UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Lever Brothers Company, Inc.,	)	Docket No. TSCA-III-113
	)	
Respondent	)	

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Manufacturer's or Cautionary Labels - Where a PCB transformer was not marked with the PCB label described in 40 CFR 761.45, but was marked with cautionary labels warning anyone approaching of the presence of PCBs, Penalty Policy (45 FR 59770 et seq., September 10, 1980) required that this failure be considered a minor extent marking violation. Briggs & Stratton, TSCA Appeal No. 81-1 (Final Decision, February 4, 1981) distinguished.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Location of Spill or Discharge - Although PCB Penalty Policy does not provide for mitigation of penalty based on location of spill or discharge of PCBs, where discharge was miniscule in relation to upper limits of minor extent category of Penalty Policy and occurred in a closed, protected area, thus minimizing likelihood of exposure of PCBs to humans or the environment, 25% reduction in gravity-based penalty was determined to be proper.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Extent of Potential Damage - Where quantity of PCBs in transformers involved in record-keeping violations (failure to have available annual documents on disposition of PCBs and records of quarterly inspections) placed violations in major extent category of Penalty Policy Matrix, but record supported finding that annual documents had previously been maintained and transformers regularly inspected for leaks, extent of potential damage, which is primarily related to ability to enforce the Act, was determined to be only partially related to quantities of PCBs involved and violations were placed in significant extent category of Penalty Matrix.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Lack of culpability - Where it appeared that a PCB transformer, although not marked at time of inspection which was genesis of proceeding, had previously been marked as required by 40 CFR 761.40, that Respondent had begun visually inspecting transformers for leaks and documenting results thereof long before it was required to do so, but PCB records were missing, and that Respondent acted promptly to correct deficiences noted, a 40% reduction in gravity-based penalty for good faith (lack of culpability) was determined to be in the interests of justice and to be consonant with PCB Penalty Policy. Expenditures by Respondent in removing PCB transformers from service, held not to warrant a further reduction in penalty so determined.

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Initial Decision

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced on April 17, 1985 by the issuance of a complaint by the Director, Hazardous Waste Management Division, U.S. Environmental Protection Agency, Region III, Philadelphia, Pennsylvania. The complaint, in four counts, charged Respondent, Lever Brothers Company, Inc. with violations of the Act[1/] and regulations (40 CFR Part 761). Specifically, Respondent was charged with failure to mark a PCB transformer with an M_L label as required by 40 CFR 761.40, with disposal of PCBs in violation of 40 CFR 761.60(a), with failure to prepare and maintain annual records on the disposition of PCBs and PCB items as required by 40 CFR 761.180(a) and with failure to conduct quarterly visual inspections of in-service transformers and maintain records of such

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1/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
>
> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;
>
> * * *.

The instant rules were promulgated under § 6(e) of the Act.

inspections in violation of 40 CFR 761.30(a)(1)(ii) and (iv). For these alleged violations it was proposed to assess Respondent a penalty of $19,000.

Respondent answered, denying the alleged violations and requesting a hearing.

A hearing on this matter was held in Philadelphia, Pennsylvania on October 1, 1985.

Findings of Fact

Based on the entire record including the briefs and proposed findings and conclusions submitted by the parties, I find that the following facts are established:

1. Lever Brothers Company, Inc. operates a facility for the production of soaps and detergents at 5300 Holabird Avenue, Baltimore, Maryland.
2. On May 1, 1984, the mentioned facility was inspected by Mr. Stephen Markowski of the Maryland State Department of Health and Mental Hygiene (Tr. 6; Inspection Report, Complainant's Exh 1). This inspection and similar inspections are conducted by the State of Maryland pursuant to grants issued by EPA to the State.
3. Mr. Markowski met with and was accompanied on the inspection by Mr. Charles Carroll, Environmental Engineering Manager for Lever Brothers and Mr. Walter Wiczkowski, Environmental Control Coordinator for Lever Brothers and the individual responsible for compliance with environmental matters at the mentioned facility (Tr. 8, 132, 135; Complainant's Exh 1).
4. At the time of the inspection, Lever Brothers had on hand two PCB transformers in service and six PCB transformers which had been taken

out of service (Tr. 10, 132; Complainant's Exh 1). According to Mr. Carroll, Lever Brothers in 1981 made a decision to remove all PCB transformers from its plants and the six out-of-service transformers were designated for disposal on April 30, 1984 (Tr. 144, 155).

