UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Jackson Brewery Development Corp. New Orleans, Louisiana, and NOLA Demolishing Corporation New Orleans, Louisiana, and New Orleans Public Service, Inc. New Oleans, Louisiana, Respondents	)	Docket No. TSCA-VI-83C

1. Toxic Substances Control Act - PCBs - Defense of abandonment of PCB-contaminated transformers determined by reference to Louisiana law where transformers were located in Louisiana.

2. Toxic Substances Control Act - PCBs - Proof of abandonment under Louisiana law requires an act of abandonment coupled with an intention to abandon.

3. Toxic Substances Control Act - PCBs - The burden of showing abandonment is on the party claiming it.

4. Toxic Substances Control Act - PCBs - Large electrical transformers are not immovables under Louisiana law, title to which passes by operation of law to the purchaser of real property.

5. Toxic Substances Control Act - PCBs - Evidence of whether the parties viewed electrical transformers as immovables considered in determining whether they were immovables under Louisiana law.

6. Toxic Substances Act - PCBs - Ownership of PCB-contaminated transformers determined by reference to state law where owner did not have possession of transformers and claimed they had been abandoned prior to effective date of PCB Ban Rule.

7. Toxic Substances Control Act - PCBs - Owner of PCB-contaminated transformers located in a building which was being demolished disposed of transformer within meaning of PCB Ban Rule when it let building owner remove them in demolishing the building.

8. Toxic Substances Control Act - PCBs - The presumption that oil-filled electrical transformers are PCB-contamined transformers, 40 C.F.R. 761.3, is not rebutted simply by reliance on the fact that the transformers are labeled by the manufacturer as oil-filled.

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Appearance for Respondent New Orleans Public Service:	Eugene G. Taggart, Esquire 1424 Whitney Bank Building New Orleans, LA 70130
Appearance for Respondent NOLA Demolishing Corp.:	Thomas L. Giraud, Esquire Giraud, Cusimano & Verderame 610 Poydras Street, Suite 201 New Orleans, LA 70130

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 alleged violations of a rule promulgated under Section 6(a) of the Act, 15 U.S.C. 2605(a), establishing prohibitions and requirements for the manufacturing, processing, distribution in commerce, the use, disposal, storage and marking of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761. 1/ The amended complaint charged that New Orleans Public Service, Inc., improperly disposed of PCB-contaminated electrical equipment, and that New Orleans Public Service, Inc., Jackson Brewery Development Corporation and NOLA Demolishing Company improperly disposed of PBCs, did not properly mark PCBs and improperly stored PCBs. A penalty of $42,000 was requested against New Orleans Public Service, Inc., and $25,000 against Jackson Brewery Development Corporation and NOLA Demolishing Company jointly.

Respondents answered denying the violations and requested a hearing.

Thereafter the EPA and Jackson Development Corporation entered into a consent order and Jackson Development Corporation was severed as a party. 2/ The EPA also withdrew all charges against New Orleans Public Service, Inc.

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."

2/ Transcript of proceedings (hereafter "Tr.") Vol. I, p. 67.

except that of improperly disposing of PCB-contaminated electrical equipment. 3/ Thus, the issues left to be resolved at the hearing were: (1) Whether New Orleans Public Service improperly disposed of PCB-contaminated electrical transformers; (2) whether NOLA Demolishing Company improperly disposed of PCBs by spilling them onto the ground, and failed to properly mark and store containers holding PCBs; and (3) the penalty to be assessed for the violations, which the EPA claims should be $17,000 against New Orleans Public Service and $25,000 against NOLA.

A hearing was held in New Orleans on August 13, 14, and 15, 1985. The parties then filed proposed findings of fact, conclusions of law and a proposed order with supporting briefs. On consideration of the entire record and the submissions by the parties, and for the reasons hereafter given, a penalty of $17,000, is assessed against New Orleans Public Service, Inc., and a penalty of $1,000 as assessed against Hamilton Singleton, d/b/a NOLA Demolishing Company. All proposed findings of fact inconsistent with this decision are rejected.

Findings of Fact

1. Jackson Brewery Development Corporation (hereafter "Jackson Brewery") is a Louisiana Corporation doing business in New Orleans, LA (Stipulation, p. 2, Par. 1).

2. At all times pertinent to this proceeding, NOLA Demolishing Company ("NOLA") was a sole proprietorship of Hamilton K. Singleton doing business in New Orleans, LA (Stipulation, p. 2, Par. 3; Tr. Vol. II, p. 283).

