10/8/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BICKFORD, INC.,	)	**Docket No. TSCA-V-C-052-92**
	)	
Respondent	)	

INITIAL DECISION

Pursuant to Section 16 of the Toxics Substances Control Act, 15 U.S.C. § 2615, respondent has been assessed a civil penalty for violating the Polychlorinated Biphenyls Manufacturing, Processing, Distribution and Use regulations, located at 40 C.F.R. Part 761.

By: Frank W. Vanderheyden
Administrative Law Judge

Appearances:

For Complainant:

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INTRODUCTION

This proceeding's journey began in an administrative complaint filed on June 12, 1992, by the United States Environmental Protection Agency, Region 5 (complainant or EPA), pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615. This section provides for the assessment of civil penalties for violations of Section 15 of TSCA, 15 U.S.C. § 2614. The complaint charged Bickford, Inc. (Bickford or respondent), with three violations of the Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution and Use regulations, located at 40 C.F.R. Part 761. Violations of these regulations, which were promulgated under Section 6(e) of TSCA, 15 U.S.C. § 2605(e), constitute violations of Section 15(1)(C).[1]

Counts I and II alleged the failure to develop and maintain annual records on the disposition of PCBs and PCB items for the calendar years 1987 and 1988, as required by 40 C.F.R. § 761.180(a). Count III alleged the failure to notify U.S. EPA of PCB waste handling activities by filing Form 7710-53 pursuant to 40 C.F.R. § 761.205(b). For these alleged violations, complainant proposed a penalty of $50,000.

On December 9, 1992, respondent's answer to the complaint was received which denied the alleged violations and proposed penalty and requested a hearing.

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[1] Section 15(1)(C) makes it unlawful for any person to fail to comply with any rule promulgated under certain sections of TSCA, including Section 2605.

Thereafter, complainant filed a motion on February 22, 1994[2], for a partial accelerated decision (PAD) regarding liability for all counts. After respondent submitted its response of March 28, complainant filed a motion on April 12, to amend its PAD motion. On May 5, the Administrative Law Judge (ALJ) granted the motion to amend, and on September 8, the ALJ ruled in favor of complainant's PAD motion. The September 8 order directed complainant to submit a draft PAD for the ALJ's review, possible revision and signature. Such submission was made on September 29, and the ALJ issued the PAD for all counts on November 28.

On March 8, 1995, complainant filed a motion to amend its complaint to increase the proposed penalty for count I to $15,000, and the total proposed penalty to $55,000. In an order of April 5, 1995, this motion was granted. On April 18, 1995, the parties submitted joint stipulations of fact. A hearing was held regarding the penalty issue.

After post-hearings briefs were submitted, the ALJ was informed that the final disposition of this case may be affected by the requirements of the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §§ 3501 et. seq. In this regard, on July 28, 1995, the ALJ ordered the parties to submit supplemental post-hearing briefs concerning this issue, focusing on the initial decision reached In re Lazarus, Inc.(Lazarus), Docket No. TSCA-V-C-32-93 at 22-26 (May 25, 1995). This case held that under Section 3512 of the PRA, no penalty could be assessed for failure to comply with 40 C.F.R. §

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[2] Unless otherwise stated, all dates are for the year 1994.

761.180(a) prior to 1989, when neither the Federal Register nor the Code of Federal Regulations displayed an Office of Management and Budget (OMB) control number as part of the regulatory text. Respondent's and complainant's respective supplemental briefs were received on August 15 and 28, 1995.

The sole issue to be resolved here is whether or not $55,000 is a proper penalty considering the relevant facts and law. In this regard, it must also be determined whether or not the penalty EPA seeks is appropriate and, where pertinent, supported by a preponderance of the evidence.[3] "Preponderance of the evidence" is the degree of relevant evidence which a reasonable mind, evaluating the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the ALJ. Further, it is not required that the ALJ decide every single issue raised in this proceeding. It is sufficient that there is a resolution of only those major questions requisite for a decision.

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[3] The applicable section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.24, provides in pertinent part that each matter in controversy shall be determined by a preponderance of the evidence.