5. One of the in-service transformers was manufactured by General Electric Company and bore Serial No. H8850422. This transformer was located on the lower roof of Warehouse No. 180, sometimes referred to as the Liquid Packing Building, and did not have affixed to its exterior the M_L (6" x 6" yellow PCB) label described in 40 CFR 761.45 (Tr. 13, 142; Complainant's Exh 1 at 3).

6. Mr. Markowski testified that Messrs. Carroll and Wiczkowski were surprised and embarrassed that the PCB label was not on the transformer (Tr. 14). He stated that Mr. Carroll and Mr. Wiczkowski surmised that the label may have deteriorated and come off due to the weather or may have been ripped off (Tr. 15).

7. At the time of the inspection, the transformer referred to in finding 5 was labeled in separate locations (one label was beneath a gauge and near a valve on the upper part of the transformer and the other label was close to a valve near the floor or deck upon which the transformer rested) containing the word "CAUTION" in large letters followed in small print by "The insulating fluid in this transformer contains Polychlorinated Biphenyls (PCB's). Care should be taken to prevent entry into the environment. In the case of malfunction or leaks consult the instruction manual or the Manufacturer. NP229A3316." (Tr. 142-43; photos, Respondent's Exhs 5, 5-A, 5-B and 5-C).

8. The second in-service transformer maintained by Respondent was a Westinghouse, Serial No. 6991991. This transformer was located in a closed room on a diked, concrete pad in a vaulted area of the southwest corner of the second floor of the main building at the facility (Tr. 19; Complainant's Exh 1 at 3). Mr. Markowski observed a stained area of approximately six to eight inches in diameter on the concrete pad beneath a valve on this transformer (Tr. 15, 19, 20; photos, Complainant's Exh 2).

9. Mr. Markowski scraped the stained area referred to in finding 8 with a razor blade, filling a 2 ml volatile organic analysis bottle to approximately one-half its capacity with the scrapings, which included dirt particles. The stained area was dry and dusty and there was no indication of fluid on, or active leaks from, the transformer (Tr. 20, 26, 143). To Mr. Markowski's knowledge, there was no source of PCBs, other than the transformer, in the area where the transformer was located (Tr. 25).

10. Approximately one week after the inspection, Mr. Markowski delivered the sample referred to above along with other samples to the Maryland State Department of Health Laboratory in Baltimore (Tr. 22, 23). Analysis of the sample showed 37% PCB as Aroclor 1260 (Inspection Sample Analysis, Complainant's Exh 1). This indicates a PCB concentration of 370,000 ppm (Tr. 24).

11. At the time of the inspection, Lever Brothers did not have available any records relating to the disposition of PCBs and PCB items (Tr. 27, 137; Complainant's Exh 1 at 4). A search for the records had

been made prior to the inspection with negative results. Messrs. Carroll and Wiczkowski informed Mr. Markowski of the belief that the disappearance of the records was related to the dismissal of the employee in charge of the records.

12. Mr. Carroll identified the employee mentioned in finding 11 as Mr. Ronald Tognocchi, Safety Manager, who was responsible at the time for the handling of PCBs (Tr. 135-36). He testified that Mr. Tognocchi left the company under unhappy circumstances in December of 1983, that Mr. Wiczkowski subsequently assumed responsibility for PCBs and that searches for the records were conducted on or about March 30, 1984, with results previously indicated (Tr. 136-37, 146). He acknowledged that Lever Brothers did not have any direct information that Mr. Tognocchi had removed the records (Tr. 145).

13. Mr. Markowski testified that there were indications Lever Brothers had made quarterly inspections of in-service transformers, but other than a record maintained by Mr. Wiczkowski commencing March 30, 1984, there were no records of such inspections available (Tr. 28, 29). Mr. Markowski stated that Mr. Wiczkowski again relied upon the possibility that all records relating to PCBs had been removed by a discharged employee as an explanation for the non-availability of the records.

14. Lever Brothers Baltimore, Maryland facility had previously been inspected by Mr. Barry Chambers of the Maryland State Department of Health on April 8, 1983 (Complainant's Exh 1, Attach 6). Mr. Chambers was identified as an employee of the Maryland State Department of

Health by Mr. Markowski, who testified that Mr. Chambers was his supervisor on May 1, 1984.2/ Mr. Chambers' report states that the facility has eight in-service PCB transformers located in locked limited access areas and includes the following finding: "All transformers were properly labeled and nonleaking." The report does not identify the transformers by serial number or manufacturer.

