UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROGERS CORPORATION,	)	DOCKET NO. TSCA-I-94-1079
	)	
	)	
RESPONDENT	)	

INITIAL DECISION ON PENALTY

Toxic Substances Control Act: Pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), the Respondent, Rogers Corporation, is assessed a civil administrative penalty of $281,400 for violating the polychlorinated biphenyl disposal requirements of 40 C.F.R. § 761.60, and Section 15 of TSCA, 15 U.S.C. § 2614.

Issued: July 28, 1998
Washington, D.C. Barbara A. Gunning
Administrative Law Judge

Appearances:

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Proceedings

The initial Complaint in this matter was filed on September 23, 1994, by the Regional Administrator for Region I of the Environmental Protection Agency ("EPA" or "Complainant") pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01 et seq.[(1)] The Complaint charged the Rogers Corporation ("Respondent") with one (1) violation of 40 C.F.R. § 761.60, which prohibits the disposal of polychlorinated biphenyls ("PCBs") at regulated concentrations in a manner not approved by the PCB regulations, and Section 15 of TSCA, 15 U.S.C. § 2614 (Count I). The amended Complaint proposed a civil administrative penalty of $300,300 for the alleged violation.

In an Order on the parties' cross-motions for accelerated decision entered on November 13, 1997, the undersigned granted the EPA's motion for accelerated decision as to liability and denied the Respondent's motion for accelerated decision. In the November 13, 1997, Order, it was held that the Respondent was liable for the single count of the Complaint alleging violation of the PCB disposal regulations at 40 C.F.R. § 761.60, which prohibit the disposal of PCBs at concentrations of 50 parts per million ("ppm") or greater in a manner not approved by the PCB regulations, and Section 15 of TSCA.

The November 13, 1997, Order Denying Respondent's Motion for Accelerated Decision and Order Granting Complainant's Motion for Partial Accelerated Decision as to Liability is incorporated herein by reference.

Thereafter, an evidentiary hearing was conducted in Boston, Massachusetts, from April 22 to 24, 1998, to determine the appropriate civil administrative penalty for the violation found in the November 13, 1997, Order on Accelerated Decision as to Liability.

On July 1, 1998, the Respondent filed a Motion for Leave to Brief the Application of the Final PCB Disposal Rule. The motion is opposed by the EPA. The motion is **Denied**.[(2)]

Facts

The Respondent is a Massachusetts company that owns and operates a manufacturing plant located at 245 Woodstock Road in East Woodstock, Connecticut ("Facility"), at which the Respondent produces polyurethane elastomers and foams. At the Facility, the Respondent operated a heat transfer system ("Heat Transfer System No. 975") ("HTS 975"), which was used to heat the machines that manufactured foam products. The HTS 975 used oil as a heat transfer medium and the system was comprised of multiple parts, including heaters, piping and plumbing, casting machines, and pumps. (Complainant's Exhibit ("Exb.") 1, Stipulation 4); (Transcript ("Tr.") at 45, 318-321).

The heater and the pumps, which circulated oil throughout the HTS 975, were housed in a pump room located in the basement of the Facility. The pumps and heater sat on a concrete pad which was surrounded by a concrete berm. (Respondent's Exb. 6). The berm itself was approximately five to six inches wide and four and one-half to five inches high. The length of the berm was about thirty-one and one-half feet (Respondent's Exb. 6); (Tr. at 312), and the width was approximately eight feet, except for a five and one-half foot area where it was reduced to five and one-half feet. (Respondent's Exb. 6); (Tr. at 47). The pumps, as part of their normal operation, constantly wept oil through "wet seals" into drip pans that overflowed onto the concrete pad and then finally collected in the surrounding concrete berm. (Tr. at 313-315). Periodically, the Respondent pumped the oil from the berm into drums, sampled the contents of the drums for PCBs, and sent the drums off-site for

disposal. From at least 1988 to at least March 1992 analyses of samples of residual heat transfer fluid taken from the berm revealed PCB concentrations under 50 ppm. (Complainant's Exb. 1, Stipulation 4f); (Complainant's Exb. 7). Mr. Robert F. Lee, the corporate manager for environmental and safety engineering for the Respondent, testified that prior to March 1994, the concrete floor in the bermed area in the pump room most recently had been cleaned with a solvent in 1988. (Tr. at 327-328).

In April 1993 Averill Environmental Laboratory, Inc., on behalf of the Respondent, performed sampling of 16 drums of waste oil from the berm under HTS 975. (Complainant's Exb. 1, Stipulation 5); (Complainant's Exb. 7); (Tr. at 345). According to the testimony of Mr. Lee, the oil in the drums was collected from the berm by using a vacuum pump system which was installed in about July 1992. The vacuum system was described as being similar to a "wet/dry vac" or vacuum cleaner with a wide head. (Tr. at 347). Analysis of the April 1993 samples was performed by Averill Environmental Laboratory, Inc. and reports of this analysis dated June 16, 1993, revealed the presence of PCBs in concentrations above 50 ppm and no more than 170 ppm in nine of the drums. (Complainant's Exb. 1, Stipulation 5); (Complainant's Exb. 7). According to the testimony of Mr. Lee, the April 16, 1993, laboratory report was not received by the Respondent until a few days after it was sent to the Respondent on or about June 16, 1993. (Complainant's Exb. 1, Stipulation 5d); (Tr. at 348). The Respondent properly shipped the 16 drums off-site for disposal in accordance with the PCB regulations. (Complainant's Exb. 1, Stipulation 6; Exb. 2). A copy of a Uniform Hazardous Waste Manifest dated September 10, 1993, reflecting this shipment off-site was sent to the Connecticut Department of Environmental Protection ("CT DEP"). (Complainant's Exb. 2); (Tr. at 38-40).

An inspection of the Facility was conducted by the CT DEP on November 5, 1993. (Complainant's Exb. 3); (Tr. at 40-69). Another inspection was conducted by the CT DEP on December 1, 1993, at which time five samples of oil from the HTS 975 pump room were collected. (Complainant's Exb. 1, Stipulation 8); (Tr. at 75-78). The sample taken from within the bermed area was taken with a metal scoopula. (Tr. at 84-87). The sample of oily Speedi-Dry was collected with a plastic scoop from the concrete floor on the outside of the berm. (Complainant's Exb. 1, Stipulation 8e); (Tr. at 87-88, 94); (Respondent's Exb. 1). Splits of these samples were provided to the Respondent. Subsequent laboratory analysis by the CT DEP of the five samples taken by the CT DEP revealed PCB concentrations of 50 ppm or greater in two of the samples. (Complainant's Exb. 1, Stipulation 8c, d, e). Specifically, a sample of oil from within the bermed area around the HTS 975 pumps contained 170 ppm of PCBs and a sample consisting of oily Speedi-Dry from the drum storage area in the pump room contained 70 ppm of PCBs. (Complainant's Exb. 1; Stipulations 8d, e).

Additional laboratory analysis reports from the Averill Environmental Laboratory, Inc., on behalf of the Respondent, dated December 21, 1993, reflect that two samples of oil taken from the bermed area surrounding the HTS 975 had PCB concentrations of 140 and 110. (Complainant's Exb. 1, Stipulation 9). In addition, Mr. Lee testified that on December 1, 1993, the Respondent took its own samples of oil from the HTS 975 pump room. Subsequent laboratory analysis by Averill Environmental Laboratory, Inc. disclosed PCB concentration levels below 50 ppm for four samples. (Respondent's Exb. 5); (Tr. at 381-386, 391-394).[(3)]

Mr. Lee testified that during the week of March 15, 1994, the floor of the pump room for HTS 975 was cleaned by Laidlaw Environmental Services, Inc. pursuant to a contract with that company dated March 7, 1994. (Complainant's Exb. 10); (Tr. at 398, 456-458). The cleaning process consisted of removing the standing residual oil and cleaning the concrete floor surfaces with an industrial surfactant using a pressure washing system. (Complainant's Exb. 10).

Civil Administrative Penalty for Violation of the PCB Disposal Regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA

A. TSCA and its Implementing Regulations

As previously discussed in the November 13, 1997, Order, Section 6 of TSCA, 15 U.S.C. § 2605, directs the Administrator of the EPA to promulgate regulations establishing requirements for the manufacture, distribution, and use of PCBs. These implementing regulations are found at 40 C.F.R. Part 761, and are entitled "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions" ("PCB regulations"). Section 6(e) of TSCA and the PCB regulations provide that it shall be unlawful for a person to dispose of PCBs at concentrations of 50 ppm or greater in any manner other than that listed in the regulations. 40 C.F.R. §§ 761.60, 761.70, 761.75.