3/ Tr. Vol. I, p. 140. Pursuant to this action of Complainant, the violations charged in paragraphs 26, 30 and 33 of the amended complaint are dismissed with prejudice against New Orleans Public Service Co.

3. New Orleans Public Service, Inc. (hereafter "NOPSI") is a Louisiana Corporation doing business in New Orleans, LA (Stipulation, p. 2, Par. 2).

4. In May 1955, NOPSI purchased three 1250 KVA transformers, Serial Nos. C-184440, C-184441 and C-184442, from General Electric Company. The face-plate on the transformers indicated that they were filled with 10-C oil, a mineral oil. Stipulation, p. 2, Par. 4; Tr. Vol. I, p. 159.

5. The three transformers were installed in a room in the Jackson Brewery Building, 620 Rue Decatur, New Orleans, LA, on December 15, 1963, (hereafter "Brewery Building") as part of the electric service furnished by NOPSI to that building. Stipulation, p. 3, Pars. 9 and 10; Complainant's Exh. 54.

6. On June 29, 1979, NOPSI discontinued electric service to the Brewery Building. The three transformers were left in place, Tr. Vol. III, p. 632; Complainant's Exh. 54. 4/

7. On May 12, 1978, the Brewery Building had been sold to the American Can Company. This company, in turn, on January 26, 1982, sold the property to the Jackson Square Investment, Ltd. NOPSI Exhs. 28, 30.

8. On March 16, 1983, Jackson Square Investment, Ltd. on behalf of Jackson Brewery entered into a written contract with NOLA to demolish and remove construction materials and equipment from certain parts of the Brewery Building. The transformers were located in the part of the building which

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4/ NOPSI's proposed finding that the transformers were "abandoned" on June 29, 1979, is rejected for the reasons stated below. See infra at 12-14.

was being demolished. Stipulation, p. 3, Par. 13; NOPSI Exh. 1; Tr. Vol. I, pp. 214-15, Vol. II, p. 309. 5/

9. At about the time that NOLA began its demolition work in early 1983, Jim Rehkopf, a field supervisor for Jackson Brewery met with representatives of NOPSI concerning the disposition of the transformers installed by NOPSI. He testified in pertinent part about this meeting as follows:

> I had called NOPSI and asked them -- or rather, told them we had some transformers located in the brewery that we'd like to get rid of. And I was under the impression that NOPSI still owned them. They referred me to John Thomas because he was the man who controlled that district for NOPSI. He came out with some other gentlemen and looked at the brewery.
>
> Q [Mr. Ingraham] Okay. Do you know approximately when that was?
>
> A It was early 1983, either late February or early March of 1983.

Apparently NOPSI's representatives were noncommittal about the disposition of the transformers except that Rehkopf was left with the impression that the transformers were NOPSI's. Tr. Vol. I, pp. 234-35.

10. Following Rehkopf's meeting with NOPSI's representatives, John Blitch on May 6, 1983, on behalf of Jackson Brewery wrote to NOPSI, attention

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5/ NOPSI alleges in its proposed findings of fact, No. 1, that Jackson Brewery was the general partner of Jackson Square Investment, Ltd. It is not clear from the record that this was the actual legal relationship between the two, see NOPSI Exh. 28. The record, however, is clear that the demolition and removal was done for the benefit of Jackson Brewery. Memorandum of explanation attached to Jackson Brewery's answer at 3. Since all parties appear to have assumed that there is no distinction to be drawn between Jackson Brewery and Jackson Square Investment, Inc., for the purposes of this case, reference to Jackson Brewery will also include Jackson Square Investment, Ltd. where appropriate.

of Thomas, advising NOPSI of NOLA's demolition of the interior and asking NOPSI whether it intended to salvage the transformers. Blitch stated in his letter as follows:

> We are well underway in demolition of various portions of the Old Brewhouse, Jax Brewery at 620 Decatur Street. The demolition consists of exterior non-conforming structures and interior gutting of mechanical and electrical equipment. Still inside the Brewhouse, there are three large NOPSI transformers and six or eight small cylindrical-type transformers. I am sure that these transformers are the property of NOPSI and, as such, you may want to recover them. The demolition contractor is now in the process of cutting out all equipment around this area and eventually will need to move through the transformer room to get to other phases of the demolition.
>
> If it is your intention to salvage these transformers, then I request that you immediately contact me at 581-4002 and advise me as such. If we have not heard from you regarding same by May 16, then we will assume that you are not interested in their recovery.
>
> Your early response to this request will be appreciated.

