UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of	)	
	)	
General Electric, Aircraft Engine Group,	)	Docket No. TSCA-V-C-147
	)	
Respondent	)	

1. Toxic Substances Control Act - PCB - The 50 ppm regulatory cutoff in the PCB Ban Rule does not apply to the cleanup of PCB spills.

2. Toxic Substances Control Act - PCB - A PCB spill must be cleaned up to the lowest level below 50 ppm practicably attainable through the use of normal cleanup methods.

3. Toxic Substances Control Act - PCB - Respondent assessed a penalty of $3,750, where the spill had been cleaned up to a level of 13 ppm PCBs, but the record showed that it could have been cleaned up to much lower levels by application of normal cleanup methods.

Appearances:

Lisa S. Seglin, United States Environmental Protection Agency, Region V, Chicago, Illinois, for Complainant.

Jeffrey O. Cerar, Squire, Sanders, and Dempsey, 1201 Pennslyvania Avenue, N.W., Washington, D.C. for Respondent.

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violation of a rule promulgated under section 6(e) of the Act, 15 U.S.C. 2605(e), establishing prohibitions and requirements for the manufacture, processing, distribution in commerce, use, diposal, storage and marking of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761.[1/] The complaint issued by the Director, Waste Management Division, Region V, United States Environmental Protection Agency ("EPA"), charged Respondent General Electric Aircraft Engine Group ("General Electric") with violation of the PCB Ban Rule by storing a 55-gallon drum containing PCB contaminated material and five 5-gallon cans of PCB liquids in a storage area not complying with the requirements of the PCB Ban Rule, by failing to mark the storage area as required by the Rule, by not maintaining records required by the Rule with respect to the drum and containers, and with not properly disposing of PCBs that were released after a high pressure airline ruptured. A total penalty of $20,000 was requested, $1,500 for the storage violation, $500 for the marking violation, $1,000 for the recordkeeping violation and $17,000 for the disposal violation.

1/ Section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for the purposes of this subsection, constitute a separate violation of section 15."

TSCA, section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under section . . . 6."

General Electric filed an answer to the complaint. The issues as to the storage, marking, and recordkeeping violations, however, were really defined by a stipulation between the parties, according to which the charge relating to the 5-gallon containers was dropped, the remaining violations admitted, and as to the requested penalty for them, General Electric disputed only the appropriateness of the penalty for the recordkeeping violation involving the 55-gallon drum.[2/] With respect to the alleged improper disposal, General Electric denied the violation, asserting that by cleaning up the PCBs released by the rupture of the airline to a level of less than 50 ppm, it had complied with the PCB Ban Rule. General Electric also contended that the requested penalty for that violation was excessive.

A hearing was held in Washington, D.C. on October 12, 1983. Thereafter, each party submitted proposed findings of fact, conclusions of law and a proposed order together with supporting briefs. On consideration of the entire record and the submissions of the parties, a penalty of $6,750 is assessed. The findings, conclusions and reasons for this penalty follow. All proposed findings and conclusions which are inconsistent with this decision are rejected.

Findings of Fact

1. Respondent General Electric is a New York Corporation which at all times relevant to this action maintained a facility in Cincinnati, Ohio.[3/]

2. On October 6, 1982, an inspection of the General Electric facility was

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2/ See Transcript of Proceedings ("Tr.") 4.

3/ According to the complaint, Par. 1, which was not denied by General Electric, the facility was located in Cincinnati, Ohio. The actual location appears to have been in Evendale, Ohio, a suburb of Cincinnati. See Respondent's proposed finding of fact No. 2. In the transcript, the location is referred to as "Eatondale". See e.g., Tr. 86.

conducted by Ohio Environmental Protection Agency employees as representatives of the EPA to determine compliance with the PCB Ban Rule. Complainant's Exhibit 1; Tr. 9.

3. At the time of the inspection, General Electric maintained one 55-gallon drum of PCB solids in a PCB storage area in Building 705 which was not curbed as required by 40 C.F.R. 761.65(b). Answer, Par.1; Tr. 4.

4. At the time of the inspection, the PCB storage area in Building 705 was not marked as required by 40 C.F.R. 761.40(e)(10). Answer, Par. 4; Tr. 4.

5. At the time of the inspection, the annual PCB document maintained by General Electric for the facility did not show the date the 55-gallon drum of PCB solids was removed from service, the date it was placed in storage for disposal, and the total weight in kilograms of PCBs as required by 40 C.F.R. 761.180(a). Answer, Par. 5; Tr. 4.