The PCB regulations list and describe the allowable disposal methods for various manifestations of PCBs. The prescribed methods of disposal for liquids, other than mineral oil dielectric fluid, containing a PCB concentration of 50 ppm or greater but less than 500 ppm include disposal in an approved incinerator, a designated chemical waste landfill, a high efficiency boiler, or a specifically approved combustion process. 40 C.F.R. § 761.60(a)(3). Violation of Section 6 of TSCA, in turn, is a violation of Section 15 of TSCA.

In the November 13, 1997, Order, the undersigned found that the Respondent violated the disposal requirements of the PCB regulations at 40 C.F.R. § 761.60 when it allowed oil contaminated with PCBs at concentrations greater than 50 ppm to pool in the concrete berm beneath HTS 975. The Respondent failed to initiate prompt cleanup in accordance with the PCB Spill Cleanup Policy found at 40 C.F.R. Part 761, Subpart G. Accordingly, the Respondent was found liable for violating 40 C.F.R. § 761.60, and Section 15 of TSCA as alleged by the EPA in Count I of the Complaint.

The assessment of a civil administrative penalty for a violation of the PCB disposal regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA is governed by Section 16(a)(2) of TSCA. Section 16(a)(2)(B) of TSCA directs that in determining the amount of a civil penalty for a violation of Section 15 of TSCA:

> 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 other such matters as justice may require.

15 U.S.C. § 1615(a)(2)(B).

In addition, Section 22.14(c) of the Rules of Practice concerning the derivation of a proposed penalty provides the following:

> The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.14(c).

B. PCB Penalty Policy and its Applicability

EPA guidelines for determining penalties for violations of the PCB rules are set forth in the 1990 Polychlorinated Biphenyls (PCB) Penalty Policy ("PCB Penalty Policy"). [(4)] (Complainant's Exb. 9). The PCB Penalty Policy establishes a two-step procedure, derived from Section 16(a)(2)(B) of TSCA, for calculating penalties for violations of the PCB regulations. The first step is the determination of the "gravity based penalty" which involves consideration of the nature, circumstances, and extent of the violation. The second step is the determination of whether any

upward or downward adjustments to the gravity based penalty are in order. This involves consideration of the respondent's ability to pay and to continue in business, past history of violations, culpability, and "other matters as justice may require."

As a preliminary matter, I note the Respondent's multiple objections to the PCB Penalty Policy and its application in the instant case. (Respondent Rogers Corporation's Reply Brief ("Respondent's Reply Brief") at 3-4, 7); (Respondent's Brief in Support of Proposed Findings of Fact and Conclusions of Law ("Respondent's Brief") at 7-8). First, the Respondent argues that the PCB Penalty Policy is primarily intended to provide guidelines for the assessment of penalties in cases of discrete, contemporaneous spills of PCBs and that the Policy does not and should not apply to historic, non-discrete disposal of PCBs as occurred in this case. The Respondent argues, in essence, that no penalty should be imposed because no violation of the PCB disposal regulations occurred.

As I previously have determined that the violation alleged in Count I of the Complaint occurred, I reject this argument as grounds for not imposing a penalty or for not applying the PCB Penalty Policy. It is emphasized and reiterated that the violation found in the instant matter is not an "historic use" of PCBs as characterized by the Respondent. (Respondent's Brief at 7); (Respondent's Reply Brief at 1-3). Rather, in the November 13, 1997, Order, I found that when the Respondent allowed oil contaminated with PCBs at concentrations greater than 50 ppm to accumulate and remain in the concrete berm beneath the HTS 975 in 1993 and 1994, the Respondent violated the disposal requirements of the PCB disposal regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA. In the November 13, 1997, Order, I further found that the Respondent had not established that it met the "disposal site" exemption from the application of the PCB disposal regulations. The Respondent's failure to dispose of the PCB-contaminated oil in the prescribed manner during the eleven-month period that the contaminated oil was allowed continuously to accumulate on the concrete floor constituted an ongoing violation. As such, the Respondent's argument that the PCB Penalty Policy should not apply to its decidedly non-historic spill is without merit.

Next, the Respondent argues that the PCB Penalty Policy is "strictly advisory," that there must be reexamination of the basic propositions on which the Policy is based where those basic propositions are genuinely placed in issue, and that the Presiding Officer is free to disregard the Policy where the risks underlying its assumptions are not present. (Respondent's Brief at 7). See Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 EAD 735 (EAB, Feb. 11, 1997); General Electric Company, TSCA Appeal No. 92-2a, 4 EAD 884 (EAB, Nov. 1, 1993). In particular, the Respondent argues that as the PCB Penalty Policy is based on the assumption that there is a health and safety risk associated with a release of PCBs and the EPA in the instant matter did not establish any health or safety risk as a result of the alleged violation, then the PCB Penalty Policy is not appropriate for application in this case. (Respondent's Brief at 8). Finally, the Respondent argues that the application of the Section 16 (TSCA) penalty factors in the manner suggested by the Penalty Policy does not yield an "appropriate" penalty in this case. (Respondent's Brief at 8).

In examining these arguments, it first is necessary to look to the statutes and regulations governing this proceeding. Section 16(a)(1) of TSCA provides that any person who violates a provision of Section 15 of TSCA shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation and that each day such a violation continues shall constitute a separate violation of Section 15. The Respondent in the instant matter has been found to have violated Section 15 of TSCA. As noted above, the statutory penalty criteria for determining the amount of a civil penalty for a violation of Section 15 of TSCA set forth at Section 16(a)(2)(B) of TSCA are the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require.

Section 16(a)(2)(A) of TSCA further provides that a civil penalty for a violation

of Section 15 of TSCA shall be assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. Pursuant to Section 551 of the APA, 5 U.S.C. § 551, a penalty policy by an agency, such as the PCB Penalty Policy, cannot be applied unquestioningly as if the policy were a rule with binding effect because such policy has not been issued in accordance with the APA procedures for rule making. Employers Insurance of Wausau, supra, at 761.

On the other hand, the procedural rules governing these proceedings, the Rules of Practice, direct the EPA to determine the dollar amount of the proposed civil penalty in accordance with any civil penalty guidelines issued under the Act and direct the Presiding Officer to consider any civil penalty guidelines issued under the Act, such as the PCB Penalty Policy, and to state specific reasons for deviating from the amount of the penalty recommended to be assessed in the complaint. Sections 22.14(c), 22.27(b) of the Rules of Practice, 40 C.F.R. §§ 22.14(c), 22.27(b). The procedural rules also provide that the complainant has the burden of going forward with and of proving that the proposed civil penalty is appropriate. Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24. The standard of proof for this burden of presentation and persuasion is by a preponderance of the evidence. Id.

These above-cited statutory and regulatory provisions govern the determination of the amount of the civil administrative penalty to be assessed in the instant case. As noted by the Environmental Appeals Board ("EAB"):

> The Presiding Officer's penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of a sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious).

Employers Insurance of Wausau, supra, at 758-759.

Recently, in EPA administrative decisions, the EAB has extensively addressed the question of the appropriate use of EPA penalty policies, particularly the PCB Penalty Policy, in determining the amount of a civil penalty. See Employers Insurance of Wausau, supra; see also, In re Rybond, Inc., RCRA Appeal No. 95-3, 6 EAD 614 (EAB, Nov. 8, 1996). In earlier cases, the EAB repeatedly had found that although a Presiding Officer is required by regulation to consider any applicable "civil penalty guidelines" issued under the governing Act, the Presiding Officer is not bound to apply such guidelines in a particular case. See In re DIC Americas, Inc., TSCA Appeal No. 94-2, 6 EAD 184, 189 (EAB, Sept. 27, 1995); In re Pacific Refining Company, EPCRA Appeal No. 94-1, 5 EAD 607 (EAB, Dec. 6, 1994); In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 EAD 529 (EAB, Oct. 20, 1994). For example, in DIC Americas, the EAB held that the Presiding Officer has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." DIC Americas, supra, at 189.

Although the EAB in Wausau ultimately upheld the use of the PCB Penalty Policy in assessing a civil administrative penalty in that case, the EAB readily recognized the limitations of the role and application of the various EPA Penalty Policies. In discussing these limitations, the EAB noted that the relevant Penalty Policy must not be treated as a rule and that in any case where the basic propositions on which the Policy is based are genuinely placed at issue, the adjudicative officers "must be prepared 'to re-examine [those] basic propositions.'" Employers Insurance of Wassau, supra at 761, quoting McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988). On the other hand, the EAB did not preclude the EPA's enforcement staff from relying on the PCB Penalty Policy as the primary tool for developing penalty proposals or to support the "appropriateness" of such proposals.

