

11/30/89

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

11/30/89
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In the Matter of)	
)	
Tulkoffs Horseradish)	Docket No. TSCA-III-403
Products Co., Inc.,)	
)	
Respondent)	

Toxic Substances Control Act -- Inspection and Recordkeeping -- The quarterly inspection and recordkeeping requirements for PCB Transformers established by an EPA Interim Measures Program, 46 Federal Register 16094 (March 10, 1981), effective May 11, 1981, were not invalidated by a claim that such Program had not been developed through the administrative rulemaking process; and accordingly Respondent's failure before January 1982 to inspect its PCB Transformers and to maintain records of such inspections violated such Program and 40 C.F.R. § 761.30(a)(1)(ix) and (xii).

Toxic Substances Control Act -- Inspection and Recordkeeping -- Where Respondent's report of its quarterly inspection of PCB Transformers showed a leak on four, but estimated the amount of dielectric fluid released from only one of the leaks, such failure of estimate for the remaining three violated 40 C.F.R. § 761.30(a)(1)(ix) and (xii), notwithstanding that no PCBs had run off or were about to run off the external surfaces of the Transformers, that the PCBs were in solid form when discovered, and that the amount of the leaks was small.

Toxic Substances Control Act -- Disposal of PCBs -- Where evidence established that leaks on Respondent's PCB Transformers were cleaned up within 48 hours of discovery in a quarterly inspection, but the leaks should have been discovered by a prior quarterly inspection, the leaks constituted a disposal of PCBs other than as authorized by 40 C.F.R. § 761.60, and thus violated that section.

Toxic Substances Control Act -- Registration of PCB Transformers with Fire Response Personnel -- Where Respondent's vice president accompanied a lieutenant of the local fire station on a half day walking tour of Respondent's facility, which included the lieutenant's looking at each of the facility's six PCB Transformers and their nameplates that listed the Transformers' PCB contents, but PCBs were never mentioned during the tour, the tour failed to constitute a registration of the PCB Transformers with the appropriate fire response personnel under 40 C.F.R. § 761.30(a)(vi).

Toxic Substances Control Act -- Recordkeeping -- Both Respondent's

failure to develop and maintain annual documents on its PCB Transformers for 1980-81 and also its failure to list in such annual documents developed and maintained for 1982-87 the weight of the PCBs contained in its PCB Transformers violated 40 C.F.R. § 761.180(a).

Appearances

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Before

Thomas W. Hoya
Administrative Law Judge

INITIAL DECISION

The Environmental Protection Agency, Region III (hereinafter "Complainant") initiated this proceeding September 28, 1988 by issuing a complaint against Tulkoffs Horseradish Products Co., Inc. (hereinafter "Respondent"). The complaint was issued under the authority of the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (hereinafter "the Act"); and it charged four violations by Respondent of regulations issued pursuant to the Act, 40 C.F.R. Part 761.

All four counts of the complaint concerned six transformers on Respondent's premises that contained polychlorinated biphenyls ("PCBs"). Count I charged a failure to inspect and to maintain records of inspections of these transformers prior to January 1982,

and a failure to estimate the amount of dielectric fluid released from leaks, both as required by 40 C.F.R. § 761.30(a)(1)(ix) and (xii). Count II charged an improper disposal of PCBs under 40 C.F.R. § 761.60, and Count III charged a failure to register the transformers with the appropriate fire response personnel under 40 C.F.R. § 761.30(a)(1)(vi).

Count IV charged a failure to develop and maintain annual PCB documents before 1982, and inaccuracies in the 1982-1987 annual PCB documents that were developed and maintained, such failures and inaccuracies alleged to be in violation of 40 C.F.R. § 761.180(a). The complaint charged that each of these four counts constituted a violation of Section 15(1)(C) of the Act, 15 U.S.C. § 2614(1)(C); and, for all four, the complaint proposed a total civil penalty of \$37,000, pursuant to Section 16(a) of the Act, 15 U.S.C. § 2615(a).

Respondent's answer substantially denied the alleged violations and requested a hearing. A hearing was held in Baltimore, Maryland on August 8-9, 1989; and the hearing included a visit to Respondent's facility in Baltimore.

On the basis of the record of this proceeding, the undersigned makes the following findings of fact.

Findings of Fact

1. Respondent is a corporation organized under the laws of the state of Maryland that owns and operates a facility in Baltimore, Maryland for the production of horseradish, horseradish combinations, and chopped garlic. (Complaint, count I, paragraphs 1-2; Answer, count I, paragraphs 1-2.)