Complainant's Exh. 4.

11. NOPSI did not respond to the letter. Blitch then called Thomas who after checking with NOPSI's engineering department called back and told Blitch that "they had indicated that the transformers were of no value to them and they did not want them." Tr. Vol I, p. 179.

12. Sometime in the month of June 1983, NOLA at the instruction of Jackson Brewery undertook the removal of the transformers from the Brewery Building. There were eight transformers in all. The three 1250 KVA transformers already referred to, and three 200 KVA transformers and two 100 KVA transformers owned apparently by Jackson Brewery. All were located in a room on the second floor of the building. Stipulation, p. 3, Par. 12; Tr. Vol. II, pp. 284, 312; Complainant's Exh. 2, p. 6; Respondent's Exh. 16.

13. At the time of their removal, the three 1250 KVA transformers contained in excess of 50 ppm PCBs but less than 500 ppm PCBs. Complainant's Exh. 54.

14. While removing the transformers, a pipe on one of the 1250 KVA transformers broke, spilling approximately 125 gallons of transformer oil. Tr. Vol. II, p. 287.

15. After removing the transformers, NOLA drained the oil from transformers and transferred the fluid to twenty-six 55-gallon drums. In the process of doing so about 25 gallons of transformer fluid spilled on the ground. Stipulation, p. 4.

16. The 26 drums filled with transformer oil were transported from the Brewery Building site to NOLA's premises at 8200 Old Gentilly Road, New Orleans, LA. Stipulation, p. 4, Par. 21.

17. The drained transformer bodies were transported by NOLA and sold by NOLA to Southern Scrap Metal Co., Ltd., 4801 Florida Avenue, New Orleans, LA. Stipulation, p. 4, Par. 21.

18. On July 5, 1983, following the completion of his demolition work, Hamilton Singleton, proprietor of NOLA, called Glen Foret of the Louisiana Department of Natural Resources to find out whether oil from the transformers was hazardous. He had apparently become concerned about this after watching a television program a few days earlier in which the subject of electrical transformers containing PCB's was discussed. Tr. Vol. II, pp. 293, 318; Complainant's Exh. 50; Stipulation, p. 5, Par. 25.

19. At the advice of Foret, Singleton took a sample of oil from one of the drums and had it tested by Shilstone Engineering Testing Laboratory

Division of Professional Services, Inc. The test disclosed that the sample contained 140 parts per million (ppm) PCBs. Complainant's Exh. 4; Stipulation, p. 5, Par. 26.

20. On or about July 8, 1983, NOPSI collected three samples of oil taken from the bottom of the tanks of the three 1250 KVA transformers and had the oil analyzed by the Shilstone Engineering Testing Laboratory Division. The test report dated July 11, 1983, disclosed that one sample contained 89 ppm PCBs, one sample contained 86 ppm PCBs, and one sample contained 78 ppm PCBs. Complainant's Exhs. 54, 61.

21. On July 11, 1983, Jackson Brewery contracted with Analysis Laboratories, Inc., to obtain and analyze samples of the fluid contained in the drums of drained transformer oil at NOLA's premises to determine the presence and concentration of PCBs in the fluid. Stipulation, p. 5, Par. 31.

22. On July 11, 1983, Tommy Blythe, an employee of Analysis Laboratories, Inc., collected a sample from each of ten of the twenty-six drums. Analysis of these samples revealed the following results:

Sample Number	Milligrams per Liter (ppm) PCB as Arochlor 1260
1	142
2	32
3	26
4	60
5	55
6	62
7	60
8	22
9	56
10	101

Stipulation, p. 6, Pars. 32, 33, 34, 35; Complainant's Exh. 44.

23. On September 7, 1983, Tommy W. Homes, an employee of Peterson Maritime Services, Inc. collected samples of transformer oil from each of the remaining sixteen drums and submitted them to Analysis Laboratories, Inc. for analysis. The results of the analyses were as follows:

Sample Number	Milligrams per Liter (ppm) PCB as Arochlor 1260
1	151
2	149
4	153
5	145
6	103
7	42
8	46
9	94
11	102
13	131
17	120
20	99
22	108
23	111
24	115
25	117

Stipulation, p. 10, Pars. 62, 63, 64; Complainant's Exh. 44.

