UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

NOV 1988
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
HODAG CHEMICAL CORPORATION,	)	Docket No. TSCA-V-C-025-88
	)	
Respondent	)	

1. Toxic Substances Control Act: Knowledge by Respondent that it is committing a violation of Section 15 (1) and (3) of TSCA is not a prerequisite for the finding of a violation and the imposition of a civil penalty under Section 16 (a).

2. Toxic Substances Control Act: Section 15 (1) and (3) of TSCA establishes a standard of strict liability; a violation may be found and a civil penalty assessed for violation thereof even where the violation is unknowing.

3. Toxic Substances Control Act; PCB Ban Rule: As a matter of law, the terms PCB and PCBs, as defined and used in 40 C.F.R. Part 761, include monochlorinated biphenyls.

4. Toxic Substances Control Act: Where a corporation has knowledge of information which would trigger a legal duty to act under TSCA, it cannot escape its responsibility to so act because the particular official charged with the responsibility to insure that the corporation met its legal duty was unaware of that information.

5. Toxic Substances Control Act; PCB Ban Rule: The recordkeeping and reporting requirements of 40 C.F.R. § 761.180(a) apply to the owner or operator of a facility using or storing PCBs contained in specific types of PCB Items, namely, PCB Container(s), PCB Transformers and PCB Voltage Capacitors.

6. Toxic Substances Control Act; PCB Ban Rule: A heat transfer system containing PCBs is not a PCB Container, but instead is a PCB Article, as the terms are used in 40 C.F.R. Part 761.

7. Toxic Substances Control Act; Determination of Penalty: The degree of discretion which a Presiding Officer possesses in determining a recommended civil penalty under TSCA is defined and delimited by the statutory criteria found in Section 16(a)(2)(B).

8. Toxic Substances Control Act; Determination of Penalty; Rules of Practice: In determining the amount of a recommended civil penalty pursuant to Section 16(a)(2)(B), the Presiding Officer must comply with the regulatory requirements of 40 C.F.R. § 22.27(b) to consider the civil penalty guidelines and to set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant.

9. Toxic Substances Control Act; Determination of Penalty; Rules of Practice: The Presiding Officer may assess a different civil penalty from that proposed by the Complainant if, upon consideration, the Presiding Officer concludes, for example, that: the civil penalty guidelines have been improperly interpreted and applied by the Complainant; or circumstances in the case warrant recognition, or, where they may have been recognized by the Complainant, warrant a weight, not accorded them by the Complainant; or the penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

APPEARANCES:

For Complainant:

Scott Dismukes, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency, Region V
230 South Dearborn Street
Chicago, IL 60604

Suzanne Glade, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency, Region V
230 South Dearborn Street
Chicago, IL 60604

For Respondent:

Eugene Propp, Esquire
Propp & Schmidt
Three First National Plaza
Suite 525
Chicago, IL 60602

BEFORE: Henry B. Frazier, III
Administrative Law Judge

INITIAL DECISION

I. Background - Violations Alleged:

This proceeding arose under the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq. ("TSCA" or the Act). An administrative complaint was issued on December 21, 1987 by the United States Environmental Protection Agency ("EPA" or "Complainant" or "Agency"), Region V, under Section 16(a) of the Act, 15 U.S.C. § 2615(a).1/ Section 16(a) of the Act provides for the imposition of civil penalties for violations of Section 15 of the Act, 15 U.S.C. § 2614.2/ The violations of Section 15 alleged in the complaint were violations of rules promulgated under Section 6, 15 U.S.C. § 2605. More specifically, the complaint alleged violations of the rules governing the use, marking and recordkeeping and reporting requirements of polychlorinated biphenyls (PCB or PCBs)

1/ 15 U.S.C. § 2615(a) provides, in pertinent part: "(1) Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation."

2/ 15 U.S.C. § 2614 provides, in pertinent part: "It shall be unlawful for any person to --

(1) fail or refuse to comply with...(B) any requirement prescribed by section...2605 of this title, (C) any rule promulgated...under section...2605 of this title...;

* * * * * * *

(3) fail or refuse to (A) establish or maintain records, (B) submit reports,...or other information,...as required by this chapter or a rule thereunder...."

contained in 40 C.F.R. Part 761 ("PCB Ban Rule"). The administrative complaint charged the Respondent, Hodag Chemical Corporation, ("Respondent" or "Hodag"), with the following violations:

Count I alleged that the Respondent failed to develop and maintain PCB records in violation of 40 C.F.R. § 761.180(a).3/

3/ 40 C.F.R. § 761.180(a) provides, in pertinent part:
"This section contains recordkeeping and reporting requirements that apply to PCBs, PCB Items, and PCB storage and disposal facilities that are subject to the requirements of the part.
(a) PCBs and PCB Items in service or projected for disposal. Beginning July 2, 1978, each owner or operator of a facility using or storing at one time at least 45 kilograms (99.4 pounds) of PCBs contained in PCB Container(s) or one or more PCB Transformers, or 50 or more PCB Large High or Low Voltage Capacitors shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year. Owners or operators with one or more facilities that use or store PCBs and PCB Items in the quantities described above may maintain the records and documents at one of the facilities that is normally occupied for 8 hours a day, provided the identity of this facility is available at each facility using or storing PCBs and PCB Items. The records and documents shall be maintained for at least five years after the facility ceases using or storing PCBs and PCB Items in the prescribed quantities. The following information for each facility shall be included in the annual document:
(1) The dates when PCBs and PCB Items are removed from service, are placed into storage for disposal, and are placed into transport for disposal. The quantities of the PCBs and PCB Items shall be indicated using the following breakdown:
(i) Total weight in kilograms of any PCBs and PCB Items in PCB Containers including the identification of container contents such as liquids and capacitors....
(2) For PCBs and PCB Items removed from service, the location of the initial disposal or storage facility and the name of the owner or operator of the facility.
(3) Total quantities of PCBs and PCB Items remaining in service at the end of the calendar year using the following breakdown:
(i) Total weight in kilograms of any PCBs and PCB Items in PCB Containers, including the identification of container contents such as liquids and capacitors...."

Count II alleged that the Respondent failed to mark its heat transfer system with a PCB label in violation of 40 C.F.R. § 761.40(a)(8).4/

Count III alleged that the Respondent failed to reduce the concentration of PCBs in its heat transfer system to below 50 ppm in violation of 40 C.F.R. § 761.30(d)(1) and (d)(3).5/

4/ 40 C.F.R. § 761.40(a)(8) provides, in pertinent part:
"Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in § 761.44 (a): The mark illustrated in Figure 1 is referred to as M_L throughout this subpart.

* * * * * * *

(8) Heat transfer systems (other that PCB Transformers) using PCBs (See also paragraph (e) of this section)...."

Paragraph (e) provides in pertinent part:

(e) As of October 1, 1979, applicable PCB Items in paragraph (a)...(8) of this section containing PCBs in concentrations of 50 to 500 ppm...shall be marked with mark M_L as described in §761.45(a).

5/ 40 C.F.R. § 761.30(d) provides, in pertinent part:
Use in heat transfer systems. After July 1, 1984, intentionally manufactured PCBs may be used in heat transfer systems in a manner other than a totally enclosed manner at a concentration level of less than 50 ppm provided that the requirements of paragraphs (d)(1) through (7) of this section are met.

(1) Each person who owns a heat transfer system that ever contained PCBs at concentrations above 50 ppm must test for the concentration of PCBs in the heat transfer fluid of such a system no later than November 1, 1979, and at least annually thereafter. All test sampling must be performed at least three months after the most recent fluid refilling. When a test shows that the PCB concentration is less than 50 ppm, testing under this paragraph is no longer required.

