UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the ~~Matter of~~	)	
	)	
Ketchikan Pulp Company,	)	Docket No. TSCA-X-86-01-14-2615
	)	
Respondent	)	

Toxic Substances Control Act - Inspection and Recordkeeping - Improper Use - Separate Violations or Acts - Where evidence established that Respondent had failed to make quarterly inspections of a PCB transformer as required by 40 CFR § 761.30(a)(1)(ix) and to maintain records of such inspections containing all information required by § 761.30(a)(1)(xii), only one violation was shown, improper use, and accordingly, only one penalty could be assessed.

Toxic Substances Control Act - Rules of Practice - PCB Penalty Policy - Conditions of Use - Because provisions of regulation (40 CFR § 761.30(a)(1)(ix) and (xii)) making quarterly inspections and recordkeeping concerning such inspections conditions of use of PCB transformers had not been promulgated at time PCB Penalty Policy (45 FR 59770) was published, and thus precise violations at issue were not contemplated by the Policy, it was held to be appropriate and in accordance with the Policy to determine the penalty by the risk of environmental damage and to use a Circumstances Level, other than Level 2 apparently contemplated for all improper use, in application of matrix in Penalty Policy.

Toxic Substances Control Act - Storage of PCB Contaminated Rags and Clothing - PCB Concentration - Burden of Proof - Where evidence established that Respondent had stored drums containing PCB contaminated rags and

clothing for a period in excess of that allowed by 40 CFR § 761.65(a), Complainant could rely on labels and representations of Respondent's employees as to contents of drums and anti-dilution rule (§ 761.1(b)) made it unnecessary for Complainant to demonstrate that PCB concentration of rags and clothing exceeded 50 ppm.

Toxic Substances Control - Annual Documents - Ancillary Records - Violation of requirement for annual documents on disposition of PCBs (40 CFR § 761.180(a)) was established where annual documents maintained by Respondent, even as supplemented by ancillary records, did not contain all specified information.

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Appearance for Respondent: Matthew Cohen, Esq.
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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 February 12, 1986, by the issuance of a complaint charging Respondent, Ketchikan Pulp Company, with violations of the Act[1/] and applicable regulations, 40 CFR Part 761. Specifically,

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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--
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> (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;
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> * * *.

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

Ketchikan was charged with failing to make certain quarterly inspections of a PCB transformer as required by 40 CFR § 761.30(a)(1); with failure to record estimates of the amount of PCB dielectric fluid released in certain leaks, to record the date and description of cleanup, containment or repair as required by § 761.30(a); with failure to remove from storage and dispose of two drums of PCB contaminated rags and clothing as required by § 761.65 (a) and with failure to include in annual documents required by § 761.180(a) all of the specified information. For these alleged violations, it was proposed to assess Ketchikan a penalty totaling $17,800.

Ketchikan answered, denying the alleged violations, contesting the amount of the penalty and requesting a hearing.

A hearing on this matter was held in Seattle, Washington on September 3 1986.

Based on the entire record including the briefs and proposed findings of the parties, I make the following:

Findings of Fact

1. Ketchikan Pulp Company operates a mill in Ketchikan, Alaska, producing an alpha cellulose pulp, which is converted into products such as rayon, cellophane and nitro cellulose (Tr. 126). The mill produces its own power and utilizes 54 PCB transformers and 19 PCB capacitors (Tr. 127-28).

2. On September 19 and 20, 1985, Ketchikan's mill was inspected by Mr. Paul Boys, an engineer and compliance inspection team leader for EPA, for the purpose, inter alia, of determining compliance with PCB regulations (Tr. 30, 31, 42; Inspection Report, dated September 27, 1985, EPA Exh 1).

Mr. Boys examined and copied records concerning inspections of transformers, inspected transformers on a random basis including those which the records indicated had leaked, examined the PCB storage area and copied annual reports or documents for the years 1982-85 (Tr. 51-57, 60).

