UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
LAZARUS, INCORPORATED,	)	Docket No. TSCA-V-C-32-93
	)	
COLUMBUS, OHIO	)	
	)	
Respondent	)	

INITIAL DECISION

In a proceeding for penalties for violations of the PCB Ban Rule, the following is found: (1) EPA may designate State employees to conduct compliance inspections; (2) the Statute of Limitations does not bar an action for penalties for failing to register PCB transformers with fire response personnel (§761.30(a)(1)(v)) or storing combustible materials next to a PCB transformer (§761.30(a)(1)(viii)), since these are continuing violations and not complete upon the day the violation first occurs; (3) the Statute of Limitations does bar violations of the requirement to inspect PCB transformers quarterly and keep records of the inspection (§761.30(a)(1)(ix) and 30(a)(1)(xii)) with respect to violations that occurred more than five years prior to the issuance of the complaint; (4) the PRA bars an action for penalties for failure to keep annual records (§761.180(a)) for the years prior to the inclusion of the OMB control number in the text of the regulation in the 1989 Federal Register.

Appearances:

Stephen N. Haughey
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Jeffrey M. Trevino
Assistant Regional Counsel
EPA Region V
77 West Jackson Blvd.
Chicago, IL 60604-3590

OPINION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), §16(a), 15 U.S.C. §1615(a), for the assessment of civil penalties for alleged violations of the rule, promulgated under Section 6(e) of the Act, 15 U.S.C. §2605(e), regulating the manufacturing, processing, distribution in commerce and use of polychlorinated byphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761.[1] The Complaint charges Lazarus with failing to register two PCB transformers with the fire response personnel with primary jurisdiction in violation of 40 C.F.R. §761.30(a)(1)(vi) (Count I), storing combustible materials within five meters of an unenclosed PCB transformer in violation of 40 C.F.R. §761.30(a)((1)(vii) (Count II), failing to conduct inspections of its PCB transformers and maintain records of such inspections in violation of 40 C.F.R.

[1] Section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of section 15...shall be liable to the United States for a civil penalty in an amount not to exceed $25,000, for each such violation. Each day such a violation continues shall for purposes of this subsection, constitute a separate violation...." TSCA, §15, makes it unlawful, inter alia, for any person to fail or refuse to comply with any rule promulgated under section 6 of the Act.

§761.30(a)(1) (Counts III-VI), failing to mark with the required M_L label an access door to Lazarus' two PCB transformers in violation of 40 C.F.R. §761.40(j) (Count VII), failing to develop and maintain records and annual documents on the disposition of its PCB items in violation of 40 C.F.R. 761.180(a) (Counts VIII-XI), and failing to dispose of PCBs in accordance with the applicable disposal requirements in violation of 40 C.F.R. §761.60 (Count XII). A penalty of $117,000, was requested.

Lazarus answered, denying the alleged violations, disputing the appropriateness of the proposed penalty and raising certain affirmative defenses, the nature of which will be considered further below. A hearing was requested.

A hearing was held in this matter in Columbus, Ohio, on June 8 and 9, 1994. Following the completion of the hearing, both parties submitted proposed findings of fact and conclusions of law with supporting briefs. On consideration of the entire record and the parties' submissions, the following Initial Decision is rendered. All proposed findings inconsistent with this decision are rejected.

The Facts

The following facts are found with respect to the alleged violations. Additional facts relating to Lazarus' defenses will be discussed below.

Lazarus is an Ohio Corporation which at all times relevant to this action maintained a facility at 141 South High Street,

Columbus, Ohio.[2] The facility consisted of a retail department store and an annex building that was located across the street ("Annex"), both operated by Lazarus.[3] The Annex, however, had been closed to the public since 1985.[4]

From 1978 through 1983, Lazarus owned and operated at its facility eleven PCB transformers.[5] By definition, a "PCB Transformer" is a transformer that contains 500 parts per million ("ppm") PCBs or greater.[6] Nine of these transformers were in use in the retail department store and two were in use at the Annex.[7] During October and November 1983, Lazarus discontinued its use of and removed from its facility seven of the nine PCB transformers in the retail department store and in January 1984, Lazarus discontinued its use of and removed the remaining two PCB transformers in the department store.[8]

On February 13, 1992, an inspection of Lazarus' facility was conducted by Susan Netzly, at that time employed by the Ohio Environmental Protection Agency ("OEPA") as a PCB Inspector. She

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[2] Answer, ¶3.

[3] Transcript of Proceedings ("TR") at 21, 31; Complainant's Exhibit ("CX") 5. Neither the testimony nor the inspection report indicate that the inspection was intended to be confined to the Lazarus Annex.

[4] Tr. 153.

[5] Answer ¶¶ 8, 9 and 10; C Ex. 5; Respondent's Exhibit ("R. Ex.") 9, 14, 15, 17, 20, 22, 23, 24.

[6] 40 C.F.R.§761.3.

[7] Tr. 158; Answer ¶¶ 8, 9 and 10.

[8] R. Ex. 20.

was accompanied by Tom Buchan, also employed by OEPA as a PCB inspector.[9] The inspection was conducted on behalf of the EPA under a grant from the EPA to the State, and both Ms. Netzly and Mr. Buchan had received credentials from the EPA to make TSCA inspections for the EPA.[10]

Ms. Netzly and Mr. Buchan met with Jerry Taylor, Maintenance Director for Lazarus.[11] They presented their U.S. EPA credentials and Notice of Inspection showing that the purpose of the inspection was to ascertain Lazarus' compliance with the PCB Ban Rule.[12]

At the time of the inspection, Lazarus maintained two in-service PCB transformers in a room in the Annex.[13] Each transformer contained approximately 140 gallons of Pyranol, a brand of fluid containing over 500 ppm PCBs.[14] The inspection disclosed the following with respect to these transformers:

Lazarus had not registered the transformers with the fire response personnel with primary jurisdiction.[15] As of December 1, 1985, such registration was required by the PCB Ban Rule.[16] The

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[9] CX 5; Tr. 16-17, 23.

