however, prepared the inventory record (Respondent's Exh 22) from data in his files which included parts per million of PCBs (Tr. 119). The inventory record is based upon the assumption that each drum contained 54 gallons.

7. After a discussion of Respondent's activities and an examination of available records concerning PCBs, Dr. Gevirtz and Ms. Dalton, accompanied by Mr. Darby, inspected the manufacturing and storage area (Tr. 57). In an area aproximately 30 inches below the level of the main floor and measuring approximately 30 feet[2/] by 20 feet, referred to as the pit, well or loading dock area, was a 2,300-gallon tank, which the inspectors were informed was filled with pure Askarel (Tr. 18, 128, 145, 146; photo, Gov't Exh 4). Mr. Gabel testified, however, that the tank contained approximately 1500 gallons (Tr. 146). This tank, but not the area in which the tank was stored, contained the PCB mark required by 40 CFR 761.20 (1980). There were two other empty tanks[3/] and two 55-gallon drums[4/] bearing PCB labels in the well area. The PCB labels on the tanks were at an

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2/ This is an estimate by Dr. Gevirtz. Respondent asserts that the well is actually twice that long (Reply Brief at 1).

3/ Dr. Gevirtz remembered only one tank being in the well area (Tr. 64).

4/ Count I of the complaint dealing with the lack of a Spill Prevention and Countermeasures (SPCC) Plan was amended to delete reference to these drums (Tr. 6), apparently based on Respondent's representation that the drums were empty.

elevation above the level of the main floor. See photos taken by Mr. Darby immediately prior to the hearing (Respondent's Exhs 11 and 12), Mr. Gabel's testimony that the labels in the photos were in the same place on October 22, 1980 (Tr. 132), and Mr. Darby's testimony that the tanks looked the same when the photos were taken as they did on October 22, 1980 (Tr. 160-61). Other objects in the well area at the time of the inspection included at least one transformer, a steam jenny, a painting tray and pallets (Tr. 130, 146, 159-60, 168; photos, Gov't's Exhs 5, 6 and 6A). The well area contained tracks and a large door at the rear, allowing entry by railroad cars or trucks (photo, Gov't Exh 3).

8. In an area to the rear of the building at Dale Road were three mineral oil storage tanks having capacities of 3,000, 8,000 and 12,000 gallons (Tr. 15, 39; photo, Gov't Exh 7). The EPA inspectors were informed that the tanks contained new mineral oil. Because of this information, samples were not drawn from the tanks, as normally would have been done, if the tanks contained used mineral oil (Tr. 40). Mr. Gabel, however, testified that the purpose of the 3,000-gallon tank was to hold used transformer liquid (Tr. 150, 151). A note on the annual document for 1980 (Tab A, Respondent's Exh 1) states that they had received a test report showing 2,600 ppm PCBs in the 3,000-gallon mineral oil storage tank not previously known to be contaminated with PCBs.

9. Complainant has alleged and Respondent has admitted that the Dale Road facility and in particular the area where the 2,300-gallon tank of

Askarel was stored was not covered by a Spill Prevention Control and Countermeasure (SPCC) Plan as required by 40 CFR 761.42 (1980). This admission included the fact that the PCBs in the mentioned tank were stored for disposal. Mr. Gabel, however, testified that Respondent had available equipment such as absorbent materials, shovels, brooms, etc. and a number of personnel who were trained to clean-up drips, and spills resulting from hose separations, etc., so that everyone knew how to react to such events (Tr. 134).

10. Completing their inspection at Dale Road, Dr. Gevirtz and Ms. Dalton, accompanied by Mr. Darby, proceeded to Respondent's Seneca Street facility. They counted sixty two 55-gallon drums of PCBs (42 in one area and 20 in the other) stored for disposal in two separate areas (Tr. 22, 31, 32, 71). The drums were stacked two levels high, one drum on top of another (Tr. 70). PCB marks were visible on most of the drums (Tr. 23, 69, 72, photos, Govt. Exhs 8 and 9). Because of the manner in which the drums were stored, however, it was not possible to observe PCB marks on each drum. The areas where the drums were stored were not marked with the PCB mark (Tr. 32, 72). Although Count IV of the complaint alleges that the drums at Seneca Street were not marked with the PCB mark, the complaint was amended to refer to the area as unmarked rather than the drums (Tr. 11).