3. Ketchikan's mill had previously been inspected by Mr. Boys on September 30, 1982 (Tr. 30, 33-42; Inspection Report, dated October 18, 1982, EPA Exh 2). Mr. Boys concluded that Ketchikan was complying with the intent of the regulations. He did, however, make several suggestions including that all items placed in the storage for disposal area be tagged with the date placed in that area, that curbing be installed to separate the PCB storage area from other equipment and that PCB labels be placed on unlabeled items in the storage for disposal area and on the door to the building housing that area.

4. As a result of the inspection referred to in finding 3, Ketchikan was notified of violations of the regulations (Notice of Noncompliance, dated December 27, 1982, EPA Exh 3). Specifically, Ketchikan was informed that quarterly inspection records failed to identify the person conducting the inspection, that the storage for disposal area and PCB items and containers in the storage for disposal area were not marked with PCB labels and PCB items and containers in the storage for disposal area did not bear dates of removal from service or placement into storage for disposal. In a letter, dated January 12, 1983, Ketchikan stated that all items referred to in the notice of December 27, 1982, had been corrected (EPA Exh 4).

5. Ketchikan's inspection records did not show that inspections of Transformer Serial No. 6902477, containing 2,705 kg of PCB fluid, had been

conducted during the first quarter of 1982, the third quarter of 1983, the first and third quarters of 1984 and the first quarter of 1985 (EPA Exh 1, Attach. 5). Moreover, the record for the mentioned transformer, while indicating certain leaks from the drain and throat area and that at least one of the leaks had been cleaned up, did not contain estimates of the amount of fluid leaked and dates and description of cleanup or repair performed.

6. At the time of the September 1982 inspection conducted by Mr. Boys, Ketchikan had two 25-gallon drums, which Ketchikan employees stated contained PCB contaminated rain gear and gloves, in storage for disposal (Tr. 40). These drums bearing dates of February 11, 1982, which Ketchikan representatives reported contained cleanup rags and contaminated clothing from the cleanup of PCB spills and leaks, were in the storage for disposal area at the time of the second inspection in September of 1985. Mr. Robert Higgins, Technical Director for Ketchikan, acknowledged that there had been no shipments of PCB waste from the facility since 1982 (Tr. 46, 47; EPA Exh 1). Records representing Ketchikan's annual documents for the years 1980-1984, confirm that there were no disposals of PCB materials during those years (EPA Exhs 1 & 2).

7. Annual documents or reports maintained by Ketchikan contain the total weight in kilograms of PCB fluids on hand at the end of the year (103,836 kg), but did not indicate the total number of PCB transformers in service and total weight in kilograms of PCBs contained in the transformers, total number of PCB large high or low voltage capacitors in service, total weight in kilograms of any PCBs and PCB items in PCB

containers remaining in service at the end of the calendar year and total weight in kilograms of any PCBs and PCB containers in storage for disposal. Ketchikan did, however, maintain equipment log sheets, which reflected a total of 43 transformers in service of which at least two contained PCBs of less than 50 ppm,2/ and one out-of-service PCB transformer held as a spare.3/ The log sheets show capacitor racks and banks and state that this equipment does not contain serial or identification numbers and that their PCB content is unknown.

8. Ketchikan had two 55-gallon drums of PCB liquid, stored for possible future use, as well as the two 25-gallon drums of PCB rags and contaminated clothing referred to previously, in the storage for disposal area at the time of the inspection in September 1985 (EPA Exh 1). A Ketchikan purchase order, dated June 20, 1986 and an accompanying hazardous waste manifest reflect the shipment for disposal to Crosby-Overton, Inc., Kent, Washington of two 55-gallon drums of PCB liquids and two 55-gallon drums of PCB cleanup materials (Tr. 133-35; Respondent's Exh 6). Although the PCB contaminated rags and clothing in storage at Ketchikan since 1982 were in 25-gallon drums (finding 6), it appears that materials referred to in the purchase order and manifest

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2/ A letter from General Electric to Ketchikan, dated January 30, 1980, reflects tests on samples from five transformers of which four showed less than 50 ppm PCBs. Only two of these non-PCB transformers can be identified on the log sheets. Although it is indicated that the log sheets consist of four pages, only three are in the record, two pages being attached to the 1982 inspection report and one page being attached to the 1985 report.