FINDINGS OF FACT

Bickford is a metal recovery and recycling business, located in New Lisbon, Wisconsin. The majority of its operations is comprised of purchasing scrap electrical equipment from electric utility companies. (JX-1 at 31.) Most of this equipment is oil-filled transformers with varying amounts of PCBs. (JX-1 at 5.) After receiving equipment, the fluid is drained, stored in containers of similar PCB concentration ranges, and shipped at a later date for disposal at an EPA approved incinerator. Copper wiring and other reclaimable metals are then obtained from the empty equipment for recycling. (JX-1 at 5-6; Tr. 25.) Bickford has been involved in this PCB separation, disposal and metal recovery process since 1978. (Tr. 165.)

When its operations first began, Bickford was only processing tested non-PCB equipment (i.e., oil-fluid containing less than 50 parts per million (ppm) PCBs) and drained transformers (i.e., oil-fluid containing less than 500 ppm PCBs). (Tr. 25.) In late 1987, Bickford began accepting untested and undrained transformers from small utility companies. (Tr. 26.) For equipment with unknown PCB content, a sample of the fluid was taken and sent for analysis to determine its PCB concentration. If the sample was found to contain greater than 500 ppm PCBs, then arrangements were immediately made to ship the equipment from the facility for incineration. (JX-1 at 31.)

On September 5, 1990, Priscilla Fonseca (Fonseca), an EPA approved inspector in Region 5, conducted an inspection of

Bickford's New Lisbon facility to evaluate the latter's compliance with the PCB regulations. The inspection arose because Bickford's name was on a list of companies that accepted electrical equipment form Consolidated Edison. Another company on this list had PCB contamination on-site so EPA decided to investigate Bickford's facility when it was in Wisconsin. (Tr. 23, 46-47.)

In her inspection report, Fonseca noted the "good housekeeping" procedures in Bickford's handling of PCB equipment. Specifically, Bickford instituted the following practices. When draining the equipment, a steel pan was used to catch any spills. All drained fluid was stored in a designated area. Fluid containing less than 50 ppm PCBs was stored in a 8,000 gallon tank, which had a concrete enclosure. Fluid containing between 50-500 ppm PCBs was stored in 55 gallon drums, and placed in an area which was diked all around with a concrete containment curb. Moreover, while awaiting proper disposal, all items were marked with the date when they were received. These containers were then sent to EPA approved disposal facilities. (JX-1 at 5-6, 32.)

To insure that no fluid remained after draining the equipment, a furnace was employed for baking the transformers at 1800-1900 degrees Fahrenheit. The equipment was placed on steel trays to collect ash from the baking process, and the ash was then gathered and stored separately too. The unsalvageable parts of the transformer were also disposed at EPA approved facilities. (JX-1 at 6.)

During the inspection, Fonseca inquired whether or not

Bickford had annual documents on its PCB activities for 1987-1989. Bickford was able to provide the inspector was an annual document summarizing its total PCB inventory for 1989, but none existed for 1987 or 1988. (Tr. 37-38.) Although Bickford did not have an annual summary document for 1987 or 1988, Bickford offered to let the inspector look through its record files. (Tr. 42, 70.) These records consisted of shipments received, manifests on shipments sent for disposal, and certificates of destruction. (JX-3 to JX-4.)

Following the inspection, Bickford hired a consulting firm, Dames & Moore, to aid in bringing itself into compliance. (Tr. 63.) Dames and Moore was able to prepare Bickford's annual summary documents for 1987 and 1988 from the latter's record files. These annual summaries were completed and submitted on December 10, 1990. (JX-1 at 30-34.) After Bickford had a chance to restore its files and review the annual document summaries, Bickford contacted EPA on August 11, 1992, to alert the latter of errors detected in these document summaries. (JX-5.) The corrected annual summaries revealed the following information regarding Bickford's handling of PCBs: during 1987, it handled at least 41,593 kilograms (kgs) of PCB waste oil; and during 1988, it handled at least 46,821 kgs of PCB waste oil. For both 1987 and 1988, this waste oil contained at least 50 ppm of PCBs. (JX-5 at 931, 942.)