11. At the time of the inspection, Respondent was in the process of constructing metal trays in which pallets upon which the drums were stacked would be placed in order to comply with the diking or curbing requirements for storage of PCBs specified by 40 CFR 761.42 (1980)

(Tr. 81; memoranda, drawing, work and purchase orders, Tab B of Respondent's Exh 1). A completed tray is shown on photographs taken at the Seneca Street facility at the time of the inspection (Govt's. Exhs 8 and 9). Although Dr. Gevirtz was critical of this method of complying with the requirements for curbing upon the ground that leakage from a drum in the top tier might extend beyond the perimeters of the tray, he acknowleged that the trays met the minimum requirements of the regulation (Tr. 28, 30, 83, 85).

12. Two days after the inspection, Mr. Gabel sent a letter to Dr. Gevirtz enclosing annual documents for the period July 1 to December 31, 1978, and for the year 1979 (letter dated October 24, 1980, Respondent's Exh 1). It was pointed out that the annual document for the year 1979 had been misfiled, but had since been located. The annual documents were originally handwritten, but had since been typed so that they would be easier to read. The letter stated that all drums at 1600 Seneca Street had been placed in metal trays, checked for leaks, PCB labels and dates and that the storage area had been marked with a PCB label.

13. In telephone conversations on December 18, 1980, Dr. Gevirtz informed Mr. Gabel that he (Gabel) had been mistaken in showing just the weight of PCBs rather than total weight of materials including PCBs on the annual documents (Tr. 50, 118; memo dated 12/18/80, Tab A, Respondent's Exh 1). Respondent had apparently estimated the weight of PCBs in drums containing PCB debris (rags, contaminated clothing, sawdust, etc.) and reported only that

figure.5/ As to liquids, Respondent had apparently analyzed samples of Askarel or relied upon analyses showing Askarel contained Aroclor at a concentration of 700,000 ppm and reported only the weight of Aroclor. Mr. Gabel relied upon a note in the regulation, which he considered authorized that method of reporting.6/ Neither the letter of October 24, 1980 nor the annual documents, however, included any data as to volumes of PCBs in the containers nor any assumptions as to the density of PCBs, which are a prerequisite for application of the note. While it is not clear that these assumptions were among data, copies of which were furnished to Dr. Gevirtz on October 22, 1980, density of PCBs was among data in Mr. Gabel's file.

14. Mr. Gabel had available data from which the weights of PCBs could be calculated and by letter, dated January 9, 1981, submitted revised

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5/ If it be assumed that a typical drum of PCB debris (rags, clothing, sawdust, etc.) weighs 65 kg (finding 14, infra), annual documents show three drums of such material were in storage at the Seneca Street facility on December 31, 1978, two drums on December 31, 1979 and four drums in storage on December 31, 1980. These numbers are consistent with the inventory record (Respondent's Exh 22), and do not support the thought that only the estimated weight of PCBs in such materials was initially reported.

6/ Tr. 118, 141-42. The note referred to (40 CFR 761.45 (1980), 44 FR No. 106, May 31, 1979 at 31557) provides:

> "Note: Any requirements for weights in kilograms of PCBs may be calculated values if the internal volume of containers and transformers is known and included in the reports, together with any assumptions on the density of the PCBs contained in the containers or transformers."

annual documents containing recalculated weights (Tab A, Respondent's Exh 1; Tr. 118; inventory record, Respondent's Exh 22). As indicated (finding 6), the inventory record contains data as to known and assumed concentrations of PCBs. These data, however, were not contained in the letter or the annual documents. The letter stated that it was assumed that each 55-gallon drum of liquid PCB contained 54 gallons, rather than 52 gallons as in the initial documents, unless the exact content was known, and that recalculated weights were based on the more commonly accepted value for Askarel of 5.875 kg/gal rather than 5.67 kg/gal used previously. Because of the necessity or desirability of allowing for expansion due to increases in temperature, a 55-gallon drum is not normally filled with 55 gallons (Tr. 120). A drum containing PCB debris (rags, contaminated protective clothing, sawdust, etc.) was weighed at 65 kg net and this weight was assumed to apply to all drums containing solids. The revised annual documents revealed the presence of four drained, in-service (not-slated-for-disposal) transformers, which were not shown on the initial documents. The letter further stated the tank at Dale Road had been emptied and found to containing less Askarel than shown on inventory records and that inventory figures had been adjusted to show correct weights. Although

Dr. Gevirtz considered that exact quantities of PCBs in gallons should have been furnished, he did not contact Mr. Gabel because he assumed that all information available had been supplied (Tr. 52).