2. On May 3, 1988 a duly designated representative of the Environmental Protection Agency (hereinafter "EPA") inspected Respondent's facility to determine its compliance with PCB regulations issued pursuant to the Act. (Hearing Transcript (hereinafter "Tr.") 18; Complainant's Hearing Exhibit (hereinafter "Comp. Exh.") C1.)
3. At the time of the May 3, 1988 inspection, Respondent had six transformers in service on its facility. (Complaint, count I, paragraph 4; Answer, count I, paragraph 4; Comp. Exh. C1).
4. Each of these six transformers contained PCBs (Complaint, count I, paragraph 4; Answer, count I, paragraph 4; Resp. First Prehearing Submittal, Exh. 1A, 1B, 2A-2L, 5; Comp. Exh. C1), and each also had a manufacturer's nameplate indicating that it contained PCBs in concentrations exceeding 500 ppm. (Tr. 31-32, Comp. Exh. C1, Attachment (hereinafter "Att.") 4).
5. Respondent took title to the property on which its facility is located in April 1980, and in June 1980 began some operations at this facility. The six transformers containing PCBs were on the property on these dates, and have remained there since. (Respondent's (hereinafter "Resp.") Post-Hearing Brief, Exh. A; Tr. 199, 235, 247, 306-07.)
6. Respondent began inspecting the six transformers containing PCBs and maintaining records of such inspections in January 1982. (Tr. 202, 235, 247; Comp. Exh. C1, Att. 5.)
7. Respondent's report of its December 21, 1987 quarterly inspection of its six transformers containing PCBs showed a

PCB leak on four of them--transformers numbered 963183, 5121935, C374305-55P, and C69437--but made an estimate of the dielectric fluid released from only the leak from number C69437. (Comp. Exh. C1, Att. 5.)

8. Respondent cleaned up the PCB leaks on the four transformers containing PCBs within 48 hours of their discovery on December 21, 1987. (Tr. 271-74.)
9. Proper quarterly inspections by Respondent of its transformers containing PCBs would have discovered the four PCB leaks in a quarterly inspection before the December 21, 1987 inspection. (Tr. 266-67, 243.)
10. In June 1983 a lieutenant from the fire station with primary jurisdiction for Respondent's facility spent at least half a day on a walking tour of the facility, accompanied by a vice president of Respondent. The lieutenant's purpose in making the tour was to obtain the information that the fire station needed to respond effectively to a fire. During the tour the lieutenant made notes. The lieutenant looked at each of the six transformers that contained PCBs, including their nameplates, which listed their contents, and directed Respondent's vice president to mark on a large map of the facility the location of that one transformer that was near where people worked. PCBs were never mentioned during the tour. (Tr. 308-21.)
11. On January 14, 1988 Respondent sent a letter to the local fire station to advise it of Respondent's plan to remove the six

transformers containing PCBs by October 1, 1990. For each of the six, the letter stated the manufacturer, the model and serial number, the PCB content, the total weight of the transformer, and the location. (Comp. Exh. C1, Att. 4.)

12. At the time of the May 3, 1988 inspection of Respondent's facility by EPA, Respondent had developed and maintained no annual documents for its transformers containing PCBs for any years before 1982 and, in the annual documents it developed and maintained for the years 1982-1987, it listed the total weight of the transformers, and not the total weight of the PCBs contained in the transformers. (Comp. Exh. C1, Att. 5.)

CONCLUSIONS

1. Respondent is a "person" as such term is defined in 40 C.F.R. § 761.3.
2. Respondent's six transformers are each a "PCB Transformer" as such term is defined in 40 C.F.R. § 761.3.
3. EPA's Interim Measures Program, 46 Federal Register 16094 (March 10, 1981), effectively established a quarterly inspection requirement for PCB Transformers from May 11, 1981 to September 24, 1982. Accordingly, Respondent's failure before January 1982 to inspect its PCB Transformers quarterly and to maintain records of such inspections constituted a violation of such Interim Measures Program, 40 C.F.R. § 761.30(1)(ix) and (xii), and 15 U.S.C. § 2614(1)(C).
4. Respondent's report of its December 21, 1987 quarterly inspection of its six PCB Transformers showing a leak on four

of them, but estimating the amount of the dielectric fluid released from only one leak, constituted a violation of 40 C.F.R. § 761.30(a)(1)(ix) and (xii) and 15 U.S.C. § 2614(1)(C).

5. The leaks on Respondent's four PCB Transformers discovered by Respondent's December 21, 1987 quarterly inspection constituted a disposal of PCBs other than as authorized by 40 C.F.R. § 761.60, and hence violated that section and 15 U.S.C. § 2614(1)(C).
6. The June 1983 walking tour of Respondent's facility by a lieutenant from the local fire station and Respondent's January 14, 1988 letter to that fire station regarding its PCB Transformers failed to constitute a registration by December 1, 1985 of its PCB Transformers with that fire station under 40 C.F.R. § 761.30(a)(1)(vi). Accordingly, Respondent violated that section and 15 U.S.C. § 2614(1)(C).
7. Respondent did not take title to or begin operations on the property on which the PCB Transformers are located until 1980, and accordingly it did not violate 40 C.F.R. § 180(a) and 15 U.S.C. § 2614(1)(C) by failing to develop and maintain annual documents on the PCB Transformers before 1980.
8. Respondent violated 40 C.F.R. § 761.180(a) and 15 U.S.C. § 2614(1)(C) both by failing to develop and maintain annual documents on its PCB Transformers in 1980 and 1981, and also by failing to list in its annual documents for 1982-1987 the weight of the PCBs contained in its PCB Transformers.