During the inspection, Fonseca also inquired whether or not Bickford had notified EPA about its PCB waste handling activity. Bickford indicated that it had not, but related that it already had

a Resource Conservation and Recovery Act (RCRA) EPA identification number. Bickford had applied for and received the following RCRA identification number in 1980: WID 981093255. (JX-7; Tr. 165, 173.) However, Fonseca explained that this identification number was insufficient, and that Bickford needed to apply for a PCB identification number. (Tr. 35, 170.)

Nine months before the inspection, in January 1990, Bickford attended an EPA sponsored meeting at which the requirement to have an identification number was discussed. Bickford assumed its RCRA identification number satisfied this demand. (Tr. 169-70.) On April 4, 1990, the requirement to have an EPA identification number for PCB waste handling activities went into effect. (Tr. 104, 106.)

Roughly two weeks prior to the inspection, on August 24, 1990, Bickford shipped 44 PCB articles which contained about 7,625 kgs of PCB waste oil. (JX-8, Table 1.2 at 968-82.) The day after the inspection, September 6, 1990, Bickford completed the form to notify EPA of its PCB activities. (JX-1 at 22-24.) On the notification form, block Roman numeral II asked for an EPA identification number if already assigned under RCRA. Bickford supplied the aforementioned number. (JX-1 at 24, 26.) Also, after consulting with EPA, Bickford listed its PCB activity as a PCB generator on the notification form. (JX-1 at 25-27, 37.) On September 26, 1990, EPA assigned Bickford a PCB waste handling identification number. The number given, WID 981093255, was the same as its RCRA one. (JX-1 at 28.)

APPROPRIATENESS OF PENALTY

As stated in the introduction, the sole issue to be determined here is the appropriateness of EPA's proposed penalty. In this regard, Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), states that any person who violates a provision of Section 15 shall be liable for a penalty not to exceed $25,000 for each violation. In determining the amount of the penalty, Section 16(a)(2)(B) of TSCA requires that:

> [T]he Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B).

Further, under the Rules, the ALJ is also required to "consider" any civil penalty guidelines issued under the respective Act when computing a penalty. 40 C.F.R. § 22.27(b). However, it is emphasized the penalty policies serve as guidelines only, and do not rise to the level of binding regulations. As it has been stated on numerous instances, the penalty policies aid in the uniform application of the statutory factors, but there is no mandate that they be rigidly followed. In re James C. Lin & Lin Cubing, Inc., FIFRA Appeal No. 94-2 at 5 (EAB, December 6, 1994)(citations omitted). After considering the penalty policy, the ALJ has full discretion to assess a different penalty from that recommended in the complaint provided the rationale is explained.

40 C.F.R. § 22.27(b).

I. PCB PENALTY POLICY[4]

The PCB Penalty Policy (policy) implements a two-stage system for determining penalties brought under Section 16 of TSCA. First, there is a determination of a "gravity-based penalty" (GBP). The GBP is based upon the following factors from Section 16(a)(2)(B) of TSCA: the "nature" of the violation, the "extent" of potential or actual environmental harm from a violation, and the "circumstances" of the violation, which reflects the probability of harm to human health or the environment. The GBP is calculated by a matrix which plots the "extent" of the violation on a horizontal axis, and the "circumstances" of the violation on a vertical axis. The "extent" category is divided into three levels in order of descending potential harm-"major, significant, and minor." The "circumstance" category is also broken down into three ranges- high, medium and low. Each range has two levels with high, containing levels one and two; medium, levels three and four; and low, levels five and six. (CX-2 at 9.) At the point on the matrix, where the "extent" and "circumstance" categories intersect, the GBP is determined. The requirement to consider the "nature" of the violation is already incorporated into the matrix because the "nature" of all

[4] In this case the applicable penalty policy document is the Polychlorinated Biphenyls (PCB) Penalty Policy, issued April 9, 1990. This policy is applicable to all administrative actions commenced after the issue date, regardless of when the violation occurred. (CX-2 at 1.)

PCB infractions are the same, being chemical control violations. (CX-2 at 2.) Under the second stage, the GBP may be adjusted, upward or downward, based upon adjustment factors relating to the violator in the aforementioned Section 16(a)(2)(B).