15. The purpose of the requirement for annual documents is so that a person or firm handling PCBs will have records to enable it to keep track of PCBs and to enable EPA to more readily monitor compliance with the regulations (Tr. 34, 35).

16. The complaint, issued on August 7, 1981, charged Respondent with five violations of the Act and regulations. Count I alleged that Respondent on October 22, 1980, stored PCBs at the Dale Road facility without an SPCC Plan as required by 40 CFR 761.42, Count II alleged that Respondent stored sixty two 55-gallon drums of PCBs at the Seneca Street facility in an undiked or uncurbed area in violation of 40 CFR 761.42(b), Counts III and IV alleged that the areas at Dale Road and Seneca Street where PCBs were stored did not have the PCB mark as required by 40 CFR 761.20 and Count V charged Respondent with failure to prepare and maintain an annual document showing inventory and disposal of PCBs as required by 40 CFR 761.45. Penalties of $15,000 each were proposed for Counts I and II, $5,000 each for Counts III and IV and $10,000 for Count V for a total of $50,000. Respondent has not contended that the amount of the proposed penalty would adversely effect its ability to remain in business.

Conclusions

1. Respondent's action on October 22, 1980, in storing for disposal approximately 1,500 gallons of PCBs at its Dale Road facility without having in effect a Spill Prevention Control and Countermesures (SPCC) Plan constitutes a violation of 40 CFR 761.42(c)(7)(ii) (1980) and of section 15 (15 U.S.C. 2614) of the Act.

2. Respondent's action on October 22, 1980, in storing for disposal 62 55-gallon drums of PCBs at its Seneca Street facility in an undiked or uncurbed area constitutes a violation of 40 CFR 761.42(b)(1)(ii) (1980) and of section 15 of the Act.

3. Respondent's action on October 22, 1980, in storing for disposal PCBs in areas not marked with the PCB mark at its Dale Road and Seneca Street facilities constitute violations of 40 CFR 761.42(c)(3) (1980) and of section 15 of the Act.

4. Although Respondent on October 22, 1980, had what purported to be annual documents for the period ending December 31, 1978 and for the calendar year 1979, these documents were incomplete in that they contained estimated net weights of PCBs rather than total weight of PCBs and PCB items and articles in containers as required by 40 CFR 761.45(a)(1) and (3) and (b)(3) (1980). These documents were also incomplete in failing to show a shipment of 634 kg of PCB liquid shipped from Dale Road to Seneca Street on September 11, 1979 as required by 761.45(b)(4) and the presence of four PCB transformers, which although drained, were slated for future use rather than disposal (761.45(a)(1)(ii)). Even

if the revised documents submitted under date of January 9, 1981, be regarded as complying with the regulation, the document for calendar year 1979 was required to be available not later than July 1, 1980 and thus Respondent was not in compliance with 40 CFR 761.45(a).

5. For the above violations of the regulations and Act, Respondent is liable for a civil penalty in accordance with section 16(a) of the Act (15 U.S.C. 2615(a)).

Discussion

While in its answer, Respondent denied Counts III, IV and V, the only violation seriously disputed factually is Count V. This count alleges that Respondent failed to prepare and maintain annual documents for the period ending December 31, 1978 and for the calendar year 1979 as required by 40 CFR 761.45 (1980). Respondent points out that the regulation does not require that the data be in any particular form or format and asserts that Respondent had all the raw data, maintained the data in annual documents, delivered the data to EPA inspectors, recalculated the weights and submitted revised annual documents when requested to do so (Proposed Findings and Conclusions, dated July 1, 1983, at 9, 10). Respondent argues that the mere fact that a different system of computation might be more accurate, should not be sufficient to constitute a violation of the regulation requiring an annual document. It points out that Dr. Gevirtz made no effort to contact Respondent after receipt of the revised annual documents and that it was reasonable for Respondent to assume that it had submitted a satisfactory report. These arguments are wide of the mark,

because it is not merely that a different system of computation might be more accurate, but what the regulation reasonably construed requires. Moreover, Dr. Gevirtz's reason for not calling Mr. Gabel was that he assumed that all available information had been furnished.