24. Of the twenty-six drums of transformer oil, twenty-one were found to contain PCB's in excess of 50 ppm. Findings 21 and 22.

25. Hamilton Singleton on receiving the laboratory report referred to in Finding 18 above that the sample from one of the drums of transformer oil stored on NOLA's premises contained 140 ppm PCBs, notified Foret of the results of the analysis. Foret, in turn, notified Daryl Mount of EPA Region VI of the situation. Jackson Exh. 21. 6/

6/ Although Jackson was severed as a party, it was agreed that certain exhibits originally identified as "Jackson Exhibits" would be admitted into evidence. See list of exhibits attached to Stipulation, and Tr. Vol. I, p. 91.

26. Singleton, apparently on the advice of Foret, roped off the area where the drums were stored and put up a sign warning of the presence of dangerous chemicals. Tr. Vol. II, pp. 328, 335.

27. On July 20, 1983, J. David Sullivan, an EPA inspector from Region VI made an inspection of NOLA's premises. A sample was taken from one of the 55-gallon drums and assigned EPA Sample No. AG1601. Analysis of the sample by the EPA's Houston Laboratory showed that it contained PCBs in concentration of 56 ppm. Stipulation, p. 7, Pars. 42-44; Complainant's Exh. 33.

28. On July 21, 1983, Sullivan also inspected the transformer bodies removed from the Jackson Brewery Building by NOLA, and located at Southern Scrap Material Co. Ltd. He collected a sample from one of the 100 KVA transformer bodies and from one of the 200 KVA transformer bodies. These samples were assigned EPA Sample Nos. AG1602 and AG1603. On analysis, Sample No. AG1602, taken from the 100 KVA transformer, was found to contain PCBs in concentration of 72 parts per billion (0.072 ppm), and Sample No. AG1603, taken from the 200 KVA transformer, was found to contain PCBs in concentration of 29.3 ppm. Sample No. AG1602, however, was analyzed as a water sample and was not a measure of the PCB content of the oil that had been in the transformer. Stipulation, pp. 8-9, Pars. 46-52; Complainant Exh. 2, p. 6; Complainant's Exhs. 36, 38; Tr. 558-59.

29. The drums of drained transformer oil were eventually removed from the NOLA site and properly disposed of and the site cleaned up by Jackson Brewery, which also undertook the cleanup of the PCBs spilled at the Brewery Building. Jackson Exhs. 17, 21.

Discussion, Conclusions and Penalties

The facts can be briefly summarized as follows: NOPSI installed three 1250 KVA transformers in the Jackson Brewery Building in December 1963, to provide electric service to the building. In June 1979, NOPSI discontinued service to the building but left the transformers in place. Apparently no one thereafter paid any attention to the transformers until early 1983, when Jackson Brewery, the new owner of the building wanted them removed so it could proceed with its demolition of the interior of that part of the building. NOPSI was told of the demolition and said that it was not interested in the transformers. Jackson Brewery accordingly had them removed by NOLA as part of its demolition work. While removing the transformers, NOLA spilled some of the transformer fluid, and a further spill occurred when NOLA drained the transformer fluid into 55-gallon drums. After the transformers were taken out of the building, NOLA then stored the drums on its premises prior to further disposing of the oil. The three 1250 KVA trans formers were labelled as oil-filled transformers, but on testing, the transformer fluid was found to contain PCBs in excess of 50 ppm PCBs but less than 400 ppm PCBs.

NOLA does not contest the violations charged against it of improperly disposing of PCBs, and failing to properly mark and store them, but only the appropriateness of the penalty. NOPSI, however, denies the violation charged against it of improperly disposing of PCB-contaminated transformers.

The Liability of NOPSI

NOPSI's defense to the unauthorized disposal of the three 1250 KVA transformers in 1983, is that it did not then own the transformers, having abandoned them when it discontinued electric service to the Brewery Building

on June 29, 1979, which date was prior to the effective date of the PCB Ban Rule. 7/

All parties agree that what constitutes abandonment is to be determined by reference to Louisiana law. Under Louisiana law, to establish the abandonment of personal property it must be shown that there was an act of abandonment coupled with an intention to abandon. Powell v. Cox, 92 So. 2d, 739, 742 (La. Ct. App. 1957); New Orleans Bank & Trust Co. v. City of New Orleans, 147 So. 42, 44-45 (La. S.Ct. 1933). The intention of the owner is a matter of material importance. Powell v. Cox, supra, 92 So. 2d 742.