15. Regarding record-keeping, Mr. Chambers' report refers to a copy of one page from the inspection log which is included as Attachment #5 and states that "The annual report is included as attachment #6." (sic)

16. The report is otherwise silent on record-keeping. Mr. Markowski testified that if records were missing or if there were record-keeping violations, that fact should have been noted in the report. The mentioned page from the inspection log shows inspections of the GE transformer identified in finding 5.3/ This document reflects that inspections of the transformer occurred on October 18, 1979, March 3, and April 1, 1980; April 21, August 14 and November 30, 1981; April 17, October 4 and December 3, 1982 and January 6, February 7 and March 10, 1983. All findings are "OK" with the exception of the inspection of April 21, 1981, which indicates that a valve was leaking. The record shows this valve was repaired on April 22, 1981.

2/ Tr. 33. From this testimony, it could be inferred that Mr. Chambers was available at the time of the hearing. He did not, however, appear as a witness.

3/ Although the page does not contain the serial number of the GE transformer inspected, it does identify the transformer as being located on "Top of liq. Packing bldg." (sic) The record of transformer inspections conducted by Mr. Wiczkowski beginning March 30, 1984 (Respondent's Exh 3), identifies the transformer inspected as "GE H885042" and specifies its location as "Liquid pack roof of warehouse" or over railwell in Warehouse 180.

17. The annual report (document) referred to by Mr. Chambers is dated July 1, 1982, and reflects that it is for the year ending June 30, 1982. Ms. Tan noted that the document did not cover either the calendar years 1981 or 1982, but indicated that it was otherwise satisfactory (Tr. 76). The document shows the disposal of one 2000KVA transformer (Serial No. H882379) which was shipped to Chemical Waste Management, Inc. on February 10, 1982. This document also reflects eight in-service transformers were on hand, containing a total of 2194 gallons or 12,948.99 kg of PCB fluid.

18. Lever Brothers contracted with MET Electrical Testing Company, Inc. to perform inspection and testing services on electrical equipment including transformers (Contract No. 1-0562-1 for the period 1981 through 1983 and a contract bearing the same number for the period 1984 through 1986, Respondent's Exhs 1 and 2). While the contracts require inspection of transformers for leaks, visual inspections are to be performed on a yearly basis. Reports of inspections and tests conducted by MET Electrical Testing are in the record (Respondent's Exhs 4-A, 4-B and 4-C). These reports, bearing dates of August 27, 1982, July 25, 1983 and March 1984, reflect inspections of the Second Floor Substation where the Westinghouse PCB transformer (Serial No. 6991991) was located. While the earlier reports list transformers as among equipment inspected, only the report of March 1984, reflecting an inspection on January 16, 1984 (Exh 4-C), specifically mentions the above transformer and indicates no leaks.

19. Mr. Carroll testified that in consonance with the program to eliminate PCBs from its plants (finding 4), Lever Brothers removed the

last two PCB transformers from active service in July of 1985 (Tr. 133). He estimated the cost of disposing of the transformers and PCB fluids in accordance with the regulations at $25,000 per transformer (Tr. 134).

20. Proposed penalties to be assessed against Lever Brothers for the violations alleged were calculated by Ms. Patricia Tan, an environmental engineer employed by Complainant, in accordance with the PCB Penalty Policy, 45 FR 59770 et seq., September 10, 1980 (Tr. 63-65). Under the Penalty Policy, penalties are determined by use of a matrix employing extent of potential damage (major, significant and minor) on a horizontal axis and circumstances (probability of damages), (high, mid and low ranges) on a vertical axis. Each range is broken into two levels of penalty amount.

21. Regarding the failure to have one of the transformers in active service marked with the PCB label, Ms. Tan testified that she regarded this as a Circumstances Level 3 or major marking violation (actually probability of damage in the mid-range) and the extent as significant, resulting in a penalty of $10,000 for this violation (Tr. 66, 67). The significant determination was based on the fact the transformer was reported to contain 350 gallons of PCBs and Table IV in the Penalty Policy, which places PCB quantities of 220 to 1100 gallons in the significant category. Ms. Tan stated that had she known the transformer had been marked with manufacturer's labels (finding 7) it would have been regarded as a minor marking [Level 5] circumstance (Tr. 68). She explained, however, that the "extent" would have remained in the Significant Category, resulting in a penalty of $3,000.