The purpose of an annual document is to enable a person or firm to keep track of PCBs and to enable EPA to readily monitor compliance with the regulations (finding 15). Obviously, annual documents incomplete as to quantities of PCBs and PCB contaminated materials cannot effectively serve this purpose.

Mr. Gabel apparently interpreted the note at 40 CFR 761.45(b)(4) (1980) (note 6, supra) as allowing the reporting of only estimated net or calculated weights of PCBs rather than the total weight of PCBs and PCB items, articles, etc. The note refers only to PCBs rather than PCB items, articles, etc., and cannot properly be so interpreted. Dr. Gevirtz informed Mr. Gabel in the first telephone conversation that Respondent was supposed to actually weigh each drum without regard to the note and in the second telephone conversation that the note apparently applied only to mixtures containing low levels of PCBs where it could be assumed that the weight of the oil and the weight of the mixture including PCBs would not significantly differ. There is no warrant for the latter restrictive interpretation of the note. Complainant asserts flatly that the revised annual documents submitted on January 9, 1981, were incomplete, because Respondent had not weighed each drum containing PCBs (Opening Brief at 18). Respondent weighed one drum of PCB debris or solids and applied that weight to each drum containing similar material and Complainant is correct that each drum of PCB solids should have been weighed. The note, however, allows the use of calculated weights for

liquid PCBs, if internal volumes of containers are known[7/] and included in the reports together with any assumptions as to density of PCBs in the containers. An obvious purpose of the note is to preclude the necessity of weighing each container of liquid PCBs. The size of the drums and assumed volumes were provided in the letter of January 9, 1981. It has been found (finding 6) that known and assumed densities of PCBs were among data available to Dr. Gevirtz at the time of the inspection on October 22, 1980. While deficient in that exact quantities of PCBs in gallons were not stated, it is concluded that the revised annual documents furnished under date of January 9, 1981, substantially complied with the regulation requiring such documents.

Penalty

Section 16(a) of the Act provides in pertinent part:

> "(2)(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

EPA published guidelines for the assessment of civil penalties under the Act on September 10, 1980 (45 FR No. 177 at 59770, et seq.). The guidelines establish a gravity based penalty dependent on the probability and extent of potential damage. Probability is categorized as high, mid or low range (circumstance levels), while extent of potential damage is characterized as major, significant or minor (45 FR at 59777).

7/ Dr. Gevirtz testified that assumptions as to the specific gravity (parts PCBs per million) of Askarel could be made and this specific gravity applied to calculate weights in kilograms, if the exact number of gallons was known (Tr. 53). This is a proper interpretation of the note.

A major violation in the high range of probability (Circumstance Level 1) calls for the maximum penalty for a single violation of $25,000, while a major violation in the low range of probability (Circumstance Level 6) calls for a penalty of $2,000. Violations of the regulations are classified into eight categories, the instant ones relating to storage, marking and recordkeeping and three of which were classified as major because of the quantities (in excess of 1100 gallons) and concentrations of PCBs (in excess of 100,000 ppm involved).

Major storage violations are categorized as Circumstance Level 3 and the lack of a SPCC Plan at the Dale Road facility resulted in a proposed penalty of $15,000 under Count I of the complaint. The lack of diking or curbing at the Seneca Street facility was also a Circumstance Level 3 violation, again resulting in a proposed penalty of $15,000. The marking violations (Counts III and IV of the complaint) were placed in Circumstance Level 5 (minor marking violations)8/ and a $5,000 penalty proposed for each count. Failure to have annual documents was placed in Circumstance Level 4 (a major record-keeping violation) and a $10,000 penalty proposed.