6. At the time of the inspection, the EPA inspectors observed an oily residue on an interior wall and adjoining ceiling in Building 302, in an area used as a machine shop. The residue was heavier at the top of the wall and on the ceiling, and lighter at the bottom of the wall, indicating that the oil had run down the wall. Tr. 12, 103; Complainant's Exhibit 1.

7. The inspectors took two swab samples from the wall, one from the sixth or ninth cinderblock up from the floor, and one from the fourteenth cinderblock. The samples were taken by wiping a cotton swab dipped in hexane, a solvent, over a 100 square centimeter (100 cm^2) area marked out with a template. Tr. 13-15; Complainant's Exhibit 1.[4/]

4/ While Ms. Sword testified that she took a swab sample from the ninth cinderblock up from the floor (Tr. 14), the inspection report states that the sample was taken six blocks from the floor (Complainant's Exhibit 1). It is immaterial whether it was the sixth or the ninth block.

8. Sample ER 335, taken 14 blocks up from the floor, on analysis, disclosed a PCB concentration of 2.2 micrograms/cm^2 (220 ug/100 cm^2), and sample ER 336 taken from the block closer to the floor disclosed a PCB concentration of 0.31 micrograms/cm^2 (31 ug/100 cm^2). Complainant's Exhibit 1; Tr. 45

9. Duplicate samples were taken by the inspectors from 100 cm^2 areas adjacent to the EPA's sample areas, and given to General Electric. These were tested for General Electric by Kettering Laboratories and were reported to contain 13 and 2.5 parts per million (ppm) PCBs respectively in a 10 ml hexane solution. Tr. 14; General Electric proposed finding No. 38.[5/]

10. The oily residue on the wall and ceiling resulted from the rupture of a compressor airline in Building 302 on February 17, 1982. The history of this incident and General Electric's actions with respect to it are as follows:

A. The airline rupture spread asbestos insulation on the outside of the line throughout the area and also sprayed the wall and ceiling in the vicinity of the ruptured pipe with about two to three quarts of oil that had accumulated inside the pipe. Tr. 88, 103; Complainant's Exhibit 5; Respondent's Exhibit 3.

5/ General Electric as support for the results of the Kettering tests cites a document not introduced into evidence but furnished in its prehearing exchange as "Respondent's Document 2." A document not introduced into evidence does not consitute evidence and cannot be relied on to support a finding, unless it is a document that can be officially noticed, which cannot be said of Document 2. The EPA, however, has not questioned General Electric's proposed finding that PCBs were present on the wall in the concentrations stated, but instead has taken the position that even if PCBs were present in such concentrations, it would still be a violation of the disposal requirements. See infra at 14, n.25. Accordingly, General Electric's proposed finding is accepted as reliably stating the results of the Kettering test.

B. General Electric immediately began to clean up the debris from the spill. At that point it was unaware that the spattered oil contained PCBs and directed its efforts to removing the asbestos. The cleanup included twice wiping down the wall on which the oil had sprayed with 1,1,1 - trichloroethane, a solvent that dissolves oil. Tr. 90, 114, 140, 142.

C. Samples of the oil on the wall were taken immediately after the airline rupture and before cleanup for possible future use in investigating the incident. Tr. 91, 94.

D. During its investigation of the incident in the three weeks following the airline rupture, General Electric discovered that PCBs had been used in the compressor between 1953 and 1971. It then took a portion of the oil samples it had taken before cleanup and submitted them to DuBois Testing Service and Kettering Laboratory for testing. Tr. 91.

E. The results of the tests were reported on March 22, 1982. The sample analyzed by Kettering Laboratory disclosed 84,460 ppm PCBs. The sample analyzed by DuBois Testing Service disclosed 60,000 ppm PCBs. Tr. 117; Respondent's Exhibits 1 and 2.

F. When the test reports were received confirming the presence of PCBs in the oil, General Electric had already disposed of the debris and cleanup materials in an asbestos landfill, which was not approved for the disposal of PCBs. Tr. 116-17.

G. On March 23 or March 24, 1982, General Electric informed Tom Winston, Chief of the Southwest District Ohio Office of the State EPA about the disposal of the PCB contaminated material. Mr. Winston recommended that General Electric call the Chief of the Waste Management Branch, EPA, Region V. Tr. 100, 123, 130.

H. On March 25, General Electric called EPA, Region V, and was referred to Mr. David Homer. The substance of the conversation with Mr. Homer dealt with

General Electric having disposed of the debris and materials from the cleanup in the asbestos landfill. Mr. Homer was apparently told that "the discolored areas were wiped clean." In fact, however, there was still an oily residue visible on the wall. Respondent's Exhibit 3; Complainant's Exhibit 5; Tr. 12, 19.

