UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re	)	TSCA Docket No. VI-1C
Yaffe Iron and Metal Company, Inc.,	)	
Respondent	)	Initial Decision

Preliminary Statement

This is a proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), instituted by a complaint issued July 26, 1979 by the Regional Administrator, Region VI, United States Environmental Protection Agency, against Yaffe Iron and Metal Company, Inc., the Respondent herein, for alleged violations of the act and the regulations issued thereunder.[1/] Specifically, the complaint alleges that the Respondent failed to mark "PCB containers" as defined in the regulations, improperly stored such containers in that the storage facility did not have an adequate roof or walls and did not have the prescribed floor and curbing, burned PCB mixtures in an incinerator that did not comply with the regulations, disposed of PCB mixtures in an unauthorized manner due to the leaking of drums containing PCB mixtures,

1/ Section 16(a) of the act provides, in part, as follows:

> (a) Civil. - (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 of section 15.

Section 15 of the act (15 U.S.C. 2614) provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with . . . (B) any requirement prescribed by section . . . 6, or (C) any rule promulgated under section . . . 6" or to "(3) fail or refuse to (A) establish or maintain records . . . as required by this Act or a rule promulgated thereunder."

and failed to keep required records, all in violation of the act and the pertinent regulations issued pursuant, in effect, to section 6 of the act. (15 U.S.C. 2605). The complaint proposed a civil penalty in the total amount of $50,000 for such violations.

After several answers had been filed, Respondent filed an amended and substituted answer in which it admitted that "the three storage tanks and the two drums from which samples were taken were not marked" in accordance with the act and the regulations issued thereunder, and, in effect, denied that it violated the act and the regulations issued pursuant thereto as charged. Additionally, Respondent contested the appropriateness of any civil penalty should it be found to have violated the act.

The parties submitted prehearing materials pursuant to section 22.19(e) of the pertinent rules of practice (43 F.R. 34730, 34735). A prehearing conference and hearing were held October 6 and 7, 1980, respectively, in Tulsa, Oklahoma, before Herbert L. Perlman, Chief Administrative Law Judge, United States Environmental Protection Agency. Complainant was represented by Mary E. Kale, Attorney at Law, Enforcement Division, Region VI, United States Environmental Protection Agency, and Respondent was represented by Charles R. Nestrud and Charles J. Lincoln, Attorneys at Law, Little Rock, Arkansas. Complainant presented 5 witnesses and introduced numerous exhibits into evidence. Five witnesses testified on behalf of Respondent and it also introduced numerous exhibits into evidence. After the hearing, Complainant was granted leave to amend the complaint to correct a typographical error therein and the parties filed briefs.

Findings of Fact

1. Respondent, Yaffe Iron and Metal Company, Inc., is a corporation doing business in Muskogee, Oklahoma. Respondent is in the scrap and warehousing business. A small part of its business is the purchase of scrap electric transformers from various electric utility companies, the breaking down or wrecking of such transformers and the salvage of primarily copper and steel therefrom which Respondent then sells. The transformers handled by Respondent, or some of them, contain transformer oil.

2. Prior to October 1977, Respondent disassembled the scrap transformers out of doors. In response to a complaint from an adjoining landowner, the Oklahoma State Department of Health and the Muskogee County Health Department inspected Respondent's premises. As the result of such inspection, H. A. Caves, Director, Industrial & Solid Waste Division, of the Oklahoma State Department of Health, in a letter dated October 4, 1977 to Respondent, stated as follows:

> On August 30, 1977, Gary McDonald, a member of our staff, accompanied J. C. Shutler, RPS, Muskogee County Health Department on an investigation of a complaint adjacent to your property. The complaint involved an oily substance present in a drainage ditch as it exits your property and crosses adjacent property.
>
> Samples of the oily substance were taken and photographs were made. The analysis of the sample validated that it was definitely oil, and also indicated the presence of 36.30 milligrams per liter polychlorinated biphenyls (PCB's). As you should be well aware, PCB's are present in electrical transformers and have been ruled Controlled Industrial Waste and should be disposed of at an approved site.
>
> Improper disposal of this waste is a violation of the Oklahoma Controlled Industrial Waste Disposal Act, Title 63 O.S. 1976, §2751-2765 and the Rules and Regulations promulgated thereof (copy enclosed).
>
> This office will await written notification as to the extent of correction of this problem. . .

3. Respondent then remodeled or renovated a vacant building on its premises which allowed Respondent to unload transformers inside such building, open them on a sloped concrete floor, resulting in the transformer oil being caught beneath the floor in a pit, and then pump the transformer oil to 2 overhead bulk storage tanks located outside of the building on the west side thereof. The renovation of the transformer processing building was completed April 27, 1978 at a cost of $30,395.