* * * * * * *

(3) After November 1, 1979, no heat transfer system that is used in the manufacture or processing of any food, drug, cosmetic or device, as defined in Section 201 of the Federal Food, Drug, and Cosmetic Act, may contain transfer fluid with 50 ppm or greater PCB (0.005% on a dry weight basis).

II. Background - Penalties Proposed:

The complaint proposed that a civil penalty be assessed against the Respondent in the following amounts for each of the violations alleged:

Count I:	Improper Recordkeeping	$ 1,000.00
Count II:	Improper Marking	$ 1,500.00
Count III:	Improper Use	$13,000.00
	Total Proposed Penalty	$15,500.00

III. Background - Processing of the Case:

Hodag responded to the complaint on January 19, 1988, contesting both the alleged violations and the appropriateness of the proposed penalty, and requested a hearing. The Respondent contended, both in denial and as an affirmative defense, that it was without knowledge that there was any PCB contaminated fluid in the heat transfer system of Hodag Chemical Corporation.

On May 9, 1988, the parties entered into a Stipulation of Facts (Joint [Jnt.] Exhibit [Exh.] 1). On June 21, 1988, the Complainant submitted a Motion for Partial Accelerated Decision which was denied by the undersigned on June 30, 1988. A hearing was held in Chicago, Illinois, on July 12 and 13, 1988. Thereafter, each party filed proposed findings of fact, conclusions of

law and a proposed order, together with a supporting brief or memorandum on September 29, 1988.6/

On the basis of the entire record, including the testimony elicited at the hearing, the stipulation of facts, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

6/ Following closing statements at the hearing, the parties jointly moved on the record that they be granted forty-five (45) days after notification of the availability of the transcript to file these submissions, which motion was granted pursuant to 40 C.F.R. § 22.26.

FINDINGS OF FACT

1. The Respondent is the Hodag Chemical Corporation, which is and was at all times relevant to the complaint herein, a corporation incorporated under the laws of the State of Illinois, with a place of business at 7247 North Central Park Avenue, Skokie, Illinois. Stipulation and Jnt. Exh. 1, p. 1.
2. The Respondent is a 35-year old company which manufactures anti-foam surface active agents as well as emulsifying agents. The Respondent employs 40 people. Respondent went through Chapter XI bankruptcy proceedings from June 25, 1982 to January 19, 1984. Stipulation and Jnt. Exh. 1, p. 1.
3. On February 28, 1986, Ms. Maria (Dorsey) White and Ms. Holly McDonald, representatives of EPA, inspected, in the presence of Mr. Kenneth Pettengill, the Respondent's facility located at 7247 North Central Park Avenue, Skokie, Illinois. Stipulation and Jnt. Exh. 1, p. 2; Transcript ("Tr.") 18, 23-24.
4. Mr. Kenneth Pettengill was the Vice President of Manufacturing for Respondent at the time of the inspection. Mr. Pettengill was in charge of the manufacturing equipment, including the operation and maintenance of the heat transfer system used at the facility. He had been employed by the Respondent since April 1977 and had served as Vice President of Manufacturing from August 1981 until his retirement on June 30, 1988. Stipulation and Jnt. Exh. 1, p. 2; Tr. 132-133, 163.

5. At the time of the inspection, Respondent had one heat transfer system in service which contained approximately 275 gallons (or five 55-gallon drums) of fluid. Stipulation and Jnt. Exh. 1, p. 2; Tr. 39, 146.

6. When Mr. Pettengill joined Hodag in 1977, he asked what fluid was being used in the heat transfer system. He was told by the head maintenance man that the fluid was Therminol 66 which Mr. Pettengill knew to be safe and non-hazardous. Hodag did not purchase any product containing PCBs after Mr. Pettengill joined the company. Tr. 133-134, 137, 145.

7. At the time of the EPA inspection on February 28, 1986, Respondent's heat transfer system was used in producing ingredients for cosmetics and food products and agents for use in manufacturing cosmetics and various food products. Stipulation and Jnt. Exh. 1, p. 4; Tr. 137-138, 165.

8. At the time of the EPA inspection on February 28, 1986, the EPA representatives took a sample of the Therminol 66 heat transfer fluid from Hodag's heat transfer system. The sample was numbered 86TS44-S01. Ms. McDonald gave Mr. Pettengill a signed and dated receipt for the sample which Mr. Pettengill also signed. Complainant's Exh. 2; Tr. 25.

9. On February 28, 1986, Ms. McDonald relinquished the sample numbered 86TS44-S01 to Mr. William Sargent of EPA who signed a Chain of Custody Record therefor. Complainant's Exh. 3; Tr. 28-31.

10. On March 7, 1986, the sample numbered 86TS44-S01 was received under official custody seal by the EPA National Enforcement Investigations Center (NEIC) in Denver, Colorado, from EPA Region V. By report dated July 7, 1986, the NEIC stated that the sample was diluted in hexane which was then cleaned with sulfuric acid and analyzed by electron-capture gas chromatography. The analysis revealed the presence of PCBs in 590 ppm. Complainant's Exh. 4; Tr. 31.

11. By a telephone call on July 21, 1986, EPA representatives advised Respondent that the concentration of PCBs in the heat transfer fluid was 590 ppm. Mr. Pettengill requested written confirmation of this information and was advised by EPA that it would take six to eight weeks before he could be provided with such written confirmation. However, Respondent did not receive written confirmation until receipt of the complaint herein in January 1988. Stipulation and Jnt. Exh. 1, p. 2; Tr. 154-156.

12. Sometime "much later" after the telephone report from EPA on July 21, 1986, Mr. Pettengill made an inspection of the company records to determine whether, at any time, Hodag had purchased a heat transfer fluid containing PCBs. He found, in the engineering files of the heat transfer system maintenance department, letters from Monsanto dated August 1, 1969

(Respondent's Exh. 1) and August 17, 1971 (Respondent's Exh. 3) and the Monsanto specification sheet for Therminol FR fluids (Respondent's Exh. 2). Mr. Pettengill was responsible for those records. Tr. 151-152, 162-163, 165, 179.

13. Based on the letter from Monsanto, dated August 1, 1969, and addressed to Hodag, attn: Mr. John Roach, Respondent had purchased Therminol FR-1 fluid for the heat transfer system from the Monsanto Company. Mr. John Roach was an employee of Hodag who left the company in 1970. Stipulation and Jnt. Exh. 1, p. 2; Respondent's Exh. 1.

14. When Respondent purchased the subject Therminol FR-1 fluid, Monsanto's specification sheet for Therminol FR heat transfer liquids, which included Therminol FR-1, stated that Therminol FR liquids are chlorinated biphenyls. Stipulation and Jnt. Exh. 1, p. 3; Respondent's Exh. 2.

15. Chlorinated biphenyls are, by definition, PCBs. Stipulation and Jnt. Exh. 1, p. 3.

16. By letter, dated August 17, 1971, addressed to Mr. H. Haasler of Hodag Chemical Corporation, Monsanto arranged with Respondent to ship, at no charge to Respondent, eight drums of Therminol 66 which were to be used as a replacement fluid for the previously purchased Therminol FR-1 fluid. Mr. Haasler left the employment of Hodag in 1972. Stipulation and Jnt. Exh. 1, p. 3; Respondent's Exh. 3.