Although the ALJ is required by the Rules of Practice (40 CFR 22.27(b)) to consider the guidelines in determining the amount of the penalty, he

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8/ This was in accordance with the penalty policy describing as minor marking violations:

> "Low Range
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> Level five:
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> (3) Minor marking violations. These are situations in which all the requirements of the rule have not been followed, but there are sufficient indications to notify someone unfamiliar with the situation that PCBs are present and enable them to identify PCB items. An example would be the failure to mark a transport vehicle containing PCB items which are themselves marked" (45 FR at 59780).

is not bound thereby. For the reasons hereinafter appearing, it is concluded that strict application of the guidelines in this instance does not provide the basis for an appropriate penalty.

Respondent contends that the evidence establishes its good faith in attempting to comply with PCB regulations, while Complainant asserts that the evidence demonstrates the opposite. Mr. Gabel, who is a graduate of MIT and a registered professional engineer, testified that in an effort to keep up with PCB regulations he checked the index of the Federal Register on a daily basis and read any portions he considered pertinent (Tr. 108-09). He also read literature concerning PCB regulations in various technical magazines and publications including information published by the National Electrical Manufacturer's Association of which Respondent is a member. He maintained a file of Federal Register and other information pertaining to PCBs, sending copies of various materials and notes and comments thereon to Mr. Darby (Tr. 156).

From the foregoing evidence, Complainant argues that Mr. Gabel was well informed concerning the requirements of the PCB regulations and the penalties for noncompliance (Brief at 20). Complainant emphasizes that Mr. Gabel was a registered professional engineer and points out that Mr. Darby was an experienced and sophisticated businessman, having been an executive with RCA for 16 years prior to assuming the presidency of Respondent. Complainant further emphasizes that Mr. Darby was kept informed of the requirements of PCB regulations by Mr. Gabel (Id. at 22).

Complainant says that these executives clearly did not translate their knowledge of PCB regulations into action [necessary for compliance].

Respondent on the other hand asserts that Mr. Gabel and Mr. Darby were open, honest and cooperative with the inspectors, spending as much time with them as necessary, allowing them access to available records and to the plant, permitting photos to be taken and furnishing the inspectors with copies of requested documents (Proposed Findings at 14). Respondent also points out that additional documents were mailed to EPA within two days of the inspection and that Respondent had available inventory data enabling it to keep track of PCBs and to furnish reasonably complete annual documents when the necessity therefor was called to its attention. Mr. Darby testified that the drums of PCBs at Seneca Street were inspected on a daily basis and that movement in the area where the drums were stored was discouraged (Tr. 164, 175). This testimony is cited to buttress the contention Respondent acted in good faith. Respondent also cites Mr. Gabel's testimony to the effect that over a two-year period beginning in 1978 he made several telephonic inquiries of EPA to ascertain if there was an approved facility to incinerate PCBs of over 500 ppm, the answer being that it would be another few months before such a facility was available as only trial "burns" were being conducted at the time.9/

Complainant seems to be of the view that the violations border on wilfulness, which appears to be based on the assumption that Mr. Gabel was thoroughly familiar, if not expert, with regard to the PCB regulations. The evidence does not establish that this is so and it is concluded that Respondent's position that the evidence demonstrates its good faith must

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9/ Tr. 135-40. Although Dr. Gevirtz testified that facilities to incinerate high concentrations of PCBs in El Dorado, Arkansas and Deer Park, Texas had been approved (Tr. 179-80), no such facilities were available at the time of the inspection on October 22, 1980, the approvals not being forthcoming until 1981.

be accepted.10/ Although Mr. Gabel made commendable efforts to familiarize himself with and to keep abreast of changes to PCB regulations, he misinterpreted the note at 40 CFR 761.45(b)(4) (1980) as authorizing the recording of estimated net weights of PCBs in annual documents rather than total weights including PCB contaminated materials. This, of course, is not to excuse any violation, but merely to demonstrate that Mr. Gabel's understanding of the regulations was less than profound. This fact together with the further fact that in none of the violations charged does it appear that Respondent totally ignored the requirements of the regulation11/ and Respondent's prompt corrective action amply establish Respondent's good faith.12/

Respondent's position is that because of the location of the tank containing PCBs at Dale Road and the availability of personnel and