NOPSI is correct that the burden of establishing ownership of the transformers is on the EPA. Here the EPA met that burden initially by NOPSI's own admission that it owned the transformers up until the time of the claimed abandonment. The burden of showing abandonment (by which is meant the burden of persuasion), on the other hand, is upon the party relying on it. This seems to be clearly the rule when the owner is defending his property against someone claiming title to it by abandonment. See Linscomb v. Goodyear Tire & Rubber Co., 199 F.2d 431, 435 (8th Cir. 1952). It should also be the rule when the owner pleads abandonment as a means of escaping some obligation or liability that attaches to the property. For unless there is unequivocal evidence that the owner actually intended

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7/ The PCB Ban Rule regulating the disposal of transformers containing PCBs in concentrations of 50 ppm or more became effective on July 2, 1979. 44 Fed. Reg. 31514 (May 31, 1979). Prior thereto, only the disposal of transformers containing PCBs in concentration of 500 ppm or greater was regulated. See PCB Disposal and Marking Rule published February 17, 1978, 43 Fed. Reg. 7157 ("PCB mixture" defined as any mixture containing 500 ppm or greater PCBs). There is no evidence that the three transformers ever contained PCBs in concentrations of 500 ppm or greater.

to abandon the property, the inference is unescapable there was no actual intention to abandon the property at the time but that abandonment is being asserted as an afterthought to escape the liability or obligation that the property imposes upon the owner. See Katsaris v. United States, 684 F.2d 758 (11th Cir. 1982).

Here the act claiming to evidence abandonment of the transformers was NOPSI's not removing the transformers after service was discontinued. That act, however, is equally susceptible of the interpretation that the transformers were let in place not because NOPSI was abandoning them but because NOPSI either had no immediate use for them elsewhere, or it wanted them available in the event that electric service was resumed. It is significant that the two Jackson Brewery representatives involved in demolishing the building thought that the transformers belonged to NOPSI. 8/ While this does not in itself conclusively establish that the transformers were still NOPSI's property, it does confirm the conclusion that the bare act of leaving the transformers at the building does not unequivocally show that what was intended was "the relinquishment of property to which a person is entitled, with no purpose of again claiming it . . . ." Powell v. Cox, supra, 92 So. 2d 741 (quoting 1 C.J.S. Abandonment, § 1, p. 4). Also, the fact that NOPSI's representative on being questioned about the transformers came down

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8/ Finding of Fact Nos. 9 and 10 supra. There is no evidence that the Jackson Brewery representatives were attempting to place ownership in NOPSI because they had in mind the possibility that the transformers might contain PCBs. Their sole concern appears to have been with removing the transformers so they could proceed with the demolition.

to look at the building before deciding that the transformers were of no use to NOPSI, is inconsistent with NOPSI's claim that it had abandoned all rights to the transformers back in 1979.

It is concluded, accordingly, that NOPSI has not sustained its burden of showing that it had already abandoned the transformers when Jackson Brewery approached it about removing the transformers from the building in early 1983.

NOPSI argues that in any event the transformers were component parts of the building and under Louisiana law title to them passed to Jackson Brewery when it purchased the building, as there was no recorded vault agreement or other instrument reserving title in NOPSI, and they were not included in the property which was reserved under the Act of Sale. In support of this argument, NOPSI relies upon Articles 466 and 469 of the Louisiana Civil Code which provide as follows: 9/

> Art. 466. Component parts of buildings or other constructions.
>
> Things permanently attached to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, are its component parts.
>
> Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.
>
> * * *
>
> Art. 469. Transfer or encumbrance of Immovable.
>
> The transfer or encumbrance of an immovable includes its component parts.

9/ The part of the Louisiana Civil Code dealing with immovables, Articles 462-469, is included as NOPSI's Exh. 24.