17. In the August 17, 1971 letter, Monsanto directed Respondent to thoroughly drain the Therminol FR fluid from the heat transfer system. Monsanto said: "this means removing all of the FR fluid" and further explained that extra Therminol 66 fluid had been included to use as a flushing agent to remove any residual FR from the system. Monsanto included, with the shipment of Therminol 66, the extra fluid to be used as a flushing agent. Monsanto directed Respondent to replace the drained Therminol FR-1 fluid with the new Therminol 66 fluid and to ship the drained Therminol FR-1 fluid back to Monsanto at Monsanto's expense. Stipulation and Jnt. Exh. 1, p. 3; Respondent's Exh. 3.

18. Monsanto's August 17, 1971 letter directing replacement of Therminol FR-1 with Therminol 66 was written and sent to Hodag prior to the promulgation of the PCB Disposal and Marking regulations on February 17, 1978 (43 Fed. Reg. 7150). Stipulation and Jnt. Exh. 1, p. 3.

19. Monsanto's specification sheet for Therminol 66 heat transfer fluid states that Therminol 66 is composed of modified terphenyls and that Therminol 66 should not be confused with Monsanto's Therminol FR fire-resistant fluids. Stipulation and Jnt. Exh. 1, p. 3-4; Respondent's Exh. 4.

20. The term "PCB" was not used by Monsanto in the August 1, 1969 letter to Hodag, in the August 17, 1971 letter to Hodag, in the specification sheet for Therminol FR heat transfer liquids or in the specification sheet for Therminol 66 heat transfer fluid. Stipulation and Jnt. Exh. 1, p.3; Respondent's Exhs. 1, 2, 3 and 4.

21. On November 24, 1986, Respondent had a sample of the fluid from its heat transfer unit submitted to the Analytical Laboratory of Union Carbide Corporation for analysis. By report dated December 3, 1986, Union Carbide stated that its test showed the concentration of PCBs to be 430 ppm, plus or minus 50 ppm. Stipulation and Jnt. Exh. 1, p. 2; Respondent's Exh. 10; Tr. 156.

22. Respondent is the owner and operator of the heat transfer system which contained liquid contaminated with PCBs. Stipulation and Jnt. Exh. 1, p. 5.

23. On February 10, 1988, Monsanto, in response to a "recent" inquiry, wrote Mr. Pettengill of Hodag Corporation to explain that prior to 1972 several heat transfer fluids in the Therminol FR series of products contained various PCB formulations and to explain that Therminol 66 is not a PCB containing fluid. Respondent's Exh. 5; Tr. 159-160.

24. Respondent had the heat transfer system flushed and refilled with Therminol 66 on or about February 17, 1988. Tr. 166-168, 217-218; Respondent's Exh. 6.

25. Hodag has expended $9,381.93 to flush and refill the heat transfer system with the Therminol 66. Stipulation and Jnt. Exh. 1, p. 4.

26. Respondent requested, by purchase order dated June 10, 1988, that Chemical Waste Management, Inc. pick up, transport and incinerate 12 drums of waste at a cost of $2,319.00. Respondent's Exh. 9.

27. Respondent's total expenditure for removal and disposal of the PCB contaminated Therminol 66 liquid as of February 15, 1988, was estimated to be at least $12,901.93. Stipulation and Jnt. Exh., p. 4.

28. Hodag has had additional analyses of the fluid in the heat transfer system performed since the system was flushed and refilled. By reports dated February 18, 1988, March 1, 1988 and June 27, 1988 from Gulf Coast Laboratories, the tests have shown a concentration of PCBs in a range of from less than 5 ppm to 10 ppm. Respondent's Exh. 6, 7 and 8.

29. At the time of the inspection, the Respondent had not developed and maintained complete annual records for calendar years 1978 through 1984 for the 275 gallons of PCB fluids contained in its PCB Item, a heat transfer system. Stipulation and Jnt. Exh. 1, p. 5.

30. At the time of the inspection, the heat transfer system was not marked with a PCB label. Stipulation and Jnt. Exh. 1, p. 5; Answer p. 3.

31. Respondent had not tested the fluid in the heat transfer system for PCBs between the time of the publication of Part 761 in 1979 and the time of the EPA inspection in 1986. Complainant's Exh. 5, p. 2; Complainant's Exh. 6, p. 2; Tr. 42.

32. Mr. Pettengill was aware in 1979 that the PCB regulations went into effect because it was in the trade press. Tr. 144.

33. Hodag had not experienced any spillage or leaking of the heat transfer fluid from the heat transfer system during Mr. Pettengill's service with the company. The fluid was occasionally topped off because of fugitive emissions from the system. Tr. 140-141, 166.

34. The density of Therminol FR-1 is 10.9 pounds per gallon and the density of Therminol 66 is about 8.35 pounds per gallon. The weight of one 55-gallon drum of Therminol FR-1 is about 600 pounds. The weight of one 55-gallon drum of Therminol 66 is about 460 pounds. Respondent's Exh. 1; Tr. 156, 215-216.

DISCUSSION AND CONCLUSIONS

The Complainant is, by lawful delegation, the Director, Environmental Services Division, Region V, EPA.[7/] The Respondent is a "person" as defined in 40 C.F.R. § 761.3[8/] and is subject to the prohibitions set forth in 40 C.F.R. Part 761.[9/]

Respondent concedes that, at the time of the EPA inspection, it had not developed and maintained complete annual records for calendar years 1978 through 1984 for the 275 gallons of PCB fluids contained in the PCB Item, a heat transfer system. Respondent further concedes that at the time of the inspection, the heat transfer system was not marked with a PCB label. Respondent had not tested the fluid in the heat transfer system for PCBs between 1979 and 1986, and concedes, on the basis of the analysis which it had performed following the EPA inspection, that the fluid in the heat transfer system contained PCBs in excess of 50 ppm.

Nevertheless, Respondent denies any liability for the alleged violations on the grounds that to Respondent's knowledge, information and belief, there was no PCB content in the heat transfer

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7/ Stipulation & Jnt. Exh. 1, p. 1.

8/ 40 C.F.R. § 761.3 provides, in pertinent part: "'Person' means any natural or judicial person including any...individual, corporation...."

9/ Stipulation & Jnt. Exh. 1, p. 2. See also 40 C.F.R. § 761.1(b) which provides, in pertinent part: "This part applies to all persons who...use...PCBs or PCB Items. Substances that are regulated by this rule include...heat transfer fluids...."

system. Hence, Respondent contends that because it lacked knowledge, it did not violate the provisions of 40 C.F.R. Part 761.

I. Is Knowledge by Respondent Required to Find a Violation?

Respondent's contention that it is not liable because the violations were unknowing violations is not supported by the statute, its legislative history or precedent thereunder.

Respondent argues that its position is supported by Section 15(2) of TSCA, 15 U.S.C. § 2614(2) which provides in pertinent part:

> It shall be unlawful for any person to --
> 1. ...
> 2. use for commercial purposes, a chemical substance or mixture which such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 2604 or 2605 of this title, a rule or order under Section 2604 or 2605 of this title...
> 3. ...
> 4. ....

The Respondent's reliance upon this provision is misplaced. The complaint herein does not allege that Respondent used a chemical substance or mixture which was manufactured, processed, or distributed in commerce in violation of statute or regulation. EPA does not allege that the PCBs which Respondent admittedly used were illegally manufactured, processed or distributed. Instead, the complaint alleged certain use, recordkeeping and marking violations of regulations (40 C.F.R. Part 761) promulgated under Section 16 of TSCA, 15 U.S.C. § 2605. Hence, the statutory basis for the alleged violations is found in Section 15(1) and (3) of TSCA, 15

U.S.C. § 2614(1) and (3).[10/] Section 2614(1) makes it unlawful to fail to comply with any rule promulgated under Section 2605 and Section 2614(3) makes it unlawful to fail to establish or maintain records required by a rule issued under TSCA.