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10/ Although troubling from the standpoint of Respondent's compliance, the disclosure in the annual document for 1980 of the receipt on December 4, 1980, of a test report showing a concentration of 2600 ppm PCBs in a 3,000-gallon tank of used mineral oil previously thought to be uncontaminated (finding 8) strengthens rather than detracts from this conclusion. This is because Respondent had no obligation to have the annual document for 1980 available until July 1, 1981 and no obligation to submit that information to EPA. In this connection, Respondent asserts that Mr. Gabel's testimony (Tr. 151) to the effect that repaired transformers were some times filled with oil from this tank was mistaken and has stated that it is prepared to move to reopen the record and to submit affidavits from Mr. Gabel or other employees that oil from this tank was not used in other transformers (Reply Brief at 13, 14).

11/ It is recognized that a possible exception is the lack of a SPCC Plan at Dale Road. The area where the tank containing PCBs was stored, however, had far higher diking than the regulations required on three sides, which together with available equipment and personnel, made it likely that all but catastrophic spills would be contained.

12/ Good faith is relevant because among factors which the statute requires be considered in determining the amount of penalty is "degree of culpability." Culpable suggests less stringent blame than guilty and connotes malfeasance or errors of omission, negligence or ignorance. Webster's Third New International Dictionary (1967).

equipment for clean-up of spills, contamination of the area was unlikely (Proposed Findings at 3). See note 11, supra. Complainant disputes this position upon the ground that it ignores the fact the floor of the well area was at grade level and that there was no barrior to the rear or fourth side. (Reply Brief at 3). It is concluded, however, that the substantial diking on three sides would assist immeasurably in the containment of all but catastrophic spills. Complainant appears to agree for it asserts that any spill of 1500 gallons of PCB fluid in the tank would flow unrestricted out the back door (Id.). Because activity in handling PCBs at Dale Road had essentially stopped (repair of PCB transformers having been discontinued in 1979), a spill of such a magnitude was unlikely. Because of this circumstance and Respondent's good faith, an appropriate penalty for the lack of a SPCC Plan at Dale Road is considered to be $7,500.

Respondent was in the process of constructing trays in which to store the drums of PCBs at Seneca Street at the time of the inspection on October 22, 1980. These trays undisputably complied with the requirements of the regulation (40 CFR 761.42(b)(1)(ii)) (1980) and Complainant's contention that Respondent should have done more to protect against the possibility of leaks from drums in the second tier has no support in the regulations and no place in determining an appropriate penalty. Although Complainant asserts that the drums were stored in an undiked area for three years, the disposal and marking regulation was only effective as of April 18, 1978 (43 FR No. 34, February 17, 1978, at 7150, et seq.) and it is clear that prompt corrective action was taken, Respondent's letter of October 24, 1980, reporting that the process of

placing drums in trays had been completed. Under all the circumstances, an appropriate penalty for this violation is considered to be $7,500.

Regarding the marking violations (Counts III and IV of the complaint, Respondent argues that the PCB marks on the three tanks in the well area at Dale Road and the PCB marks on the drums at Seneca Street serve the same purpose and therefore constitute essential compliance with the marking requirements of 40 CFR 761.20 (1980) (Proposed Findings at 3). It is, of course, clear that the requirement for marking areas where PCBs are stored is separate from the requirement for marking PCB containers, the regulation (40 CFR 761.20(a)) (1980) providing in pertinent part: "Each of the following items in existence on or after July 1, 1978, shall be marked * * * (10) Each storage area used to store PCBs and PCB items for disposal." It is also clear that one of the purposes of the marking requirement is to warn individuals entering or approaching a PCB storage area of the presence of hazardous materials and of the necessity to exercise caution. Accordingly, the more conspicuous the PCB marks are, the more likely it is that their warning purpose would be served. The regulation, however, does not require that a PCB storage area be marked in any particular manner and Complainant's argument (Brief at 15), that a PCB mark should have been placed on the outside of the door leading to the well area at Dale Road and that a second mark should have been placed on a stanchion adjacent to the well area inside the building ignores the "or" in Dr. Gevirtz's testimony describing possible alternative methods of complying with the area marking requirement (Tr. 21, 22).