3/ Ketchikan has instituted a computerized system for maintaining an inventory of PCB equipment and recording quarterly inspections (Tr. 130-31; PCB Equipment Log and Quarterly Report, Respondent's Exh 7). The mentioned report reflects an inventory of 61 PCB transformers of which 17 are listed as spares. The inventory does not include any capacitors.

include materials in the 25-gallon drums. Mr. Higgins testified that Ketchikan had not disposed of the cleanup materials at an earlier date, because of the belief that a moratorium had been placed on the shipment of PCBs over navigable waters (Tr. 138). No basis for this belief has been presented.4/ Mr. Higgins, however, made similar statements to Mr. Boys at the time of the September 1982 and 1985 inspections (Tr. 59; EPA Exh 1).

9. A TSCA Inspection Checklist is attached to Mr. Boys' 1985 inspection report (Attach. 3). Mr. Boys stated that he went through the checklist with Mr. Higgins and Mr. Greg Anglin, a Ketchikan engineer (Tr. 46, 47). One of the questions on page 2 of the checklist is: Are quarterly inspections made (start 8-10-81) of PCB transformers? Although there is no checkmark indicating that this question was asked or answered, Mr. Boys testified that he inquired as to the frequency of inspections conducted by Ketchikan (47, 49, 55). Mr. Boys acknowledged that he could not recall asking a specific question, but maintained that the question must have been asked based on his usual practice and the fact that he obtained copies of the inspection records (Tr. 69-71). He recalled that he went through the checklist primarily with Mr. Anglin and contended that the fact this particular checklist question was not marked, was not necessarily indicative the question was not asked. Mr. Higgins testified that to the best of his recollection, Mr. Boys did not ask any questions concerning quarterly inspections (Tr. 137-38).

4/ Although Mr. Higgins answered affirmatively the question of whether he had made inquiries to the Coast Guard or other agencies concerning the supposed moratorium (Tr. 145), there is no indication in the record of the extent of these inquiries or the information thereby garnered.

10. Referring to Violation One of the complaint concerning Ketchikan's alleged failure to inspect Transformer Serial No. 6902477 during five quarters in the period 1982-85, Mr. Higgins testified that this transformer was inspected quite frequently for maintenance purposes (Tr. 132-33). While he acknowledged that he did not impart information as to the frequency of inspection of this transformer to Mr. Boys at the time of the inspection (Tr. 143-45), this is consistent with his testimony he did not recall Mr. Boys asking any questions in this regard. Asked whether he had raised the matter of [unrecorded] inspections at the time of the settlement conference in Seattle, he answered promptly and emphatically in the affirmative.5/

11. Mr. Jack Shearouse, Assistant Maintenance Superintendent for Ketchikan, testified that during the period 1982 through 1985 he was chief electrician at the mill (Tr. 148-49). He described the operation of the mill as a 24-hour-a-day, seven-day week process and stated there were always electricians on duty. He said that there were approximately 50 transformers in service during the 1982-85 period and that he personally made tours on a weekly basis trying to inspect every substation and piece of rotating equipment so as to detect and address potential problems (Tr. 150-51). Describing the inspection of transformers, he stated that you listened for sounds, resonance (vibration) or the lack thereof, touched and smelled the transformers to check vibration and for signs of overheating and looked for leaks. These inspections were not recorded unless

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5/ Although Rule 408 of the Federal Rules of Evidence provides in pertinent part that evidence of conduct or statements made in compromise negotiations is not admissible, the rule is not applicable where the evidence is offered for another purpose such as proving bias or prejudice of a witness. Federal Rule 408 is applicable to this proceeding. See Rule 22.22 Evidence.

there was a problem, in which case a work order would usually be written (Tr. 152). He explained that leaks, which he characterized as minor weeps, occurred during hot weather when the ambient temperature and the load on the transformer were high. The weeps were captured in small pie pans. In Mr. Shearouse's opinion, Ketchikan did not have a big problem with leaks.