While Section 2614 (2) includes the requirement that Respondent "knew or had reason to know" that the chemical substance being used was manufactured, processed or distributed in violation of law, Section 2614(1) and (3) contain no requirement of knowledge by the Respondent in order to find a violation thereof or a violation of regulations issued thereunder. In other words, knowledge by the Respondent that it is committing a violation of Section 15 (1) and (3) of TSCA, 15 U.S.C. § 2614(1) and (3), is not a requirement for the finding of a violation thereof nor for the resulting imposition of a civil penalty under Section 16(a) of TSCA, 15 U.S.C. § 2615(a). Section 16(a) simply provides that "any person who violates a provision of Section 2614 of this title shall be liable..." In contrast, Section 16(b) provides that, in addition to civil penalties imposed under 16(a), a person who "knowingly or willfully" violates Section 15 shall be subject to certain criminal penalties. Thus, knowledge is relevant when criminal penalties are sought for a violation of Section 15, but not when civil penalties are sought for violations

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10/ See supra note 2.

of Section 15(1) and (3). Section 15 (1) and (3) "involve simply failure or refusal to comply with some regulatory provision of TSCA. As to those violations, the 'knowingly or willfully' requirement of Section 16(b) appears to add at least some degree of scienter not required for a civil violation."11/

Additional support for this conclusion is found in the Report of the House Committee on Interstate and Foreign Commerce on TSCA: "Although commission of one of the acts prohibited by Section 15 automatically makes one subject to the assessment of a civil penalty, the Administrator may take into consideration certain mitigating circumstances in determining the amount of the civil penalty. The Administrator shall consider....the degree of culpability...."12/ Thus, culpability is a matter to consider when determining the amount of the civil penalty, but not a matter to consider when determining liability.

Respondent's contention that it is not liable because the violations were unknowing violations must be rejected. A similar contention was rejected in AMTRAK 3/ where it was established that

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11/ D.W. Stever, Law of Chemical Regulation and Hazardous Waste, § 2.07[2][a], at 2-53 (1988) (emphasis added).

12/ H.R. Rep. No. 1341, 94th Cong., 2d Sess. 52, reprinted in Legislative History of the Toxic Substances Control Act...Prepared by the...Library of Congress for the House Comm. on Interstate and Foreign Commerce, 459 (Comm. Print 1976) (emphasis added).

13/ National Railroad Passenger Corporation (AMTRAK), (TSCA Docket No. VI-24C) (Final Decision, April 27, 1982).

AMTRAK had PCB transformers, but AMTRAK contended that a record-keeping violation should be overlooked because of "its reasonable belief that it had no PCB transformers." As the Judicial Officer said: "Proof that a respondent knowingly or willfully violated a regulation is not an element of the offense for purposes of assessing civil penalties....To adopt respondent's approach would undermine the purpose of the recordkeeping requirements by rewarding a lack of due diligence."14/ In conclusion, Section 15 (1) and (3) of TSCA, 15 U.S.C. § 2614(1) and (3) establishes a standard of strict liability. A violation may be found and a civil penalty may be assessed under TSCA for failure to comply with any requirement prescribed by Section 6, 15 U.S.C. § 2605, or any rule promulgated thereunder, or for failure to establish or maintain records or submit reports as required by TSCA, or any rule promulgated thereunder, even where the failure is unknowing or inadvertent or unintended.15/

II. Did Respondent Know of the Presence of PCBs?

Even if some degree of knowledge by Respondent that PCBs had been used in its heat transfer system were a prerequisite to finding a violation, there is sufficient evidence16/ in the record

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14/ Id. at 9 (footnote omitted).

15/ See generally, Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Col. L. Rev. 1435 (1979).

16/ 40 C.F.R. § 22.24 provides, in pertinent part, that: "Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

to establish that Respondent had implied knowledge, if not express knowledge, that the Therminol FR-1 fluid had been used in its heat transfer system, and that the fluid contained PCBs. Respondent possessed in its files correspondence with Monsanto which showed that Therminol FR-1 had been purchased and placed in the system in 1969 and a Monsanto specification sheet which stated that "Monsanto Therminol FR heat transfer liquids are chlorinated biphenyls." The parties stipulated chlorinated biphenyls are, by definition, PCBs.

Nevertheless, Respondent denies that it knew that Therminol FR-1 contained PCBs or that it knew that PCBs were in its heat transfer system. In support, it cites the fact that neither of the letters from Monsanto nor the specification sheet for Therminol FR-1 used the term PCB or PCBs or the term polychlorinated biphenyls. Instead they used only the term chlorinated biphenyl which, Respondent contends, was not considered a PCB, as a matter of common chemical engineering nomenclature, from about 1968 to 1978. Respondent also points to the fact that each of the Hodag employees who were the recipients of Monsanto's letters in 1969 and 1971 left Hodag in 1970 and 1972, respectively, and relies upon the testimony of Mr. Pettengill that he was unaware of the presence of PCBs in the heat transfer system until he was informed of the test results following the EPA inspection. Finally, Respondent emphasizes the Therminol FR-1 fluid was removed and replaced by Therminol 66 fluid at Monsanto's direction and expense in 1971. I will examine each of these contentions in order.

A. The Monsanto Documents and the Meaning of PCB.

Respondent contends that the Monsanto specification sheet, which used only the term chlorinated biphenyl and did not use the terms PCB, PCBs or polychlorinated biphenyl(s), did not provide sufficient notice to Respondent to support a finding that Respondent knew or should have known that PCBs had been present in the heat transfer system. In support, Respondent contends that chlorinated biphenyls were not considered PCBs from about 1968 to 1978. It argues that a chlorinated biphenyl is a monochlorinated biphenyl and that monochlorinated biphenyls were not considered PCBs as a matter of plain English and the common meaning of the prefix "poly" in chemical engineering nomenclature at that time. Respondent points out that "poly" means two or more. Hence, PCBs included all polychlorinated biphenyls but did not, as a matter of chemical engineering nomenclature from 1968 to 1978, include monochlorinated biphenyls.17/

17/ In its contention that Respondent was without notice that PCBs were present in its heat transfer system given the wording of Monsanto's documents and given the meaning of the term PCB or PCBs in common chemical engineering nomenclature from 1968 to 1978, I do not consider Respondent to be attacking the validity of 40 C.F.R. Part 761 or any part thereof. Moreover, the parties stipulated that: "The Polychlorinated Biphenyls ("PCBs") Disposal and Marking regulations were lawfully promulgated pursuant to Section 6 of TSCA, 15 U.S.C. 2605, on February 17, 1978 (43 Fed. Reg. 7150). The PCBs Manufacturing, Processing, Distribution in Commerce and Use regulations ("PCB rule") were lawfully promulgated on May 31, 1979 (44 Fed. Reg. 31514), and incorporated the disposal and marking regulations. The PCB rule was subsequently amended and partially recodified at 40 C.F.R. Part 761." Stipulation and Jnt. Exh. 1, pp. 1-2.

Respondent's contention misses the mark. The question is not how the term PCB may have been defined as a matter of common chemical engineering nomenclature from 1968 to 1978 or whether Monsanto actually used the term PCB or PCBs in its documents provided to Hodag. The question, for the purpose of determining liability herein and of Respondent's knowledge, is how the term PCB was defined in TSCA or the regulations promulgated thereunder.