With regard to the PCB Penalty Policy, the EAB in Wausau pointed out that as that Policy discusses each of the statutory penalty factors and appears to be designed to enhance the fairness and consistency of penalty assessments, proof of the EPA's adherence to the PCB Penalty Policy in any particular case is some evidence that

the statutory factors were taken into account and that the proposed penalty is an "appropriate" penalty. Employers Insurance of Wausau, supra, at 760. The EAB further found that the EPA's burden of proof ordinarily does not require the introduction of evidence to support each and every factual proposition that is recited in the Policy or is implicit in or underlying the Policy unless there is a specific challenge to the Policy by the respondent or a specific request for such evidence by the Presiding Officer. Id. Finally, the EAB in Wausau emphasized that when the Presiding Officer considers and addresses the respondent's challenges to the application of the Penalty Policy to the case at issue, to the Policy's analysis of the TSCA penalty factors, or to the Policy's factual basis, such review by the ALJ does not impermissibly treat the Policy as a rule. Id. at 762.

I now return to the Respondent's argument that the Presiding Officer should not apply the PCB Penalty Policy in this case. Based on the preceding review and analysis of the governing statutes, regulations, and EPA administrative decisions, I reject the Respondent's arguments that the PCB Penalty Policy is "strictly advisory" and that the Policy should not be applied in this case. The Respondent's allegation that the PCB Penalty Policy is not for application because the EPA did not establish any health or safety risk has no foundation in law or in fact in the instant case. Although the Respondent correctly points out that a respondent can challenge the underlying propositions and underpinnings of a penalty policy, some parameters must be placed on such challenges. In particular, some limitations must be placed on the EPA's need to prove every underlying factual scientific proposition, even if challenged. See In re Woodkiln, CAA Appeal No. 96-2, 1997 EPA App. Lexis 14 (EAB, July 17, 1997).

For example, as here, an examination of the propriety of the regulatory ban on the production of PCBs or the levels at which PCBs are regulated goes beyond the scope and authority of this tribunal. Id. Similarly, the assignment of the appropriate "circumstance level" under the PCB Penalty Policy can be challenged on the basis of the facts or circumstances in each case but such challenge should not focus on whether PCBs are carcinogens or are deleterious to human health as a medical issue.

At the hearing, the Respondent sought to challenge both the propriety of the classification of PCBs as a probable human carcinogen (Class B) and the presumption that PCBs pose a health risk upon exposure. (Tr. at 128-152). Following the hearing, the Respondent has acknowledged that the toxicity of PCBs is not at issue in this case but simultaneously contends that a September 1996 EPA study of PCB toxicity found PCBs are not as potent as previously determined and that the testimony of "Ms." [Dr.] Smuts showed that there is no scientific proof, based on human studies, that PCBs cause cancer in humans. (Respondent's Reply Brief at 6-7). The Respondent also notes that the undersigned limited the testimony of Dr. Smuts at the hearing on this matter. (Tr. at 108).

Initially, I point out that Dr. Mary Elizabeth Smuts' testimony at the hearing supports the findings that PCBs present serious risks to human health and the environment and that there were three primary routes of human exposure to PCBs at the Facility; inhalation, dermal contact, and ingestion. (Tr. at 111-113, 122-124, 144). In addition, the Respondent's witness, Mr. Lee, acknowledged that he is aware of references in studies to the possible harm to human health from exposure to PCBs. (Tr. at 426-427). At the hearing, the EPA satisfactorily substantiated the "underpinnings" of the PCB Penalty Policy as to the risk to human health and the environment presented by exposure to PCBs. Moreover, I find that the Respondent, by cross-examination of Dr. Smuts and the presentation of its own evidence, has not "genuinely placed at issue" the PCB Penalty Policy's underlying proposition that exposure to PCBs presents a distinct risk to human health and the environment.

The Respondent correctly notes that I limited the testimony of Dr. Smuts at the hearing. Inasmuch as I find that an examination and adjudication of the propriety of the classification of PCBs as a probable carcinogen (Class B) and its attendant medical consequences are beyond the scope of my authority, the testimony regarding these matters has been deemed irrelevant. Such finding was the reason for the limitation of Dr. Smuts' testimony at the hearing.

At the hearing, the Respondent also sought to demonstrate the distinction between the health risks resulting from cigarette smoke and PCBs by pointing out that cigarette smoke, a known human carcinogen (Class A), has not been banned by the Government, as yet, while PCBs, only a probable human carcinogen, are banned. (Tr. at 133-134). Such distinction is irrelevant to the question of whether PCBs present a health risk. The longstanding regulatory ban on the manufacture, processing, and distribution of PCBs, in itself, speaks to the perceived health risk.

In regard to the Respondent's contention that the EPA has not established any health or safety risk as a result of the alleged violation in the instant matter, I strongly disagree. (Respondent's Brief at 8). First, I emphasize that the violation found here is that exposed PCB contaminated oil at levels of 50 ppm or greater was allowed to accumulate on a concrete floor and berm for an eleven-month period with occasional collection into drums in the basement HTS 975 pump room located below the factory floor. During this period of time, some workers were directly exposed to this PCB contaminated oil with little, if any, protection.

Specifically, I note that testimony of the EPA's and Respondent's witnesses at the hearing disclosed the following: The HTS 975 pump room was locked but unmarked until January 1994 (Tr. at 46, 67,); at least seven people had access to the room (Tr. at 470) (Complainant's Exb. 12); there was no independent ventilation of the HTS 975 pump room which was quite warm (80-100 degrees Fahrenheit) and humid (Tr. at 47-48); respiratory protection equipment was not made available to workers entering the HTS 975 pump room (Tr. at 46, 67); protective clothing for workers entering the HTS 975 pump room was not recommended by the Respondent until August 1993 (Tr. at 428) and this clothing was taken to a commercial laundry (Tr. at 431-433); oily footprints were present on the floor outside the bermed area in the HTS 975 pump room on the CT DEP inspections in November 1993 and on December 1, 1993 (Complainant's Exbs. 4, 5); (Tr. at 48-51, 72-74); protective clothing for workers entering the HTS 975 pump room was not required until January 1994 (Tr. at 463); and workers who entered the HTS 975 pump room were allowed to leave the room without cleaning up or showering (Tr. at 428-432), and were allowed to leave the room and the Facility wearing their work boots (Tr. at 431).

Such testimony and the evidence discussed above clearly establish that the disposal violation found here posed a distinct risk of harm to human health and the environment. There was an immediate release of PCBs from the spill or leak into the environment when the PCB contaminated oil was allowed to collect on the concrete floor and berm in the HTS 975 pump room. I, therefore, conclude that there is no basis for the Respondent's challenge to the applicability of the PCB Penalty Policy on the ground that the violation here did not result in any risk to human health or the environment.

Accordingly, the facts and circumstances in the instant case are readily distinguishable from those found by the Presiding Officer in General Electric, supra, cited by the Respondent in support of the proposition that the PCB Penalty Policy should be disregarded because the risks underlying the policy's assumptions (actual or potential harm to humans) were not present. The violation in the instant case did not result from an expansive definition of the term "disposal" but rather from an actual discharge of PCBs. Therefore, the Respondent's reliance on the Presiding Officer's holding in General Electric, supra, is misplaced.

C. Calculation of the Proposed Penalty

I now turn to the civil administrative penalty proposed by the EPA for the Respondent's violation of the PCB disposal regulations and Section 15 of TSCA. As stated above, Section 16(a)(2)(B) of TSCA sets forth various factors that the EPA and the Presiding Officer must consider in determining the amount of the civil penalty. In addition to the above-cited statutory penalty criteria under TSCA, the EPA relies extensively upon the guidelines set forth in its PCB Penalty Policy in calculating its proposed penalty. The EPA's PCB Penalty Policy is based on the statutory language identifying the penalty factors. See Employers Insurance of Wausau, supra, at 760. I observe that the EPA's PCB Penalty Policy closely tracks

the statutory language identifying the penalty factors.

The PCB Penalty Policy provides the EPA with a logical calculation methodology for determining an appropriate penalty. The policy helps the EPA apply the statutory penalty factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the nation. See DIC Americas, supra, at 189. The stated purpose of the 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." (Complainant's Exb. 9 at 1).

With this background in mind and having determined that the PCB Penalty Policy may be applied in this case, I proceed with a step by step analysis of the statutory factors and the calculation methods employed by the EPA in the generation of the proposed penalty in the amount of $300,300. Again, I note that pursuant to the statutory criteria set forth in Section 16(a)(2)(B) of TSCA and the PCB Penalty Policy, a two-step procedure is employed to determine the dollar amount of the appropriate penalty. The first step is the determination of the "gravity based penalty" which involves consideration of the nature, circumstances, and extent of the violation. The second step is the determination of whether any upward or downward adjustments to the gravity based penalty are in order. This involves consideration of the respondent's ability to pay and to continue in business, past history of violations, culpability, and "other matters as justice may require."