I. Mr. Homer, on being told by General Electric that the amount of oil discharged by the rupture was 2-3 quarts, and contained 7% PCBs (equivalent to 70,000 ppm), said that the overall concentration in the debris and cleanup materials was around 20 ppm, and that the EPA would take no action with respect to the disposal of the debris and cleanup material. He stated, however, that if General Electric found anymore oil that the contractor had missed, this should be cleaned up and the materials involved be sent to an Annex II landfill. Tr. 130-131; Complainant's Exhibit 5; Respondent's Exhibit 3.

J. No further cleanup of the wall was done and the oil stains seen by the EPA inspectors on the wall were what remained from the spill after General Electric had finished it's asbestos cleanup. Tr. 114-15.

12. Subsequent to the issuance of the complaint in this case, General Electric was advised by the EPA at a settlement conference to undertake a further clean-up of the PCBs on the wall. Tr. 92, 100-01, 113-15, 117-18.

13. This second cleanup was done in August 1983. It required first stripping the paint from the wall, which had been painted in early 1983, after the EPA's inspection, as part of a regular maintenance program. The area was then cleaned with Spic and Span and Freon, a solvent. Tr. 82, 92, 143.

14. After this second cleanup, samples were taken of the affected area which revealed levels of less than one ppm PCBs. Tr. 144; Respondent's Exhibit 4.

Discussion and Conclusions

The only contested violation is the charge of improperly disposing of PCBs discharged by the ruptured airline, specifically with not complying with

40 C.F.R. section 761.60(d). The relevant provisions are 761.60(d)(1) and (2), which read as follows:

> (d) SPILLS. (1) Spills, leaks, and other uncontrolled discharges of PCBs constitute the disposal of PCBS.
> (2) PCBs resulting from the clean-up and removal of spills, leaks, or other uncontrolled discharges, must be stored and disposed of in accordance with paragraph (a) of this section. 6/

The above provisions have been in effect since September 24, 1982. Prior thereto the section read in pertinent part as follows:

> (d) SPILLS. (1) Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs.
> (2) PCBs resulting from spill cleanup and removal operations shall be stored and disposed of in accordance with paragraph (a) of this section. In order to determine if a spill of PCBs has resulted in a contamination level that is 50 ppm of PCBs or greater in soil, gravel, sludge, fill, rubble, or other land based substances, the person who spills PCBs should consult with the appropriate EPA Regional Administrator to obtain information on sampling methods and analytical procedures for determining the PCB contamination level associated with the spill. 7/

For reasons hereafter explained both the prior and present versions of section 761.60(d), are relevant to the determination of General Electric's liability.

6/ 47 Fed. Reg. 37342, 37359 (August 25, 1982). A third paragraph, 761.60(d)(3), which provides that the disposal regulations do not exempt persons from any actions or liability under other statutes, is not claimed to be relevant to this proceeding.

7/ 40 C.F.R. 761.60(d) (1982).

Initially to be decided is what constitutes an improper disposal under the rule. General Electric argues that a spill is not per se an improper disposal but becomes such if it is not adequately cleaned up.[8/] While it is not at all clear that this is also the position of the EPA, it is clear that this case would not have been brought if in the opinion of the EPA the spill had been adequately cleaned up.[9/] The question, then, is whether the cleanup of the spill on the wall was "adequate". General Electric says that it was because a spill need only be cleaned up to where the residue left contains less than 50 ppm PCBs. The EPA disagrees and asserts that the cleanup must be carried to the lowest level below 50 ppm which is practicably achieveable through the use of normal cleaning procedures, and that was not done here.

In support of its argument, General Electric relies on the following statement in section 761.1 of the PCB Ban Rule:

> * * * Unless it is otherwise specificlly provided, the terms PCB and PCBs are used in this rule to refer to any chemical substances and combinations of substances that contain 50 ppm (on a dry weight basis) or greater of PCBs, as defined in § 761.3(s), including any byproduct, intermediate, or impurity manufactured at any point in a process. Any chemical substances and combinations of substances that contain less than 50 ppm PCBs because of any dilution, shall be included as PCB and PCBs unless otherwise specifically provided. * * *

8/ Respondent's brief at 14. Reference in this opinion to the "cleaning up" of a spill means removing the spilled PCBs or material contaminated with PCBs from the spill site and disposing of them in an acceptable way.

9/ Tr. 66-67, 70-71; Complainant's brief at 20.