Section 6(e) of TSCA established a detailed scheme to dispose of polychlorinated biphenyls, to phase out their manufacture, processing and distribution and to limit their use. However, the statute did not define polychlorinated biphenyls. When EPA first promulgated regulations to govern the disposal and marking of PCBs,[18/] PCB was defined to include "PCB Chemical Substance" which in turn was defined to mean "any chemical substance which is limited to the biphenyl molecule which has been chlorinated to varying degrees." Subsequently, when EPA promulgated the PCB Ban Rule[19/] to regulate, among other things, the use of PCBs, it modified and republished the PCB Disposal and Marking Rule as a part of an integrated single Part of the Code of Federal Regulations, Part 761, to implement Section 6(e) of TSCA. At that time, EPA changed the definition of PCB essentially to that which had been the definition of

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18/ 43 Fed. Reg. 7150 (February 17, 1978).
19/ 44 Fed. Reg. 31514 (May 31, 1979).

"PCB Chemical Substance" and deleted that term from the regulations. As a result, PCB was defined as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance."

Chief Judge Latchum of the United States District Court for Delaware has held, in a well-reasoned decision,20/ "that the express language of the definition [of PCB] in the regulations, when read in isolation, would seem to apply to all chlorinated biphenyls. It refers to biphenyl molecules 'chlorinated to varying degrees' without limitation. It does not provide 'to varying degrees greater than one.'"21/ The Court went on to say that the history of this definition of PCBs "dispels any doubts that it was understood to apply to MCBs,"22/ noting that EPA "adopted the policy of treating chlorinated biphenyls of all degrees of chlorination, including monochloro biphenyl, as PCBs well before the passage of TSCA....Congress was aware of these regulations and they were cited in the debates relating to Section 6(e) of TSCA."23/

20/ Dow Chemical Company v. Costle, 484 F. Supp. 101 (1980).
21/ Id. at 108.
22/ Id. at 109.
23/ Id. at 104 (emphasis in original).

The Court found that the public, in general, and industry representatives, in particular, were aware that the scope of EPA's definition of PCBs included MCBs even before that term was defined in Part 761 of the regulations published in May 1979 to implement Section 6(e) of TSCA.24/

Therefore, it is clear that, as a matter of law, the terms PCB and PCBs, as defined and used in 40 C.F.R. Part 761, include chlorinated biphenyls. The Respondent, like everyone else, is charged with knowledge of the provisions of Part 761.25/

The Respondent possessed a Monsanto specification sheet which discribed the Therminol FR heat transfer fluids as chlorinated biphenyls. Consequently, Respondent's contention that, based upon the Monsanto documents, it had no knowledge that PCBs were present in its heat transfer system, must be rejected.

B. Corporate Liability and Corporate Knowledge.

To further support its position that Respondent was without knowledge that PCBs were present in the heat transfer fluid, Respondent points to the fact that the employees who were the recipients, on behalf of Hodag, of the Monsanto correspondence and

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24/ Id. at 110.

25/ 44 U.S.C. § 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

specification sheets in 1969 and 1971, left Hodag in 1970 and 1972, respectively. Respondent also cites the lack of actual, express personal knowledge by Mr. Kenneth Pettengill, who joined Hodag in 1977 and served as Vice President of Manufacturing from August 1981 to July 1988.

Mr. Pettengill testified that when he joined Hodag in 1977, he was told that the heat transfer fluid was Therminol 66 which he knew to be safe and non-hazardous. He also testified that Hodag did not purchase any PCBs after he joined the company. Sometime after July 1986, Mr. Pettengill inspected the company records and found the letters from Monsanto and the Monsanto specification sheet for Therminol FR fluids.[26/] I found Mr. Pettengill to be a thoroughly credible witness and I find that Mr. Pettengill personally did not have actual express knowledge that PCBs were present in the system until he became aware of the test results following the inspection by EPA.

However, the fact that Mr. Pettengill did not possess actual express knowledge of the presence of PCBs does not resolve the question of Hodag's knowledge or of Hodag's liability. If any knowledge is required to establish the liability of the Respondent,

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26/ Tr. 133-134, 137-138, 145, 151-152, 154.

it would be corporate knowledge. The knowledge imputed to the corporation does not necessarily turn on the actual express knowledge or lack of such knowledge of a particular employee.

The corporation, as a legal entity, is an intangible being that can act and know and reason through the medium of persons working as its managers, agents and employees. As a general rule, private corporations are held to have constructive knowledge of all departments within the organization.27/

> "Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:
>
> '[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.'"28/

27/ Camacho v. Bowling, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983).

28/ U.S. v. Bank of New England, N.A., 821 F. 2d 844, 856 (1st Cir. 1987), cert. denied, 108 S. Ct. 328 (1987), quoting U.S. v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974).

Moreover, corporate officers are chargeable with knowledge of every fact concerning corporate affairs, including facts contained in the corporate books and records, which the exercise of ordinary diligence and the performance of their duties would give them.29/ The failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.30/ Mr. Pettengill, as Vice President of Manufacturing, was responsible for the heat transfer system. Documents establishing the presence of a PCB fluid, Therminol FR-1, in the heat transfer system from 1969 to 1971 were in the engineering files of the maintenance department. Mr. Pettengill was responsible for those records. He is charged with knowledge of the information contained in those records and that knowledge is imputed to the corporation.

Where a corporation has knowledge of information which would trigger a legal duty to act, it cannot escape its responsibility to so act because the particular official charged with the responsibility to insure that the corporation met its legal duty was unaware of that information.31/ The corporate form clearly pro-

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29/ Myzel v. Fields, 386 F. 2d 718, 736 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968); 19 C.J.S. Corporations § 762, at pp. 109-110 (1940).

30/ Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (D.M.D. Fl. 1970), aff'd. 441 F. 2d 728 (5th Cir. 1971), cert. denied, Howard v. Florida East Coast Ry. Co., 404 U.S. 897 (1971).

31/ USM Corp. v. SPS Technologies, Inc., 514 F. Supp. 213, 236 (N.D. Ill. 1981), aff'd, in part, and vacated, in part, on other grounds, 694 F. 2d 505 (7th Cir. 1982), cert. denied, 462 U.S. 1107 (1983).

vides a business venture with certain rights and benefits under the law. However, the corporate form does not in any way alter, reduce or relieve a business entity of its responsibilities under TSCA.

As Chief Justice Marshall said in the celebrated Dartmouth College case: "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law."32/ Although a corporation is a creature of the law (or a legal fiction as some have described it), it nevertheless is a person under the regulations implementing TSCA as much as is an individual operating a sole proprietorship. To accept Respondent's contention that it lacked knowledge because of personnel turnover and the lack of actual express knowledge by the Vice President of Manufacturing would amount to relieving Hodag of its responsibility because of the failure of Mr. Pettengill to become fully informed as to the presence of PCBs. Although Mr. Pettengill was unaware of the presence of the documents from Monsanto in the files for which he was responsible until some time after the EPA inspection, Hodag cannot escape its legal responsibilities under TSCA for that reason.

The development of a hazy corporate memory resulting from the simple passage of time and the accompanying turnover of personnel

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32/ Trustees of Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 636 (1819).

combined with a lack of due diligence by later hired officers or employees is not a basis to relieve a corporation of liability for a violation of TSCA and the requirements thereunder. Corporate liability is not reduced because the later hired officer or employee may have been neglectful in carrying out his personal responsibilities or personally may have lacked actual express knowledge that the corporation was in violation of the statute. As has been shown, the failure to know what could have been known with the exercise of reasonable inquiry and due diligence amounts to knowledge in the eyes of the law. To relieve a corporation of its liability for the reasons suggested by Hodag would encourage corporate officials and employees to remain uninformed and unknowledgeable as to the possible presence of PCBs. It would promote the absence of due diligence and the neglect of TSCA's PCB requirements within the corporate structure. With such important public interests as the protection of health and the environment at stake, it was clearly intended that corporations be held responsible for the acts or the failure to act of those to whom the corporations choose to entrust the conduct of their affairs, thus stimulating a maximum effort by corporations to assure adherence to the requirements of TSCA and the implementing regulations thereunder.