4. Due to the natural gas shortage, Respondent installed a dual fuel burner system on the incinerator it utilized to burn the insulation from the copper wire contained in scrap transformers, using transformer oil as a fuel. Transformer oil stored in the bulk overhead storage tanks was placed in a 400 gallon tank which was moved to the incinerator by a fork lift. The dual fuel burner using transformer oil was first used during the second or third week of January 1979. After about one week of operation, there was a fire in the incinerator and the oil pump was burned out. Approximately 3 weeks later, the dual fuel burner was again operative and after a week and a half of operation there was a big fire which burned up the floor of the furnace, some of the piping, and the fan. Respondent utilized approximately 2 mobile tank loads of transformer oil a week during the operation of the dual fuel burner system. The transformer oil burned in the incinerator contained more than 500 parts per million of PCBs. The copper incinerator was not approved by the Regional Administrator of Region VI and did not meet the requirements of section 761.40(a) of the regulations.

5. The Oklahoma State Department of Health again inspected Respondent's premises. By letter dated April 25, 1979, Donald A. Hensch, Director, Industrial Waste Division, stated as follows to the Chief of Complainant's Solid Waste Branch in Region VI:

> During recent inspections of Yaffee Iron and Metal Corporation, our staff discovered a PCB contamination problem in and around that company's site. Runoff from the site was sampled, as was transformer oil that Yaffee officials indicated was being burned as a fuel in a smelting furnace. Subsequent analysis of the two (2) samples revealed substantial concentrations of Polychlorinated Biphenyls.
>
> The rainwater runoff crosses private property and discharges into Cooty Creek. The incinerator using contaminated transformer oil as a fuel source is apparently without air pollution control devices and is not constructed to safely destroy PCB's.
>
> . . . this office requests that you take appropriate action with all haste. . .

6. On May 2, 1979, Complainant's employee conducted an investigation of Respondent's premises in the company of an inspector from the Oklahoma State Department of Health and the Muskogee County Health Department. Five samples were taken with the following results:

Sample No.	Sample Location	PCB Concentration
YA-1	Transformer oil from one of the transformers	None detected
YA-2	South overhead bulk oil storage tank	730 ppm (Aroclor 1260)
YA-3	North overhead bulk oil storage tank	51.6 ppm (Aroclor 1260)
YA-4	Mobile bulk oil storage tank	681 ppm (Aroclor 1260)
YA-5	Water from drainage ditch at south end of transformer building	2.88 ppb (Aroclor 1260)

A follow-up inspection was conducted on May 17, 1979 by Complainant's employee during which 11 more samples were taken with the following results:

Sample No.	Sample Location	PCB Concentration
137487	Oil taken from central drain inside transformer processing building	None detected
137488	Surface soil in front of transformer processing building	Less than 500 ppm (Aroclor 1260)
137489	Oil from pipe leading from sump pump in transformer processing building connecting to oil storage tanks	None detected
137490	Oil from one 55 gallon drum on west side of transformer processing building	Water leaked out of sample, oil analyzed at 700 ppm (Aroclor 1254)
137491	Surface soil between transformer processing building and drainage ditch	Less than 500 ppm (Aroclor 1254)
137492	Oil from one 55 gallon drum at rear of transformer processing building	11,000 ppm (Aroclor 1260)
137493	Thick, sticky substance on outer surface of 55 gallon drum sampled in 137492	4,000 ppm (Aroclor 1260)
137494	Surface soil between transformer processing building and drainage ditch	Less than 500 ppm (Aroclor 1260)
137495	Ash from floor of copper incinerator	None detected
137496	Surface soil from drainage ditch	Less than 500 ppm (Aroclor 1260)
137497	Water and soil sample from drainage ditch	Less than 500 ppm (Aroclor 1260)

7. The south overhead bulk oil storage tank, the mobile bulk oil storage tank, the 55 gallon drum located on the west side of the transformer processing building containing 700 parts per million of PCBs, and the 55 gallon drum at the rear of the processing building containing 11,000 ppm of PCBs were not marked with the M_L PCB label (see section 761.44(a) of the regulations) or any marking indicating that these containers held PCBs. The

volume of PCBs in these containers was not reflected in any of Respondent's records. The 55 gallon drum on the west side of the transformer processing building had no top, was located out of doors and contained some water, probably rainwater. The 55 gallon drum located behind or at the rear of the transformer processing building was under a corrugated metal roof but the area had no walls or curbing. This drum had no lid and a hole and dents on its side.

8. Subsequent to the May 2 and 17, 1979 inspections and after conferring with Complainant's employees, Respondent transferred the contents of 55 gallon drums at the side and rear of the transformer processing building, including those referred to in Finding of Fact 7, to the south overhead storage tank. It scraped up the soil from in front of the transformer processing building, stored it temporarily in existing barrels and, upon receipt of approved drums, placed the soil and some of the old barrels, which were shredded, in approved drums. In addition, an earthen berm was constructed around the transformer processing building and a concrete curb was placed around the overhead bulk oil storage tanks. Respondent also purchased a filtering device to reduce the PCB concentration in the oil contained in the overhead storage tanks and contracted with an engineering firm to design an incinerator which would comply with the regulations, but abandoned this project due to expected adverse public reaction. The cost of these activities totaled approximately $15,650.

9. Respondent's gross sales for the year ending December 31, 1978 were in excess of 9 million dollars. The payment of the civil penalty proposed herein will not significantly affect Respondent's ability to continue in business.