[10] Tr. 20, 23; The grant appears to be in conjunction with an EPA pilot TSCA cooperative enforcement agreement program. See CX 5 (cover page).

[11] Tr. 23, 151; CX 5.

[12] Tr. 23-24, 77; CX 5.

[13] Answer, ¶8; Tr. 31-32; CX 5.

[14] Tr. 44-45.

[15] Tr. 27, 174; RX 1.

[16] 40 C.F.R. §761.30(a)(1)(vi).

transformers were eventually registered on February 20, 1992.[17]

Lazarus was storing combustible materials, including wood shelves, cardboard boxes, paper bags, rubber hosing rags and plastic items within five meters of the two transformers.[18] The PCB Ban Rule, requires as of December 1, 1985, that combustible material must not be stored within 5 meters of a PCB transformer.[19]

Lazarus did not have records of its inspection and maintenance history for the two PCB transformers for the 3d and 4th quarters of 1991, for the 2d and 4th quarters of 1990, for the 3d and 4th quarters of 1989, 1988 and 1987, for the 2d and 4th quarters of 1986, for the 3d and 4th quarters of 1985, and for any of the quarters in the years 1984, 1983, 1982 and 1981.[20] The PCB Ban Rule requires that a visual inspection of each PCB transformer in use must be performed at least once every three months, and records of transformer inspections and maintenance history must be maintained at least 3 years after disposing of the transformer.[21]

The door giving access to the room in which the two PCB

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[17] Tr. 203-304.

[18] Tr.33-34, 38, 175-176, 207-208; CX 5.

[19] 40 C.F.R. §761.30 (a)(1)(viii).

[20] RX 8; Tr. 163; CX 5.

[21] 40 C.F.R. §§761.30(a)(1)(ix),(xii), codifying the Interim Measures Program, 40 C.F.R. Part 761, Appendix B(III), 46 Fed. Reg. 16090, 16091, 16095 (March 10, 1981). These requirements went into effect May 11, 1981, but the first inspection of PCB Transformers not posing an exposure risk to food or feed products had to be completed by August 10, 1981, and not by May 11, 1981, as the complaint implies. 46 Fed. Reg 16091.

Transformers were located was not marked with an M_L label.[22] The PCB Ban Rule requires that the vault door, machinery room door or means of access, other than grates and manhole covers, to the PCB transformer location must be marked with the M_L mark, unless an alternative mark had been approved by the Regional administrator.[23] The door to the transformer room was marked with a sign which read "Danger: High Voltage."[24] This marking did not come within the exception since it had never been submitted to the Regional Administrator for approval.[25]

Lazarus had no annual records or annual written document log of the disposition of PCBs and PCB Items in service or projected for disposal for the years 1978 - 1990.[26] The PCB ban rule requires any facility using or storing one or more PCB transformers to develop such documents and maintain them for at least 3 years after the facility ceases using or storing such PCB Items.[27]

The two PCB transformers were on an uncurbed, undiked and untrenched floor at the facility.[28] One of the PCB Transformers was leaking Pyranol PCB oil from its spout onto the floor, and had

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[22] CX 5; Tr. 32.

[23] 40 C.F.R. §761.40(j)(1) and (j)(2).

[24] Tr. 155.

[25] Tr. 202.

[26] CX 5; Tr. 204-205.

[27] 40 C.F.R. §761.180(a).

[28] CX 5; Tr. 208-209.

created a one square foot Pyranol PCB oil stain on the floor.[29] Spills and leaks are by definition a "disposal" of PCBs. Such a disposal does not meet the disposal requirements of the Rule.[30]

Discussion

Lazarus raises three defenses. It asserts, first, that State Inspectors have no authority to conduct inspections on compliance with Federal TSCA requirements so that the EPA's evidence was illegally obtained and should be suppressed. Second, it asserts that many of the violations charged are subject to the five-year statute of limitations. Third, it asserts that the documentation and record-keeping requirements which it is charged with violating were not in compliance with the Paperwork Reduction Act of 1980, 44 U.S.C. §§3501 et. seq., and are unenforceable. In addition, Lazarus also contends that the proposed penalty is excessive under the circumstances present in this case and taking into consideration Lazarus' good faith efforts in complying with the PCB ban Rule.

Complainant's Evidence was Lawfully Obtained

The inspection was made pursuant to a cooperative enforcement program between Ohio and the EPA and a grant Ohio received from the EPA. Ms. Netzly's duties as a PCB Inspector employed by OEPA included making TSCA inspections for the EPA.[31] She and the other OEPA employee accompanying her had credentials given her by U.S. EPA attesting to their authorization to conduct TSCA investigations

[29] CX 5; Tr. 46-47.

[30] 40 C.F.R. §761.60(d).

[31] Tr. 20.

for the EPA.[32]

The EPA's authority to designate State employees as TSCA inspectors is found in TSCA §11(a), 15 U.S.C. §2610(a), which reads in pertinent part as follows:

> For purposes of administering this Chapter, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances [or] mixtures... are manufactured, processed, stored or held before or after their distribution in commerce....Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises...to be inspected.