12. Referring to Transformer 1E (Serial No. 6902477), Mr. Shearouse testified that the problem was a leaking packing gland on the drain valve (Tr. 152). He stated attempts were made to correct this situation and that the leak was reduced to a weep, which he described as droplets forming over a period of time, not having any volume. He testified this transformer was located in the main substation in the Pulp Prep Building. He further described the location of this transformer as right next to the entrance of the transformer room and testified that during the period 1982-'85, he normally inspected the transformer on a weekly basis (Tr. 153). In his absence, an individual identified as the lead electrician, Mr. Jerry Hildebrandt, conducted the inspections (Tr. 154). Inspections by Messrs. Shearouse and Hildebrandt were not coordinated with those conducted by Mr. Paul McGarrigan, who performed inspections for the purpose of complying with PCB regulations. Regarding weeps or droplets, Mr. Shearouse stated that periodically he would have the safety representative don protective clothing, wipe up the minor drips and dispose of the contaminated material in drums (Tr. 155). He could recall only one instance where a measurable amount of liquid had leaked and acknowledged that cleanups were not always performed within 48 hours (Tr. 159).

13. Proposed penalties were computed by Mr. William Hedgebeth, an EPA environmental protection specialist (Tr. 80-82). For this purpose, he utilized the Guidelines for the Assessment of Civil Penalties Under 16 of the Toxic Substances Control Act; PCB Penalty Policy (45 FR 59770, September 10, 1980), hereinafter PCB Penalty Policy (Tr. 83). Referring to Violation One of the complaint, the alleged failure to inspect Transformer Serial No. 6902477 during the first quarter of 1982, the third quarter of 1983, the first and third quarters of 1984 and the first quarter of 1985, as required by § 761.30(a)(1)(ix), Mr. Hedgbeth determined an appropriate penalty to be $13,000 (Tr. 90). Under the cited section of the regulation quarterly inspections of PCB transformers are a condition of use and improper use is a Circumstances Level 2 violation (45 FR at 59778). The quantity of PCBs in the transformer (2,705 kg) places the violation in the significant category of the penalty matrix (45 FR 59777), resulting in the proposed penalty of $13,000 determined by Mr. Hedgebeth (Tr. 91-93). Elaborating on the significance of the missing quarterly inspections, he pointed out that inspections in 1981 had shown leaks (Tr. 93-94). Regarding Violation Two, failure to include all required information such as quantities leaked and cleanup performed in inspection records for the mentioned transformer, Mr. Hedgebeth testified that although this failure could have been regarded as a use violation, he determined it was a Level 6, minor recordkeeping violation (Tr. 97-99). The quantity of PCBs remained the same so that the extent of potential damage was significant, resulting in a penalty in accordance with the matrix of $1,300.

14. Regarding Violation Three, failure to remove two drums of PCB contaminated clothing and rags from storage and properly dispose of the same in accordance with § 761.65(a), Mr. Hedgebeth determined an appropriate penalty to be $1,500. Because there were only two drums and clearly a small quantity of PCBs, he concluded that the extent was minor (Tr. 102). The drums had apparently been in storage for over three years and he regarded this as a Level 3, major storage violation, resulting in a penalty of $1,500. As to the final violation, failure of annual reports to include all information required by § 761.180(a), the total quantity of PCBs was over 103,000 kg and the extent clearly major. Mr. Hedgebeth concluded this was a Circumstances Level 6 violation resulting in a proposed penalty of $2,000 (Tr. 104-06). He considered that there were not any mitigating factors, which would warrant a reduction in the penalty. He asserted that there were other transformers listed on his memorandum, dated July 1, 1986 (EPA Exh 6), for which records of quarterly inspections were missing (Tr. 107-08). Under cross-examination, he acknowledged that adjustment factors such as Ketchikan's good faith or lack of culpability and ability to pay were not considered (Tr. 114-21).

15. Ketchikan has stipulated that it has the financial capability to pay the proposed penalty and that it will not seek a lower penalty on that ground (Joint Motion To Amend Complaint and Stipulation, executed by Ketchikan August 12, 1986). Nevertheless, Mr. Higgins testified that because of high costs and declining markets for its product, it wasn't certain that Ketchikan could continue operating the mill and that Ketchikan's financial performance in recent years had been very poor (Tr. 139-41). He attributed Ketchikan's difficulty in

complying with environmental regulations in part to severe cutbacks in personnel.