A. Counts I and II

Counts I and II seek to assess penalties for the failure to keep annual summaries on the disposition of PCBs and PCB items as required by 40 C.F.R. § 761.180(a) for the years 1987 and 1988. In Lazarus, which involved these same violations, it was held that the failure to "display" an OMB control number as part of the regulatory text published in the Federal Register and the Code of Federal Regulations barred the assessment of penalties under the PRA. 44 U.S.C. § 3512.

Complainant argues that the public protection provision of the PRA, Section 3512, has no force at this stage in the proceeding because it is an affirmative defense that has been waived by Bickford's failure to raise the same. This section declares notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency unless the information collection request displays a current control number. Id. An affirmative defense can be any matter asserted that does not controvert complainant's prima facie case, but nonetheless, constitutes a defense to the complaint. 2A James W. Moore et al., Moore's Federal Practice, ¶

8.27[1] at 8-154 to 8-155, [3] at 8-162 (2d ed. 1995). Section 3512 of the PRA clearly falls under the rubric of an affirmative defense. Although this section does not controvert the recordkeeping requirements of 40 C.F.R. § 761.180(a), it blocks any penalties for such non-compliance if its demands are not met.

While it is found that Section 3512 is an affirmative defense, under the circumstances here, the ALJ does not agree that this defense has been waived. As a general proposition, the failure to plead an affirmative defense results in the waiver of that defense. However, this rule is not applied automatically, and numerous exceptions exist. 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1278 at 477, 491 (2d ed. 1990); See also Moore's Federal Practice, ¶ 8.27[3] at 8-166. For example, the failure to plead an affirmative defense will not result in a waiver if it would not be in the interests of justice. Id. at 8-173. This case demonstrates such an instance.

Congress enacted the PRA to eliminate unnecessary Federal paperwork demands, and alleviate a general public fear of the government's paper deluge. S. Rep. No. 930, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 6244. The PRA addressed these concerns by requiring all information collection requests to display an OMB control number, notifying the public that the information is needed and collected efficiently. To protect the public, any collection of information which did not display an OMB approved control number could be ignored without penalty. Id. at 2, 14; U.S.C.C.A.N. at 6242, 6254.

The preamble to the implementing regulations emphasized the importance of the requirement to display control numbers on all information gathering in order to notify the public that the paperwork burden has passed the PRA's clearance process. This display rule applied regardless of whether it was an information collection request or an collection of information requirement adopted after notice and comment. 48 Fed. Reg. 13666, 13668 (March 31, 1983). "The purpose of the Paperwork Reduction Act and of this rule [displaying control numbers] is to protect the public; it would be entirely contrary to the spirit and intent of the Act to make its fundamental public notification mechanisms depend upon [indiscernible] legalistic distinctions between information collection requests and collection of information requirements. . . ." Id. at 13670. Where both the PRA and its implementing regulations specifically require that notice be given to alert the public of the PRA's applicability, by displaying an OMB control number, it would be inequitable to find that this defense has been waived, if a respondent was unaware of the PRA's relevance because the fundamental notice mandate has not been properly followed.

Further, the purpose of pleading an affirmative defense is to protect against unfair surprise. Williams v. Ashland Engineering Co., 863 F. Supp. 46, 48 (D. Mass. 1994). However, a waiver is not warranted if no prejudice results to the opposing party from the failure to plead. Moore's Federal Practice, ¶ 8.27[3] at 8-169 to 8-170. Under the Rules, the ALJ has broad powers to assure a fair and impartial proceeding, including that all pertinent issues are

adjudicated. 40 C.F.R. § 22.04(c). Despite respondent's failure to plead this defense, no prejudice can exist where both parties where given an opportunity to argue this issue on post-hearing supplemental briefs. Additionally, the primary rationale for the one case that complainant cites, ruling the PRA defense was waived, was that the government did not have time to prepare its case for this claim, and further discovery would be necessary resulting in delay. (Complainant's Supp. Br. Ex. B, U.S. v. Bethlehem Steel Corp., No. 90-326, Tr. at 947-48 (N.D. Ind. July 19, 1993)(order denying respondent's summary judgment motion on penalty claims).) These concerns are not present here after supplemental briefs. Moreover, substantial legal defenses, upon which a court can rule without much factual proof, should not be dismissed on mere technicalities. See Williams 863 F. Supp. at 48 (pre-emption defense not waived where no prejudice alleged by failure to plead in answer, and plaintiffs had notice of such defense). It is concluded that the PRA defense is not waived under these circumstances.