It is Lazarus' contention that the term "duly designated representative" is ambiguous, and since the term is not defined in the Act or applicable regulations, it is appropriate to look to the legislative history and other analogous statutes for its meaning. When the term is construed according to these sources, it is argued, the proper construction is that State employees were not intended to be included.

Much the same argument was made and rejected in the case of Litton Industrial Automation Systems, Inc., New Britain Machines Division, TSCA Appeal No. 93-4 (Jan 27, 1995) (hereafter "Litton Industrial Automation Systems").

Contrary to what Lazarus argues, I do not find the term "duly designated representative" to be ambiguous. Applying the words in their ordinary meaning, Ms. Netzly would clearly qualify as such a

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[32] Tr. 20, 23-24; The grant appears to be in conjunction with a U.S. EPA pilot TSCA cooperative enforcement agreement program. See CX 5 (cover page).

person. Although questioning the validity of her actions, Lazarus does not really dispute that Ms. Netzly had been designated by the Administrator to make TSCA compliance inspections as a representative of the EPA and that she carried the proper credentials to show this.[33] That the term "representative" is not further defined in the Statute does not, as Lazarus claims, contribute to the ambiguity but merely reinforces the construction that it was not to be limited to EPA employees.[34]

Lazarus in support of its interpretation relies upon the fact that missing from TSCA are the provisions in other statutes in which Congress expressly authorized the EPA to delegate enforcement to the State, citing sections 114(a) and (b) of the Clean Air Act, 42 U.S.C. §§7414(a) and (b), sections 308 (a) and (c) of the Clean Water Act, 33 U.S.C. §§1318(a) and (c), section 3007(a) of the Resource Conservation and Recovery Act, 42 U.S.C. §6927(a). Lazarus also cites Congressman Maguires' statement giving assurance that the authority to make grants to States in §28 would not be used by the EPA to pass some of its testing, monitoring and enforcement on

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[33] See Tr. 23-24.

[34] Litton Industrial Automation Systems, at 8. See also, Aluminum Co. of America v. DuBois, No. C80-1178V, slip. op. at 7 (W.D. Wash. May 29, 1981) (Court in rejecting the contention that the EPA did not have authority under TSCA §11 to authorize private contractors to make inspections noted that there was nothing in the Statute restricting the literal meaning of "representative" to employees of the EPA.) The opinion is reproduced as an Exhibit to Lazarus' Motion to Suppress Evidence, for Accelerated Decision and to Continue Hearing, filed May 27, 1994.

to the states.[35]

Lazarus' argument is without merit. The EPA's authority to designate State employees to serve as TSCA inspectors is not a delegation or an authorization of a State program but is simply intended to provide assistance to the EPA as it carries out its enforcement program.[36] Lazarus' reliance on §28 and Congressman Maguires' statement with respect thereto is also without merit. His statement may explain why the States were given only limited enforcement authority but it does not preclude using State employees to complement the EPA's own enforcement.[37]

The remaining Statute cited by Lazarus, FIFRA, §9, prior to its amendment limited inspections to "officers and employees duly

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[35] House Committee on Interstate and Foreign Commerce, Legislative History of the Toxic Substances Control Act 617-618 (Comm. Print 1976).

[36] The State program involved using EPA trained State employees to inspect for compliance with the Federal Program, with the EPA selecting the places to be inspected and, as should be apparent from this proceeding, enforcing the violations. These are the only details of the program disclosed in the record and they readily comport with a program that "complements" and does not reduce the Administrator's enforcement authority. See Tr. 20, 21, 23, 53; CX 5 (cover page). See Litton Industrial Automation Systems, TSCA Appeal No. 93-4 at 10.

[37] Litton Industrial Automation Systems, TSCA Appeal No. 93-4 at 10-12.

Lazarus in its motion to suppress also suggested that the EPA's program was not the kind of State program Congress had in mind in §28. The EPA's interpretation of what kind of programs are appropriate under §28, however, is entitled to weight. Cf., FCC v. Schreiber, 381 U.S. 279, 289-290 (1965) (Administrative agencies have a broad discretion in determining the manner in which they will conduct business).

designated by the Administrator."[38] Such language is more readily susceptible to the interpretation that inspections are limited to officers and employees of the EPA than the more broadly worded §11.

I find, in short, that the Administrator's designation of Ms. Netzly as a person to perform inspections for the EPA was authorized by §11, and was not inconsistent with TSCA §28.

Count I

Count I deals with Lazarus' failure to register its 2 PCB Transformers with the fire response personnel with primary jurisdiction, as required by §761.30(a)(1)(vi). Lazarus argues that this registration requirement was a one-time regulatory requirement, which became effective on December 1, 1985, and, therefore is barred by the five-year statute of limitations provided in 28 U.S.C. §2462.

There is no doubt that 28 U.S.C. §2462 applies to civil penalty suits under TSCA. 3M Company (Minnesota Mining and Manufacturing) v. Browner, 17 F. 3d 1453 (D.C. Cir. 1994). The Statute starts to run from the date "when the claim first accrued."[39] According to Lazarus, the claim accrued on December 1, 1985, when the requirement for registering PCB Transformers with fire response personnel went into effect and the violation for which it is now being charged consisted of the failure to report on that date.

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[38] FIFRA, §9(a), 86 Stat. 973, 988 (1972), amended by 7 U.S.C. 136g(a) (1988).

[39] 28 U.S.C. §2462.

Lazarus argues that its position is supported by Toussie v. United States, 397 U.S. 112 (1970). That case involved the failure of Toussie to register for the draft within five days after reaching his eighteenth birthday. Toussie was required to register sometime between June 23 and June 28, 1959. He was not indicted for failing to register until May 3, 1967. The Supreme Court held that the indictment was barred by the five-year statute of limitations applicable to non-capital criminal cases.