DISCUSSIONCount I: Pre-1982 Quarterly Reports, Estimating Leaked Fluid

Count I of the complaint charged two separate violations of 40 C.F.R. § 761.30(a)(1)(ix) and (xii). The first charge was Respondent's failure, from May 11, 1981 to January 1982, to inspect its PCB Transformers quarterly and to maintain records of such inspections, as such requirement was established from May 11, 1981 to September 24, 1982 by an EPA Interim Measures Program, 46 Federal Register 16094 (March 10, 1981). The second charge was Respondent's failure to estimate, on its December 21, 1987 quarterly inspection report, the amount of the dielectric fluid released from leaks on three of the four PCB Transformers for which such leaks were recorded.

As to the first charge, Respondent's defense was essentially that this Interim Measures Program was "not developed through the administrative rulemaking process" and was therefore without the force of law (Resp. Reply Brief 5). Respondent's defense, however, lacked any citation of legal authority or explanation of its rationale, and as such is unpersuasive.

It was the second charge--a failure to estimate the amount of dielectric fluid released from three leaks--on which Respondent focused particularly. The basis of the charge was Respondent's report of its December 21, 1987 quarterly inspection, which showed a PCB leak from four of the six PCB Transformers, but contained an estimate of the fluid released from only one of these leaks.

In testimony, one leak was described as like "a paint run that

hasn't completely dried ... maybe five or six inches long running down the side of that transformer" (Tr. 211). It was that leak for which an estimate was made of the amount of dielectric fluid released. That estimate was: "less than one gallon. Actual amount not known" (Resp. Post-Hearing Brief 11; see also Comp. Exh. C1, Att. 5). The remaining three leaks, for which no estimate was made of fluid released, were described as solidified drops of PCB material, one-half to three-quarters of an inch long, hanging from the drain valves of each of these transformers (Tr. 217, 220-222, 266).

Complainant supported its charge by citing the definition of "[l]eak" in 40 C.F.R. § 761.3 as "any instance in which a PCB Article, PCB Container, or PCB Equipment has any PCBs on any portion of its external surface." Therefore, concluded Complainant, Respondent's report of its December 21, 1987 inspection failed, for three of the four indicated leaks, to satisfy the requirement of 40 C.F.R. § 761.30(a)(1)(xii)(E) that it include an "[a]n estimate of the amount of dielectric fluid released from any leak."

Respondent attacked this conclusion by asserting that the solidified drips on the three drain valves did not constitute "leaks" within the meaning of the requirement for estimating the amount of fluid released. Respondent's basic argument was that this requirement should be read in conjunction with other provisions of the regulations. Here Respondent cited especially 40 C.F.R. § 761.30(a)(1)(x), which prescribes a repair or

replacement obligation when "a PCB Transformer is found to have a leak which results in any quantity of PCBs running off or about to run off the external surface of the transformer." Since, Respondent claimed, nothing on its transformers was "running off or about to run off," Respondent contended that the requirement to estimate the amount of dielectric fluid released did not apply.

Respondent's argument fails, however, because the reporting requirement of 40 C.F.R. § 761.30(a)(1)(xii)(E) is not limited only to those leaks subject to the repair or replacement requirement in 40 C.F.R. § 761.30(a)(1)(x). By its terms, the reporting requirement of 40 C.F.R. § 761.30(a)(1)(xii)(E) applies simply to "any leak."

The whole section--40 C.F.R. § 761.30(a)(1)(xii)--expressly cross references no other section. But its subject is "Records of inspection and maintenance history;" it prescribes how long these records must be maintained and what information they must contain. Inspections to be documented in these records are mandated by 40 C.F.R. § 761.30(a)(1)(ix); and that section requires an "investigation for any leak of dielectric fluid on or around the transformer." Consequently, the reporting requirement of 40 C.F.R. § 761.30(a)(1)(xii)(E) applies to the amount of dielectric fluid released from any such leak. Clearly such leaks encompass all four from Respondent's PCB Transformers.

Respondent attacked this charge in the complaint also by asserting that the "materials discovered on the transformers ... were not fluid" and "were de minimis in quantity" (Resp. Reply

Brief 4). Both of these attacks also, however, fall short. Nothing in the language of the reporting requirement suggests that it ceases to apply if the PCBs are in a solid form when discovered. As to the de minimis objection, again nothing in the language of the reporting requirement justifies the exception that Respondent claimed.