Turning now to the merits of the PRA defense, complainant argues that it met the demands of the PRA by publishing the OMB control number for PCB recordkeeping requirements in the Federal Register on February 27, 1986. 51 Fed. Reg. 6929. Complainant then contends that the holding of Lazarus is wrong on two grounds: (1) neither the statute nor the regulation clearly requires publication of the control number in both the Federal Register and the Code of Federal Regulations, and (2) given this ambiguity, the

letter from the Acting General Counsel of OMB, which stated that EPA's publication in the Federal Register satisfied the display requirement, should have been accorded deference. (Complainant's Supp. Br. Ex. D.)

The ALJ is not persuaded by these arguments. In the case of collections of information published in the Federal Register, "display" is defined as publishing 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 in the Code of Federal Regulations if the issuance is also included therein. 5 C.F.R. § 1320.7(e)(2)(emphasis added). However, in EPA's February 27 Federal Register publication, the OMB control number appears without any regulatory text and without any reference to the Code of Federal Regulation's part or section. This manner of publication does not demonstrate proper "display" as defined above.

Notwithstanding this deficiency, the ALJ does not find the term "display" ambiguous. Although "display" is undefined in the PRA, the statute grants authority to the Director of OMB to issue regulations as necessary to implement the PRA. 44 U.S.C. § 3516. The term "display," issued under this directive, explicitly requires publication of the control number in the Federal Register as part of the regulatory text, and ensure that it is included in the Code of Federal Regulations if the issuance is also included therein. Despite this apparent clarity, as the ALJ in Lazarus pointed out, any doubt about the display requirements is removed by the preamble to the regulation. Lazarus at 24. In discussing

modification of the term "display," the preamble stated the most significant change was that:

> [T]he phrase (as part of the regulatory text or as a technical amendment) [has been added] into subparagraph 7(f)(2) 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.

48 Fed. Reg. 13676. This language clearly indicates that OMB intended publication of the control number in both the text of the Federal Register and the text of the Code of Federal Regulations. Based upon the above, no deference need be accorded an informal interpretation that is inconsistent with a regulation. Lazarus at 25 (citations omitted). To give effect to EPA's publication would undermine the intent of specifically alerting the public of the PRA's applicability by requiring that a control number be displayed in text of the regulation. It is concluded that Bickford cannot be assessed a penalty for counts I and II, when a control number did not appear in the text of the regulation in the Federal Register until December 21, 1989. 54 Fed. Reg. 52716, 52752.

IT IS ORDERED that counts I and II be **DISMISSED**.

B. Count III

Complainant proposes a GBP of $25,000 for this count based upon a "major" extent and circumstance "level 1" determination. (CX-2 at 9.) For non-disposal violations, the policy calculates a

violation's extent by the amount of material involved. The "major" extent finding was calculated from Bickford's 1990 annual summary which listed 7,625 kgs of PCB waste oil shipped on August 24, 1990. This date was used because it was the only shipment that occurred between the time the regulation went into effect on April 4, 1990, and the date of Bickford's September 6, 1990 notification. (JX-8, Table 1.2 at 968-983; Tr. 105-06.) In accordance with the policy, which recommends a "major" extent finding for all non-disposal violations greater than 6,000 kgs, complainant assigned this level. (CX-2 at 5.)

Respondent does not dispute the amount of PCB material shipped on August 24. Instead, respondent argues that if it held off on making this one shipment, roughly two weeks before the inspection, it would not have been subject to this violation. This argument lacks merit. In its notification form, respondent registered as a "PCB generator." As a "generator" of PCB waste, the failure to notify prohibits all PCB waste handling activity not simply transportation off-site. 40 C.F.R. § 761.202(b)(1)(i). Considering the amount and high volume of PCB movement on-site and off-site, the potential harm to the environment from possible improper PCB management or spills is concluded to reflect a "major" extent finding.