1. Gravity-Based Penalty

To determine the gravity based penalty, the following statutory criteria 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. Under the PCB Penalty Policy, these factors are incorporated in a matrix which allows determination of the appropriate proposed gravity based penalty. (Complainant's Exbs. 8, 9 at 1-2); (Tr. at 160-179). Based on the proposition that 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, these regulations under the PCB Penalty Policy are treated as chemical control regulations, and the definitions of the "extent" and "circumstances" categories reflect the chemical control nature of the violations of the PCB regulations. (Complainant's Exb. 9 at 2).

Under the PCB Penalty Policy, the quantity of PCBs involved in a violation will determine whether the "Major, Significant, or Minor" extent category is assigned for assessing a penalty based on the gravity based penalty matrix. In addition, the concentration of the PCBs involved in a violation must be considered in determining which extent category is applicable. (Complainant's Exb. 9 at 3). The assignment of the applicable extent category is based on the proposition that the greater the quantity or concentration of PCBs there is in a violation, the greater the degree and likelihood of harm from the violation of the PCB rules. (Complainant's Exb. 9 at 3).

Under the PCB Penalty Policy, violations of the PCB rules are classified as either disposal or non-disposal violations. (Complainant's Exb. 9 at 3). The instant matter involves a disposal violation. When known, the source gallons are used to determine the extent for disposal violations. (Complainant's Exb. 9 at 6). According to the Policy, improper disposal violations generally present a greater risk of harm to human health and the environment than non-disposal violations, and the remediation cost of disposal violations is generally greater than that of non-disposal violations. (Complainant's Exb. 9 at 5). Thus, the EPA, in its PCB Penalty Policy, has structured the extent category of the Policy to approximate the costs of disposal and cleanup and to remove any economic incentives to violate the rules. (Complainant's Exb. 9 at 7). The stated objective of the Policy is not to estimate actual costs for a specific case but to provide a sufficient and reasonable basis for calculating a penalty that will encourage compliance with the PCB rules. (Complainant's Exb. 9 at 7).

Further, based on the premise that PCBs can be toxic at very low concentrations and therefore a spill of a large amount of low concentration PCB material could cause widespread harm, the PCB Penalty Policy does not provide a reduction of the total quantity of PCB material involved in a spill in direct proportion to the concentration of that material. A penalty policy which allows such reduction would be viewed as severely undermining the regulatory scheme and resulting in penalties that may not reflect the harm or deter improper disposal. (Complainant's Exb. 9 at 8).

The remaining variable for determining a penalty from the gravity based penalty matrix under the PCB Penalty Policy is the circumstance of the violation, which reflects the violation's probability of causing harm to human health or the environment. The circumstances are ranked "High, Medium, or Low" and each of these circumstances has two levels, resulting in a total of six circumstance levels. (Complainant's Exb. 9 at 9).

Proportional Penalty Calculation Method

In the instant case, the EPA calculated the proposed penalty of $300,300 using the formula for calculating proportional penalties found in Appendix B of the PCB Penalty Policy. (Complainant's Exb. 9 at 23); (Tr. at 163). Pursuant to the PCB Penalty Policy, the EPA calculates penalties for continuing violations by employing two separate methods. The first method provides for combining the total quantity of PCBs involved during the period of the violation ("per day penalty calculation"). The second method provides for multiplying the gravity based penalty by the number of days the violation occurred, using 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. (Complainant's Exb. 9 at 14). Usually, the proportional penalty calculation method is used for continuing violations.

At this point, I note that in the instant matter the proportional calculation method yields a penalty in the amount of $281,400 and that the per day calculation method would yield a penalty in excess of $ 1,300,000.[(5)] (Tr. at 183-184). In light of this disparity, the EPA chose the proportional penalty calculation as the more appropriate method of calculating the proposed penalty. I agree with this approach.

Step 1 of Calculating Proportional Penalty

Pursuant to the proportional penalty calculation method, the first step ("Step 1") is to multiply the quantity of PCBs involved by the concentration reduction, if any, and then multiply that figure by the number of days of the violation. (Complainant's Exb. 9 at 23); (Tr. at 163). As the EPA did not know the total amount of oil removed from the berm in the HTS 975 pump room during the relevant period, it estimated the quantity of the oil released by estimating the amount of oil released daily into the berm (Tr. at 164). The EPA had information that the pumps constantly wept oil, that it was known that there were PCBs at regulated levels in the oil from the berm as of June 1993, and that the containment berm was not cleaned until March 1994. (Tr. at 164-165). The EPA then derived the estimate of the daily release from five manifests which showed the amount of oil collected from the berm and shipped off-site for disposal over the period from October 25, 1988, to September 10, 1993, and from the observation of Ms. Janet Kwiatkowski and representations made to her by Respondent's employees during the December 1, 1993, CT DEP inspection reflecting that the three drums in the HTS pump room on that date contained waste oil from the berm under HTS 975. (Complainant's Exb. 8); (Tr. at 68-69, 167-171). The resulting estimate of the average daily discharge of oil to the berm was 1.56 gallons per day which was then rounded down to 1.5 gallons per day. (Complainant's Exb. 8); (Tr. at 171).

Next, the EPA applied a concentration reduction adjustment to the amount of oil estimated to be released into the berm on a daily basis. Based on the laboratory analysis findings from the oil samples taken by Rogers in April 1993 and by the CT DEP on December 1, 1993, showing regulated PCB concentration levels between 70 and 170 ppm, a thirty (30) percent concentration reduction for concentrations of PCBs between 50 and 499 ppm was applied. (Complainant's Exbs. 8, 9 at 8); (Tr. at 172). This concentration adjustment resulted in the estimated adjusted daily release of 1.05 gallons of oil. (Complainant's Exb. 8).

The final calculation of Step 1 is to multiply the adjusted daily release of oil by the duration of the violation. The EPA used the dates of June 16, 1993, to March 29, 1994, a period of 286 days, to determine the duration of the violation which resulted in the calculation of 300.30 gallons of PCB contaminated oil in violation. (Complainant's Exbs. 8, 9 at 23); (Tr. at 175).

Duration of Penalty and the Penalty Assessment Period

The Respondent has raised several objections to the calculations in Step 1 as proposed by the EPA. (Respondent's Reply Brief at 5); (Respondent's Brief at 9-10). First, the Respondent argues that the June 16, 1993, start date of the violation was not established, particularly as it did not receive the June 16, 1993, laboratory report from Averill Environmental Laboratory until some time after June 16, 1993. The Respondent avers that "[t]he Complainant has acknowledged that June 16th is an arbitrary date chosen in the absence of physical evidence establishing the date of the alleged release of PCBs at the Facility" and that "in choosing the arbitrary June 16, 1993, start date, the Complainant implicitly acknowledges that it is impossible to determine the duration of a historic spill in accordance with the Penalty Policy guidelines." (Respondent's Brief at 10). The Respondent argues that it could not reasonably have known that the bermed area needed to be remediated until it discovered the source of the PCBs in April 1994.

Additionally, the Respondent argues that the March 29, 1994, cut-off date for the alleged violation is incorrect for several reasons. The Respondent maintains that it cleaned the floor of the bermed area with solvents during the week of March 15, 1994, and that it continuously collected and disposed of oil from the berm since before June 1993 and reduced and finally eliminated oil weeping into the berm by March 1994. Also, the Respondent asserts that the March 29, 1994, cut-off date fails to account for the source of the PCBs, which was an historic contamination.

The EPA counters that June 16, 1993, is the appropriate onset date for the assessment of a penalty for the violation because that is the date on which the Respondent knew or should have known that there were regulated levels of PCBs in the waste oil in the bermed area beneath HTS 975. (Complainant's Post-Hearing Reply Memorandum ("Complainant's Reply Brief") at 7); (Complainant's Post-Hearing Memorandum ("Complainant's Brief") at 19-20). It is asserted by the EPA that the June 16, 1993, date gives the Respondent considerable benefit of the doubt. In this regard, the EPA points out that Averill Laboratory, on behalf of the Respondent, had analyzed the samples no later than June 7, 1993, and Mr. Lee could promptly have obtained the results by telephone as he did with the December 1, 1993, sampling. The EPA further maintains that March 29, 1994, is the appropriate end date of the violation based on Stipulation 13, wherein the parties stipulated that the Respondent had undertaken certain measures in response to the March 29, 1994, Order from the CT DEP, including the chemical cleaning of the floor in the HTS 975 pump room. (Complainant's Reply Brief at 7-8); (Complainant's Brief at 24-25). (Complainant's Exb. 1, Stipulation 13).