Conclusions

I

The complaint alleges, in part, that "On or about May 2, 1979 and May 17, 1979, Respondent had at its place of business in Muskogee, Oklahoma, certain storage tanks and drums containing PCB mixtures as that term is defined in 40 CFR Section 761"; that said "containers are 'PCB containers' within the meaning of 40 CFR Section 761.2(u)"; and that said "PCB containers were not marked in accordance with Section 6(e) of TSCA and 40 CFR Section 761.20(a)(1)(i)".[2/] Respondent, in its amended and substituted answer, admitted that "the three storage tanks and the two drums from which samples were taken were not marked in accordance with §6(e) of TSCA and 40 C.F.R. §761.20(a)".[3/] There remains for determination herein whether such tanks and drums need meet the marking requirements of the act and the regulations issued thereunder. In other words, it is necessary to determine

2/ The pertinent regulations involved herein are the PCB Disposal and Marking Regulations issued February 8, 1978 and effective April 18, 1978 (43 F.R. 7150), as amended by 43 F.R. 33918, effective August 2, 1978.

3/ Section 761.20(a) provides, in part, as follows:

(a) The following marking requirements shall apply:

(1) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in Annex V - Section 761.44(a): The mark illustrated in Figure 1 is referred to as M_L throughout this subpart.

(i) PCB container . . .

whether the contents thereof fall within the appropriate definitions of the regulations.[4/]

The record establishes that the south overhead bulk oil storage tank, the mobile bulk oil storage tank, a 55 gallon drum located on the west side of the transformer processing building and a 55 gallon drum at the rear of the transformer processing building all contained PCBs in concentrations in excess of 500 parts per million (ppm), namely, 730 ppm, 681 ppm, 700 ppm and 11,000 ppm, respectively. Complainant has established, we believe, the accuracy of these results. However, in connection with the finding of 700 ppm of PCBs in the sample from the 55 gallon drum located outdoors on the west side of the transformer processing building, Respondent contends that the sample was defective or incompletely tested and that Complainant has failed, therefore, to establish that the drum contained PCBs in excess of 500 ppm, the minimum concentration of PCBs then subject to regulation. The record establishes that an EPA inspector took a sample from the drum involved; that the sample consisted of oil and water; that the sample was placed in a

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4/ Under the regulations in effect at the times involved herein, "PCB Container" and "PCB Mixture" were defined in sections 761.2(u) and (w) thereof, in part, as follows:

> (u) "PCB Container" means any package, can, bottle, bag, barrel, drum, tank, or other device used to contain a . . . PCB mixture, . . . and whose surface(s) has been in direct contact with a . . .PCB mixture.
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> (w) "PCB Mixture" means any mixture which contains 0.05 percent (on a dry weight basis) or greater of a PCB chemical substance, and any mixture which contains less than 0.05 percent PCB chemical substance because of any dilution of a mixture containing more than 0.05 percent PCB chemical substance. This definition includes, but is not limited to, dielectric fluid and contaminated solvents, oils, waste oils, other chemicals, rags, soil, paints, debris, sludge, slurries, dredge spoils, and materials contaminated as a result of spills.

glass jar which was mailed to a laboratory in Denver, Colorado; and that the water leaked out of the glass jar in transit and the residue, that is, the oil segment of the sample, was found to contain 700 ppm of PCBs upon laboratory analysis. Respondent contends that the test results did not represent the PCB content of the entire sample due to the loss of the water segment thereof and further contends that it has not been established that the sample as a whole contained PCBs in excess of 500 ppm.

Dr. William Langley, supervisory chemist at the Environmental Protection Agency, Houston, Texas, laboratory and an expert in analytical chemistry, testified that it would be the usual practice, in connection with a multi-level sample of oil and water, to run an analysis only of the oil layer; that the PCBs would most probably bind themselves to the oil molecules and the water would not be expected to contain much PCBs. However, Dr. Langley further testified that he or his laboratory could analyze the oil layer and the water layer separately for PCBs and could calculate the combined concentration of PCBs in a sample containing water and oil. Of course, this was not done with the sample taken from the 55 gallon drum located on the west side of the transformer processing building as the water component thereof had leaked out of the glass jar containing it in transit to the Denver laboratory.

By reason of the foregoing, Respondent contends that the analytical results do not represent the PCB contents of the entire sample and do not establish that the entire sample or the drum from which it was taken contained 500 or more parts per million of PCBs. Respondent's argument overlooks the definition of "PCB Mixture" which, in effect, establishes the 500 ppm concentration requirement for regulation. Section 761.2(w) defines a "PCB Mixture", in part, to mean "any mixture which contains 0.05 percent (on a dry weight basis)

or greater of a PCB chemical substance, and any mixture which contains less than 0.05 percent PCB chemical substance because of any dilution of a mixture containing more than 0.05 percent PCB chemical substance . . ." (See footnote 4). The oil layer of the sample involved contained 700 ppm of PCBs and is itself a mixture, Aroclor 1254, and a PCB mixture as defined in the regulations. The sample, if the water layer had not leaked from the glass jar, would continue to represent a PCB mixture as defined in the regulations even if the dilution of the oil by the water layer resulted in the sample having less than 500 ppm of PCBs.[5/] The location and condition of the drum involved necessitates the conclusion that the water segment of the sample was rainwater. Also, Respondent's arguments with respect to the inspector's alleged failure to stir the contents of the drum involved is lacking in merit due to the definition of PCB mixture. In addition, the document referred to by counsel for Respondent in this regard is only a draft document and the mixing of the sample source is to be done "if practical." Under the circumstances, it is doubtful that such mixing would have been practical. Respondent's similar argument with respect to the sample taken from the 55 gallon drum located at the rear of the transformer processing building is similarly lacking in merit.