In this case, the evidence discloses that the oil sprayed on the wall contained several thousand ppm PCBs. General Electric accordingly does not question its obligation under the rule to clean up the sprayed oil. It contends, however, that the Agency's general policy expressed in section 761.1, to regulate only PCBs of 50 ppm or more was also intended to apply to the level of cleanup required. The Agency argues that the exclusion for PCBs in concentrations of less than 50 ppm does not apply because this is a case where the PCBs were "diluted" by the process of cleaning them off the wall.[10/] The reference to dilution in the regulation was to instances where the PCB concentration is reduced by increasing the volume of the PCB contaminated material, either a liquid or a solid, so as to lower the unit concentration of PCBs per unit of material, and this also accords with the ordinary meaning of dilution.[11/] The EPA's position, accordingly, that reducing the concentration by removing PCBs from the wall was dilution is rejected. Examination of the language of sections 761.60(d)(1) and (2) themselves and their legislative history does disclose, however, that the 50 ppm cut-off does not apply to the clean up of spills of materials or substances that contain 50 ppm or more PCBs.

Sections 761.60(d) and (d)(2) are in reality two separate provisions. Section 761.60(d)(1) relates to the spill itself stating that spills and other uncontrolled discharges constitute the disposal of PCBs. There is

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10/ Complainant's brief at 7-8.

11/ See Preamble to PCB Ban Rule, 44 Fed. Reg. 31518, 31521 (May 31, 1979); See also, Tr. 71, 102. The EPA cites a dictionary definition where "dilution" is defined to include not only the addition of water or the like but also to "make fainter", which arguably might include not only the addition of a "diluent" but also removal of part of the substance. Reply brief at 7. The most that can be said, however, is that all dictionary definitions of the word apparently do not agree. See Respondent's reply brief at 5.

nothing said about cleanup. Read literally, it would appear to make spills and uncontrolled discharges illegal in and of themselves, since they are not one of the authorized forms of disposal. Section 761.60(d)(2) relates to the disposal of PCBs resulting from cleaning up and removing the spilled or discharged PCBs. Prior to its amendment in 1982, section 761.60 (d)(2) also contained language with respect to determining whether the spill had resulted in a contamination level of 50 ppm or more.[12/] That language, would appear to refer to the disposal of PCB contaminated materials and not to a level of cleanup of the spilled PCBs. In any event, that it was not intended to set a level of cleanup is made clear from the history of the 1982 amendment.

The EPA originally proposed to amend section 761.60(d) by adding a provision that would require that contaminated material resulting from the spills, leaks and other uncontrolled discharges be cleaned up to prexisting background levels of PCBs where there is a risk of exposure to water, human food, or animal feed, that any visible signs of PCB contamination must be removed, and that in all cases cleanup is required to below 50 ppm PCBs.[13/] The EPA, however, did not adopt the proposal and instead, deleted the second sentence of section 761.60(d)(2), which referred to testing to determine the level of PCB contamination resulting from the spill. It explained its action as follows:

> The proposal also contained requirements for cleanup of PCB contamination resulting from spills, leaks, and other uncontrolled discharges of PCBs. Comments in response to these provisions varied. Some comments stated that a requirement for level of cleanup should be set, but that cleanup to

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12/ See supra at 7.

13/ 47 Fed. Reg. 17443 (April 22, 1982).

> a concentration of 50 ppm was always appropriate. Other comments expressed concern about setting any specific requirements for level of cleanup at this time and about how these levels would be determined in the field. Still others approved of the standards set in the proposed rule.
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> The Agency has decided not to include language regarding the required level of cleanup in this final rule. A part of § 761.20(d)(2) (formerly § 761.10(d)(2)), which was sometimes construed as setting a required level of cleanup has been deleted. 14/

General Electric argues that the Agency's refusal to fix a level of cleanup shows an intention to require that PCB concentration caused by spill need only be reduced to a concentration below 50 ppm. 15/ In fact, however, the Agency's explanation shows precisely the contrary, namely, that the Agency was concerned with the undesireability of establishing fixed levels of cleanup which would be generally applicable to all situations. Indeed, its reason for deleting the second sentence in section 761.60(d)(2), was to dispel any implication that there was any such required level of cleanup. In sum, nothing in the Agency's action or in the language of section 760.61(d), as amended, suggests that the Agency intended to limit the cleanup of spills to only where the concentration is below 50 ppm.

The reasonable construction of section 761.60(d), as it now reads and in light of its history, is that the spill itself of PCBs in concentrations of 50 ppm or more is an improper disposal, and the cleanup is an element of

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14/ 47 Fed. Reg. 37354 (August 25, 1982).