The violation in the instant matter, the improper disposal of PCBs, began on at least April 28, 1993, the date Averill Environmental Laboratory collected samples of waste oil from drums taken from the bermed area in the HTS 975 pump room which later showed that the oil contained PCBs at a regulated concentration level. (Complainant's Exb. 1, Stipulation 5); (Complainant's Exb. 7). The Averill Environmental Laboratory reports dated June 16, 1993, reflect that the dates of

analyses of the samples were June 2-7, 1993. (Complainant's Exb. 7). In this regard, I note that TSCA is a strict liability statute, and that there is no requirement that a violator's conduct be willful or knowing for it to be found a violation of the statute or its implementing regulations. See In the Matter of Leonard Strandley, TSCA Appeal No. 89-4, 3 EAD 718, 722 (CJO, Nov. 25, 1991).

In the Stipulations, the parties agreed that Averill Environmental Laboratory sent the results of the April 28, 1993, sampling to the Respondent on or about June 16, 1993. (Complainant's Exb. 1, Stipulation 5d). The credible and unrebutted testimony of Mr. Lee reflects that the Averill Environmental Laboratory report dated June 16, 1993, was not received by the Respondent until a few days later. The EPA, as a matter of enforcement discretion, generously used June 16, 1993, as the starting date of the assessment of the penalty for the violation rather than the April 28, 1993, collection date. (Tr. at 173). In keeping with the EPA's beneficial exercise of discretion and in view of the testimony of Mr. Lee, I find that the more appropriate onset date for the assessment of a penalty for the disposal violation in this matter is June 21, 1993.[(6)]

With regard to the end date for the violation at issue here, I find that the appropriate date is March 15, 1994.[(7)] Again, I look to the credible and unrebutted testimony of Mr. Lee regarding this matter which reflects that during the week of March 15, 1994, the floor of the bermed area in the HTS 975 pump room was cleaned with a solvent by a contractor pursuant to a contract dated March 7, 1994. (Tr. at 399). I find that the unrebutted testimony of Mr. Lee as to this matter is more persuasive than the Stipulation which strongly suggests that the chemical cleaning of the floor in the HTS 975 room was not performed until March 29, 1994, or later.

At the hearing, the Respondent presented much testimony regarding the alleged "cleaning" of the concrete floor and berm in the HTS 975 pump room. In particular, Mr. Lee testified that beginning in about June 1993 the oil on the floor and berm was vacuumed more frequently and maintenance measures were taken to reduce the weeping from the pumps, and that in January 1994 larger drip pans were installed under the pumps. (Tr. at 352-372); (Respondent's Exb. 6). This activity by the Respondent, which is discussed in greater detail below, did not constitute or equate to a "clean up" of the concrete floor and berm so as to terminate the violation found here. There is no dispute that a cleaning of the floor and berm with a solvent did not occur prior to the week of March 15, 1994. Moreover, evidence submitted at the hearing establishes that samples of oil taken from the bermed area in April 1993 and again in December 1993 had PCB concentrations at regulated levels. In view of this evidence and testimony, I find no basis for a finding that the violation ended prior to the chemical cleaning of the floor beneath HTS 975 during the week of March 15, 1994.

Accordingly, the duration of the violation period in the instant matter for the purposes of the calculation of the appropriate penalty is determined to be 268 days. All future references and calculations in this decision assume the 268 day period for the violation. The Respondent's remaining arguments regarding the arbitrariness of the dates of the violation inaccurately portray the EPA's position and are without merit.

Volume Calculation

Next, I turn to the Respondent's argument that the EPA's volume calculation is arbitrary and that the EPA is unable to calculate the volume of PCBs allegedly disposed of by the Respondent for purposes of the PCB Penalty Policy. (Respondent's Reply Brief at 6); (Respondent's Brief at 11-12, 14-15). Specifically, the Respondent maintains that the EPA's estimation that an average of 1.50 gallons of oil per day "wept" from HTS 975 for purposes of calculating a daily spill volume is misguided in that the amount of oil collected in the berm does not reflect PCBs disposed of, other than by a flawed application of the "anti-dilution rule." (Respondent's Brief at 11-12). The Respondent contends that the EPA has failed to acknowledge that the Respondent dramatically reduced the amount of oil weeping from

HTS 975 and collected oil more frequently during the period from August 1993 to March 1994, thus reducing the amount of oil collecting in the berm. Finally, the Respondent contends that as "none of the pre-1993 shipments of waste oil contained PCBs in excess of 50 ppm and the oil 'weeping' from HTS 975 after 1972 did not contain PCBs," the EPA's use of these pre-1993 shipments in estimating the volume of PCBs in violation was inappropriate. (Respondent's Brief at 12, fn. 8).

In opposition, the EPA argues that the estimated spill volume of 1.50 gallons per day is reasonable and is supported by the record. (Complainant's Reply Brief at 6-7); Complainant's Brief at 16-19, 20-21). The EPA maintains that it calculated a conservative estimate by using manifests showing the shipment of waste oil from HTS 975 for the period from October 25, 1988, through September 10, 1993, and the number of drums of HTS 975 waste oil on-site at the December 1, 1993, inspection even though the average amount of waste oil from the HTS 975 shipped or on hand during the violation period was greater. The EPA also asserts that although the Respondent claims that the amount of oil discharged to the berm during the later part of 1993 was "dramatically reduced" because of improved maintenance of the pumps, the quantitative evidence does not support this claim. (Complainant's Reply Brief at 6-7); (Complainant's Brief at 18). (Complainant's Exb. 8); (Tr. at 68, 479). Finally, the EPA contends that the Respondent has not offered any alternative method or supporting evidence to calculate the volume of material involved in the violation.

With regard to its application of the "anti-dilution" rule, the EPA notes that the PCB regulations at 40 C.F.R. § 761.1(b) contain an anti-dilution provision: "No provision specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided." The EPA maintains that once there were PCBs at regulated levels in the oil collected from the HTS 975 berm in April 1993, and because the berm was not adequately cleaned during the violation period, any oil added to the berm became regulated PCB material. (Complainant's Brief at 20-21).

I agree with the EPA's analysis of the application of the regulatory anti-dilution provision to the facts in the instant case. See 40 C.F.R. § 761.1(b); In the Matter of Rollins Environmental Services (NJ) Inc., TSCA Appeal No. 90-2, 3 EAD 329, 335-336 (J.O. Sept. 28, 1990, aff'd in part, vacated in part, 937 F.2d 649 (D.C. Cir. 1991) (general discussion of the application of the anti-dilution rule). There is no probative evidence to support the Respondent's assertion that the EPA arbitrarily applied the anti-dilution rule to increase the volume, duration, or concentration level of the alleged disposal violation. (Respondent's Brief at 14-15). I note that the Respondent has not set forth an alternative interpretation of the regulatory anti-dilution provision or cited any authority to support a contrary interpretation other than its conclusory assertion that the rule is not for application here. Thus, in the instant matter all the waste oil collected from the HTS 975 berm during the violation period from April 28, 1993, to March 15, 1994, is deemed to be regulated PCB oil.

Further, I find that the EPA's conservative estimate of the average amount of daily waste oil from the berm is both reasonable and appropriate. This estimation has a reasonable basis in the evidence produced at the hearing. In this regard, I note that the EPA, in estimating the daily waste oil, used the manifests showing the shipments of waste oil from HTS 975 for the period from October 25, 1988, to September 10, 1993, and relied on the observations of Ms. Kwiatkowski and representations made to her by the Respondent's employees that the three drums in the HTS 975 pump room observed during the December 1, 1993, inspection contained waste oil collected from the berm beneath HTS 975. (Complainant's Exbs. 7, 8); (Tr. at 68, 164-171, 258-260, 479).

If the EPA, in calculating the approximate volume of oil in violation, had used the known quantity of waste oil collected from the berm beneath HTS 975 for the period from March 27, 1992, to September 10, 1993, and/or the approximate quantity collected from the berm between September 10, 1993, and the date of inspection on December 1, 1993, which more accurately reflects the violation period, rather than the volume of waste oil collected from the berm and shipped off-site during the 5-year period from 1988 to 1993, a significantly greater amount of volume of oil in

violation would result. (Complainant's Exbs. 7, 8); (Tr. at 204). Consequently, the proposed penalty by the EPA using this beneficial estimation is less than that generated by the alternative estimation suggested by the Respondent in its Brief. (Respondent's Brief at 12, fn. 8). Finally, I note that the Respondent has not proffered any alternative method or evidence for calculating the average daily spill volume other than its assertion that there was no violation producing a spill for which a penalty may be assessed.