22. Concerning Count II of the complaint for improper disposal, Ms. Tan determined that the circumstance was Level 1 and the extent minor resulting in a penalty of $5,000 (Tr. 69). The "extent" was considered to be minor because of the small amount of material involved in the spill (Tr. 72, 73). As to the violations for failure to have an annual document and failure to have records of quarterly inspections, Ms. Tan determined that the "extent" was major and the circumstances Level 6, resulting in a penalty of $2,000 for each of these counts (Tr. 74, 78, 79). The major extent category was selected based on the fact the eight transformers at the facility contained in excess of 1100 gallons of PCB fluid. Ms. Tan testified that in the absence of the annual document furnished to Mr. Chambers at the time of the 1983 inspection (the circumstances would have been Level 4 and the penalty $10,000 (Tr. 75). She maintained that the firm could have been cited (penalyzed) for five such violations covering the years 1978 through 1982) rather than one (Tr. 75, 76).

23. Although Lever Brothers had started documenting inspections of PCB transformers before they were required to do so, Ms. Tan pointed out that the page from the inspection log attached to the Mr. Chambers' report was deficient in that it did not show inspections for the first and third quarters of 1982 (Tr. 77, 79). She also testified that documentation for inspections required to be performed during the second, third and fourth quarters of 1983 was missing (Tr. 85). This testimony does not consider the MET Electrical Testing Company report, dated July 25, 1983, which provides results of an inspection of the

Lever Brothers facility conducted on June 13, 1983 (MET Electrical Testing Company letter, dated August 17, 1983, Respondent's Exh 6).

24. Lever Brothers representatives were cooperative in the inspections and repeatedly indicated that action necessary to fully comply with the regulations would be taken (Tr. 30, 31, 109). Lever Brothers has not previously been charged with violations of the Act (Tr. 109, 145). Mr. Carroll testified that an appropriate PCB label was placed on the PCB transformer lacking such a label on the day of the inspection (Tr. 148).

Conclusions

1. At the time of the inspection on May 1, 1984, Lever Brothers was in violation of the Act and regulations in the following respects:

   A. One of two in-service transformers, i.e., GE Transformer, Serial No. H8850422, was not marked with the M_L label described in 40 CFR 761.45 as required by 40 CFR 761.40.

   B. The leak or spill of PCBs beneath or adjacent to a valve on the other transformer in active service, Westinghouse Transformer, Serial No. 6991991, constituted an improper disposal of PCBs (40 CFR 761.60(d)) in violation of 40 CFR 761.60(a).

   C. Failure to have available records and annual documents on the disposition of PCBs and PCB items constitutes a violation of 40 CFR 761.180(a).

   D. Respondent's failure to inspect PCB transformers on a quarterly basis and maintain records of such inspections is a violation of 40 CFR 761.30(a).

2. The inspection conducted by Mr. Barry Chambers of the Maryland State Department of Health on April 8, 1983, supports the conclusion that Lever Brothers was then in substantial compliance with the requirements of 40 CFR Part 761.

3. For the violations referred to in conclusion 1 above, Respondent is liable for a civil penalty in accordance with § 16(a)(1) and (2)(B) (15 U.S.C. 2615).

4. An appropriate penalty is the sum of $5,610.

Discussion

Pointing to the cautionary labels on the GE transformer in active service at the time of the inspection on May 1, 1984 (finding 7), and to the similarity between the language on these labels and that on the M_L label described in 40 CFR 761.45, Respondent cites the *doctrine de minimis non curat lex* (the law does not concern itself with trifles) and argues that Count I concerning the lack of the EPA specified labels on the transformer should be dismissed (Proposed Conclusions of Law at 8, 9). Respondent also relies upon Ms. Tan's testimony to the effect that the purpose of the EPA label was to warn anyone approaching of the presence of PCBs and that the labels on the transformer would provide such notice (Tr. 92).

In *Briggs & Stratton Corporation*, TSCA Appeal No. 81-1 (Final Decision, February 4, 1981), the Judicial Officer rejected a similar argument, pointing

out that the EPA specified label includes information to contact EPA for proper disposal. It might also be noted that the label specified by the regulation includes a toll-free number of the Coast Guard, which is to be contacted in case of accident or spill. The Judicial Officer ruled that the presence of manufacturer's labels indicating the presence of PCBs was not an adequate substitute for the label required by the regulation and did not warrant any mitigation of the penalty assessed by the presiding officer.4/

It will be recalled that Ms. Tan testified that she would have reduced the proposed penalty for the lack of an EPA label from $10,000 to $3,000 had she known of the cautionary labels on the transformer (finding 21). The effect of this testimony is to change the marking violation in the Penalty Policy Matrix (Significant Extent) from Level 3 to Level 5. This is in accord with the Penalty Policy which defines minor marking violations as situations where all the requirements of the rule have not been followed, but there are sufficient indications to notify someone unfamiliar with the situation of the presence of PCBs and to enable the identification of PCB items (45 FR at 59780). In Briggs & Stratton, supra, the initial decision was rendered prior to publication of the PCB Penalty Policy and the Penalty Policy was held to be inapplicable. Accordingly, Briggs & Stratton does not control here and gravity-based penalty for the marking violation is determined to be $3,000.