We conclude that Respondent violated section 761.20(a), the marking regulations, by reason of its failure to mark the south overhead storage tank, the mobile storage tank and the 2 drums involved as required by the regulations.

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5 / The dilution referred to relates, in reality, to the analysis of each layer and the mathematical computation of the combined concentration of PCBs in each layer as the water and oil layers do not mix. We have serious doubts that the sample taken represented a "mixture" as the oil and water layers do not combine. (See section 761.2(o)). For this reason as well, the oil layer alone represented a PCB mixture as defined in the regulations.

While Respondent advances some arguments with respect to the volatilization of the contents of the mobile storage tank, such contentions, which will be considered later in this Initial Decision, do not affect or concern the accuracy of the laboratory analysis of a sample from such tank.

II

Due to the then natural gas shortage, Respondent attempted to develop a secondary or alternate source of fuel which would, of course, incidentally also result in the disposal of waste oil. It devised a dual fuel burner for the afterburner on its copper incinerator to utilize the oil resulting from the destruction of the scrap tansformers it processed. The oil was stored in the overhead bulk storage tanks and transported to the copper incinerator in the 400 gallon mobile bulk storage tank. The dual fuel burner was first utilized in the second or third week of January 1979[6/] and after about one week of use or testing, a fire occurred in the copper incinerator which burned out the oil pump. It then took about 3 weeks to fix the oil pump. After approximately a week or two of additional use, there was a big fire which burned up the floor of the furnace, some of the piping and the fan. Yaffe began repairing this damage about a week prior to the first EPA inspection on May 2, 1979 and then abandoned its repair efforts at the suggestion of Complainant's employees. The complaint, as amended, alleges that at "a date prior to May 2, 1979, but after April 18, 1978," the effective date of the regulations involved,

6/ The record contains some indication that the use of transformer oil to fuel the copper incinerator may have occurred prior to this time and that such incineration may have been for a much longer duration than approximately 2 to 3 weeks. However, we have accepted the testimony of Respondent's witnesses in this regard in the absence of any conclusive evidence to the contrary.

"Respondent burned PCB mixtures in a furnace located on its place of business in Muskogee, Oklahoma" and that this burning was not performed in an incinerator complying with section 761.40 of the regulations in violation of section 15(1)(C) of the act as Respondent failed in this regard to comply with a rule promulgated under section 6 of the act. (See also section 761.10(b)).

It is patent that Respondent burned transformer oil in the early part of 1979 in an incinerator which did not comply with the regulations. In fact, at the time involved there was not an incinerator in the entire country which met the requirements of the regulations. The dispute between the parties with regard to the burning of transformer oil is whether such oil constituted a PCB mixture. As indicated above, the south overhead bulk storage tank contained oil which had 730 parts per million of PCBs while the north overhead tank contained transformer oil with 51.6 ppm of PCBs.[7/] Respondent contends, in part, that the transformer oil which was burned came from the north overhead storage tank and Complainant contends that such oil used as fuel came from the south overhead tank.

It is difficult to believe that the oil utilized to fuel the incinerator came from the north overhead tank, as contended by Respondent. The EPA inspector, in his report of the May 2, 1979 inspection at Respondent's premises, which report was prepared soon thereafter, stated that "The south [overhead storage] tank was being used and has apparently been used exclusively for the past year although there was some oil in the north tank . . . A small portable

7/ The samples of oil were taken from the north and south tank on May 2, 1979 and represent the PCB content of the oil contained therein on that date. The sample from the mobile bulk oil storage tank which contained 681 ppm of PCBs was also taken May 2, 1979.

oil tank of about 350 gallon capacity is used to fuel the copper wire furnace. This small tank is periodically filled from the large south oil storage tank . . ." In addition, the description in such report of the places where samples were taken states with respect to the south storage tank, in part, that "South tank has been used almost exclusively for the past year. The discharge valve is kept locked" and states with respect to the north storage tank, in part, that "Discharge valve stuck. Appeared to be rust in the sample. Tank not being used." The report was prepared before the results of the laboratory analyses of the samples from the north and south tanks were known to the inspector and, in fact, possibly even before the analyses were run. Furthermore, this inspector testified at the hearing that Mr. Herbert McCutchen, Respondent's plant foreman, who accompanied him on his inspection on May 2, 1979, stated that Yaffe was using the south tank and that the north tank was almost empty.