15/ Respondent's brief at 15.

the violation only insofar as it is to be considered in determining the appropriate penalty in a given case.[16/]

General Electric argues that without some objective criterion in the regulation fixing a level of cleanup, the regulation would be void for vagueness.[17/] The regulation, however, in making a spill illegal per se can hardly be called vague. Nor does making the penalty dependent upon the circumstances of a particular spill and the efforts made to clean it up render the regulation too indefinite. To support its claim that due process requires that specific levels of cleanup must be set, General Electric cites cases which deal either with the permissible scope of regulation where First Amendment rights are concerned or with the specificity of the definition of a crime.[18/] Such cases are not controlling in determining the scope of regulations promulgated pursuant to remedial civil legislation such as TSCA. See Brennan v. Occupational Safety and Health Review Comm., 505 F.2d 869, 872 (10th Cir. 1974). Of course, even in civil legislation a party cannot held to a standard which it cannot reasonably be be expected to know about. Id at 872.

16/ This construction is consistent with the response which the Agency made in the preamble to the amended PCB Ban Rule to the comment that under the amended rule the Agency would charge a party with unauthorized disposal when PCBs are spilled or leaked during authorized use of electrical equipment but prompt cleanup is initiated. The Agency said that it will not charge a party with a disposal violation if the spill or leak occurs during authorized use of electrical equipment and adequate cleanup measures are initiated within 48 hours. 47 Fed. Reg. 37354 (August 25, 1982).

17/ Respondent's brief at 24-25.

18/ Respondent's brief at 24-25.

That, however, is not the case here. There is no question but that General Electric knew that it must clean up spilled PCBs promptly.[19/] Contrary to what General Electric contends, the EPA is not seeking to hold General Electric to some unpublished arbitrarily determined standard.[20/] The EPA refers generally to the requirement that spills be cleaned up to "background" levels.[21/] The purport of Dr. Clark's testimony and of his memorandum on which the EPA relies, however, is that spills be cleaned up to the lowest level of concentration below 50 ppm PCBs which is practicably attainable through the use of normal cleanup methods.[22/] The record in this case demonstrates that simply by using a household cleaner, Spic and Span, and an industrial solvent, Freon, General Electric was able to clean up the PCBs on the wall to a much lower level of concentration than what was originally accomplished.[23/] Nor can General Electric's original cleanup be be taken as a gauge of what would normally be done to clean up PCBs, since its efforts were directed entirely to the removal of asbestos, and it was only by happenstance that the PCBs were brought down to a level of below 50 ppm.[24/] In contrast, Dr. Clark testified that the EPA's experience with other companies

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19/ Although the cleanup was undertaken to remove asbestos, General Electric does not deny that there was an obligation under the PCB Ban Rule to also clean up PCBs.

20/ Respondent's brief at 21-24.

21/ Complainant's brief at 9.

22/ Tr. 42-43; Complainant's Exhibit 4.

23/ See Findings of Fact Nos. 12 and 13. The cleanup also required stripping paint from the walls, but that resulted from General Electric repainting the wall after the EPA had inspected the facility. Tr. 148.

24/ See Findings of Fact Nos. 10B - 10F.

had shown that where the effort was specifically directed to removal of PCBs, a level of about 10 micrograms per hundred centimeters squared could be easily achieved.[25/]

General Electric also argues that requiring a cleanup only to 50 ppm is consistent with the policy seemingly expressed by the Agency in its preamble to the original PCB Ban Rule (40 Fed. Reg. 31514, 31516 (May 31, 1979), that the burden of cleaning up to a lower level outweighed the risks associated with leaving such PCBs unregulated.[26/] In reading the preamble, however, it is evident that the Agency was concerned with the fact that it was technically impossible to eliminate the inadvertent production of PCBs during the manufacturing process, and as the Agency noted in its proposed rule, it was also concerned with the problem of regulating the diffuse and extremely numerous PCB sources of concentrations

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25/ Tr. 42, Complainant's Exhibit 4. One question in this case which is not being resolved because it is not necessary for decision, is the appropriate measurement for the concentration of PCBs on the wall. The EPA uses the ratio of micrograms of PCBs to the 100 cm^2 of the wall area sampled. General Electric converts the results into ppm by measuring the PCBs wiped off the wall as a percentage of the 10 ml solvent solution into which the wipe samples were placed. The concentration so determined would vary with the quantity of solvent solution used as the denominator of the fraction. See Tr. 28-29, 170-71. The EPA, however, does not question General Electric's ppm determinations, and it is assumed, therefore, that they accurately reflect the level of PCB concentration on the wall and that the final cleanup result achieved of less than 1 ppm was within the range considered acceptable by the EPA.