C. Monsanto's Role in the Removal of PCBs.

The fact that the Therminol FR-1 fluid was removed from the heat transfer system by the Respondent in 1971 at Monsanto's

expense and at Monsanto's direction does not alter Respondent's liability for any violations subsequently found. Monsanto gave Hodag very specific directions to thoroughly drain the Therminol FR-1 fluid from the heat transfer system, emphasizing that "this means removing all of the FR fluid" and explaining that extra Therminol 66 fluid had been included as a flushing agent to remove any residual FR-1 from the system. Any failure to follow these explicit instructions and thereby leave a residual PCB concentration was Hodag's failure--not Monsanto's. Hodag, as owner and operator of the heat transfer system, is the person to whom Part 761 applies in this case. Moreover, it strains ones credulity that the long since departed Hodag employee, Mr. H. Haasler, would not have made further inquiry of Monsanto in 1971 as to the reasons for Monsanto's free replacement of Therminol FR-1 with Therminol 66 only two years after the FR-1 fluid was purchased by Hodag.

When EPA issued the consolidated Part 761 in May 1979, it noted in the Preamble that "the PCB problem in heat transfer systems is generally one of residual PCB contamination of the non-PCB replacement fluids...[s]ince the Food and Drug Administration required the removal of PCB heat transfer fluids from these systems several years ago...."33/ EPA also noted that "PCBs were used as a heat transfer fluid in certain applications from 1962 to 1972. In the period from 1970 to 1972, approximately 90 percent of the heat

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33/ 44 Fed. Reg. 31534 (May 31, 1979).

transfer systems that used PCB fluid were refilled with non-PCB fluid. In spite of this refilling, most systems contain residual PCB concentrations."

Hodag is the owner and operator of the heat transfer system and had control over it from 1969 to the time of the inspection and afterwards. Hodag had an obligation to comply with the requirements of TSCA and Part 761 and must bear full responsibility for its failure to do so.

In summary, I must reject each of Respondent's arguments that it should not be held liable because it did not possess knowledge that Therminol FR-1 contained PCBs or that PCBs were in its heat transfer system.

I find that Respondent, Hodag Chemical Corporation, as a person under 40 C.F.R. Part 761, possessed direct information that PCBs were introduced into the heat transfer system in 1969 and consequently had actual knowledge of that fact. I further find that Hodag Chemical Corporation, at the very least, had knowledge of such facts and circumstances as would lead it, by the exercise of due diligence and reasonable inquiry, to conclude that even after the removal of the Therminol FR-1 in 1971, PCBs remained at concentrations above 50 ppm. I also find that Respondent possessed sufficient knowledge so as to lead it, through the further exercise of due diligence and reasonable inquiry (i.e. testing pursuant to 40 C. F. R. § 761.30(d)(1)) to conclude that the PCB concentration remained above 50 ppm following publication of the PCB Ban Rule in 1979.

I turn now to a consideration of the specific violations alleged in Counts I, II, and III of the Complaint.

III. Count I - Improper Recordkeeping:

Count I alleged that the Respondent had failed to develop and maintain PCB records in violation of 40 C.F.R. § 761.180(a). At the time of the inspection, the Respondent had not developed and maintained complete annual records for calendar years 1978 through 1984 for the 275 gallons of PCB fluids contained in its PCB item, the heat transfer system.

The initial question is whether the recordkeeping and reporting requirements of § 761.180(a) (supra note 3) apply to a facility using a heat transfer system containing PCBs.[34/] In attempting to answer this question, I must say that I find § 761.180(a) less than crystal clear. The introductory text of Section 180 states that

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34/ The Respondent contends that the weight of PCBs in the heat transfer system, using the EPA test figure of 590 ppm, would be .616 kilograms and hence, EPA failed to prove that Respondent had stored or used at one time at least 45 kilograms of PCBs. Complainant disputes Respondent's contention and points out that the definition of PCBs includes "any combination of substances which contain such substance." Hence, contrary to the Respondent's position, the definition of PCB does not restrict the term to pure PCBs. Complainant contends that the weight of the total amount of PCB contaminated fluid contained in the heat transfer system, which was approximately 1045 kilograms, must be used to determine whether the 45 kg turnkey amount is met. Although I need not reach Respondent's contention because I dispose of this count on other grounds, I find the Complainant's interpretation of the regulation to be correct and hence, the 45 kg turnkey amount was met in this case.

the "section contains recordkeeping and reporting requirements that apply to PCBs [and] PCB Items...that are subject to the requirements of the part." The heading for paragraph (a) of Section 180 is: "PCBs and PCB Items in service or projected for disposal." A PCB Item is defined as "any PCB Article, PCB Article Container, PCB Container, or PCB Equipment that deliberately or unintentionally contains or has [as] a part of it any PCB or PCBs."35/ Thus, "PCB Item" is a broad term which encompasses anything that contains or has as a part of it PCBs. If one relied solely upon the introductory text of the section and the heading of the paragraph, one might conclude that the requirements of the section applied to a facility using PCBs or any PCB Item, including a heat transfer system.

However, the operative regulatory text of paragraph (a) is not that broad. The operative regulatory text requires the owner or operator of a facility using or storing PCBs contained in specific types of PCB Items, namely PCB Container(s), PCB Transformers and PCB Voltage Capacitors, to develop and maintain such records.36/ The specific reporting requirements of paragraph (a) lend support to a conclusion that § 180(a) applies only to certain specific PCB Items and not to all PCBs and all PCB Items. Thus, for example,

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35/ 40 C.F.R. § 761.3.

36/ PCB Container is listed in the definition of PCB Item. PCB Article, which is also listed in the definition of PCB Item, is defined as including capacitors and transformers. See 40 C.F.R. 761.3.

the quantities of PCBs and PCB Items which must be included in the annual document pursuant to subparagraphs (1)(i) and (3)(i) are described as "total weight in kilograms of any PCBs and PCB Items in PCB Containers." Thus, only where the PCBs or PCB Items are in PCB Containers do these specific reporting requirements apply.

A review of the initial promulgation and subsequent development of the recordkeeping requirements of § 761.180(a) supports the conclusion that the requirements apply only to certain specific PCB Items, i.e., PCB Containers, PCB Transformers and PCB Voltage Capacitors. Initially, the requirements of § 761.180(a) were published as § 761.45 which read as follows:

> § 761.45 Records and monitoring.
>
> (a) PCB's in service or projected for disposal. Beginning July 2, 1978, each owner or operator of a facility containing at least 45 kilograms (99.4 pounds) of PCB chemical substances or PCB mixtures contained in a PCB container or PCB containers, or one or more PCB transformers, or 50 or more PCB large, high or low voltage capacitors shall develop and maintain records on the disposition of PCBs.[37/]

In the preamble to the proposed rule, EPA explained that while the provision affected "all persons who own or operate storage or disposal facilities," it only affected "some persons with PCBs in service."[38/] EPA went on to say that the "regulation contains

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37/ 43 Fed. Reg. 7163 (February 17, 1978).
38/ 42 Fed. Reg. 26566 (May 24, 1977) (emphasis added).

requirements for recordkeeping for selected PCBs that are projected for eventual disposal. Recordkeeping is also required for owners and operators of facilities used for the disposal and storage of waste PCBs."39/ Thus, the requirements were not intended to apply to all users of PCBs nor to all PCBs. The requirements were intended to apply only to some users of PCBs and to selected PCBs, namely: "each owner or operator of a facility containing at least 45 kilograms (99.4 pounds) of PCB...contained in...PCB containers...PCB transformers or...PCB... voltage capacitors...." Clearly, neither the present form of the literal operative regulatory language nor its "legislative history" supports a conclusion that the reporting and recordkeeping requirements apply to all owners and operators of any facility using or storing the required weight of PCBs contained in any PCB Item.