At the hearing, Mr. McCutchen testified that the transformer oil would have been removed from the north overhead storage tank into the mobile tank as the north tank was filled first and the transformer oil would have been taken from this tank first. He further testified that he did not personally fill the mobile tank from the overhead tanks and that he gave the person who discharged the oil from the overhead tank to the mobile tank the key to the north tank which was the tank which was full at the time.

The testimony of Mr. McCutchen was given approximately 17 months after the May 2, 1979 inspection and 21 months after the movement of some of the

transformer oil from the overhead storage tank to the mobile 400 gallon tank. It also was adduced after the results of the laboratory analyses of the samples from the overhead storage tanks were known to him and Respondent. In addition, the north overhead tank could not have been almost empty, as testified, in effect, by Complainant's employee, by reason of the use of the oil contained therein in the copper incinerator, as Respondent's witnesses testified that this alternate source of fuel was only utilized for a relatively short period of time and the amount of the oil utilized would not approach by a wide margin the capacity of the north overhead storage tank.

This is to be compared to the written report of the EPA inspector prepared immediately after the May 2, 1979 inspection and before the laboratory test results were known. Of even greater significance, however, and, in reality, the determining factor on the issue of whether a PCB mixture was burned in the incinerator, is the laboratory test result of the sample from the mobile storage tank. That tank remained at the copper incinerator after the second fire there and contained a residue or small amount of transformer oil on May 2, 1979. In addition, the record is devoid of evidence of any addition of oil to or subtraction of oil from such tank subsequent to the second fire and prior to May 2, 1979.[8/] The oil therein had a PCB content of 681 ppm. While Dr. Langley, Complainant's expert witness agreed that such oil would experience some volatilization, he testified that generally transformer oils are not very volatile and that the amount of volatilization

8/ Under the circumstances presented in the record, it became Respondent's burden, we believe, to establish that the transformer oil in the mobile tank on May 2, 1979 was different in some respect from the oil used to fuel the incinerator.

would be less than 1 percent. It seems to us that the transformer oil contained in the mobile tank could not have come from the north overhead storage tank and must have come, instead, from the south overhead storage tank. In any event, as the oil contained in the mobile storage tank had been used as a fuel in the copper incinerator, it is concluded that Respondent violated the act and the regulations issued thereunder as charged in connection with the unlawful incineration of a PCB mixture.

III

The complaint further alleges that the storage tanks and drums containing PCB mixtures, described in the complaint, are PCB containers as defined in section 761.2(u) of the pertinent regulations, and were stored by Respondent at its place of business and that the methods of such storage were improper as they failed to meet the requirements of section 761.42(b)(1) of the regulations "in that the storage did not have adequate roof or walls and did not have the prescribed floor and curbing."[9/] In the briefs filed

9/ Section 761.42(b)(1) provides, in pertinent part, as follows:

> . . . after July 1, 1978, owners or operators of any facilities used for the storage of PCB's designated for disposal shall comply with the following requirements:
>
> (1) Such facilities shall have:
>
> (i) An adequate roof and walls to prevent rain water from reaching the stored PCBs.
>
> (ii) An adequate floor which has continuous curbing with a minimum six inch high curb. Such floor and curbing must provide a containment volume equal to at least two times the internal volume of the largest PCB article or PCB container stored therein or 25 percent of the total internal volume of all PCB equipment or containers stored therein, whichever is greater. . . .
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> (iv) Floors and curbing constructed of continuous smooth and impervious materials such as Portland cement concrete or steel to prevent or minimize penetration of PCB chemical substances or mixtures. . . .

herein, counsel for Complainant would have us find storage violations which were not charged in the complaint. This we will not do. In addition, counsel for Complainant, in her reply brief, stated that "no penalty is sought based upon the storage of the bulk tanks . . . The storage penalty is sought solely with regard to the 55-gallon drums on the north and west side of the transformer building."

It is patent that Respondent did not comply with section 761.42(b)(1) in connection with the drums involved.[10/] In fact, as Respondent contended that it did not have any PCBs on its premises, it did not even attempt to maintain storage facilities in compliance with the regulations. The record indicates that the 55 gallon drum containing 700 parts per million of PCBs located on the west side of the transformer processing building was situated out of doors and did not have a lid so that rainwater could and undoubtedly did accumulate therein, and that the area where it was located had no "roof and walls to prevent rain water from reaching the stored PCBs" or a "floor which has continuous curbing with a minimum six inch high curb." In short, the storage area had no roof and walls, or a floor with any curbing. The 55 gallon drum located behind the transformer processing building which contained 11,000 ppm of PCBs was outside of the building but under a corrugated metal roof. There were no walls or curbing, however, but the corrugated metal roof

10/ Respondent's arguments with respect to the sampling of the 2 drums and the alleged consequences of the loss of some of the sample from the drum located on the west side of the transformer processing building were considered and rejected in Part I of these Conclusions. Also, it is obvious that the drums involved contained "PCB's designated for disposal."

did protect the drum from the rain.[11/]

Respondent appears to associate the allegation in the complaint with respect to leaking drums to some sort of violation of the storage regulations and to further allege that the pertinent regulations do not contain a separate violation for the facts alleged in the complaint and established at the hearing with respect to leaking drums. Respondent states that "Complainant's argument that an act of improper disposal can be inferred from the existence of a sticky PCB mixture on the outer surface of a drum is without authority of the regulations."