Respondent suggested also the difficulty of quantifying the small quantities that were involved in these three leaks. Respondent's report did, nonetheless, estimate in general terms the small quantity of dielectric fluid released from the fourth leak; and Complainant made no objection to the generality of the estimate. Respondent offered no reason why it could not have made a similar estimate for the three leaks at issue. Respondent's further point that the modest quantity of fluid involved in these leaks should mitigate any sanction to be imposed is considered below under the heading Civil Penalty.

Count II: Improper Disposal of PCBs

The second count of the complaint charged an improper disposal of the PCBs involved in these four leaks. To sustain this charge, Complainant cited 40 C.F.R. § 761.60(a), which provides that, with exceptions inapplicable here, PCBs at concentrations exceeding 50 ppm or greater must be disposed of in an incinerator complying with 40 C.F.R. § 761.70. Complainant next cited 40 C.F.R. § 761.3 and 761.60(d), which declare that "leaks," "spills," "and other uncontrolled discharges of PCBs" at concentrations of 50 ppm or greater constitute the "disposal" of PCBs.

The definition of "leak" in 40 C.F.R. § 761.3 has been quoted above. To establish that the four discharges on Respondent's transformers were also "spills," Complainant cited EPA's PCB Spill Cleanup Policy, 52 Federal Register 10688 (April 2, 1987). That Policy defines a "spill" to mean "both intentional and unintentional spills, leaks, and other uncontrolled discharges where the release results in any quantity of PCBs running off or about to run off the external surface of the equipment" (52 Fed. Reg. 10690-91). Therefore, concluded Complainant, the PCBs on the outside of Respondent's transformers were leaks or spills that constituted a disposal of PCBs in a manner other than authorized by 40 C.F.R. § 761.60(a), and hence violated that section.

As further support for that conclusion, Complainant cited In the Matter of Samsonite Corporation, TSCA PCB-VIII-86-036 (1987). In that case, no PCBs had run off or were about to run off the external surfaces of the transformers, but leaks of PCBs on these surfaces were held nonetheless to constitute an unauthorized disposal of PCBs under 40 C.F.R. § 761.60.

Complainant charged that Respondent violated also 40 C.F.R. § 761.30(a)(1)(x). The first three sentences of that regulation particularly became one focus of Respondent's defense, so they are set forth in full below.

"If a PCB Transformer is found to have a leak which results in any quantity of PCBs running off or about to run off the external surface of the transformer, then the transformer must be repaired or replaced to eliminate the source of the leak.

In all cases any leaking material must be cleaned up and properly disposed of according to disposal requirements of § 761.60. Cleanup of the released PCBs must be initiated as soon as possible, but in no case later than 48 hours of its discovery."

Complainant argued that the leaks discovered in the December 21, 1987 inspection were, according to the evidence, so old that they should have been discovered by a prior quarterly inspection. Consequently, asserted Complainant, even had the leaks been cleaned up within 48 hours of their actual discovery on December 21, 1987, the cleanup would have come after the 48-hour period prescribed by the regulation, because the discovery was late. For the proposition that a cleanup within 48 hours of actual discovery is untimely if the leak should have been discovered by prior inspections, Complainant again cited Samsonite.

Complainant further challenged Respondent's evidence that the leaks were cleaned up within 48 hours of their discovery on December 21, 1987. Here Complainant's main point was that Respondent's principal evidence was hearsay.

Respondent denied Complainant's charges under both 40 C.F.R. § 761.60 and 40 C.F.R. § 761.30(a)(1)(x). In reply to Complainant's equating of "leaks" with "disposal," Respondent cited the following EPA statement.

"A number of comments [to EPA's including "leaks" in the definition of "disposal"] stated that it was unfair to charge a party with unauthorized disposal when PCBs are spilled or

leaked during authorized use of electrical equipment but prompt cleanup is initiated. It is not the Agency's intention that § 761.3(h) and § 761.60(d) should be applied in this way. Where the responsible party shows that: (1) The spill, leak, or uncontrolled discharge occurred during authorized use of electrical equipment and (2) adequate cleanup measures were initiated within 48 hours, the Agency will not charge the party with a disposal violation." 47 Fed. Reg. 37354 (Aug. 25, 1982).

Respondent's next point was essentially that the PCBs discovered on the surfaces of its four transformers did not constitute leaks of the type to which 40 C.F.R. § 761.30(a)(1)(x) applies, and that, regardless, they were in fact cleaned up within the required 48 hours. The target of this regulation, according to Respondent, is "active leaks which have resulted in or threaten to result in contact of dielectric fluid with objects other than the transformers themselves" (Resp. Post-Hearing Brief 4).

Each of the leaks at issue here, Respondent observed, "had not separated and was not in any danger of separating from the transformers" (*id.* 7). In Samsonite, Respondent noted that "each transformer 'had leaked and was leaking dielectric fluid,' which was described on one transformer as 'viscous, dark and sticky'" (Resp. Reply Brief 7). Respondent stated that the material on its four transformers was, by contrast, "immobile and solid" (emphasis in original) (*id.*). Therefore, contended Respondent, the leaks on the external surfaces of its transformers were not what it

characterized as "'active' leaks" (*id.* 2), and accordingly the PCBs were not subject to the 48-hour cleanup requirement.