TSCA and the regulatory requirement to register transformers significantly differ from the Statute requiring draft registration considered in Toussie.

First, and most important, is the nature of the act itself that constitutes the violation. In Toussie, the Court construed the Act as imposing a one-time duty to register. The Court found that there was no language in the Statute making the violation a continuing one and nothing inherent in the act of registration itself which makes failure to register a continuing crime.[40] The regulation involved here requires PCB transformers to be registered with fire response personnel who need to know this information in responding to a fire because of the serious injury that can be caused both to the environment and to the response personnel when PCB Transformers are exposed to fire.[41] The danger of this injury exists so long as the PCB transformers are not registered. Thus, it

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[40] Toussie, 397 U.S. at 122.

[41] See Preamble to Final Rule for Polychlorinated Biphenyls in Electrical Transformers, 50 Fed. Reg. 29170, 29172 (Jul 17, 1985).

is entirely reasonable to construe the duty to register as a continuing one and not a one-time obligation to register the PCB transformers on December 1, 1985:

Second, there is the language of TSCA §16(a)(1), 15 U.S.C. §2615(a)(1), which provides as follows:

> Any person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $20,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title.

There does not appear to have been any similar provision in the Statute involved in Toussie. Although the legislative history of §16(a)(1) is sparse, the provision would seem to serve the same purpose as the continuing violation provision in the Federal Trade Commission Act considered by the Court in the case of United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). The Statute there provided that in the case of a violation consisting of continuing failure or neglect to obey a final Federal Trade Commission order each day of continuance of such failure or neglect shall be deemed a separate offense.[42] The Court construed the provision as intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose effect is continuing and whose detrimental effect could be terminated or minimized by the violator.[43] So here, the regulation imposed an

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[42] Federal Trade Commission Act, 15 U.S.C. §45(1).

[43] United States v. ITT Continental Baking Co., 420 U.S.223, 232 (1974)

initial duty on Lazarus to register all PCB transformers on site on December 31, 1985, but the effects of not registering the transformers upon the environment and personnel exposed to them continued beyond that date. To require that the proceeding be instituted within five years of the original violation would simply be contrary to the deterrent purpose of §16(a)(1).

I find, accordingly, that unlike the violations considered in Toussie and 3M, which were found to be completed at the time they occurred, the failure to register the PCB transformers was a violation that continued up to the date of the inspection, which was well within the statutory period.

In defense against the assessment of any penalty for the failure to report, Lazarus also called as a witness its "Safety Auditor", a Mr. Richard Bollon. Mr. Bollon started with Lazarus some time in 1968. Mr. Bollon also serves as a Columbus firefighter and has had training in fire response involving electrical equipment including fires involving PCB transformers. He stated that personnel from the local fire department that would first respond to a fire would annually conduct "familiarization inspections." Crews from fire apparatus at the local fire station would physically inspect the facility, including the Annex, where the presence of the PCB Transformers was pointed out to them.[44] These are matters more appropriately considered below in connection with determining the appropriate penalty.

Count II

[44] Tr. 270-277.

Count II of the complaint deals with Lazarus' storage of combustible materials within five meters of the two PCB Transformers in violation of 40 C.F.R. §761.30(a)(1)(viii).

Contrary to what Lazarus argues, I do not find the rule unclear in being applied to the materials found by Ms. Netzly to be within five meters of the PCB Transformers, namely, wood shelves, cardboard boxes, paper bags, and rubber hoses. The room was admittedly used to store items.[45] The items mentioned are commonly regarded as "combustible" given the ordinary meaning of the word as "capable of catching fire or burning."[46] The presence of these materials so near the transformers was sufficient to show a violation of the rule. The fact they included wooden shelving that Lazarus contends should be considered an "integrable" part of the room, does not reduce the risk of having combustible materials near the transformer which the rule was designed to protect against . Lazarus implies that the rule would not apply to materials "in use", such as a ladder. Materials in use can also be stored pending their being put to use. If the materials were kept so near to the transformers for an indefinite period of time, and there is nothing in the record to indicate they were not, that is enough to constitute storage.

Since this prohibition became effective on December 1, 1985, Lazarus again asserts that the violation occurred on that date and any assessment of penalties is barred by the five-year Statute of

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[45] Tr. 175.

[46] Webster's II New Riverside University Dictionary 285 (1984).

Limitations. This argument is rejected. Like the requirement to notify the fire department, the prohibition against storing combustible materials near a PCB Transformer is a continuing one. The violation charged is the storage of these combustible materials on the date of inspection, and not on the storage of items five years prior to the date the complaint was issued.

Counts III - VI

Counts III, IV and VI deal with Lazarus' failure to conduct quarterly inspections of its two PCB Transformers and to keep records of inspection and maintenance history of the transformers for at least three years after disposing of the transformers.[47] The specific periods alleged are the fourth and third quarters of 1991, and incomplete records of inspection and maintenance history from the third quarter of 1981 through the first quarter of 1991.

These inspection and record-keeping requirements were originally promulgated in 1981, as an Interim Measures Program and were subsequently codified, as amended, in 40 C.F.R. §§ 761.30(a)(1)(ix), (a)(1)(x) and (xii).[48] The two provisions that appear to be involved here are section 30(a)(1)(ix), which requires that transformers in use or stored for reuse be inspected at least

[47] The EPA has dropped its charge in Count V that Lazarus did not inspect and have records of inspection or maintenance history for its two PCB Transformers for the second quarter of 1991. Proposed Findings of Fact, Conclusions of Law and Order at 33-34. That Count, accordingly, is dismissed.