4/ Id. at 29. It should be noted, however, that the ALJ reduced the penalties sought by the Agency for marking violations from $10,000 to $7,500 in one instance and from $10,000 to $5,000 in another instance.

Under the Penalty Policy, any improper disposal of PCBs is considered to be a Level 1 violation. Because of the quantity involved in the spill was less than 220 gallons and contaminated an area of less than 150 square feet, the extent was determined to be minor and the proposed penalty for this violation set at $5,000. Based on the small quantity involved in the spill or stained area (6" to 8" in diameter), the location of the stained area (in a closed, locked room in a vaulted, diked area), the fact that there is no evidence the transformer was leaking and the possibility that the spill could have been caused by MET Electrical Testing when it drew samples for testing in August of 1983 and thereafter, Respondent argues that this count of the complaint should be dismissed (Proposed Conclusions of Law at 10-11).

The regulation (40 CFR 761.60(d)) provides that spills and other uncontrolled discharges of PCBs in concentrations of 50 ppm or greater constitute disposal of PCBs. Because this is true regardless of the quantity of PCBs involved in the spill or discharge, and it is clear that the PCB concentration exceeds the 50 ppm limit, there is no basis for dismissing this count of the complaint.

The Penalty Policy places all improper disposals of PCBs in Circumstances Level 1 and provides for variations in extent of potential damage (major, significant and minor), the quantity involved here being in the minor category. Indeed, it is clear that the discharge here is miniscule in relation to the upper limits (less then 220 gallons or a contaminated area of less than 150 square feet) of the minor extent classification. Of course, inherent in any demarcation along quantity lines is the likelihood

that the upper limits will vary widely from the minimum and thus make a uniform penalty assessment based on such a demarcation appear inequitable in a given instance. Accordingly, the fact that the discharge here is miniscule in relation to the upper limit of the minor extent classification is not in and of itself a sufficient reason for reducing the penalty otherwise determined. Nevertheless, the spirit, if not the letter of the Policy[5/] provides for adjustments in such situations and it is concluded that the small quantity of the discharge here involved warrants a 25% reduction in the gravity-based penalty, reducing that sum to $3,750.[6/] This reduction is especially warranted in view of the location of the discharge--a closed, locked room, in a vaulted, diked area--where the likelihood of substantial exposure of PCBs to humans or the environment is minimal. While the Policy does not provide for adjustments depending on the location of the discharge, except that spills into water or contamination of food and feed are always regarded as major, this reduction is in no sense rewarding a lucky or fortuitous violator, because a manyfold greater discharge would not have appreciably increased the risk.

Turning to record-keeping violations, it is clear that annual documents or other records concerning the disposition of PCBs and the quantity on

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5/ The Policy provides at 45 FR 59776:

> Significant-minor borderline violations. Occasionally a violation, while of significant extent, will be so close to the borderline separating minor and significant violations that the penalty may seem disproportionately high. In this situation, additional reduction of up to 25% off the GBP may be applied before the other adjustment factor are considered. (sic)

6/ Respondent has not established its contention that the spill was due to the activities of MET Electrical Testing in drawing samples.

hand were not available at the time of the inspection on May 1, 1984. It is equally clear that an annual document for the year ending June 30, 1982, was available at the time of the inspection on April 8, 1983. Although this document is not for a calendar year as required by the regulation (40 CFR 761.180(a)), Ms. Tan indicated that the document was otherwise satisfactory (finding 17). The real question here is whether the record permits or requires an inference that annual documents other than the one mentioned were available at the time of the 1983 inspection. Although the inference would be stronger if the Chambers' inspection report referred to "an annual report" or "the most recent annual report," it is concluded that the inference is appropriate and should be made. Mr. Chambers' report is silent as to omissions in or violations of record-keeping requirements and inasmuch as inspection policy requires that such omissions or violations be noted (finding 16), it is concluded that the annual document attached to the report was not the only such document available at the time. The Chambers' report refers to and attaches a copy of one page from the inspection log and there is clearly a sound basis for an inference that other records of inspections of PCB transformers were available on April 8, 1983.