This interpretation by Respondent of the 48-hour cleanup requirement is rejected on the basis of both the requirement's wording and its apparent purpose. As a matter of wording, the 48-hour requirement in 40 C.F.R. § 761.(a)(1)(x) would seem more reasonably triggered by the first sentence's phrase "If a PCB Transformer is found to have a leak," together with the second sentence's phrase "In all cases." The wording does not indicate that the first sentence's phrase about "PCBs running off or about to run off" is a precondition for the 48-hour requirement. Furthermore, as a matter of the apparent purpose of this section and of the above quoted EPA statement, Respondent's interpretation would leave "released PCBs" free of any time limit for cleanup. That outcome would seem contrary to the whole thrust of the section and the statement. Consequently, the PCB leaks on Respondent's transformers are adjudged as subject to the 48-hour cleanup requirement.

Thus the pivotal question becomes whether Respondent's cleanup complied with that requirement. To show that the PCBs were cleaned up within the required 48 hours, Respondent presented the testimony of the project manager of a firm retained by Respondent to advise it on maintaining its electrical equipment (Tr. 271-74). This project manager testified that he participated in the December 21, 1987 inspection that discovered the four leaks, that he directed a technician of his firm to clean up the leaks, and that the

technician subsequently confirmed to him that the leaks had been cleaned up within the 48-hour period.

Complainant noted that the project manager's testimony as to the actual cleaning up of the PCBs was based only on what he claimed to have been told by the technician. Nonetheless, this testimony will be accepted as establishing that the cleanup was accomplished within 48 hours of December 21, 1987. The project manager's testimony throughout seemed believable and reliable.

Complainant argued additionally, however, that even if the PCBs were cleaned up within 48 hours of their discovery on December 21, 1987, Respondent still failed to comply with the 48-hour requirement because their discovery was late. The weight of the evidence does support Complainant's contention that the PCB leaks were so old when discovered that they should have been detected by a prior quarterly inspection. The project manager mentioned above, for example, testified that the solidified drips "had a collection of dust to indicate that they had been there probably quite a few years" (Tr. 266-67; see also Tr. 243).

Complainant cited Samsonite for the proposition that cleaning up a leak from a PCB Transformer within 48 hours of actual discovery fails to satisfy the 48-hour rule if proper quarterly inspections would have discovered the leak at an earlier date. That proposition is sensible and is adopted here. It would be an unreasonable interpretation of 40 C.F.R. § 761.30(a)(1)(x) to reward Respondent for conducting inadequate quarterly inspections before December 21, 1987.

These inspections were deficient for not discovering the PCB leaks finally detected on December 21, 1987. Further evidence of the unreliability of these prior quarterly inspections appeared in the testimony of Respondent's official who conducted them during 1983-87 (Tr. 233-34). As noted by Complainant (Post Hearing Brief 6), this testimony conflicted with other evidence on two points. The first was whether the 1986 inspections were conducted during the Monday-Friday work week (Tr. 262-63) or on Saturdays (Resp. First Prehearing Submittal Exh. 2, Comp. Post Hearing Brief Exh. 1). The second was whether some of the quarterly inspections done before December 21, 1989 were conducted in the presence of the project manager mentioned above (Tr. 240, 244) or whether the December 21, 1987 inspection was the first conducted in his presence (Tr. 265).

In sum, the leaks on Respondent's PCB Transformers discovered on December 21, 1987 were subject to the 48-hour cleanup requirement; and Respondent's cleanup failed to comply with that requirement, because the leaks should have been discovered by a prior quarterly inspection. Therefore Respondent obtains no benefit from the EPA statement, quoted above, providing that leaks promptly cleaned up will not precipitate a charge of unauthorized disposal. Respondent's "leaks" constituted a "disposal" of PCBs under the applicable regulations; and Respondent was not saved from a charge of a disposal violation by the above quoted EPA statement, because Respondent's cleanup failed to satisfy the 48-hour requirement. Thus the leaks on Respondent's PCB Transformers were

a disposal of PCBs other than as authorized by 40 C.F.R. § 761.60, and hence a violation of that section.

Respondent also suggested an infirmity in Complainant's case because it relied on evidence obtained from Respondent's records. Under Section 22.24 of the Consolidated Rules of Practice, 40 C.F.R. Part 22, Complainant need only establish a prima facie case, and at that point Respondent has the burden of going forward with any defenses. For Count II in this proceeding, Complainant has established its prima facie case, and Respondent has not established any defenses.

Respondent additionally stressed its substantial efforts in general to comply with the PCB regulations. Although these efforts do not rebut the conclusion that Respondent committed the disposal violation charged in count II of the Complaint, they are relevant to the sanction that should be imposed, and are considered below under the heading Civil Penalty.