[48] For the Interim Measures Program, see 40 C.F.R. Part 761, Appendix B (III), 46 Fed. Reg. 16090 (March 10, 1981). The codification giving rise to the current rule was promulgated in 1985, 50 Fed. Reg. 29199, 29200-29201 (July 17, 1985).

once every three months for leaks, and section 30(a)(1)(xii), which requires that records of the inspection and maintenance history of a transformer must be maintained for at least three years after the disposal of the transformer.

The evidence is that pursuant to its own program and not because of any regulatory requirements, Lazarus did actually inspect the transformers monthly from 1981 on, and that preventive maintenance was performed twice a year, including correcting small leaks found on some of the transformers.[49] Also, from 1986 on, Lazarus kept a semi-annual report of inspection.[50] Lazarus, however, was apparently unaware that it was required by regulation to make quarterly inspections and keep records of the quarterly inspections and maintenance history.[51]

Lazarus argues that any failure to inspect more than five years prior to the commencement of this proceeding and any failure to have records of inspections and maintenance relating to that period is barred by the five-year statute of limitations. For purposes of this proceeding it is assumed that this proceeding was commenced on June 16, 1993, when the administrative complaint was filed with the Regional Hearing Clerk and mailed to Lazarus.[52]

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[49] Rx. 2, 7, 22; Tr. 244, 245, 265.

[50] RX 8.

[51] Tr. 160. Lazarus did keep a semi-annual report of inspection and maintenance from 1986 on. RX 8.

[52] The complaint was signed on May 27, 1993, but taking the date when it becomes a matter of public record by filing it with the Regional Hearing Clerk and serving it upon Lazarus is in conformity with the Federal Rules. Fed. R. Civ. P. 3 and 5(e). The

Thus, the time period involved is the period prior to June 16, 1988. Some of the violations for which a penalty is sought fall within that period, namely, Lazarus' failure to have records of inspection from the third quarter of 1981 through the second quarter of 1988. Lazarus does not press the issue, because many of the violations did occur within the statutory period. The question is considered here because of Lazarus' claim that the record-keeping violations are de minimis.

Although the complaint alleges as a violation the failure to inspect and to maintain records of inspections and maintenance, the EPA professes to seek penalties only for the failure to produce or have available at the time of the inspection records of quarterly inspections.[53]

The rule requiring records of inspection and maintenance is separate from the rule requiring that the transformers be inspected quarterly.[54] The question is whether the requirement to maintain records of inspections is a violation that can be considered separate and apart from the failure to inspect.

The purpose of the records would appear to be to enable the

EPA also appears to be in agreement that the five-year period should be counted from the June 16 date. See Complainant's response to Respondent's motion to dismiss Counts I - IX at 4.

[53] Complainant's Proposed Findings of Fact, Conclusions of Law and Order at 56-61.

[54] See §761.30(a)(1)(ix) (requiring quarterly visual inspections), §761.30(a)(1)(x) (requiring that leaking transformers be repaired and replaced and leaks cleaned up) and §761.30(a)(1)(xii) (requiring records of inspection and maintenance history).

EPA to determine whether the inspection and maintenance had been done.[55] The absence of a record showing that an inspection had been done may be significant to the EPA if there is a question about whether a respondent had made the inspection. But if the evidence shows that the inspection was not done, whether or not respondent had a record showing this seems immaterial. In short, I find that the failure to maintain records cannot be considered apart from the asserted failure to inspect, and they really constitute one violation in determining the penalty to be assessed. This is recognized in the PCB Penalty Policy which states that since lack of inspections will normally result in lack of records of inspection, only one violation should be charged.[56]

While the obligation to make quarterly inspections is made by rule a continuing one, the failure to inspect in any quarterly time period is not the kind of violation that is by nature continuing but is complete upon termination of the quarterly period. The lack of a record that would merely show that the inspection was not done in a particular quarter is also by its nature not a continuing violation. The EPA should not be allowed to avoid the consequences of the lack of inspection being barred by the Statute of Limitations by exacting a penalty for failing to have a record showing that the inspection was not made.

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[55] This is suggested by the PCB Penalty Policy, CX 2 at 3, discussing the "extent"of potential and actual environmental harm with respect to use, storage and manifesting violations. If the records have any other purpose, that has not been demonstrated in this record.

[56] PCB Penalty Policy at 13.

Thus, with respect to the records violations charged, while I do not agree with Lazarus that the complaint did not give sufficient notice that it would be charged only with the failure to keep records, I do find that the significance of the violation in determining the appropriate penalty cannot be considered separate and apart from what inspections were actually done by Lazarus.

COUNT VII

Count VII of the complaint charges Lazarus with the failure to mark with the required M_l label an access door to the room containing the two PCB transformers in violation of 40 C.F.R. §761.40(j).

Lazarus contends that the EPA is barred from recovering any penalty for this violation. It argues that the label is an "information request" within the meaning of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§. 3501-3520, and that the requirement to display this label is unenforceable because the EPA has not complied with the PRA.

Lazarus relies upon the fact that labeling requirements are included in the definition of a "collection of information." [57] The format of the M_l mark is prescribed by regulation. It is intended to warn the public of the presence of PCBs and not to provide information to the EPA. Rules mandating disclosure by the regulated community of information to third parties are not subject to the PRA.[58] Accordingly, Lazarus' claim that no penalty can be

[57] 5 CFR § 1320.7(c)((1).

[58] Dole v. Steel Workers, 494 U.S. 26 (1990).

assessed for this violation is rejected.