The gravity-based penalties of $2,000 for each of the record-keeping violations, were calculated in strict accordance with the Penalty Policy (major extent because of the quantity of PCBs in the transformers and Circumstances Level 6 because of the low potential for damage). These record-keeping violations related primarily to hinderance or obstruction of EPA's ability to enforce the Act and the extent of that hinderance is not primarily related to the quantity of PCBs involved. The record

supports the finding that Respondent prepared and maintained annual documents on the disposition of PCBs and inspected and maintained records of such inspections, albeit in neither instance in strict accordance with the regulations. Under these circumstances, it is concluded that these record-keeping violations may appropriately be placed in the Significant Extent category of the penalty matrix.7/ The "Circumstances" or probability of damage remains in the low range at Level 6, thereby establishing the gravity-based penalty for these record-keeping violations at $1,300 each.

This brings us to the "with respect to the violator" language of the Act8/ under which factors such as the degree of culpability and such other matters as justice may require are considered. The fact that the GE transformer was previously properly labeled, that Respondent had commenced keeping records of visual inspections of PCB transformers long before it was

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7/ In Bell & Howell Co., TSCA-V-C-033, 034 & 035 (Final Decision, December 2, 1983), the Judicial Officer made it clear that the presiding officer was not required to assess a penalty identical to one of the amounts shown in the Penalty Policy Matrix and that where warranted, other amounts (boxes) may be selected in determining an appropriate penalty.

8/ Section 16(a)(2)(B) of the Act provides:

> (B) 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 culpability, and such other matters as justice may require.

required to do so[9/] establish Respondent's good faith or otherwise stated a small or low degree of culpability.[10/] Although the evidence will not support a finding that the PCB records were removed or destroyed by the former employee responsible for such matters, it is worthy of note that Respondent searched for the missing records in March of 1984, sometime prior to the inspection on May 1 of that year. These facts coupled with the fact Respondent has no prior history of violations of the Act and moved promptly to correct deficiencies noted in the inspection warrant a 40% reduction in the gravity-based penalty, which as computed above totals $9,350, to $5,610.[11/]

Respondent argues that no penalty should be assessed because it is entitled to a credit for environmentally beneficial expenditures in excess of $100,000 incurred in removing PCB transformers from service (Proposed Conclusions of Law at 15, 16). The Penalty Policy does in some circumstances provide for credits for sums expended in cleaning up or otherwise mitigating the harm caused by the violation (45 FR at 59775). The Policy makes clear, however, that because cleanup costs are considered to be part

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9/ In accordance with the Interim Measures Program (46 FR 16091, March 10, 1981) the first inspection of transformers, other than those posing a risk to food or feed, was to be completed by August 10, 1981.

10/ Culpability as used in the Act is given its normal definition as being synonymous with "blameworthy."

11/ Although the penalty so determined is considered to be consonant with the Penalty Policy, it is, of course, clear that I am not bound thereby (40 CFR 22.27) and have considerable discretion in determining an appropriate penalty. Electric Service Co., TSCA Appeal No. 82-2 (Final Decision, January 7, 1985).

of the cost of the violation, such credits will only be granted in situations where the penalty plus the costs of cleanup are excessive for the particular violation. Here, Respondent made a business decision to remove PCB transformers from its plants and while this decision eliminates the possibility of future violations of the regulation, the costs of transformer removal are not related to correcting the violations found. Although there is no evidence in the records of the costs of cleaning up or remedying the violations, such costs would not appear to be substantial. Under such circumstances, the costs of correcting the violations found plus the penalty may not be considered excessive in relation to the violations and an appropriate condition for applying the credit has not been demonstrated.

ORDER

Respondent, Lever Brothers Company, Inc., having violated the Act and regulations in the particulars hereinbefore recited, is assessed a penalty of $5,610 in accordance with § 16(a) of the Act. Payment of the penalty shall be made by mailing a cashiers or certified check in the amount of $5,610 payable to the Treasurer of the United States to Regional Hearing Clerk, EPA, Region III, P. O. Box 360515M, Pittsburgh, Pennsylvania 15251, within 60 days of the date of this order.11/

Dated this 13th day of December 1985

Spencer T. Nissen
Administrative Law Judge

11/ Unless appealed in accordance with 40 CFR 22.30, or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).