There have been two substantive changes to this provision since its initial publication.40/ First, changes were made in 1979 as a result of the deletion of the terms "PCB Chemical Substance" and "PCB Mixture" from the Part, the addition of the term "PCB Item" to the Part and the revision of the definition of PCB.41/ There is no indication in the preamble to the rule that, as a result of these revisions, any change was intended in scope or

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39/ Id. at 26570 (emphasis added).
40/ Redesignations are not considered substantive changes.
41/ 44 Fed. Reg. 31514 (May 31, 1979).

reach of the requirements of the section, or that the requirements were intended to apply to all PCBs or to all PCBs contained in any PCB Items.42/

The second change was simply the addition of the introductory text at the beginning of the Section.43/ In summary, the historical background of Section 761.180(a) supports the conclusion that the recordkeeping and reporting requirements apply only to owners or operators of facilities using or storing at least 45 kilograms of PCBs contained in specific types of PCB Items, namely PCB Container(s), PCB Transformers and PCB Voltage Capacitors.

Clearly, a heat transfer system is not a transformer or a voltage capacitor. The remaining question is whether a heat transfer system containing PCBs is a PCB Container. "PCB Container" is defined as "any package, can, bottle, bag, barrel, drum, tank, or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs."44/ When the term "PCB Container" was first defined in the 1978 regulations concerning PCB disposal and marking, EPA explained in the preamble that the "definition is meant to cover containers where PCB chemical substances or PCB mixtures are, or have been, in direct contact with their internal or external surfaces <u>but where the PCB chemical substances or mixtures are, or were not performing any</u>

42/ 44 Fed. Reg. 31524.
43/ 49 Fed. Reg. 28191 (July 10, 1984).
44/ 40 C.F.R. § 761.3.

function."[45] In further explanation, EPA had said in the preamble to the proposed rules[46] that a PCB Container "simply contains PCB chemical substances or mixtures. This differs from a PCB article where the PCB chemical substances or PCB mixtures are essential to the proper functioning of the article."[47]

A "PCB Article" is defined as "any manufactured article, other than a PCB Container, that contains PCBs and whose surface(s) has been in direct contact with PCBs. 'PCB Article' includes capacitors, transformers, electric motors, pumps, pipes and any other manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the PCB Article."[48] When the term "PCB Article" was first defined in the 1978 PCB disposal and marking rules, EPA explained in the preamble that "examples of PCB articles are piping, pumps, radiators and other components of heat transfer systems...that use PCB chemical substances and PCB mixtures as an internal coolant."[49]

45/ 43 Fed. Reg. 7150 (February 17, 1978) (emphasis added).
46/ 42 Fed. Reg. 26564 (May 24, 1977).
47/ Id. at 26566 (emphasis added).
48/ 40 C.F.R. § 761.3.
49/ 43 Fed. Reg. 7150 (February 17, 1978) (emphasis added). See also 42 Fed. Reg. 26564.

It is clear from the history of Part 761 that EPA intended that heat transfer systems be treated as PCB Articles and not as PCB Containers. Therefore, I conclude that Hodag's heat transfer system is not a PCB Container. Section 761.180(a) does not apply to Respondent because Hodag had not used or stored PCBs in a PCB Container between July 2, 1978 and the date of the Complaint.

As the Judicial Officer has said when describing another provision of the PCB regulation: "The language of the regulations in question is unclear and misleading, and as a consequence, it would be manifestly unfair to impose a monetary penalty on anyone who failed to interpret the regulations in a manner advocated by the Complainant."50/ To paraphrase a later passage in that decision: This is especially true since it is readily apparent that the draftsman of the regulation could have easily inserted the word "item(s)" for the word "container(s)" in the operative language of the Section.

In summary, Complainant has failed to establish a violation of Section 761.180(a) and Count I of the complaint must be dismissed.51/

50/ In re Liberty Light & Power, TSCA Docket No. VI-8C, Final Decision No. 81-4, at 3.

51/ This is not to say that no recordkeeping requirements apply to the use of PCBs in heat transfer systems. Data obtained as a result of test sampling required by § 761.30(d)(1) must be retained for five years after the heat transfer system reaches 50 ppm PCB pursuant to §761.30(d)(5).

IV. Count II - Improper Marking:

Count II alleged that the Respondent failed to mark its heat transfer system with a PCB label in violation of 40 C.F.R. § 761.40(a)(8).52/ The marking requirements of that section require that heat transfer systems using PCBs be marked with a PCB label as illustrated in 40 C.F.R. § 761.45(a). At the time of the inspection in 1986, the heat transfer system was not marked with a PCB label. The heat transfer system contained liquid contaminated with PCBs in excess of 50 ppm. Respondent is the owner and operator of that heat transfer system. Therefore, Respondent's failure to mark the system is a volation of 40 C.F.R § 761.40(a)(8) and 15 U.S.C. § 2614.

4. Count III - Improper Use:

Count III alleged that the Respondent failed to reduce the concentration of PCBs in its heat transfer system to below 50 ppm in violation of 40 C.F.R. § 761.30(d)(1) and (d)(3).53/ These provisions of the regulations permit the use of PCBs in heat transfer systems in a manner other than a totally enclosed manner54/ after

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52/ See supra note 4.
53/ See supra note 5.
54/ In the Preamble to the consolidated Part 761 in May 1979, EPA found that "Heat transfer systems are, by and large, relatively, but not totally enclosed systems and, therefore, their use of PCBs is not in a totally enclosed manner....However, good maintenance practices will minimize the quantity of fluids that may be lost. For most systems, the loss of PCB fluid is well controlled and the corresponding amount of top-off fluid added to these systems is very small." 44 Fed. Reg. 31534 (May 31, 1979). Hodag's heat transfer fluid was occasionally topped off because of fugitive emissions from the system. Therefore, the heat transfer system was not operated in a totally enclosed manner, i.e., in a "manner that will ensure no exposure of human beings or the environment to any concentration of PCBs." 40 C.F.R. § 761.3.

July 1, 1984, provided that the concentration of PCBs so used is less than 50 ppm. If the heat transfer system ever contained PCBs in a concentration above 50 ppm, the system must have been tested by November 1, 1979 and annually thereafter until the concentration of PCBs was below 50 ppm. However, if the heat transfer system was to be used in the manufacture or processing of any food or drug after November 1, 1979, the concentration of PCBs may not exceed 50 ppm after that date. At the time of the inspection, Respondent had a heat transfer system in service; it contained approximately 275 gallons of fluid contaminated with PCBs. Between 1969 and 1971, the heat transfer system had contained Therminol FR-1, a heat transfer fluid which contained chlorinated biphenyls or PCBs. The Therminol FR-1 was drained from the system and replaced with Therminol 66 in 1971. Tests on the fluid sample taken by EPA in February 1986 revealed the presence of PCBs in a concentration of 590 ppm. A subsequent test in November 1986 by Union Carbide Corporation, taken at the request of Respondent, showed the concentration of PCBs to be 430 ppm, plus or minus 50 ppm. Hence, the concentration of PCBs was in excess of 50 ppm. Respondent's heat transfer system was used in manufacturing products and agents for use in the production of cosmetics and various food products. Respondent had not tested the fluid in the heat transfer system for PCBs between the time of the publication of Part 761 in 1979 and the EPA inspection in 1986. Therefore, I find that Respondent was in violation of 40 C.F.R. § 761.30(d)(1) and (d)(3) and 15 U.S.C. § 2614.