26/ Respondent's brief at 18.

below 50 ppm already present in the environment.[27/] There is no indication that the EPA considered the particular question involved here, namely, how should the cleanup of spills and other uncontrolled discharges of PCBs in concentrations of 50 ppm or more be treated.

In promulgating the PCB Ban Rule, the EPA, addressing the question of what concentrations of PCBs could be considered as significant, stated as follows:

> EPA considered a finite concentration as the demarcation between "significant" and "insignificant exposure". The chief reason for not taking this approach, however, is that there simply is no rational basis for selecting any particular exposure level above zero for the purposes of this regulation. PCB's are extremely persistent and ubiquitous in the environment, bioconcentrate and bioaccumulate within many organisms, induce a variety of adverse effects in humans and laboratory mammals, and possess no known "no effect" level for some of these effects. Based on the existing information on the environmental risks associated with exposure to PCB's (summarized in the Support Document), it is apparent that there is no finite level at which continuing releases in the environment could be regarded as insignificant. Accordingly, the Administrator has determined that any exposure to PCB's is significant and shall not be permitted unless explicitly authorized or exempted. 28/

27/ See 43 Fed. Reg. 24804 (June 7, 1978). See also the discussion of the 50 ppm cutoff in Environmental Defense Fund v. EPA, 636 F.2d 1267, 1279-1281 (D.C. Cir. 1980). In that case, the court voided the 50 ppm cutoff finding that the EPA had not shown that it had sufficiently considered whether the cutoff provided adequate protection for human health and the environment. 636 F.2d at 1284.

28/ Preamble to the proposed rule, 43 Fed. Reg. 24805 (June 7, 1978). The EPA adhered to this reasoning in its final rule. See 44 Fed. Reg. 31518 (May 31, 1979). The concerns expressed about the hazards of any exposure to PCBs were reiterated in Dr. Clark's testimony. See Tr. 40-42.

In view of the policy expressed therein, the 50 ppm cutoff should not be construed as applying to situations which result in adding PCBs to the environment unless it is clear that the EPA so intended. Here it is neither clear from the spill provisions themselves nor from their history that the EPA intended this result.

Accordingly, it is concluded that the spilled PCBs found on the wall at the time of inspection had not been disposed of in accordance with the requirements of 40 C.F.R. 761.60(d).[29/]

The Penalty

The statutory criteria for assessing penalties under TSCA, section 16(a) are listed in section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B), which provides as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpablity, and such other matters as justice may require.

To provide guidance on the assessment of penalties under section 16, the EPA enforcement staff has issued guidelines setting forth the general policies it will follow and has supplemented these guidelines with a specific policy for assessing penalties for violations relating to PCBs.[30/]

29/ The EPA has claimed no violation with respect to the spilled PCBs which were cleaned up and disposed of in the asbestos landfill. This is undoubtedly in accordance with the advice given by the EPA to General Electric that it would take no action with respect to that disposal. See Complainant's Exhibit 5; Respondent's Exhibit 3.

30/ See 45 Fed. Reg. 59770-59783 (September 10, 1983). The guidelines and penalty policy are also included in the record as Complainant's Exhibit 3. Reference, however, will be to the Federal Register pages.

The procedural rules for these proceedings require that I consider the guidelines and PCB penalty policy in determining the appropriate penalty, and that if I assess a penalty different in amount from that proposed in the complaint, I must give my reasons therefore.[31/]

The PCB penalty policy uses a matrix to establish an initial penalty based on the nature, extent, circumstances, and gravity of the violation. The initial penalty can then be adjusted upwards or downwards depending upon consideration of the other statutory factors, i.e., culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require.[32/]

For the violations charged in the four counts of the complaint, the EPA has requested a total penalty of $20,000, broken down as follows: A penalty of $1,500 for improper storage (Count I), $500 for improper marking (Count II), $1,000 for improper recordkeeping (Count III), and $17,000 for improper disposal (Count IV). The only penalties questioned by General Electric as excessive are the $1,000 penalty for improper marking and $17,000 for improper disposal.[33/] General Electric has not, however, raised any issue with respect to its ability to pay such penalties or claimed that payment would adversely affect its ability to continue in business.

The improper recordkeeping violation concerned General Electric's failure to show the date on which one 55-gallon drum of PCB solids was removed from service, the date it was placed in storage for disposal, and the total

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31/ 40 C.F.R. 22.27(b).

32/ 45 Fed. Reg. 59777.