Step 2 of Calculating Proportional Penalty

Returning to the EPA's proposed penalty, Step 2 is the next step for consideration in the proportional penalty calculation pursuant to the PCB Penalty Policy. Step 2 is a determination of whether the amount of PCBs released, as measured by the gallons in violation (Step 1), is more or less than two times the limit for the "Major" extent category. (Complainant's Exbs. 8, 9 at 23); (Tr. at 175-176). The PCB Penalty Policy directs proceeding to Step 3 in the calculation if the amount of PCBs released is greater than two times the limit for the "Major" extent category. (Complainant's Exb. 9 at 23). The limit for the Major extent category for a disposal violation is 25 gallons. (Complainant's Exb. 9 at 7). As the calculated amount of PCBs released in the instant matter is 281.4 gallons and this amount is far greater than two times the 25 gallon limit, the calculation of the proportional penalty proceeds to Step 3. (Tr. at 176).

Step 3 of Calculating Proportional Penalty

In Step 3, the total release, as measured in gallons in violation (Step 1), is divided by the limit for the Major extent category, which is 25 gallons for a disposal violation. In essence, this sum represents the number of Major extent violations as each 25-gallon portion equals one violation. In the instant matter, the number of gallons in violation, 281.4, divided by 25 gallons results in the number of 11.256 violations. (Tr. at 176-177). This result is multiplied by the applicable dollar amount in the Major extent category which then yields the proportional penalty. (Complainant's Exbs. 8, 9 at 23); (Tr. at 177).

In determining the applicable dollar amount from the Major extent category, the EPA used the Circumstance ranked "High Range, Level 1." (Complainant's Exb. 8); (Tr. at 160-161, 177). Thus, in the instant matter, the result of 11.256 violations from earlier in Step 3 was multiplied by $25,000, the dollar amount for the Major extent category, High Range, Level 1, from the gravity based penalty matrix, yielding a proportional penalty in the total amount of $281,400. This amount of $281,400 constitutes the gravity based penalty.

At the hearing, the Respondent contested the EPA's use of the High Range, Level 1, as the Circumstance category for determining the gravity based penalty. The EPA argues that the Circumstances of the violation at issue were that of a High Range, Level 1, Major disposal. (Complainant's Brief at 8).

Ms. Marianne Milette, a senior enforcement coordinator at the EPA for Region I, testified that the EPA used the Circumstance level of "High Range, Level 1," because it was the most appropriate category based on the descriptions contained in the PCB Penalty Policy. (Tr. at 160-162). As previously noted above, the categorization of the Circumstance level under the Penalty Policy is to reflect the violation's probability of causing harm to human health or the environment. (Complainant's Exb. 9 at 9). The Circumstances are ranked "High, Medium, and Low," and each of these ranges has two different levels, "Level 1 and Level 2," resulting in six Circumstance levels.

The Circumstance ranked "High Range, Level 1" is described, in pertinent part, as follows:

> Major disposal. This includes any significant uncontrolled discharge of

> PCBs, such as any leakage or spills from a 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. [(8)]

(Complainant's Exb. 9 at 10).

My review of the various descriptions of the different types of PCB violations within each of the circumstance categories leads me to the conclusion that the EPA appropriately characterized the Circumstance of the violation in this case as "High Range, Level 1" under the PCB Penalty Policy. This categorization accurately depicts the violation found here and the risk of harm the violation posed to human health and the environment. I also note that the Respondent has not set forth persuasively any argument suggesting a more appropriate categorization of the Circumstance level. Accordingly, the Respondent's objection to that assessment is rejected.

Step 4 of Calculating Proportional Penalty

Step 4 of the proportional penalty calculation provides that the penalty amount is divided by the number of days of the violation which yields the per day penalty. (Complainant's Exb. 9 at 23). The per day penalty later is multiplied by the number of days after any applicable adjustments are made. Step 4 is eliminated by the EPA in the instant case because the division of the total penalty by the number of days of the violation generating the per day penalty which is then multiplied again by the number of days yields the same number. (Tr. at 178). The elimination of Step 4 stems from the absence of the application of any adjustment factors to the gravity based penalty in the instant matter. (Tr. at 178-179).

2. Adjustments to the Gravity Based Penalty

In the instant matter, the EPA made no upward or downward adjustments to its proposed gravity based penalty. (Complainant's Exb. 8); (Tr. at 179-183). The Respondent argues that the EPA has failed to make appropriate downward adjustments for the Respondent's lack of culpability, compliance history, and good attitude; i.e., good faith efforts to comply with the appropriate regulations, prompt corrective action, and actions to protect its workers. (Respondent's Brief at 12); (Respondent's Reply Brief at 4).

As discussed above, Section 16(a)(2)(B) of TSCA directs the Administrator, in determining the amount of the civil penalty, to consider certain factors with respect to the violator in addition to the nature, circumstances, extent, and gravity of the violation. These statutory factors are directly referenced in the PCB Penalty Policy as adjustments to the gravity based penalty. (Complainant's Exb. 9 at 14-19).

Culpability

As previously discussed, TSCA is a strict liability statute; that is, there is no requirement that a violator's conduct be knowing or willful for it to be found in violation of Section 15 of TSCA or the PCB regulations. See Leonard Strandley, supra. However, Section 16(a)(2)(B) of TSCA requires the Presiding Officer to take into account the degree of culpability on the part of the violator in determining the amount of a civil penalty. Under the PCB Penalty Policy, the factor of culpability is assessed by two principal criteria; the violator's knowledge of the particular requirement, and the degree of the violator's control over the violative condition. (Complainant's Exb. 9 at 15).

According to the PCB Penalty Policy, the test as to the violator's knowledge is whether the violator knew or should have known of the relevant requirement or the possible dangers of its actions. (Complainant's Exb. 9 at 15). Generally, any company with PCBs is deemed to have knowledge of all aspects of TSCA and the PCB regulations, and a reduction in the penalty based on lack of knowledge can occur only 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. (Complainant's Exb. 9 at 15). With regard to the degree of control over the violation, the Policy encompasses the EPA's expectation that when PCB violations are discovered, the responsible party immediately will take all necessary steps to come into compliance. I observe that the PCB Penalty Policy's guidelines as to culpability generously comport with the strict liability nature of TSCA.

The PCB Penalty Policy recognizes three levels of culpability. (Complainant's Exb. 9 at 15). Level I is assigned where the violation is willful, and in such case the gravity based penalty is adjusted upward by 25%. Level II is assigned where the violator had or should have had knowledge or control, and in such case no adjustment is made to the gravity based penalty. Level III is assigned where the violator lacked sufficient knowledge of the potential hazard created by its conduct and also lacked control over the situation to prevent occurrence of the violation. The violator's conduct should be reasonably prudent and responsible. When Level III is assigned, a 25% downward adjustment is applied. (Complainant's Exb. 9 at 15).

With regard to its argument that no penalty, or at least a 25% reduction, is warranted for lack of culpability, the Respondent claims that after it became aware of the PCB problem in June 1993 it acted promptly and in good faith to attempt to identify the source of PCBs and to institute appropriate measures to protect the safety and health of its workers during the investigation of the source. (Respondent's Brief at 1, 4-6, 12-13). Specifically, the Respondent reports that it inquired with the laboratory that performed the June 1993 PCB testing to verify the accuracy of the results, that it inquired with its supplier to verify that PCB contaminated oil had not been sent by mistake, that it investigated with its maintenance staff all possible sources of the PCB oil by reviewing the machines and piping, that it took necessary precautions to protect its employees by issuing protective clothing, and that its maintenance staff cleaned up the oil in the bermed area more frequently with the vacuum and replaced the seals on the pumps and installed larger drip pans to reduce the amount of waste oil collecting in the bermed area. The Respondent argues that it could not reasonably have known that the bermed area needed to be remediated until it discovered the source of the PCBs in April 1994. (Respondent's Brief at 10).

The Respondent's argument that no penalty is appropriate in this case or that at least a 25% reduction is warranted for lack of culpability because it has established that it acted promptly, reasonably, and responsibly to discover the source of the PCBS at its Facility in order to remediate an "historic" contamination is specious. The record establishes that in June 1993 the Respondent learned that the waste oil pumped from the bermed area in the HTS 975 pump room contained PCBs at regulated levels. The Respondent acknowledges that the pumps for the HTS 975 continuously wept oil as part of its normal operation and that this oil dripped onto the concrete pad below the HTS 975 before accumulating in the concrete berm surrounding the pad. (Tr. at 313-315).