Counts VIII - XI

Counts VIII - XI charge Lazarus with a failure to keep annual records on the disposition of PCB's and PCB items as required by 40 C.F.R. § 761.180(a). Count VIII charges a failure to keep such records for the calendar year 1990, Count IX charges a failure to keep such records for the calendar year 1989, Count X charges a failure to keep such records for the calendar year 1988, and Count XI charges a failure to keep such records for the calendar years 1978 - 1987.

Lazarus contends that the EPA is barred by the PRA from enforcing the record-keeping requirements. It further asserts that the regulation is ambiguous and that Lazarus' construction that no records were required should be upheld as reasonable, or, in the alternative, that enforcement of the violations charged in Count XI is barred by the five-year statute of limitations. Since it does not press the Statute of Limitations defense, that issue will not be considered here.

There is no question that the record-keeping requirements are subject to the PRA as information collection requests. The Act went into effect on April 1, 1981.[59] OMB approval appears to have been in effect for the record requirements of § 761.180(a) except for lapses from 9/30/82 - 2/14/83 and 9/30/85 - 12/10/85. The OMB control number, however, was not displayed in the text of the regulation published in the Federal Register or in the Code of

[59] Pub. L. No. 96-511, §5, 94 Stat. 286.

Federal Regulations until the regulations's amendment in 1989.[60]

The PRA provides that no person shall be subject to any penalty for failing to maintain or provide information to an agency unless the information collection request displays the current OMB control number.[61] Regulations issued by OMB define "display" in the case of collections of information published in regulations as:

> [P]ublishing the OMB control number in the Federal Register (as part of the regulatory text, or as a technical amendment) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein....[62]

OMB's regulation plainly requires that the control number be displayed in text of the regulation published in the Code of Federal Regulations. The EPA argues that this was not required in the case of the annual records mandated by §761.180(a), citing an opinion given by OMB's Acting General Counsel in a letter dated May 26, 1993, in response to a letter from the EPA's Acting General Counsel of May 26, 1993. The letter of the EPA's Acting General Counsel sets forth arguments why constructive notice given by publication in the Federal Register of the OMB control number

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[60] See Memorandum from Michael J. Walker to ORC Toxics Branch Chiefs, "Paperwork Reduction Act ICR Lapses for TSCA, FIFRA, AHERA, and EPCRA Regulations Important To the Toxics Enforcement Program", dated Jun 11, 1993, Respondent's Exhibit F to its motion for accelerated decision regarding Counts VII through XII. The EPA does not question Mr. Walker's analysis in his memorandum. See Respondent's Proposed Findings of Fact and Conclusions of Law at 63. See also 51 FR 6929 (Feb 27, 1986). The OMB approval, however, was included in the text of the amendment published in the FR on December 21, 1989, 54 FR 52750, 52752.

[61] 44 U.S.C § 3512.

[62] 5 CFR § 1320.7(e)(2).

should be sufficient and publication in the CFR not required.[63] OMB's Acting General Counsel stated, that in light of the information given by the EPA and "other considerations", it is OMB's determination that notification in the preamble to the final rule or in separate notices in the Federal register were sufficient to satisfy the display requirements of the PRA and OMB's regulation.[64]

The display of the OMB control number is required by statute and the term is defined by regulation to require that it be published in the Federal Register as part of the regulatory text "to ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein."[65] Although the wording seems reasonably clear that the control number was to be included as part of the text of the regulation published in the CFR, any doubts about this is dispelled by the preamble to the regulation. There it is stated that:

> [S]ubparagraph 7(f)(2) [has been changed] to indicate more clearly that OMB intends for agencies to incorporate OMB control numbers into the text of regulations so that the numbers will appear in the regulations as published in the Code of Federal Regulations. Publication of control numbers in the preamble to regulations would not have accomplished this purpose.[66]

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[63] Exhibit F.

[64] The correspondence is contained in Attachment F to the EPA's response to Respondent's motion for an accelerated decision for Counts VII through XI (hereafter "Attachment F").

[65] 5 C.F.R. §1320.7(e)(1).

[66] 48 Fed. Reg. 13676 (Mar 31, 1983).

The constructive notice provision of 44 U.S.C. §1507, is modified by the publication provisions of the PRA. The Act itself does not define "display" but delegates to the Director of OMB the authority to issue regulations interpreting the PRA.[67] Presumably, OMB could have made any publication in the Federal Register sufficient notification of the OMB control number. It is significant that it did not. The regulation's statement of what is required by "display" of the control number, is entitled to great weight.[68] On the other hand, an informal ruling interpreting a regulation is entitled to weight only if it is not inconsistent with the regulation.[69] Here, the Acting General Counsel's opinion is inconsistent with the regulatory requirement that the control number be included in the text published in the Code of Federal Regulations and it is entitled to little weight. I find, accordingly, that Lazarus cannot be assessed a penalty for its failure to keep and, therefore, produce annual records on the disposition of PCB's and PCB Items prior to the inclusion in the 1989 Federal Register of the OMB control number.[70] This results in

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[67] 44 U.S.C. §3516.

[68] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984).

[69] United States v. Larionof, 431 U.S. 864, 872 (1977); General Electric Co. v. EPA, No. 93-1807, slip op. 5 (D.C. Cir. May 12, 1995).