Count III: Registration with Fire Response Personnel

The third count of the complaint charged that Respondent failed to register its PCB Transformers by December 1, 1985 with the fire response personnel with primary jurisdiction, as required by 40 C.F.R. § 761.30(a)(1)(vi). Respondent answered by claiming sufficient registration through a June 1983 walking tour of its facility by a lieutenant from the local fire station, the fire response unit with primary jurisdiction, "and through subsequent communications" (Resp. Reply Brief 2).

As to the walking tour, Respondent presented evidence that in

June 1983 a lieutenant from the local fire station spent at least a half day on a walking tour of the facility. He was accompanied by a vice president of Respondent. The lieutenant's purpose in making the tour was to obtain the information that the fire station would need to respond effectively to a fire, such as how to gain access to Respondent's facility, the location of secondary exits and fire hose connections, and the names and telephone numbers of people at Respondent to contact in the event of problems.

During the tour the lieutenant made notes, and directed Respondent's vice president to mark certain information on a large map of the facility. As for the six PCB Transformers, the lieutenant looked at each one, including its nameplate, and directed Respondent's vice president to mark on the map of the facility the location of that one transformer that was near where people worked.

Complainant challenged the adequacy of this walking tour as a registration of the PCB Transformers because there is no evidence that PCBs were ever mentioned during the tour (Tr. 321). Respondent's reply was that the lieutenant did look at the nameplate on each of the transformers and took notes on the transformers. Since the nameplates disclosed that these were PCB Transformers, Respondent claimed that such inspection by the lieutenant constituted a satisfactory registration.

As noted, 40 C.F.R. § 761.30(a)(1)(vi) requires that "all PCB Transformers ... must be registered with fire response personnel;" and the section also sets forth certain "[i]nformation required to

be provided to fire response personnel." The section supplies no further definition of the meaning of "registered." In advancing this June 1983 walking tour as its registration, Respondent emphasized that the section nowhere requires that the registration be in written form.

On the question of this walking tour's possible satisfaction of the registration requirement, Respondent's claim is rejected. Whatever the precise meaning of registration in this section, it at least required Respondent to make some explicit identification to fire response personnel of its transformers as PCB Transformers. Respondent's simply allowing the lieutenant to look at the transformers and their nameplates, even if the nameplates listed the PCB contents, provides no assurance that the lieutenant focused on that crucial item of information on the nameplates.

Fires involving PCB Transformers present special and serious problems (see, e.g., 50 Fed. Reg. 29170 (July 17, 1985)). Hence it was important that Respondent make the appropriate fire response personnel clearly aware of the existence of its PCB Transformers. To achieve that awareness, more affirmative action was required of Respondent than just accompanying the lieutenant on his June 1983 walking tour.

Also relative to this question, Respondent submitted with its posthearing Reply Brief a document (Exh. 1) that was identified (Reply Brief 9) as a 1978 Manual of Procedure on PCBs for the Baltimore City Fire Department. According to Respondent, that Manual instructed unit commanders during inspections to check

transformers for proper marking, and advised the commanders that information on PCB content was listed on the equipment tag located on the equipment (Reply Brief 9).

Complainant objected to the inclusion of this Manual with Respondent's Reply Brief as an untimely submission of evidence, and the objection was sustained. It will nonetheless be observed here that, even had that Manual been admitted into the record, it would not qualify the June 1983 walking tour of Respondent's facility as fulfilling the required registration. The point is that a reasonable meaning of the registration requirement is that Respondent must undertake some affirmative action to call the existence of the PCB Transformers to the attention of the appropriate fire department personnel and to identify them expressly as PCB Transformers. It is not enough to let fire department personnel look at the transformers and to expect that on their own the personnel will figure out that they are PCB Transformers and will obtain the needed information regarding them.

As another part of its claimed registration of its PCB Transformers with fire response personnel, Respondent cited a January 14, 1988 letter that it sent to the local fire station (Comp. Exh. C1, Att. 4). The letter stated that its purpose was to advise the fire station that Respondent planned to remove the PCB Transformers by October 1, 1990, and the letter represented itself as "an up-dated list of the PCB Transformers on property." Even though its stated purpose was not to register the PCB Transformers with the fire department, the letter did in fact

contain much of the information required for such registration.

This January 1988 letter fails, nevertheless, to demonstrate Respondent's compliance with the registration requirement. Its chief shortfall is that it was sent over two years after the December 1, 1985 deadline for such registration. Although it represented itself as an "up-dated list," Respondent produced no evidence of anything that it updated, other than the June 1983 walking tour. As stated above, that walking tour did not constitute a satisfactory registration, so that, as of the December 1, 1985 deadline, Respondent had not sufficiently registered its PCB Transformers.