First, I note that even though the Respondent was aware that the oil from the berm contained PCBs at regulated levels as of June 1993, it took no action to thoroughly clean the concrete floor and bermed area until March 1994. Rather, it allowed the contaminated oil to continue to accumulate on the floor and in the berm for a period of nine months. Periodic vacuuming does not constitute the requisite "cleanup" of the contaminated disposal site.

The Respondent claims that it could not reasonably have known that the bermed area needed to be remediated until it discovered the source of the PCBs. However, the Respondent checked every conceivable remote source before examining the most obvious source, the HTS 975. The Respondent did not even investigate the floor itself as a possible source until March 1994, although it now claims that the

underlying concrete and soil are the source. I emphasize that regardless of the source of the PCBs, the Respondent knew or should have known that it was responsible for the removal of the PCB contaminated oil that continuously accumulated on the concrete floor and in the berm and for properly cleaning this improper disposal site. Nevertheless, the Respondent continued to operate the HTS 975 twenty-four hours a day, seven days a week, fifty weeks a year while knowing that the HTS 975 pumps continuously wept oil and that this waste oil was being added to a PCB contaminated site. (Tr. at 313-315, 439-440).

The period of time that elapsed during the Respondent's alleged investigation as to the source of the regulated PCBs, nine months, can not be characterized as prompt, prudent, or even reasonable. I also note that subsequent to the June 1993 laboratory report showing PCB contamination at regulated levels, the Respondent performed no PCB testing of the waste oil until the CT DEP conducted its second inspection of the Facility in December 1993. The Respondent only took action to remediate its PCB problem in response to the CT DEP inspection results in December 1993 even though its own testing had disclosed the PCB violation in June 1993. In view of this evidence, I do not find the Respondent's allegation that it made good faith efforts to comply with the regulations and that it took prompt action to find the source of the PCB contamination to be credible.

The fact that the Respondent made protective clothing available to its workers entering the HTS pump room in August 1993 does not indicate serious appreciation of the violation and its possible harm to human health. I note that until at least January 1994 the protective clothing was worn on a voluntary basis, there was no requirement for cleaning up or washing by the workers leaving the pump room, the workers could leave the pump room and possibly the Facility wearing their regular work boots, and the protective clothing was sent to a commercial laundry without precautions to prevent commingling with other laundry. (Tr. at 354, 429-432). Moreover, no protective respiratory equipment was provided to its workers entering the HTS 975 pump room. Such action on the part of the Respondent can not be considered prompt or responsible protection of its workers. The Respondent made no effort to protect the environment from the PCB contamination.

In view of the foregoing, I find no probative evidence to support the Respondent's position that it lacked control over the situation to prevent the ongoing occurrence of the violation. The Respondent's conduct under the circumstances in the instant matter is not considered to have been reasonably prudent, prompt, or responsible. Therefore, I conclude that there is no basis for the Respondent's contentions that no penalty is warranted or that a 25% downward adjustment is merited for its lack of culpability in this matter. In addition, I find no basis for the Respondent's similar position that a downward adjustment of 15% is merited for its "good attitude", a factor for consideration under the statutory criteria of "other matters as justice may require." The Respondent has not demonstrated that it made a good faith effort to stop the violation and comply with the PCB disposal regulations, that it took prompt corrective action, or that it took satisfactory actions to minimize harm to human health or the environment.

Ability to Pay and Effect on Ability to Continue to Do Business

I now turn to the remaining statutory factors for consideration in assessing the civil penalty at issue: ability to pay, effect on ability to continue to do business, any history of prior such violations, and such other matters as justice may require. Other than its generalized assertion that no penalty is warranted, the Respondent has not contested or presented evidence regarding the EPA's position that no adjustment is warranted for the factors of the Respondent's ability to pay and the effect of the penalty on its ability to continue to do business. The EPA relies on Ms. Milette's testimony that the EPA found no information indicating that the Respondent had an inability to pay the proposed penalty and on Stipulation 38, which states, in pertinent part, that the Respondent "does not contest that it has the ability to pay the penalty proposed." (Complainant's Exb. 1, Stipulation 38); (Complainant's Brief at 11).

History of Prior Such Violations

With regard to the Respondent's assertion that a downward adjustment is merited for its compliance history (Respondent's Brief at 12), I note that the statutory provision governing this factor, Section 16(a)(2)(B) of TSCA, is couched in the affirmative language of whether there is "any history of prior such violations." This manner of describing the factor comports with the EPA's PCB Penalty Policy of only providing for an upward adjustment for prior similar (TSCA or its rules) violations. (Complainant's Exb. 9 at 15-16). In the instant matter, no evidence was presented regarding the existence of other violations of TSCA or its rules by the Respondent. (Tr. at 180). Therefore, the EPA's position that an upward adjustment is not warranted for prior such violations is appropriate.

At the hearing, the Respondent presented testimony and evidence concerning its commendations from the EPA for its contribution to environmental excellence based on the Respondent's participation in EPA programs, particularly the EPA's 33/50 Program. (Respondent's Exb. 7); (Tr. at 418-421). Such recognition, while commendable, is not relevant to the assessment of the appropriate penalty for the violation here. Further, the EPA points out that the Respondent already realized a substantial monetary benefit for its participation in the EPA's 33/50 program by reducing its cost to dispose of hazardous waste. (Tr. at 481-483). (Complainant's Reply Brief at 15).

Other Factors as Justice May Require

Finally, I address the last statutory factor of "such matters as justice may require." This factor, as interpreted by the PCB Penalty Policy, includes the factors of attitude, voluntary disclosure, the cost of the violation to the Government, the economic benefits received by the violator due to its non-compliance, and the environmentally beneficial measures that a violator may perform in exchange for a reduction in the penalty. (Complainant's Exb. 9 at 17-19).

Attitude

In assessing the violator's attitude under the Policy, consideration is given to the factors of whether the violator is making good faith efforts to comply with the appropriate regulations, the promptness of the violator's corrective action, and any actions taken to minimize harm to the environment caused by the violation. (Complainant's Exb. 9 at 17).

As noted above in the discussion concerning culpability, I do not find that the Respondent's conduct under the facts and circumstances presented in this case warrant a downward adjustment for attitude. In particular, the credible evidence of record does not demonstrate that the Respondent made a good faith effort to stop the violation and comply with the PCB disposal regulations, that it took prompt corrective action, or that it took any significant actions to minimize harm to the environment.

Voluntary Disclosure

With regard to the factor of voluntary disclosure, it is noted that in order to encourage voluntary disclosure of PCB violations, the PCB Penalty Policy provides for a downward adjustment of 25% for voluntary disclosure and an additional downward adjustment of 15% for immediate disclosure within 30 days of discovery and when the respondent takes all required steps reasonably expected to mitigate the violation. (Complainant's Exb. 9 at 18). In order to be eligible for the voluntary disclosure penalty reduction, the respondent must make the disclosure prior to

being notified of a pending inspection. Also, the disclosure cannot be that which is required by the PCB regulations or is made after the EPA has received information relating to the alleged information. (Complainant's Exb. 9 at 18).

In the instant matter, the CT DEP learned of a possible PCB violation after the CT DEP received copies of the September 10, 1993, Uniform Hazardous Waste Manifest (EPA Form 8700-22) reflecting the shipment of waste oil from the Respondent's Facility which contained PCBs at regulated levels. (Complainant's Exb. 2); (Tr. at 38-39). Such "disclosure" is required by the regulations, and otherwise cannot be construed reasonably as a voluntary disclosure of the violation. 40 C.F.R. §§ 761.202-761.210. The Respondent's suggestion that the filing of the manifest constituted voluntary disclosure is rejected.

Remaining Factors

Adjustments to the gravity based penalty based on the remaining factors recognized under the PCB Penalty Policy, the cost of the violation to the Government, economic benefit of noncompliance, and settlement with environmentally beneficial actions, were not made by the EPA in the instant matter. The EPA maintains that no adjustments were made for the first two factors as there was no cost to the Government to clean up and it had no information concerning any possible economic benefit of noncompliance. (Tr. at 182). The EPA also notes that these two factors only result in upward adjustments to the gravity based penalty. (Respondent's Brief at 13-14).

With regard to the third factor, settlement with environmentally beneficial actions, the Respondent maintains that this factor is not relevant because there was no settlement in this matter. (Complainant's Exb. 9 at 19); (Tr. at 182). (Complainant's Brief at 14). In this regard, the EPA emphasizes that under the PCB Penalty Policy, the EPA may reduce a penalty in exchange for specific environmentally beneficial actions performed by the respondent. (Complainant's Exb. 9 at 19). The Respondent, on the other hand, asserts that it has made a number of environmentally beneficial expenditures at the Facility and that these expenditures should be considered when determining the appropriate penalty.