[70] 44 USC §3512. If Lazarus knew of OMB's approval of the record-keeping requirements even though the control number had not been included in the C.F.R., this would, of course, raise a different question. Publication of the control number protects a party from having to comply with information collection requests not approved by OMB. To excuse the party who knew of the OMB

the dismissal of Counts X and XI.[71]

With respect to Count VIII and IX, I do not agree with Lazarus's claim that the record-keeping requirements of §761.180(a) are vague and confusing. The heading of the recordkeeping provision is "PCBs and PCB Items in service or projected for disposal." The regulation specifically requires that the annual log show in addition to the information relating to the disposal of PCBs, the total quantities of PCBs and PCB Items in service at the end of the year.[72] It is reasonable to read the regulation as requiring annual records on all PCBs and PCB Items both in service and disposed of so as to give a continuous record over time of PCBs used or stored by the owner or operator from the time the regulation went into effect. It is Lazarus' interpretation of the regulation as requiring annual records only for the years in which PCBs have been disposed of that is strained.

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approval from complying with the record-keeping requirement simply because the prescribed form of notice was not given would not serve the purpose of informing the party of OMB approval and would deprive the EPA of useful information. Regulations should not be construed to give such an foolish result. Ralpho v. Bell, 569 F. 2d 607, 627, rehg denied, 569 F. 2d 636 (DC Cir. 1977), appeal after remand, Melong v. Micronesian Claims Commission, 643 F. 2d 10 (1980).

[71] The date on which the annual report for 1989 had to be compiled was July 1, 1990. The OMB control number was included in the text of the amendment published in the FR on December 21, 1989, and I find that this is sufficient compliance with the PRA, even though the 1990 CFR in which the text containing the OMB control number was set forth, was undoubtedly not available to the public until after July 1, 1990, since it contains the regulations as of July 1, 1990.

[72] 40 CFR §761.180(a)(2)(iii) through (vi). The requirement to keep records and an annual log has been in effect since July 2, 1978. See 40 CFR §761.180 (1989).

Count XII

Count XII charges that Lazarus failed to dispose of PCBs in accordance with the applicable disposal requirements, 40 C.F.R. §761.60. On her inspection, Ms. Netzly observed that one of the two PCB transformers was leaking oil from its spout onto the floor, and that there was a square foot of oil spill on the area underneath the spout.[73]

The testimony is in conflict as to whether the spill was of recent origin or not. According to Ms. Netzly, she noticed that there was oil around the spout itself and the spout looked oily. She also said that some of the areas on the floor appeared glossy and a little oily compared to other material on the floor that appeared dry. All of this indicated that the leak was either ongoing or had occurred in some areas just recently.[74] On the other hand, electrical contractors who serviced the transformers for Lazarus and Lazarus' Maintenance director testified that in their opinion the spouts of the transformer did not leak and that the oil spill could not have been of recent origin.[75] Given Ms. Netzly's training and her experience as a PCB inspector, I find Ms. Netzly's conclusion that at least some of the stain on the floor was the result of recent dripping from the spout to be the more

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[73] CX 5, p.4; Tr. 46-47.

[74] Tr. 47, 73.

[75] Tr. 172-173, 245-46, 251, 255, 266.

credible testimony.[76]

Lazarus also argues that any disposal violation resulting from a spill that occurred prior to June 1988, is barred by the five-year Statute of Limitations. The argument is without merit. First, the evidence supports the finding that some of the spill, if not all of it, occurred within the last five years. Second, the spilled PCBs remain PCBs that are improperly disposed of until they are cleaned up and disposed of properly.[77] In short, the obligation to properly dispose of spilled PCBs is a continuing one.

The Penalty

For Count I, the EPA proposes a penalty of $13,000 for Lazarus' failure to register the transformers with the local fire response personnel. This is derived from the PCB Penalty policy, which according to the EPA classifies the violation as a significant non-disposal violation (240 gallons of PCBs over 500 ppm concentration), level 2.

The testimony of Richard B. Bollon, however, shows that the probability of harm caused by not giving actual notice, on which the circumstance classification is based, is low.[78] Accordingly, I find that the appropriate penalty is $6,000.

For Count II, the EPA proposes a $6,000 penalty for Lazarus'

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[76] Ms. Netzly has a Bachelor of Science degree in chemistry and biology, and was a PCB Inspector from August 1990 through June of 1992, conducting between 35 and 40 inspections per year. Tr. 16, 20, 52.

[77] Standard Scrap Metal Company, TSCA Appeal No. 87-4 (1990) at 4-5.

[78] See Supra at 15.

storage of combustible materials near the PCB transformers. This is the penalty recommended by the penalty policy for a use violation that is significant in extent and minor in circumstance. I find this penalty reasonable. The quantity of combustible materials stored in close proximity to the PCB transformers justifies more than the nominal penalty proposed by Lazarus.

For Counts III, IV and VI, the EPA proposes a penalty of $13,000 per count or a total penalty of $39,000. These violations according to the EPA fall into the classification of major use violations that are significant in extent.

The inspection violations are all attributable to the same cause. Lazarus was unaware of the regulatory requirement that quarterly inspections were required. It did have its own program of monthly inspections, performed preventive maintenance twice a year and from 1986 on, kept semi-annual reports of inspections.[79]

Since violations prior to the second quarter of 1988, are barred by the Statute of Limitations, it would seem that this should result in a reduction for the penalty sought under Count VI. The EPA proposes, however, the same penalty for a failure to have records of inspection for the third and fourth quarters of 1991, of $13,000 for each quarter, that it does for the failure to have quarterly records of inspection for the entire period comprising the third quarter of 1981 through the first quarter of 1991. No allowance is made in the EPA's penalty calculation for whether there has been only one quarter missed or whether numerous quarters

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[79] Supra, p. 17.

have been missed.