In support of its position that area markings would have added little to the usefulness of existing labels as warnings, Respondent has introduced a

photo (Exh 17) showing the area where the drums were stored at Seneca Street marked with PCB labels affixed to boards or pieces of cardboard suspended by wires from the ceiling or overhead supports, while another photo (Exh 18) shows the same area without the labels. Dr. Gevirtz testified that Respondent's photos (Exhs 11 through 14 at Dale Road and 15 through 18 at Seneca Street) did not depict the reality of the situation [with regard to visibility of the labels] at the time of the inspection because the areas in the photos were more neat, the drums were stacked in a more orderly manner with PCB labels facing one direction and the lighting was far better (Tr. 61, 62, 73, 74). Accepting this testimony as accurate, it nevertheless appears that Respondent's position has a substantial basis in fact.13/ Under all of the circumstances, an appropriate penalty for each of the marking violations is considered to be $1,000 for Count III and $1,000 for Count IV.

Regarding Count V, failure to have annual documents, it is clear that Complainant is literally correct. Even if the failure to locate the document for 1979 at the time of the inspection on Octobe 22, 1980, is excused, the annual documents submitted under date of October 24 contained only estimated net quantities including PCB contaminated materials, failed to include a shipment of PCBs from Dale Road to Seneca Street and failed to mention the presence of four drained PCB transformers slated for future use. The first deficiency resulted from Mr. Gabel's misinterpretation of the note at

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13/ Complainant emphasizes Mr. Darby's testimony that because the pit area at Dale Road was used for painting of transformers and other activities, it was possible for the labels on the tanks to be covered by overspray from the paint from time to time (Tr. 171-72). It is clear, however, that this was not the situation at the time of inspection, there is no indication of the frequency of such happenings, if they in fact occurred, and this appears contrary to testimony of Messrs. Gabel and Darby (finding 7) that tanks and labels in the photos (Respondent's Exhs 11 through 14) looked the same on October 22, 1980.

40 CFR 761.45(b)(4) (1980) and is clearly the more serious. It is concluded that the shipment of PCBs was reflected in the inventory at Seneca Street, there being no evidence to the contrary and the failure to mention four transformers, which had been drained of PCBs, is certainly a marginal omission. Although the revised annual documents contained assumed rather than actual volumes of PCBs, it has been determined that assumed and known data on PCB densities were available to Dr. Gevirtz and that the revised annual documents substantially complied with the regulation. It is concluded that Respondent had available records enabling it to reasonably keep track of PCBs and thus one of the purposes of annual documents (finding 15) was served. Under all of the circumstances, an appropriate penalty for the failure to have complete annual documents is considered to be $4,000.

It is concluded that an appropriate total penalty for the violations herein found is $21,000.14/ The purpose of a penalty is to deter further or future violations and it is considered that this sum will adequately achieve that purpose under the circumstances prevailing herein.

14/ Although the penalty guidelines have been determined to be inapplicable, it is noted that adjustments of up to 40% from the gravity based penalty are authorized (up to 15% for attitude of the violator and up to 25% for borderline situations separating minor and significant violations) (45 FR at 59773 and 59776). It is also noted that an essentially equivalent result would be reached by adopting Respondent's contention (Proposed Findings at 12) to the effect that if they are violations at all, the first four counts of the complaint should be treated as Level 5 (minor storage and marking violations), because any spilled material would be substantially contained, damage would be relatively small and markings were sufficient to alert anyone approaching the area of the presence of PCBs. Respondent contends that Count V should be treated as a Level 6 violation, because it is a minor record-keeping violation which does not seriously impair EPA's enforcement efforts. Respondent also contends that all violations should be placed in the minor extent category, which would, of course, reduce the penalty to approximately 10% of that determined here.

Conclusion[15/]

For the violations of section 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations herein found, a penalty of $21,000 is assessed against Respondent Niagara Transformer Corporation, pursuant to section 16 of the Act. Respondent is ordered to pay the same by submitting a certified or cashiers check to the Regional Hearing Clerk in the amount of $21,000 payable to the Treasurer of the United States within 60 days after receipt of this order.

Dated this 22nd day of September 1983.

Spencer T. Nissen
Administrative Law Judge

15/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects to review the same sua sponte as therein provided, this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).