Besides citing the 1983 walking tour and the 1988 letter, Respondent made additional arguments regarding the City of Baltimore's recordkeeping practices and the burden of proof. As to the former, Respondent presented evidence "that there is no regulatory requirement for City of Baltimore to maintain records of PCB transformer restrictions" (Resp. Post-Hearing Brief 17). The presence or absence of requirements for the City of Baltimore, however, does not relieve Respondent of the registration duty placed upon it by 40 C.F.R. § 761.30(a)(1)(vi).

Respondent's argument on the burden of proof was essentially the same as its argument on this point regarding count II of the complaint. It is rejected here for the same reason that it was rejected under that count.

Count IV: Pre-1982 Annual Reports, Accuracy of Reports

Count IV of the complaint charged that Respondent failed to

develop and maintain annual documents on its PCB Transformers for the years 1978-1981, as required by 40 C.F.R. § 761.180(a), and failed also to develop and maintain these required annual documents accurately for the years 1982-1987. The specific alleged inaccuracy was that Respondent's 1982-1987 annual documents listed the total weight of the transformers, rather than the total weight of the PCBs contained in them.

As to the 1978-1981 charge, Respondent's first defense was that it did not take title to or begin operations on the property on which the PCB Transformers are located until 1980. That defense is valid, and disposes of the charge for the years 1978 and 1979. As for 1980 and 1981, Respondent acknowledged its failure to develop and maintain the required annual documents for those years, but argued that these violations were not such as to merit a civil penalty.

As Respondent acknowledged, it did violate 40 C.F.R. § 761.180(a) for 1980 and 1981. The appropriate sanction is a matter that is considered below under the heading Civil Penalty.

As for the charge that Respondent's annual documents for 1982-1987 violated 40 C.F.R. § 761.180(a) by listing the total weight of the PCB Transformers rather than the total weight of their PCBs, Respondent again acknowledged the violation. Respondent stressed that the violation resulted simply from a good faith misunderstanding of the legal requirement, and once more argued that it was not a violation that deserved any civil penalty.

Respondent's acknowledgment, which is supported by the

evidence (Comp. Exh. C1, Att. 5), establishes that it did violate 40 C.F.R. § 761.180(a) by listing the wrong weight in its annual documents for 1982-1987. As with the 1980-1981 violation of this section, the appropriate sanction is a matter that is reviewed below under the heading Civil Penalty.

Civil Penalty

Complainant proposed a civil penalty of \$10,000 for count I of the complaint, \$5,000 for count II, \$20,000 for count III, and \$2,000 for count IV, for a total civil penalty of \$37,000. As the basis for these figures, Complainant cited EPA's published PCB Penalty Policy, 45 Federal Register 59770 (Sept. 10, 1980).

To calculate the count I figure, Complainant asserted that the circumstance was a level 4 (use violation) and that the extent was major, which combined to produce a gravity based penalty of \$10,000. To calculate the count II figure, Complainant claimed that the circumstance was a level 1 (disposal violation) and that the circumstance was minor (less than one gallon), which combined to produce a gravity based penalty of \$5,000.

Respondent challenged these calculations chiefly by comparing its situation with that of the respondent in Samsonite, the case cited by Complainant to establish that Respondent had violated the regulations as charged. The violations found in Samsonite were, Respondent argued, more serious than its own, and yet the civil penalty assessed in Samsonite was only \$200 per leak for the three comparable PCB leaks.

In Samsonite, as in the instant case, leaks from transformers

containing PCBs were discovered, no PCBs had run off or were about to run off the external surface of the transformers, and the leaks were cleaned up promptly after discovery. Also in Samsonite, like the instant case, four leaks were discovered; but it was the three less important leaks in Samsonite that were the focus of Respondent's argument, and it is these three that are considered below.

For these three leaks in Samsonite, three factors did in fact, as Respondent urged, make that respondent's situation less favorable than Respondent's here. First and especially significant, in Samsonite the leaks were discovered by an EPA inspection of the respondent's facility; in the instant case, the inspection program instituted by Respondent itself discovered the leaks.

Second, the leaks in Samsonite were larger, covering areas of "several square inches," "approximately eight square inches," and "about five square inches and dried runs or rivulets, a few feet in length, emanated from the base of said 'small weep' area" (Samsonite 6, 7). In the instant case, one leak was a run five or six inches long, and the other three were solidified drops of one-half to three-quarters of an inch long. Third, in Samsonite all the leaks were still active when discovered, thus having the potential for further environmental damage, whereas in the instant case the leaks had run their course, save possibly for the leak that was a five or six inch run.

In assessing the civil penalty in Samsonite, the Presiding

Officer noted that the respondent "had, before the subject EPA inspection, instituted a monthly inspection plan," and that "[t]he premises are clean and orderly and great effort is apparently exerted to conform to applicable regulation" (Samsonite 14). Further, the respondent's "failure to discover the subject leaks [was attributable] to the small amount of dielectric fluid observed," and the respondent had "instituted ... cleanup and maintenance procedures ... immediately following" discovery of the leaks (id.).