If there is a reasonable basis for calculating the penalty in this fashion, it is not apparent in the papers before me. I see no reason why all missed quarterly inspections from June 1988 on, since the prior period is barred by the Statute of Limitations, should not, in fact, be treated as a single violation consisting of the failure to conduct all required visual inspections but where a significant percentage was conducted and records of such inspections were kept. Such a violation would seem to fall within the level four, minor use violations of the penalty policy and subject to a penalty of $6,000. The penalty for Counts III, IV and VI is, therefore, reduced to $6,000.

For Count VII, the EPA proposes a penalty of $13,000 for the failure to mark the door to its PCB transformers with an M_L label. The EPA classifies the violation as a major marking violation. Lazarus argues that there was little risk that persons entering the room would not know that PCB transformers were present, because the only people having access to the room were the maintenance force, Lazarus's electrical contractor and security people and the transformers themselves were properly marked with labels which were visible to anyone entering the room.

The mark on the door warns a person of the presence of PCBs at the time of entering the room. Even if a person at some time has been told that the transformers are PCB transformers, the mark is an onsite reminder which minimizes the danger that the person may not have remembered or may have overlooked the fact that PCBs are

present. The presence of the mark on the transformers themselves would not be as effective a warning, particularly if the person on entering found a fire present with smoke obscuring his or her vision.

I find, accordingly, that $13,000 is an appropriate penalty for this violation.

Counts VIII - XI, allege failure to prepare and have available an annual document on the disposition of PCBs. As already found, all Counts have been dismissed for failure to comply with the Paperwork Reduction Act, except Counts VIII and IX for which the EPA seeks penalties for failure to produce the annual reports for the calendar years 1989 and 1990. The violation is classified as a Level 4 (significant recordkeeping violations) and in the "significant" circumstance category. The penalty proposed is $6,000 per Count.

The evidence is that Lazarus did have records with respect to the information that would be included in the annual report.[80] The EPA argues that the annual reports that Lazarus constructed were incomplete.[81] It does appear that the information supplied contained all the material information regarding the disposition of PCBs and what was missing was attributable either to clerical error

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[80] Tr. 166-169, 184-185; RX 9.

[81] Complainant's response to Respondent's Proposed Findings of Fact, Conclusions of Law and proposed Order at 48-49.

or insignificant.[82] Again the EPA's treatment of the violations by making some the subject of separate counts and lumping others into one count is rejected. I find that they should be treated as a single violation. As a level six minor recordkeeping violation, the appropriate penalty is $1300.

For the improper disposition of PCBs alleged in Count XII, the EPA places the violation in the category of a major disposal, Level 1, where the extent of damage would be minor. The penalty proposed for a violation in this category is $5,000.

The evidence shows that Lazarus contacted WATEC, a waste-disposal company on the day of the inspection.[83] WATEC submitted its proposal on February 17, 1992, four days after the inspection, and the clean-up was completed on February 18, 1992.[84] The area itself was not cordoned off and no warning signs were posted advising persons to avoid the area but the building itself was closed and the door was locked. Lazarus employees did go into the room to remove the combustible materials that Ms. Netzly said should not be there.[85]

Lazarus claims that its clean-up efforts were sufficient compliance with the EPA's requirements to create a presumption

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[82] Tr. 221. Although the documents were prepared after the inspection, this does not appear to be significant in and of itself. See Tr. 69-70.

[83] Tr. 181.

[84] RX 10.

[85] Tr. 215-216, 219.

against an enforcement action for penalties.[86] I find that Lazarus did make a good faith effort to promptly clean up the spill. While no warning signs were posted, entry was restricted and the only entry made was for purpose of removing the combustible materials. This certainly minimized whatever hazard may have been created in exposing individuals to the spill and spreading the contamination.

The EPA's policy establishes a presumption against the imposition of a penalty where the cleanup requirements have been met. It is not clear exactly as to what burden is shifted to the EPA by the operation of the presumption.[87] Nevertheless, it does speak in terms of "enforcement discretion."[88] The policy, however, shows that the EPA believes that a respondent's good faith efforts to promptly and completely clean up a spill should be taken into account in assessing a penalty . Under the facts here I find that while Lazarus did not comply to the letter with the EPA's cleanup requirements, its good faith efforts do justify a %50 reduction in the penalty. Accordingly, the penalty is reduced to $2500.[89]

I find, accordingly, that the appropriate penalty for the

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[86] For requirements for cleanup see 40 CFR §761.125(c). For the EPA's policy regarding the effect of compliance on enforcement, see 40 CFR §761.135.

[87] Presumptions are ordinarily evidentiary devices for inferring the existence of a fact in issue from the establishmemnt of other facts. See Fed. R. Evid. 301; St. Mary's Honor Center v. Hicks, --U.S.--, 125 L. Ed.2d 407, 416 (1993).

[88] 40 CFR §761.135(b).

[89] Cf. James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (Dec. 6, 1994) at 11 (Penalty policy need not be followed where formulation overstates the actual gravity of harm).

violations herein found is $34,800.

ORDER[90]

Pursuant to the Toxic Substances Control Act, section 16(a), 15 USC §2615(a), a civil penalty of $34,800, is assessed against Lazarus, Incorporated, Columbus, Ohio. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA - Region 5
(Regional Hearing Clerk)
P.O. Box 360582M
Chicago, IL 60673

Gerald Harwood
Senior Administrative Law Judge

Dated: May 25 1995

[90] Unless an appeal is taken pursuant to 40 CFR §22.30, or the Environmental Appeals Board elects, sua sponte, to review this decision, this decsion shall become the final order of the Agency. 40 CFR §22.27(c).