Complainant proposed a circumstance "level 1" because this level encompassed the failure to notify EPA under major manifesting violations. (CX-2 at 10.) According to EPA, this level was appropriate because a failure to notify allows a facility to

operate outside the regulatory scheme. EPA amplified that this regulation arose in response to Congressional oversight hearings which revealed numerous instances of unknown improper disposal of PCBs. These hearings also illuminated that EPA did not have a complete grasp on the universe of PCB waste handlers. The notification requirement remedied this regulatory gap by establishing a database of all PCB waste handlers for future compliance inspections. However, without notification, the potential for harm to public health and environment is great because EPA is not aware of these activities, and thus, unable to ensure that the handling and eventual disposal of PCBs is being done properly. (Tr. 108-11.)

Respondent contests this level on the basis that its failure to notify only resulted in receiving the same EPA identification number it already had since 1980, for RCRA purposes. Respondent also asserts that EPA should have known about its PCB activity from earlier correspondence. Accordingly, this violation only amounted to a mere technical paperwork infraction and not a serious potential for harm.

These arguments have already been addressed and rejected in the preamble to the regulation. The purpose of this rule is to implement an effective tracking system of PCB waste from generation to disposal in order to address problems of PCB management. Notification was the foundation of this tracking system by requiring all entities engaged in PCB activity to provide EPA with basic information about the nature, location, and extent of these

activities. 54 Fed. Reg. 52716. Notwithstanding prior notification under RCRA, EPA explicitly emphasized that notification is still required for purposes of identifying under TSCA the location and nature of a facility's PCB waste activities, as well as the identification numbers previously issued to it. Id. at 52722. Additionally, EPA specifically explained that in situations where a RCRA identification number already existed, EPA would use the same number to minimize the burden of being assigned multiple numbers. Id. at 52721. As illustrated by this statement, respondent was assigned the same number for its own administrative convenience.

Although respondent's arguments are not persuasive, complainant's proposed circumstance "level 1" is out of tune with the evidentiary record. "Level 1" reflects the highest probability for damage, however, this probability was mitigated by several considerations. One of the main purposes of the notification requirement was to enable EPA to ensure proper PCB management through inspections. Id. at 52720 (discussing notification will facilitate compliance by establishing a database of all PCB waste handlers to target for inspections). Fonseca's inspection report documented Bickford's "good housekeeping" procedures. Without notifying EPA of its activities, the threat of a compliance inspection did not exist for Bickford. Despite the absence of this compliance incentive, Bickford instituted careful waste handling procedures. For example, measures to protect against spills were applied during the draining and salvage processes. Additionally,

all drained fluid was properly stored in tanks or drums of similar concentrations, dated, and placed in leak-preventive areas. Furthermore, transportation of both PCB waste and unsalvageable parts of the transformers were sent to EPA approved disposal facilities. See, supra, at 6.

The notification requirement was also aimed at tracing PCB movement. The record demonstrates that Bickford was in compliance with the annual summary requirement on PCB disposition for 1990. (JX-8.) The annual documents help ensure proper disposal by providing a means of tracing the disposition of PCBs. In re Bell & Howell Co., 1 EAD 811, 815 (1983). Bickford's 1990 annual summary tracks its PCB disposition during the period of non-compliance by listing the serial number, manifest number and date of disposal for all shipments. (JX-8.) Accordingly, any potential problem of tracing the disposition of its PCBs, during respondent's six-month period without a number, is alleviated by this summary.

Based upon the above, the high probability of damage associated with a circumstance "level 1" is not present. This level reflects that a failure to notify is usually associated with improper PCB management, and a failure to consider the risks of faulty management. On the other hand, respondent's PCB waste handling procedures exhibited careful PCB management, thereby, significantly lessening the high probability of damage from spills, leaks or improper disposal. These waste handling procedures also demonstrated respondent's observance of other PCB regulations and appreciation of the hazards posed by PCBs. The impact from

respondent's failure to notify was the concealment, albeit inadvertent, of basic information on its PCB activities from EPA. This information is integral to informing EPA of all PCB waste handlers so that it can carry out its duty in assuring compliance with PCB management and disposal. Considering these circumstances, it is concluded that respondent's failure to file its notification is more accurately reflected in a circumstance "level 3" which encompasses the failure to have basic information on PCB disposition or the failure to submit a report on PCB activity.