Accordingly, the Presiding Officer concluded "that the Circumstances (Probability for Damage) is in the Low Range and the Extent of Potential Damage to be Minor" (id. 15). Therefore, "[b]ecause of Samsonite's housekeeping and cleanup efficiencies," the Presiding Officer "select[ed] the matrix's lower level of Low Range/Minor and assess[ed] a civil penalty in the sum of \$200 for each violation charged, or a total penalty for the violations in Count I of \$600" (id.). No civil penalty was charged or assessed for the respondent's failure to estimate the amount of dielectric fluid released from the leaks.

This approach of Samsonite will be adopted for assessing the civil penalty for counts I and II of the complaint in the instant case. Samsonite was the precedent cited by Complainant for resolving some of the disputed points of law here, although Complainant did dissent from Samsonite's penalty assessment. Samsonite's approach to resolving points of law was followed in the instant Initial Decision, and one proposition from Samsonite

was expressly adopted. Samsonite's approach to assessing the civil penalty produces a dollar figure that appears reasonable, and the approach will be used here.

As observed above, Respondent's situation is more favorable than that of the Samsonite respondent in three respects. In addition, Respondent was similar to the Samsonite respondent in the factors supporting that respondent that were noted in that decision. Thus Respondent also cleaned up its leaks promptly after their discovery, and Respondent also had a good recordkeeping program and expended efforts to comply with applicable regulations. An official who had conducted the EPA inspection of Respondent's facility testified that Respondent's recordkeeping was excellent (Tr. 64-65; see also Tr. 25, 41); and, as for efforts to comply, Respondent has voluntarily installed secondary containment around its PCB Transformers, a matter discussed further below.

Respondent did have one deficiency as part of counts I and II that was absent from Samsonite: Respondent's failure to inspect its PCB Transformers quarterly and to maintain records of such inspections from May 11, 1981 to January 1982. That deficiency, however, is offset by those respects in which Respondent performed better than the Samsonite respondent. Consequently, for both counts I and II, Respondent will be assessed a civil penalty at the same rate as was the Samsonite respondent, viz., \$200 per leak. For Respondent's four leaks, that approach produces a total civil penalty of \$800 for counts I and II of the complaint.

For count III of the complaint, Complainant asserted that the

circumstance was level 2 (use violation) and that the extent was major, for a gravity based penalty of \$20,000. That analysis is accepted.

For count IV of the complaint, Complainant asserted that the circumstance was level 6 and that the extent was major, for a gravity based penalty of \$2,000. That analysis also is accepted.

One factor of adjustment exists: Respondent's voluntary expenditures for secondary containment of its PCB Transformers. These expenditures were beyond what the regulations require, and were already significantly under way at the time of the May 3, 1988 EPA inspection (Tr. 55-57). Respondent documented \$5,050.88 of such expenditures before taxes. That figure will be reduced by fifteen percent, the lowest federal income tax rate to which the taxable income of a corporation is subject, giving a figure of \$4,293; and Respondent's civil penalty assessment will be adjusted downward by that reduced figure. Thus Respondent's civil penalty becomes \$800 for counts I and II, plus \$20,000 for count III, plus \$2,000 for count IV, less \$4,293 for these secondary containment expenditures, or \$18,507.

Motions, Proposed Findings and Conclusions

Respondent's motion to dismiss the complaint on the ground that Complainant has failed to prove its charges by a preponderance of the evidence is denied. As stated above, the record of this proceeding sustains all four counts of the complaint.

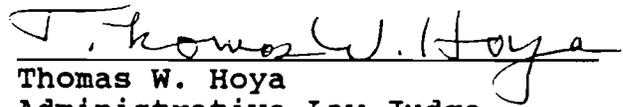
All proposed findings of fact and proposed conclusions not adopted above are denied.

FINAL ORDER

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(1), a civil penalty of \$18,507 is hereby assessed against Respondent Tulkoffs Horseradish Products Co., Inc. for the violations of the Act found in this proceeding.

Respondent shall pay the full amount of the civil penalty within 60 days after receipt of the final order¹ in this proceeding by forwarding a cashier's check or certified check, payable to the Treasurer, United States of America, to the following address:

Regional Hearing Clerk, Region III
U.S. Environmental Protection Agency
P.O. Box 360515M
Pittsburgh, PA 15251


Thomas W. Hoya
Administrative Law Judge

Dated: November 30, 1989

¹ Pursuant to Section 22.27(c) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, that govern this proceeding, this Initial Decision "shall become the final order of the Administrator within forty five (45) days after its service on the parties and without further proceedings unless" it is appealed by a party to the Administrator or the Administrator elects, sua sponte, to review it. Under Section 22.30(a) of these Consolidated Rules, parties have twenty (20) days after service upon them of this Initial Decision to appeal it.