The complaint alleges that "Respondent stored PCB containers, including drums, at its place of business"; that the drums were leaking as that term is defined in section 761.2(k) of the regulations;[12/] that such leaking

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11/ Respondent alleges that it is improper to consider "Roof and Walls" and "Floor and Curbing" as separate violations. We need not consider this contention as it does not appear that this was done. The amount stated for the alleged violation in the complaint is $10,000 with a breakdown of $5,000 for the lack of roof and walls and $5,000 for the lack of floor and curbing. Counsel for Complainant states in her reply brief that "EPA's purpose in assessing the penalty in this manner serves to allow the breakdown of the elements of a storage violation so that if some requirements are met and others are not this fact is clear from the complaint." We agree with counsel for Complainant that, in effect, Respondent's contentions are matters of form and not substance. In any event, both elements of the alleged storage violation have been found herein and Complainant has proposed an allowable penalty therefor.

12/ Section 761.2(k) provides, in part, as follows:

> "Leak" or "leaking" means any instance in which a . . . PCB container . . . has any . . . PCB mixture on any portion of its external surface.

constitutes disposal as defined in section 761.2(g) thereof;[13/] and that such disposal is not authorized under section 761.10 which sets forth the allowable methods or means of disposing of PCBs. The record indicates that the residue or substance on the outside of the 55 gallon drum located to the rear of the transformer processing building contained PCBs in the concentration of 4000 parts per million. It is clear that such 55 gallon drum, a PCB container, had a PCB mixture on a portion of its external surface and that this constituted a "leak" or "leaking" pursuant to section 761.2(k) of the regulations. In addition, Complainant appears to contend that such "leaking" resulted in the constructive disposal of the PCBs contained on such drum despite the fact that the sticky PCB mixture on the side of the drum "is stable in movement, does not flow"[14/] (See footnote 13). The fact that the sticky PCB mixture on the side of the drum constituted a "leak" under the regulations does not appear to have any relevance to the violation charged. In addition, the drum or its contents or both were being stored for future disposal and we find no relevant subsection of the disposal regulations applicable to it unless it is section 761.10(e)(2) which permits

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13/ Section 761.2(g) provides as follows:

> "Disposal" means to intentionally or accidentally discard, throw away, or otherwise complete or terminate the useful life of an object or substance. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating, or confining those substances, mixtures, or articles that are being disposed.

14/ See also section 761.10(e) of the regulations which provides that "Spills and other uncontrolled discharges" of PCB mixtures constitute the disposal of such mixtures. (Emphasis supplied).

storage. The useful life of the PCB mixture in the drum and on the outside thereof was, in reality, terminated, but the drum was being stored until actually disposed of. Complainant has failed to establish any violation in this regard. We have not considered alleged disposal violations not charged.

Furthermore, we do not consider in connection with this alleged violation, and did not consider with respect to the storage violation found above, the drums on Respondent's premises which were not found to contain PCB mixtures. Complainant contends that the 2 drums where such mixtures were found were representative samples of most of the other 55 gallon drums at Respondent's facilities. While we recognize and appreciate the practical impossibility of sampling the contents of each drum, we cannot, without more, conclude that the 2 drums were representative of other drums there located. In short, aside from the appearance of some of the other drums, Complainant has not introduced any evidence as to the probable PCB concentration of their contents. We are not hereby saying that the tested contents of some drums may never be ascribed to or equated to the contents of other drums. However, Complainant has not afforded a basis to do so here other than the statement that the drums sampled were representative of unsampled drums. Nor has counsel for Complainant established that the contaminated soil referred to by her constituted a PCB mixture or PCB mixtures.

The complaint also alleges that "Respondent did not keep PCB records as required." In response to the prehearing letter, Complainant amplified this allegation by stating, in part, that ". . . beginning July 1, 1978, it [Respondent] was required by the regulations to keep records which would provide the

information for [an annual report]. Respondent maintained no records at all upon which to base its annual PCB report . . ." It is clear that such is the case, although some of the matters to be contained in the annual report are not, in reality, applicable to Respondent's business.[15/]

Respondent contends that section 761.45(a) of the regulations provides for the development and maintenance of records on the disposition of PCBs and that there has been no disposition of PCBs at its facilities since July 2. 1978, the effective date of the record keeping requirement. The record indicates that there was disposal of some PCB mixtures by the incineration thereof during the early part of 1979. In addition, the record keeping requirements also relate to the storage for disposal of such mixtures, an activity which Respondent clearly engaged in. In fact, the placement of PCB mixtures in the south overhead storage tank constituted such an act.