33/ Respondent's brief at 2.

weight in kilograms of PCBs.[34/] The EPA classified this as a major record-keeping violation (in assessing the probability of causing damage), but of minor extent because of the relatively small amount of PCBs involved.[35/] General Electric claims that the penalty is excessive since the drum itself and its contents were identified, they were only a small part of the PCBs handled, and General Electric did comply with respect to the other PCBs handled by it.[36/]

The information in the annual document is required to assist the EPA in determining compliance with PCB requirements and to assist owners and operators in maintaining effective inventory control of PCBs and insuring timely disposal.[37/] It seems self-evident that the date a PCB container has been removed from service and the date it has been placed in storage for disposal are important for both the EPA and General Electric in determining whether it was being handled in accordance with the PCB Ban Rule's requirements.[38/] The weight of the PCBs in kilograms is also important in determining whether all quantities of PCBs shown in the annual report have been accounted for. Consequently, the violation was properly

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34/ Finding of Fact No. 5.

35/ Complainant's Exhibit 10.

36/ Respondent's brief at 10-11.

37/ See preamble to proposed disposal and marking rule, 42 Fed. Reg. 26570 (May 24, 1977); Bell and Howell Co., (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983) at 8.

38/ The PCB Ban Rule, for example, has different disposal requirements for PCB containers stored before January 1, 1983, than for those stored afterwards. 40 C.F.R. 761.65(a). Also the date a PCB container has been removed from service is important in determining whether the temporary storage requirements have been complied with. See 40 C.F.R. 761.65(c)(1).

classified as a major recordkeeping violation. It is true as General Electric points out, that the penalty policy gives as an example of a minor recordkeeping violation the "omission of the date of transfers of PCBs."[39/] There is no reason to assume from this that the EPA would also consider the omission of the total weight of PCBs as minor. Further, it is highly questionable whether this was intended to refer to the omission of such significant information as the dates of removal of an item from service and of placing it in storage. In fact, there is no reference to the "transfers" of PCBs in the records required of owners and operators of facilities, although there is such a reference in the records required from disposal and storage facilities.[40/]

I also find that General Electric has not shown any reason why the initial penalty set by the penalty policy should be reduced because of any mitigating circumstances. No explanation for omitting the information is given other than one which General Electric makes for the first time in its brief that the drum was used to hold PCB contaminated items from transformer servicing and cleanup that occurred periodically.[41/] Assuming this is true, perhaps some variation in the way the information was reported in the annual document might have been in order. It would not justify omitting all information about the dates the PCBs were removed from service or stored for disposal, which is what General Electric appears to have done.

I find, accordingly, that $1,000 is the appropriate penalty for the recordkeeping violation.

39/ General Electric's brief at 11. See 45 Fed. Reg. 59780.

40/ See section 761.80(b)(2).

41/ Respondent's brief at 10.

With respect to the disposal violation, the EPA classifies the violation as significant in extent of potential damage and at the highest level in terms of probability of damage.[42/] The significant category was arrived by estimating that the contaminated area of wall was between 150 square feet and 750 square feet.[43/] Under the penalty policy all disposal violations are assigned the highest level, i.e. considered as most likely to cause damage.[44/]

The category into which the violation falls is based upon both the concentration of PCBs and the amount. The EPA considered only the extent of the contaminated wall and that it was located in an occupied work area, but did not attempt to ascertain exactly how much PCBs were involved.[45/] General Electric correctly points out that by so doing , the EPA was not properly applying the penalty policy.[46/] The policy states that when different measurements of quantity would result in a particular violation falling into more than one category, the category should be determined by the actual weight in kilograms if this information is known.[47/] The EPA argues that it had no way to reliably measure the weight of PCBs involved.[48/] I find, however, that that argument is not supported by the record and

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42/ Complainant's Exhibit 10.

43/ Tr. 66.

44/ 45 Fed. Reg. 59778. See also explanation for levels of probability of damage in the TSCA guidelines, 45 Fed. Reg. 59772.

45/ Tr. 67-68, 73-74, 77.

46/ Respondent's brief at 27-28.

47/ 45 Fed. Reg. 59779.

48/ Complainant's reply brief at 11.

that there was information from which the EPA could have ascertained the weight in kilograms for purpose of determining the proper penalty matrix. Measurements made by General Electric at the time of the spill indicated that less than ten pounds of oil containing about 75,000 ppm PCBs were spilled.[49/] This would amount to a quantity considerably below the 1,000 kilogram level which separates the minor from the significant category.[50/] The quantity of PCBs not originally cleaned up would be even smaller and probably very much smaller, given the concentration found on the wall of of 13 ppm.[51/] True there is the possibility that some of the PCBs may have volatilized between March 1982, when the original cleanup was completed, and October 1982, when the inspection occurred.[52/] Nevertheless, the concentration of PCBs remaining on the wall after the original cleanup was still undoubtedly much

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49/ Tr. 92-94; Complainant's Exhibit 5. In its conversation with Mr. Homer of the EPA, General Electric stated that it estimated the amount of oil spilled to be two to three quarts. Complainant's Exhibit 5. The quantity categories in the penalty policy are based on the assumption of an average density of PCB fluids of 10 lbs. per gallon. 45 Fed. Reg. 59779. Using that assumption, the spill would have amounted to between 5 and 7.5 pounds of oil.