CONCLUSIONS

1. Evidence that Ketchikan failed to conduct quarterly inspections of Transformer Serial No. 6902477 as required by 40 CFR § 761.30(a)(1)(ix) and to maintain records of such inspections containing all information required by § 761.30(a)(1)(xii) constitutes one violation, improper use, and does not warrant separate penalties.
2. Although the PCB Penalty Policy categorizes all improper use of PCB transformers as Circumstances Level 2, the Policy was published prior to promulgation of the cited regulation and, under the circumstances present here, improper use may, consistent with the Policy, be categorized as Circumstances Level 5 for purposes of penalty determination.
3. Complainant has carried its burden of proof as to Violation Three, storage of drums containing PCB contaminated rags and clothing in excess of the period allowed by § 761.65(a), and it is unnecessary for Complainant to demonstrate that the PCB concentration in these items equals or exceeds 50 ppm. Complainant's characterization of this as a major storage violation, however, is not accepted.
4. The only dispute as to Violation Four, failure to maintain annual documents containing all information required by § 761.180(a), is the amount of an appropriate penalty and complaint correctly determined the penalty for this violation as $2,000.
5. An appropriate penalty for these violations is the sum of $5,500.

DISCUSSION

Although Complainant has couched Violations One and Two of the complaint in terms of violations of 40 CFR § 761.30(a), rather than the particular subsections, 761.30(a)(1)(ix) and 761.30(a)(1)(xii), requiring inspection of PCB transformers and maintenance of records, it has, nevertheless, attempted to assess separate penalties. This, of course, it may not do, because, although separate acts or failures to act are alleged, there is only one violation, i.e., improper use of a PCB transformer. This conclusion follows, if not from failure to inspect, from failure to maintain records containing all information required by § 761.30(a)(1)(xii).6/ Under the PCB Penalty Policy, improper use is a Circumstances Level 2 violation and the quantity of PCBs involved (2,705 kg) places the extent of potential damage in the significant category, resulting in a penalty of $13,000. Ketchikan points out, however, that at the time the Penalty Policy was published, improper use did not include inspection and recordkeeping and therefore, it is inappropriate to include all improper use violations within Circumstances Level 2.7/ Ketchikan asserts that, consistent with the Policy, violators are to be penalized in proportion to the risk posed by the violations and argues the minimal risks of environmental damage present here justify a Circumstances Level 5 determination, yielding a gravity based penalty of no more than $3,000.

The Penalty Policy states that violations placed in Circumstances Level 2 are those considered most likely to result in improper disposal (45 FR 59781) and it is concluded that Ketchikan's arguments in this

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6/ This determination makes it unnecessary to discuss the parties' arguments as to the nature of Violation One and whether Complainant has carried its burden of proof in that respect.

7/ Reply Brief at 10-12. Inspection and recordkeeping requirements for PCB transformers were imposed by the Interim Measures Program, 46 FR 16090, March 10, 1981, effective May 11, 1981, which was promulgated as a result of the decision in EDF v. EPA, 636 F.2d 1267 (D.C. Cir. 1980).

respect have merit and are deserving of acceptance. Considering the frequency of inspections shown by this record, which Complainant does not dispute (Brief at 8), and the location of the particular transformer, the likelihood of any significant or measurable leaks of PCBs escaping detection, which after all is the purpose of the requirement for quarterly inspections, was remote. It is therefore concluded that improper use under these circumstances warrants a categorization no higher than Level 5, yielding a penalty of $3,000.8/

Turning to Violation Three, the failure to remove from storage and dispose of two drums of PCB contaminated rags and clothing as required by § 761.65(a), Ketchikan argues that Complainant hasn't proven this violation, because it has not shown that the PCB content of the rags and clothing equals or exceeds 50 ppm (Opening Brief at 9, 10; Reply Brief at 8, 9). Complainant disputes this contention, asserting that it may accept the labels and representations of Ketchikan employees as to the contents of the drums and that it need not prove the PCB content of the contaminated rags and clothing, because of the anti-dilution rule, 40 CFR 761.1(b).9/ Complainant also

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8/ It is considered that this conclusion is in accord with the Penalty Policy, defining Levels 5 and 6 as situations where there is a small likelihood that damage will result from the violation (45 FR 59772), had it contemplated inspection and recordkeeping requirements as conditions of use and partial compliance therewith. Alternatively, the same result would be reached by disregarding the Policy for the reason that it did not contemplate improper use under the circumstances shown here. See Rule 22.27(b).