Respondent makes the rather surprising argument that there is no proof in the record that Respondent had no records. Respondent has consistently taken the position in this proceeding that it was unaware that it had any PCBs on its premises at the times of the EPA inspections and that is possibly the case. Respondent had no information then as to the existence there of PCBs or the volume or amount thereof and certainly maintained no records with respect thereto on May 2 or 17, 1979. Such failure to develop and maintain

15/ Section 761.45(a) of the pertinent regulations provides, in part, as follows:

> (a) PCB's in service or projected for disposal. Beginning July 2, 1978, each owner or operator of a facility containing at least 45 kilograms (99.4 pounds) of PCB chemical substance or PCB mixtures contained in a PCB container or PCB containers . . . shall develop and maintain records on the disposition of PCB's. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year. . . .

the required records constitutes a violation of section 761.45(a) of the regulations. In re Briggs & Stratton Corporation, TSCA Dkts. No. V-C-001, 002 and 003 (February 4, 1981).

IV

We turn now to the difficult task of assessing the civil penalty to be imposed for the violations found herein.[16/] Section 16(a)(2)(B) of the act (15 U.S.C. 2615(a)(2)(B) provides that in determining the amount of a civil penalty "the Administrator shall take into account the nature, circumstances, extent, and gravity of the . . . 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."

Prior to examining each individual assessment for each violation, it may be helpful to consider the situation before and after the investigation herein

16/ Section 22.27(b) of the Interim Rules of Practice (43 F.R. 34730), the rules of practice applicable herein, provides as follows:

> (b) Amount of civil penalty. The presiding officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines published under the act. The presiding officer may increase or decrease the assessed penalty from the amount proposed to be assessed in the complaint.

At the time of the violations herein, no civil penalty guidelines were published although internal guidelines existed. Pursuant to subsequently published guidelines (45 F.R. 59770, 59777), Complainant's employee reviewed this matter "to determine whether the penalty calculated under this policy is lower than the penalty in the civil complaint" and he concluded that it was not. No change in the proposed penalty was made by Complainant as the PCB penalty policy "should not be used to raise penalties in existing actions" (45 F.R. 59770, 59777).

by Complainant's employees. Respondent is in the business, in part, of purchasing scrap transformers and breaking them down or wrecking them and salvaging some of the metal therefrom such as copper and steel. Respondent received transformers which contained transformer oil and was faced with the disposal of such oil. Respondent's president testified that towards the end of 1977 or the beginning of 1978 he was informed by a friend at an electric power company about PCB's and that he, in effect, informed his suppliers of scrap transformers not to supply him with transformers containing PCBs.[17/] In this connection, the record contains a letter dated October 4, 1977 from the Oklahoma State Department of Health to Respondent with respect to an August 30, 1977 investigation of a complaint involving "an oily substance present in a drainage ditch as it exits your property and crosses adjacent property." The letter further provided that "Samples of the oily substance were taken and photographs were made. The analysis of the sample validated that it was definitely oil, and also indicated the presence of 36.30 milligrams per liter polychlorinated biphenyls (PCB's). As you should be well aware, PCB's are present in electric transformers and have been ruled Controlled Industrial Waste and should be disposed of at an approved site." The letter then informed Respondent that improper disposal of such waste is a violation of specified sections of state law and rules and regulations promulgated thereunder and a copy of the law and regulations presumably were enclosed with the letter. The letter then provided that "This office will await

17/ Respondent contends that it then did not receive transformers containing PCBs. This does not seem probable as the south overhead tank which was the second tank filled contained 730 ppm of PCBs. Respondent's employee testified that it took 8 months to a year to fill the north overhead tank.

written notification as to the extent of correction of this problem." (See Finding of Fact 2).[18/]

Apparently in response to the action by the Oklahoma State Department of Health, Respondent moved its transformer wrecking activities indoors by remodeling a vacant building on its premises and capturing the transformer oil resulting from such operation in a pit under the floor of the building where it was pumped into the north and south overhead storage tanks located outside of, and on the west side of, the building. Respondent expended approximately $30,000 in the remodeling of the building. Subsequent to the inspections by Complainant's employees, Respondent expended approximately an additional $15,650 in remedying the findings of those inspections.

Respondent contends herein that it was unaware that its premises contained PCBs and that may well be the case, although we have some difficulty giving credence to this contention. However, we do not believe that it may escape the imposition of a civil penalty by reason thereof. In short, Respondent made no attempt to determine what was the case. It must be remembered in this regard that Respondent is in the business of wrecking scrap transformers and disposing of the transformer oil contained therein. We surmise that even some laymen not so engaged had an awareness that transformer oil contained or might contain PCBs. In addition, the Oklahoma State Department of Health informed Respondent in October 1977 that PCB's are present in electrical transformers, "[A]s you should be well aware," and that PCBs were found in a sample taken from a drainage ditch exiting Respondent's property. Respondent appears to have shown a lack of concern with the Oklahoma statute and

18/ The October 4, 1977 letter and, in fact, the April 25, 1979 letter set forth in Finding of Fact 5, were not considered or utilized for the truth of the matters contained therein, but merely to indicate what such letters stated.

regulations dealing with the disposal of PCBs which were pointed out to it and copies of which were apparently sent to it. In addition, even if we were to agree with Respondent that it received no transformers containing PCBs subsequent to the early part of 1978, which we do not (see footnote 17), it appears from the May 1979 inspections conducted by Complainant's employees and the pictures of such premises that Respondent's facility probably had transformer oil received prior to the creation of a transformer processing building and the installation of overhead bulk storage tanks and that the area was somewhat contaminated with oil. Yet, Respondent made no effort to determine if such oil contained PCBs, to determine what its responsibilities were under federal and state law or even to consider whether the incineration of transformer oil complied with state disposal regulations, let alone comparable federal regulations. Under these circumstances, Respondent's alleged lack of knowledge with respect to the PCB content of its transformer oil indicates a lack of responsibility and concern.[19/] It should be stated in Respondent's behalf, however, that Respondent expended monies subsequent to the state and federal inspections to cure deficiencies. It demonstrated, after the inspections by Complainant's employees, a cooperative attitude and attempted to comply with the pertinent regulations issued under the act and, in large measure, was successful in such attempt.