Under the policy, a circumstance "level 3" and a "major" extent finding results in a GBP of $15,000. (CX-2 at 9.) This total may now be adjusted upward or downward based upon the adjustment factors.

II. ADJUSTMENT FACTORS

Under Section 16(a)(2)(B) certain adjustment factors relating to the violator must be considered. The policy requires consideration of the same factors. These are: culpability, history of prior violations, ability to pay, ability of respondent to continue in business, and other factors that justice may require.

A. Culpability

Complainant asserts that respondent's actions fit a culpability level "II." Under this level, the violator is deemed to have had (or should have had) knowledge of the requirement.

(CX-2 at 15.) Respondent argues that it was unaware of the notification requirement, which was a "trap for the unwary." This argument is not persuasive. Respondent concedes that it attended a class in January 1990 on compliance with this rule. However, it assumed that the identification number referred to was the RCRA number which it already had. (Tr. 169-70.) Even assuming arguendo that respondent's confusion was justified, a reasonably prudent person in Bickford's position should have known about the requirement. Respondent's entire business activity involves PCBs. As a member of this regulated community, respondent should have known about the Federal Register notice in December 1989, which clearly stated that a RCRA identification number would not suffice for this requirement. It is determined that a culpability level "II" is appropriate. Under this level no adjustment to the GBP is warranted.

B. <u>History of Prior Violations</u>

For this factor, the policy suggests only an increase in the GBP for prior TSCA violations. (CX-2 at 15-16.) Complainant made no adjustment here because it was unaware of any prior violations. Respondent claims that it has never had an EPA violation nor had it ever heard from EPA except for these proceedings. These arguments are not convincing. The absence of prior violations or EPA visits can be attributed to respondent operating outside the regulatory scheme. The no adjustment finding is proper.

C. Ability to Continue in Business

The policy treats the statutory factors ability to pay and effect on ability to continue in business as one. In its brief, respondent argued for the first time that the Dun & Bradstreet report presented by complainant "fulfills [its] obligation to prove that [Bickford] cannot afford to pay the excessive penalty proposed by the EPA." (Resp't Br. at 6.) A respondent is presumed to have the ability to pay until it is put at issue by same. In re New Waterbury, Ltd., A California Limited Partnership, TSCA Appeal No. 93-2 at 15 (EAB, October 20, 1994). If this issue is not raised in the answer or during the pre-hearing exchange with supporting documentation, it can be deemed to be waived under the Rules. Id. at 16. It is concluded that this issue was waived since respondent never asserted it at any time prior to the hearing. Id. at 16-17.[5]

D. Other Factors that Justice May Require

No adjustment was made here because complainant was unaware of any information relevant to this factor. The ALJ views the record with a contrary view. The policy lists the violator's attitude as one measurement for considering an adjustment. A factor to consider in this instance is the promptness of the violator's

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[5] Even if considered, respondent's argument that it lost $40,734 in 1993 would not be meritorious. Despite this loss, respondent still had over $800,000 in retained earnings. (JX-9 at 1033.) A net loss in income does not establish an inability to pay where adequate cash reserves exist. See, e.g., James C. Lin and Lin Cubing, Inc., at 6-7.

corrective action. (CX-2 at 17.) The record illustrates that respondent immediately sent notification to EPA of its PCB waste handling activities the day after the inspection. Three weeks later, Bickford attained compliance and received its identification number. (JX-1 at 28.) These actions clearly demonstrate prompt compliance after its misunderstanding concerning the notification requirement was explained by Fonseca, and is deserving of a 10 percent reduction of the GBP. This results in a total penalty of $13,500.

IT IS ORDERED[6] that:

1. A civil penalty in the amount of $13,500 be assessed against respondent, Bickford, Inc.

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

EPA Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

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

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[6] This penalty decision, in conjunction with the order on November 28, 1994, comprise a complete initial decision under section 22.17. Unless appealed pursuant to 40 C.F.R. § 22.30, or the Environmental Appeals Board (EAB) elects to review the same, sua sponte, as provided therein, this decision shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).

4. If respondent fails to pay the penalty within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed. 31 U.S.C. § 3717, 4 C.F.R. § 102.13.

Frank W. Vanderheyden
Administrative Law Judge

Dated: October 18, 1995
Washington, D.C.