The second paragraph of Article 466 does not appear to be applicable, since the evidence indicates that the transformers were removed without substantial damage to the building or to themselves. It did require removing louvers from a window, but the louvers were not damaged and could have been reused. While a pipe broke on one of the transformers in the course of removing it, this occurred because of the way in which the transformer was attached to the crane. Once this was corrected the transformer was taken out without any further damage to it, and the other two transformers were also removed without any damage to them. 10/

NOPSI argues that facility of removal is not determinative of the status of the transformers, as the transformers are electrical installations expressly made immovable by paragraph one of Article 466. 11/ The construction of Article 466 was recently considered in the case of Equibank v. United States Internal Revenue Service, 749 F.2d 1176 (5th Cir. 1985). The question before the court was whether chandeliers in a home were immovables and hence subject to a tax lien on the home. The court noted that the Louisiana legislature did not define or otherwise describe an "electrical installation" when it enacted Article 466 in 1978. It concluded that the views of the public may therefore be considered in defining the term, and that chandeliers are ordinarily looked upon by the public as a component part of the building. Accordingly, the court held that the chandeliers should be classified as immovables. Equibank v. United States Internal Revenue Service, F.2d at 1178-79.

10/ Tr. 286-87, 372-73.

11/ Reply brief at 11.

In this case we do not have evidence of the views of the public. We do have evidence, however, as to how the parties themselves viewed the status of the transformers, which would also seem to be relevant in determining whether these transformers are immovables. The fact that Jackson Brewery thought that the transformers belonged to NOPSI, and the fact that NOPSI consented to letting Jackson Brewery remove the transformers not because it considered them fixtures which already belonged to Jackson Brewery, but because NOPSI no longer had any use for them, all indicate that the parties themselves did not regard the transformers as immovables, title to which by operation of law had passed to the purchaser of the building.

I find, accordingly, that NOPSI owned the transformers up until the time it told Jackson Brewery it had no interest in them. 12/

The EPA rests its charge of NOPSI's improper disposal of the transformers upon the claim that when NOPSI expressed no interest in the transformers, it thereby abandoned them. It is unnecessary to have recourse to the technical law of abandonment to find that NOPSI disposed of the transformers within the meaning of the PCB Ban Rule. Disposal is defined in pertinent part as meaning "intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB

12/ The EPA argues that federal policy requires that NOPSI be held responsible for proper disposal of the transformers regardless of whether it held title to the transformers under state property law (response to post-hearing briefs at 4-5). The transformers, however, were not in the physical possession of NOPSI, nor of anyone whose possession could be attributed to NOPSI because of its relationship to NOPSI. If there is some reasonable basis for imposing liability upon NOPSI besides its status as owner under state law, the EPA has not shown what this would be. Nor do I discern that relying upon state law conflicts with any policy underlying the PCB regulations or the Toxic Substances Control Act.

items . . . . There is no question but that when NOPSI left the transformers for removal by Jackson Brewery it was thereby discarding them and terminating their useful life as transformers.

It is also concluded that the 1250 KVA transformers were PCB-contaminated transformers, i.e., contained between 50 - 500 ppm PCBs, at the time of their disposal, and subject to the PCB Ban Rule's requirements for disposal as such. There was considerable discussion at the hearing as to the admissibility and credibility of the analysis made by Shilstone Engineering Testing Laboratory of the oil samples taken by NOPSI from the transformers, which showed concentrations of PCBs ranging from 78 ppm to 89 ppm. 13/ NOPSI, however, presumably would not have used Shilstone to do testing for it, if it were not a reliable laboratory. 14/ It is to be noted that NOPSI itself never appears to have questioned the results of the test at the time they were furnished, which, of course, it could have done, if it were concerned that the results differed from other information in its possession. 15/ The underlying papers showing the gas chromatograms, readouts and also the calibration record were made available to NOPSI. 16/ Apparently these disclosed no irregularities in the procedure, since NOPSI has not pointed out any.

13/ See. Tr. Vol. I, pp. 57-62, and testimony of Larry S. McAnarney. Tr. Vol. II, pp. 381-454.

14/ See Tr. Vol. II, pp. 448-49.

15/ Shilstone has apparently done other testing for NOPSI besides these particular tests and continues to do so. See Tr. Vol. II, p. 384.

16/ See Complainant's Exh. 61; Tr. Vol. II, pp. 420, 424.