19/ The penalties imposed herein are not based upon any violation of state law. The matters set forth above merely constitute background material in connection with Respondent's contentions with respect to its lack of knowledge solely for purposes of the penalty to be imposed.

The imposition of a civil penalty for the individual violations found herein cannot be done with precision or mathematical exactitude. To believe otherwise is a delusion.[20/] We conclude that the penalties proposed in the complaint for the marking, storage, and improper incineration violations, that is $5,000, $10,000 and $15,000, respectively, should be assessed against Respondent with an adjustment to be considered later in this Initial Decision. The improper incineration of PCBs constitutes a disposal of PCBs and probably the dissemination thereof into the environment. The regulations contain exacting requirements which a furnace used to incinerate PCBs must meet to avoid incompletely incinerated PCBs and the spread thereof, and, in fact, as previously stated, at the time of the use of the transformer oil herein in the copper incinerator there was no incinerator in the country which was approved or met such requirements. Considering the condition of the 2 55 gallon drums found to contain in excess of 500 ppm of PCB, we believe that the proposed penalty of $10,000 for the storage violation is, indeed, appropriate. These drums clearly were not adequate to contain the PCBs therein. The lack of a roof, walls, flooring and curbing with respect to the drum located out of doors on the west side of the transformer processing building, which drum obviously also contained rainwater due to the

20/ While the published guidelines propose, in part, to assess penalties mathematically, we are not bound thereby. As we stated at the hearing, Complainant should be commended for the publication of proposed guidelines as they are informative and helpful to the regulated public and constitute an attempt to impose uniformity and uniform treatment where complaints are issued in 10 regions and occacionally by EPA headquarters. But, their basic usefulness relates to the penalties to be proposed in the complaint to be issued. Obviously, they cannot reflect the situation after a hearing when more information is then available. We believe, however, that deference should be accorded the guidelines in the assessment of the civil penalty to the extent possible.

absence of a lid, and the lack of walls, flooring, and curbing with respect to the drum located behind the processing building, which drum had at least one hole and dents on its side, no lid, and a PCB mixture of large concentration on its exterior surface and inside thereof, take on added significance. Also, while we have not considered the remaining drums in determining whether Respondent violated the act, their condition gives added weight to Respondent's failure to have adequate storage facilities. Respondent's failure to mark the PCB containers herein as required is not to be considered lightly as such marking would, among other things, emphasize to Respondent's employees and others the dangers involved in handling the transformer oil and the importance of handling it properly both in terms of their own safety and the environment.

We are not in agreement with Complainant's assessment of a $15,000 penalty for the record keeping violation found herein and the rationale therefor. In this connection, Complainant's employee testified that such violation was very serious as it is difficult to perform the enforcement or regulatory function in the absence of records. We do not believe that administrative convenience or the difficulties of the regulator in the enforcement of the act are matters to be considered in the assessment of a penalty thereunder. Consequently, the penalty for such violation is reduced to $2,000. Cf. In re Briggs & Stratton Corporation, supra.

We stated above that the amounts found should be adjusted. Such adjustment is appropriate, we believe, by virtue of the fact that Respondent had no prior violations of the act and it has made good faith efforts to comply with the regulations subsequent to the violations found herein.

(See Complainant's Exhibit No. 8 and Respondent's Exhibit No. 7). Under the circumstances set forth in the record, and in view of the fact that this proceeding represents the first complaint issued by Region VI under the act, the amount of civil penalty found above, that is $32,000, should be reduced to $21,000.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

Order[21/]

Pursuant to section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $21,000 is hereby assessed against Respondent Yaffe Iron and Metal Company, Inc., for the violations of the act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Herbert L. Perlman
Chief Administrative Law Judge

March 27, 1981

21/ Unless an appeal is taken pursuant to section 22.30 of the interim rules of practice or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator (See section 22.27(c)).

CERTIFICATE OF MAILING

I hereby certify that a copy of the letter to the Regional Hearing Clerk, EPA, Region VI and a copy of the Initial Decision issued this date by Chief Administrative Law Judge Herbert L. Perlman, Subject: In re Yaffe Iron and Metal Company, Inc., TSCA Docket No. VI-IC, were mailed to Charles R. Nestrud, Esq., counsel for Respondent and Mary E. Kale, Esq., counsel for Complainant in this proceeding on March 27, 1981.

Shirley G. Green
Secretary to CALJ Perlman

March 27, 1981