9/ Brief at 12, 13; Reply Brief at 4, 5. Section 761.1(b) provides in pertinent part:

> (b) This part applies to all persons who manufacturer, process, distribute in commerce, use, or dispose of PCBs or PCB Items. * * * Most of the provisions of this part apply to PCBs only if PCBs are present in concentrations above a specified level. For example, Subpart D applies generally to materials at concentrations of 50 parts per million (ppm) and above. * * * No provision specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided.

cites § 761.60(d)(1) and (2),10/ to bolster its position that as long as the PCB content of the material cleaned up exceeded 50 ppm, the PCB concentration of the rags and clothing is immaterial. Ketchikan contends that Complainant has misconstrued the regulation, pointing out that § 761.60(a) also has a 50 ppm threshold and that § 761.60(a)(4),11/ refers to requirements for disposition of nonliquid PCBs at concentrations of 50 ppm or greater in the form of soil, rags, or other debris, thereby establishing that the 50 ppm concentration limit applies equally to such materials as it does to liquids. Ketchikan says that the claim of dilution is a red herring, as there has been no attempt to evade the regulations by lowering PCB content.

10/ The cited section provides:

> (d) Spills. (1) Spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs.
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> (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.

11/ Section 761.60(a) provides in pertinent part:

> (a) PCBs. (1) Except as provided in paragraphs (a)(2), (3), (4), and (5) of this section, PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70.
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> * * *
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> (4) Any non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, rags, or other debris shall be disposed of:
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> (i) In an incinerator which complies with § 761.70; or
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> (ii) In a chemical waste landfill which complies with § 761.75.

It is concluded that Complainant's position on this issue must be accepted. Contrary to Ketchikan's apparent position, operation of the "anti-dilution" rule is not dependent upon intent to evade the regulation. Instead, the rule means precisely what it plainly says and applies to "any dilution" whether intentional or otherwise (§ 761.1(b), note 9, supra). Accordingly, to the extent the contaminated rags and clothing resulted from cleanup activities or contact with PCBs equal to or in excess of 50 ppm, the drums containing such materials are clearly subject to the PCB rule.

While Section 761.60(a)(4) (note 11, supra), cited by Ketchikan, makes it clear that the specified disposal requirements for nonliquid PCBs apply only to materials having PCB concentrations equal to or in excess of 50 ppm, this does not alter the rule that for regulatory purposes, PCB concentrations cannot be brought below the 50 ppm threshold by dilution. In effect, § 761.1 (b) creates a conclusive presumption that substances and materials in contact with, or contaminated with, PCBs at concentrations equal to or above 50 ppm remain above the regulatory threshold. A PCB transformer is defined as one containing 500 ppm or greater PCB (§ 761.3) and Complainant is entitled to rely on labels on the drums and statements of Ketchikan employees that materials in the drums resulted from cleanup of transformer leaks. Moreover, the location of the drums in the storage for disposal area belies Ketchikan's assertion that the materials in the drums may have been used to cleanup leaks from non-PCB transformers. Ketchikan's contention that Complainant has not carried its burden of proof as to Violation 3 is, therefore, rejected.