50/ 45 Fed. Reg. 59777. One pound is approximately equal to 0.45 kilograms. See U.S. Department of Commerce, National Bureau of Standards, NBS Letter Circular 1051, Rev. Sept. 1976.

51/ Finding of Fact No. 9.

52/ Ms. McKinley testified that there would be no volatilization of PCBs because of their low vapor pressure. Tr. 99-100. Dr. Clark pointed out, however, that also affecting the ability of PCBs to volatilize besides their vapor pressure is the extent of surface area exposed and the size of environment. Tr. 49.

closer to that found at the time of inspection, than to the original concentration of 75,000 ppm.[53/] While it would seem more logical to measure the extent of potential damage by the quantity of PCBs not cleaned up rather than by the original quantity spilled, that question need not be resolved since in either case the quantity was less than 1,000 kilograms.

The burden is on the EPA to prove that its proposed penalty is appropriate.[54/] Here the EPA seeks to justify its penalty on the grounds that it is in accord with the penalty policy. I find, however, that under the penalty policy, this violation should be classified as minor in extent of potential damage, rather than significant, and as such, the initially determined penalty should be $5,000 and not $17,000.[55/]

I also find that there are mitigating circumstances which justify a reduction in the initially determined penalty. The TSCA penalty guidelines in accordance with the statutory standard, provide that consideration may also be given to the violator's culpability, or lack thereof, which includes the violator's knowledge of the potential hazards of its conduct and its attitude.[56/] The EPA would appear to characterize the violation as one evidencing total disregard of the law and of the inherent dangers of PCB.[57/] Although General Electric was mistaken as to its obligation under the rules with respect to cleaning up spills, the circumstances do not support the EPA's

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53/ The EPA does not dispute that the original cleanup resulted in removing some of the spilled PCBs. Also, it seems clear that PCBs are not highly volatile. Tr. 49, 99-100.

54/ 40 C.F.R. 22.24.

55/ 45 Fed. Reg. 59777.

56/ 45 Fed. Reg. 59773.

57/ Complainant's brief at 21.

characterization of General Electric's conduct. In view of the treatment in the PCB Ban Rule of PCBs in concentrations of less than 50 ppm, General Electric did have some basis for assuming that it was under no obligation to clean up the residue left on the wall after the original cleanup. So far as I know, this is the first case to squarely consider the question of whether the 50 ppm cut-off applies to the cleanup of spills.[58/] Also to be considered is that General Electric on being requested to further cleanup the wall did so and brought the remaining PCBs down to a level found satisfactory by the EPA.

The penalty policy would apparently allow no downward adjustment for a violator who lacked sufficient knowledge of the potential hazard created by his conduct, unless he also lacked control over the situation to prevent occurence of the violation.[59/] I am not sure that that language is necessarily applicable to a situation where the violator's belief that its conduct did not create a potential hazard has some basis for it, as appears to be the case here. Consequently, taking into account both General Electric's reasons for not cleaning up the spill completely and the fact that it acted promptly and thoroughly to correct the violation, I find that the initially determined penalty should be reduced 25% and that $3,750, is the appropriate penalty for this violation.

58/ The EPA brief at 8, cites language in Judge Jones' opinion in Electric Service Co., TSCA-V-C-024 (Initial Decision, August 10, 1982), at 25, to the effect that where a discharge of over 50 ppm PCBs occurs, contamination which through the process of dilution, reduces the level to below 50 ppm, is still regulated by the PCB Ban Rule. The case, however, does not appear to have dealt the question of whether reducing the concentration of PCBs by removing them in a cleanup constitutes dilution.

59/ 45 Fed. Reg. 59773.

Accordingly, it is concluded that a total penalty of $6,750, should be assessed for the violations found in this case.

ORDER [60/]

Pursuant to section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $6,750 is hereby assessed against Respondent General Electric Aircraft Engine Group, 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.

Gerald Harwood
Administrative Law Judge

January 27, 1984

60/ Unless an appeal is taken pursuant to section 22.30 of the rules of practice or the Administrator elects to review this decision on his/her own motion, the Initial Decision shall become the final order of the Administrator (See 40 C.F.R. 22.27(c)).