Accordingly, I find that the Shilstone analytical reports reliably indicated the PCB concentration of the oil in the three transformers. 17/

In addition to the evidence of the Shilstone tests, the PCB Ban Rule, 40 CFR 761.3, expressly provides that "[o]il filled electrical equipment other than circuit breakers, reclosers, and cable whose PCB concentration is unknown must be assumed to be PCB-contaminated Electrical Equipment." The Rule thus makes the oil-filled transformers presumptively PCB-contaminated transformers to the extent at least of requiring NOPSI to come forward with evidence to show the contrary. As the legislative history of the rule makes clear, the mere knowledge that the transformers are labeled by the manufacturer as oil-filled is not in itself sufficient to rebut that presumption. 18/ Indeed, to construe the requirement otherwise could be to destroy the presumption and make that provision meaningless. Since NOPSI has not come forward with any evidence to show that the transformer oil contained less than

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17/ It is recognized that in contrast to the PCB concentrations of 78 ppm, 86 ppm and 89 ppm reported on the Shilstone tests, the tests done on the drums of drained oil which contained not only oil taken from the three NOPSI transformers but also from the other five transformers disclosed concentrations of over 100 ppm PCBs and as high as 153 ppm in one instance. Findings of Fact Nos. 22 and 23. Dr. Langley, an expert on PCB analytical testing testified that this does not necessarily indicate incorrect or erroneous test procedures, but simply could result from the variability inherent in the procedure itself and from the possible mixing of the oil of all the transformers. Tr. Vol. III, pp. 582-83. The fact that there can be variable results in the tests, however, does not destroy the credibility of NOPSI's tests because the fluid in these tests can be identified as having been taken solely from the 1250 KVA transformers, while the fluid in the drums cannot be so identified.

18/ See 47 Fed. Reg. 17426, 17439-440 (April 22, 1982) (explanation to proposed amendment to the definition of PCB-contaminated Electrical Equipment). The presumption was specifically incorporated in the PCB Ban Rule by amendment to the rule published on August 22, 1982, and made effective September 24, 1982. 47 Fed. Reg. 37342, 37356 (August 25, 1982).

50 ppm PCBs, other than that the transformers were labeled by their manufacturer as "oil-filled", it is also found that the transformers were required by the PCB Ban Rule to be disposed of as PCB-contaminated transformers.

Pursuant to 40 C.F.R. 761.60(b)(4), PCB-contaminated transformers must be disposed of by draining the free flowing liquid from the transformer and disposing of it in the type of facility specified in the Rule. There are no special disposal requirements for the drained transformer casing. Since NOPSI disposed of the transformers without draining the free flowing liquid, it has violated that requirement.

The Appropriate Penalty

(a) The Penalty Assessed Against NOPSI

The EPA has proposed a penalty of $17,000 against NOPSI. This is the correct gravity based penalty under the PCB Penalty Policy. 19/ I find that no adjustment to the penalty is merited. As a provider of electricity it is inconceivable that NOPSI would not have known of the requirements of the PCB Ban Rule. Indeed NOPSI does not make any such claim. In any event, NOPSI is charged with constructive notice of the Rule. 20/ As already

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19/ See 45 Fed. Reg. 59777 (September 10, 1980). The EPA charges NOPSI with the disposal of 1,170 gallons of PCBs, based on the fact that each transformer had a capacity of 390 gallons. See Complainant's Exh. 2, p. 6. Taking the EPA's assumption that each drum stored at NOLA's premises contained 50 gallons, the volume could be somewhat less but it would still be sufficient to bring it within the significant category. The remaining five transformers had a rated volume of 397 gallons. Complainant's Exh. 2, p. 6. Assuming they were filled to capacity, this would leave 903 gallons in the drums which would have had to come from the three 1250 KVA transformers. Adding to that 903 gallons, the estimated 125 spilled during removal, brings the total to 1,028 gallons, which reduced 70% still leaves 308 gallons, well within the significant range of 220-1100 gallons. Improper disposal is a level one violation in the penalty matrix. See 45 Fed. Reg. 59777-778.

20/ See 44 U.S.C. 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947).

noted, its reliance upon the transformer's label to assume that the transformers did not contain PCB's of 50 ppm or over is directly contrary to the requirements of the Rule, and, therefore, is not a ground for reducing the penalty. On the other hand, I do not agree that NOPSI's actions justify an increase in the penalty as contended by the EPA. 21/ NOPSI's violation appears to have been inadvertent, the consequence of overlooking the fact that even through these were oil-filled transformers, the PCB Ban Rule still applied to their disposal. When the violation did come to light, Jackson Brewery, who was directly involved in the removal of the transformers, took responsibility for the clean-up. NOPSI could reasonably assume under these circumstances that no further action on its part was required, particularly since Jackson Brewery never made any demand on NOPSI to take part in the corrective or clean-up actions. 22/

Accordingly, I find that the appropriate penalty to be assessed againist NOPSI is $17,000. There is no claim by NOPSI that such a penalty is beyond its ability to pay or would affect its ability to continue to do business.