Because of the length of time the drums containing contaminated rags and clothing had been in storage, Mr. Hedgebeth regarded this as a major storage

violation (Level 3), even though he recognized that the quantity of contaminated materials (less than 50 gallons) placed the extent in the minor category. He therefore proposed a penalty of $1,500 for this violation. Ketchikan disputes this determination, pointing out that the Penalty Policy (45 FR 59780) defines a major storage violation as a situation where a significant portion of spilled material would not be contained (Brief at 10, 11). Ketchikan asserts that these drums were kept in a properly designed storage area[12/] and would not have posed any risk of contamination, even if their contents had spilled or leaked. Because a minor storage violation is defined as one where any spilled material will be substantially contained, Ketchikan argues that this should be regarded as such a violation, warranting a Level 5 categorization and a gravity based penalty of no more than $500. It is concluded that this argument is firmly based on the facts and the Penalty Policy and is accepted. An appropriate penalty for Violation Three is $500.

Ketchikan does not dispute Violation Four, the failure to include in annual reports all information required by § 761.180(a). Ketchikan also acknowledges that this violation was correctly characterized as a Level 6 "minor recordkeeping violation" (Brief at 11, 12). It vigorously disputes, however, the determination of the extent of this violation as "major," arguing that all of the required information concerning its PCB transformers was available in ancillary documents, the equipment log sheets. According to Ketchikan, the only items involved in this violation are the two drums of liquid PCBs and two drums of PCB contaminated clothing and rags, which contain less than 220 gallons, justifying an extent characterization as minor and a gravity based penalty of no more than $200 (Brief at 12, 13).

12/ A concrete curb had been installed around the storage for disposal area at the time of the second inspection (EPA Exh 1).

Ketchikan's argument is not accepted. Firstly, Complainant should not be required to examine documents or records other than those represented as being the annual documents required by § 761.180(a) in order to determine if the specified information is available.13/ Secondly, and more significantly, the record does not support Ketchikan's contention that all required information was available. As we have seen (finding 7 and note 2), the equipment log sheets in the record are incomplete and because the log sheets do not enable identification of all transformers Ketchikan had on hand, the weight of PCBs in kilograms in each transformer is of necessity lacking.14/ Moreover, while the log sheets mention capacitor banks and racks, neither the sheets nor the computer printout (Respondent's Exh 7) contain the total number of PCB large high or low voltage capacitors. Accordingly, it is concluded that Violation Four was correctly placed in the major extent category and a penalty of $2,000 will be assessed therefor.

There is not much to be said for Ketchikan's contention that the penalty should be reduced because of its demonstrated commitment to full compliance (Brief at 13-16; Reply Brief at 15, 16). While Ketchikan correctly notes that Mr. Hedgebeth did not consider the adjustment factors, such as ability to pay, any history of prior violations, and degree of culpability, and that § 16(a)(2)(B) of the Act requires these factors be taken into account, Ketchikan has stipulated that ability to pay is not in issue. Moreover, although the Penalty Policy provides that only prior violations which

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13/ See Bell & Howell Company, TSCA-V-C-033, 034, 035 (Initial Decision, February 3, 1983), affirmed in part and modified in part on other grounds (Final Decision, December 2, 1983), containing strikingly similar facts and where similar contentions were rejected.

14/ It is of interest that a December 1981 Ketchikan memorandum reflects that the total quantity of PCBs on hand had increased to 103,836 kilograms because of the discovery of four transformers previously overlooked (EPA Exh 2).

resulted in a final order may be considered for purposes of adjusting the gravity based penalty upward (45 FR 59773-74), there is no requirement that prior violations not resulting in a final order be disregarded for the purpose of determining whether lack of culpability [good faith] justifies a downward adjustment. Accordingly, it is concluded that the December 1982 Notice of Violation may be considered for this limited purpose and Ketchikan's argument that its commitment to compliance justifies a reduction in the gravity based penalty is rejected.

A penalty of $5,500 is determined to be appropriate and will be assessed against Ketchikan.

O R D E R [15/]

Ketchikan Pulp Company having violated the Act and regulations as determined herein, a penalty of $5,500 is assessed against it in accordance with § 16(a) of the Act (15 U.S.C. 2615). Payment of the penalty shall be made by sending a certified or cashier's check in the amount of $5,500 payable to the Treasurer of the United States to the following address within 60 days of the receipt of this order:

Regional Hearing Clerk
U.S. EPA, Reg. X
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

Dated this 8th day of December 1986.

Spencer T. Nissen
Administrative Law Judge

15/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) 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 Rule 22.27(c).