First, as pointed out by the EPA, this factor is not for application here as there was no settlement in this matter. Further, regardless of the EPA's definition of this factor pursuant to the PCB Penalty Policy, I do not find that this factor is applicable as the Respondent has not adequately demonstrated that it has performed environmentally beneficial actions at the Facility not related to a cleanup or another separate program sponsored by the EPA such as the 33/50 program.

Additional Arguments Raised by the Respondent

Cleanup Measures at the Facility

The Respondent maintains that consideration should be given to the significant cleanup measures taken by the Respondent at the Facility under the supervision of and in cooperation with the CT DEP since the March 1994 discovery of the source of the PCBs and its expected expenditure of almost two million dollars to remediate the historic contamination at the Facility. (Respondent's Brief at 5). (Tr. at 405). The EPA counters that the Respondent's efforts to clean up PCB contaminated soil and groundwater under the Facility are not relevant to this action, and should not mitigate the proposed penalty. (Complainant's Reply Brief at 33). I am not persuaded that the Respondent's extensive cleanup efforts at the Facility are relevant to the proposed penalty for the April 28, 1993, to March 15, 1994, disposal violation found here.

PCB Sampling

At the hearing conducted from April 22 to April 24, 1998, to determine the appropriate penalty in this matter, the Respondent proffered evidence concerning other matters. Specifically, the Respondent presented testimony regarding the CT DEP's sampling of waste oil during the December 1, 1993, inspection. The Respondent sought to introduce this evidence by arguing its relevance to the duration of the penalty and, thus, the amount of the appropriate penalty. However, the Respondent in its closing argument and in its post-hearing briefs has attempted to show that the waste oil sample taken with a metal scoopula from the concrete berm and the oily Speedi-Dry sample taken with a plastic scoop from the concrete floor outside the berm in the HTS pump room on December 1, 1993, contained concrete scrapings from the berm and floor, thus establishing that the spill involved is an historic spill not subject to the PCB disposal regulations. (Respondent's Reply Brief at 6); (Respondent's Brief at 13-15). In connection therewith, the Respondent also argues that the EPA has not proven that the June 1993 samples reflect concentrations of PCBs in excess of 50 ppm in the bermed area, and that the regulated levels of PCBs "were the result of the entrainment of contaminated concrete particles during the collection of oil by means of a new vacuum pump. (Respondent's Brief at 13, fn. 9).

Initially, I point out that these arguments should have been put forth by the Respondent at the time liability was at issue. Regardless, these arguments fail on all grounds. The Stipulations, as well as the evidence presented at the hearing, disclose that waste oil pumped from the concrete berm beneath HTS 975 contained PCBs at regulated levels upon testing performed on behalf of the Respondent in June 1993. This evidence establishes that there was a violation of the PCB disposal regulations. It is emphasized that the violation continued until proper cleanup was conducted in March 1994. The absence or presence of PCBs at regulated levels during the intervening period is not determinative of whether there was an ongoing violation. However, laboratory tests by both the EPA and the Respondent of samples taken by the CT DEP from the HTS 975 pump room on inspection on December 1, 1993, revealed PCBs at regulated levels.

As an additional matter, I find that there is no probative evidence to support the Respondent's speculative argument that the sample taken from the berm beneath the HTS 975 by the CT DEP on December 1, 1993, contained concrete scrapings. I note that the other sample taken at the December 1, 1993, inspection, was oil soaked "Speedi-Dry" which also contained PCBs at regulated levels. The Respondent's argument that its own samples collected in April 1993 and the Speedi-Dry sample taken on December 1, 1993, also contained concrete scrapings is even more speculative. Therefore, I find no merit to the Respondent's challenge to the duration of the disposal violation or its disingenuous attempt to relitigate its liability for the violation of the PCB disposal regulations at the penalty phase of this proceeding.[(9)]

Penalties in Other PCB Cases

Following the hearing, the Respondent has proffered information regarding other PCB cases adjudicated by the EPA. It is emphasized that penalties assessed in other cases are not relevant to the penalty assessment in this case. Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973); In re Chautauqua Hardware Corporation, 3 EAD 616, 626-627 EPCRA Appeal No. 91-1 (CJO, June 24, 1991).[(10)]

Conclusion

In conclusion, I find that the Respondent has violated the PCB disposal regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA. The amount of the civil

administrative penalty proposed by the EPA for this violation, as reduced by the above finding as to the shorter duration period for the penalty assessment, is both appropriate and reasonable. The EPA has demonstrated how the TSCA Section 16(a)(2)(B) penalty criteria relate to the particular facts of the violation here.

Moreover, I find that the imposition of a civil administrative penalty in the amount of $281,400 is reasonable and appropriate under the facts and circumstances in this matter. In particular, I note that the Respondent has been accorded the benefit of the doubt several times in the calculation of the amount of penalty to be assessed. For example, the period of time for which the penalty is assessed is much less than the violation period and the volume of PCB contaminated oil in violation has been calculated in a manner beneficial to the Respondent. Further, no upward adjustment to the gravity based penalty has been made for culpability or attitude although an argument can be made that such an increase would be appropriate.

Conclusions of Law

1. The November 13, 1997, Order Granting the Complainant's Motion for Partial Accelerated Decision as to Liability and Denying the Respondent's Motion for Accelerated Decision is incorporated herein by reference. See 40 C.F.R. § 22.20.

2. The Respondent violated the PCB disposal regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA.

3. An appropriate and reasonable civil administrative penalty for the Respondent's violation of the PCB disposal regulations at 40 C.F.R. § 761.60, and Section 15 of TSCA as alleged in Count I of the Complaint is $281,400. Section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2).

Order

1. The Respondent, Rogers Corporation, is assessed a civil administrative penalty in the amount of $281,400.

2. Payment of the full amount of this civil penalty shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check in the amount of $281,400, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA - Region V
P.O. Box 70753
Chicago, IL 60673

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

4. If the Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b), (c), (e).

Appeal Rights

Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within twenty (20) days of service of this Order, or the Environmental Appeals Board elects to review this decision sua sponte.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 7-28-98

Washington, DC

1. The EPA's Motion to Amend the Complaint filed on September 22, 1997, was granted by Order entered by the undersigned on November 13, 1997.

2. This issue was addressed in the Order entered on November 13, 1997.

3. Initially, in the Stipulations the parties agreed that additional samples taken by the Respondent were collected on December 7, 1993, the date reflected on the laboratory report by Averill Environmental Laboratory Inc. (Complainant's Exb. 1, Stipulation 9; Order of November 13, 1997, at fn. 4). However, at the hearing Mr. Lee testified that the wrong date was entered on the report by Averill and the correct date on which the samples were taken by the Respondent was December 1, 1993. (Tr. at 381-389). Apparently, the laboratory reports from Averill dated December 21, 1993, include the splits of the samples collected by the CT DEP on December 1, 1993, and show that two of the five samples contained PCBs at regulated levels. (Complainant's Exb. 1, Stipulation 9d); (Tr. at 460); (Respondent Rogers Corporation's Proposed Findings of Fact 28).

4. Polychlorinated Biphenyl (PCB) Penalty Policy, U.S. EPA, April 9, 1990. See 55 Fed. Reg. 13955 (Apr. 13, 1990).

5. These calculations are based on the reduction of the duration period for the assessment of a penalty, which is discussed below. At the hearing, Ms. Milette testified that the proposed penalty using the proportional calculation method was $300,400 and that the per day calculation method yielded a penalty in excess of $1,400,000. (Tr. at 183-184).

6. June 19 and 20, 1993, were a Saturday and Sunday, respectively.

7. March 15, 1994, was a Tuesday.

8. The PCB Penalty Policy notes that the adjective "major" as used in the circumstance level is not related to that term as used in the gravity based penalty matrix. (Complainant's Exb. 9 at 9).

9. The EPA persuasively argues that the more speculative argument that the vacuum device used to remove waste oil from the berm may have caused PCBs to migrate to the surface of the concrete, suggested by the Respondent's witness, Mr. Lee, at the hearing, does not support the Respondent's underlying proposition that there was an historic spill, but rather it supports a finding that there was an improper disposal of PCBs. (Complainant's Reply Brief at 3-4).

10. The Complainant's Motion to Strike filed on July 2, 1998, is now moot.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
ROGERS CORPORATION,) DOCKET NO. TSCA-I-94-1079
)
)
RESPONDENT)

E R R A T A

On page 37, Item 2. of INITIAL DECISION ON PENALTY, dated July 28, 1998, delete the address as given and insert the following address:

Regional Hearing Clerk
EPA - Region I
P.O. Box 360197M
Pittsburgh, PA 15251

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 7-31-98
Washington, DC