(b) The Penalty Against NOLA

The EPA initially proposed a penalty against NOLA and Jackson Brewery of $10,000 for the marking violation, $10,000 for the storage and $5,000 for the disposal violation, or a total of $25,000. On the basis of settling

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21/ Post-hearing brief at 39.

22/ Tr. Vol. I, p. 229.

with Jackson Brewery for $8,333.00, the EPA proposes that the balance of the penalty or $16,666.00, be assessed against NOLA. 23/

I find that the gravity based penalty has been properly calculated. 24/ I do not agree, however, with the EPA's claim that no adjustment is merited in the case of NOLA.

There is no question that Mr. Singleton, the sole owner of NOLA, lacked sufficient knowledge of the potential hazard created by the transformers. His entire conduct conclusively demonstrates this. He first learned of the potential hazard when he saw the television program after having removed the transformers and stored the oil on NOLA's premises. He then immediately got in touch with the State EPA. Thereafter, he fully cooperated with both the State and Federal authorities. 25/

Also to be considered is Hamilton Singleton's financial condition. Mr. Singleton receives a pension from the Veteran's Administration, which is his only present source of income. 26/ The business apparently has

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23/ Complainant's post hearing brief at 32.

24/ Jackson Brewery and NOLA were chared with the improper disposal taking place when some 25 gallons of fluid were spilled during the course of draining the transformers. Complainant's Exh. 45. NOPSI suggests that there is an inconsistency between its being charged with the improper disposal of transformers and Jackson Brewery not being charged with the same violation. Reply brief at 2. It is assumed that ownership of the transformers, or at least responsibility for their proper disposal thereafter, passed to Jackson Brewery when NOPSI disclaimed any further interest in them and Jackson Brewery assumed control over them by undertaking to remove them. Unlike NOPSI's action, however, the transformers were drained of their fluid. Thus, the facts in the two cases are not the same.

25/ Tr. Vol. II, pp. 790-92.

26/ NOLA Exh. 3.

now been turned over to his sons and Hamilton Singleton receives no financial benefit from it. 27/ NOLA itself appears to have had and still has very few assets. 28/ Hamilton Singleton still owes money on the loan secured to pay for insurance required for the Jackson Brewery demolition work, work for which he has never been fully paid. 29/

It is true as the EPA argues, and the penalty policy so provides, that lack of actual knowledge of the hazard created by one's conduct is not a defense to a violation where, as was the case with NOLA, the person has sufficient control over the situation to avoid committing the violation. 30/ It is also true that Hamilton Singleton operated NOLA on a shoestring. There is no evidence, however, that Singleton shirked his responsibility to protect the environment or public health where he knew these dangers to exist. His handling of the removal of asbestos during the demolition of Jackson Brewery is proof to the contrary. Complainant argues that reducing the penalty would encourage marginal businesses who violate the Act to volumtarily go out of business, when faced with penalties under TSCA. There is no evidence here that the desire to escape TSCA penalties was a motive in Singleton's discontinuing business. Instead, the decision appears to have been dictated by Singleton's present poor health. 31/

Taking into account that it was Hamilton Singleton who first brought this matter to the attention of the regulatory authorities, his cooperative

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27/ Tr. Vol. II, p. 345.

28/ See Tr. 367-68.

29/ See Tr. Vol. III, pp. 680-82. The original loan was for $10,000 but was refinanced and the balance owed is now $13,000, Id.

30/ See 45 Fed. Reg. 59773.

31/ See Vol. II, Tr. 344; Vol. III; Tr. 679; NOLA Exh. 3.

attitude thereafter, and his financial condition, I find that the appropriate penalty to be assessed against him should be $1,000.

ORDER 32/

Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), and for the reasons stated above, a civil penalty of $17,000 is hereby assessed against New Orleans Public Service, Inc., and a civil penalty of $1,000 is hereby assessed against Hamilton Singleton doing business as NOLA Demolishing Company.

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

EPA - Region VI
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Gerald Harwood
Administrative Law Judge

DATED: December 16, 1985

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