CIVIL PENALTY

Having found violations of 40 C.F.R. § 761.40(a)(8) (Count II) and 40 C.F.R. § 761.30(d)(1) and (d)(3) (Count III), I must now determine the amount of the recommended civil penalty to be assessed for each violation.

I. Obligations of the Presiding Officer in Assessing a Penalty.

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), provides: "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."

40 C.F.R. § 22.27(b) provides, in pertinent part:

> (b) Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Clearly, the degree of discretion which I possess in determining the recommended civil penalty is defined and delimited by the statutory criteria described in Section 16(a)(2)(B) and further restricted by the regulatory requirements to "consider any civil penalty guidelines issued under the Act" and to explain my reasons for any deviation from the amount of penalty recommended in the complaint. Thus, I do not possess the discretion simply to set a civil penalty at a figure which I might personally believe, based purely on my subjective judgment, to be "fair" or "appropriate" or "equitable."

Section 22.27(b) requires me to consider the EPA civil penalty guidelines. While the guidelines are not regulations, Section 22.27(b) is a regulation. As the Judicial Officer has said: "the penalty guidelines constitute an interpretation of the statutory factors set forth in TSCA § 16(a)(2)(B)...and the Administrator, not the Complainant, has specifically directed the presiding officer in § 22.27(b) of the procedural rules to give that interpretation consideration. Therefore, since the presiding officer is obviously bound to apply the statutory factors, the Administrator's direction to him to give consideration to a particular interpretation, i.e., the penalty guidelines, is the same, in terms of its legal effect, as any other regulation the Administrator might issue construing the statute; and, in that regard, the presiding officer properly observed that the requirement to give the guidelines consideration is 'entirely in accordance with the settled rule that

agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate. [Citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)].'"55/

Therefore, I am bound, pursuant to regulations, to consider the penalty guidelines. To "consider" means "to fix the mind on, with a view to careful examination," "to deliberate about and ponder over" and "to entertain or give heed to."56/ Thus, the obligation to consider the penalty guidelines means more than giving them a cursory reading or some slight scrutiny in passing. "Consider suggests a conclusion reached through reflection."57/

While I must consider the civil penalty guidelines in determining the amount of the recommended civil penalty pursuant to Section 16(a)(2)(B) of TSCA and must set forth specific reasons for assessing a penalty different in amount from that recommended by the Complainant, I am not bound to assess the same penalty as that proposed by the Complainant.58/ I may assess a different penalty if, upon consideration I conclude, for example, the guidelines

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55/ Bell and Howell Company,(TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 10, n. 6.
56/ Black's Law Dictionary (5th ed. 1979).
57/ Webster's New Dictionary of Synonyms (1968).
58/ In re: Electric Service Company, TSCA Docket No. V-C-024, Final Decision No. 82-2, at 20, n.23.

have been improperly interpreted and applied by the Complainant; or circumstances in the case warrant recognition, or, where they may have been recognized by the Complainant, warrant a weight, not accorded them by EPA;59/ or the penalty calculated and recommended by the Complainant under the guidelines is somehow not consistent with the criteria set forth in the Act.

59/ Thus, for example, the Judicial Officer has held that: "There is nothing in the guidelines which suggests that a presiding officer is required to assess a penalty in an amount which is identical to one of the amounts shown in the matrix.... The guidelines were never intended to establish an inflexible policy which would force the presiding officer to elect between one amount or the other.... Instead, it is better to view the amounts shown in the matrix as points along a continuum, representing convenient benchmarks for purposes of proposing and, in some instances, assessing penalties. Accordingly, if warranted by the circumstances, other points along the continuum may be selected in assessing a penalty. Although the guidelines do not purport to give specific guidance on how this should be done, it seems evident that, at a minimum, the additional evidence adduced at a hearing can be used as a basis for justifying deviations (up or down) from the amounts shown in the matrix. In other words, by viewing the amounts shown in the matrix as benchmarks along a continuum, a range of penalties...becomes available to account for, among other things, some of the less tangible factors which the presiding officer is in a unique position to evaluate. Moreover, the existence of this range constitutes tacit acknowledgment of the fact that, no matter how desirable, mathematical precision in setting penalties is impossible." Bell and Howell Co., (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), at 18-19 (emphasis added).

II. The TSCA Penalty Guidelines and PCB Penalty Policy.

The EPA has issued Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substance Control Act.[60/] The guidelines are in two parts: a general TSCA Civil Penalty System[61/] and a PCB Penalty Policy.[62/] The general TSCA Civil Penalty System sets forth a general penalty assessment policy which is designed to establish standardized definitions and applications of the statutory factors that Section 16(a)(2)(B) of TSCA requires the Administrator to consider in assessing a penalty.[63/] The TSCA Civil Penalty System provides the general framework within which the specific penalty guidelines of the PCB Penalty Policy were developed. Under the System, penalties are determined in two stages.

First, a "gravity-based penalty" (GBP) is calculated based upon the "nature" of the violation; the "extent" of environmental harm that could result from a given violation; and the "circumstances" of the violation. These factors are incorporated in a matrix from which the amount of the GBP is calculated.

60/ 45 Fed. Reg. 59770 (September 10, 1980).
61/ Id. at 59770-59776.
62/ Id. at 59776-59783.
63/ Id. at 59770.

Second, after the GBP figure has been determined, it is adjusted upward or downward in consideration of the remaining statutory factors: culpability; history of such violations; ability to pay; ability to continue in business; and such other matters as justice may require.

The regulation's specific penalty assessment guidance contained in the PCB Penalty Policy incorporates the approach used in the general guidelines in the TSCA Civil Penalty System. In calculating the GBP under the PCB Penalty Policy, the "nature" factor is the same for all violations because all violations of Part 761 are chemical control violations. Thus, to calculate the GBP for PCB violations, one considers the remaining two factors: (1) the "extent" of environmental harm, which is determined by the amount and concentration of the PCB material involved; and (2) the "circumstances" or "probability for damage" which is determined by eight categories of violation by type, e.g., "marking" violations or "use" violations.

III. Application of the Guidelines and Policy.

A. Calculations of the GBP -- "Extent."

In this case, the amount and concentration of the PCB material involved was 275 gallons of heat transfer fluid containing 590 ppm PCBs. Under the PCB Penalty Policy the "extent" factor for the marking violation (Count II) is "minor."64/ With a concentration

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64/ Id. at 59779.

of 590 ppm PCBs, the "Concentration Adjustments" section of the Policy provides that the total amount of PCB material involved should be reduced by 50 percent to determine the extent of probable damage.65/ Thus, the amount of PCB contaminated fluid to be considered in calculating the penalty is set at 1/2 of 275 gallons or 137.5 gallons which falls in the minor range of less than 220 gallons.66/ If the concentration of 430 ppm is used, the result would be the same. Although the amount of PCB material would be reduced by 70 percent, the resulting amount of PCB contaminated fluid (82.5 gallons) remains less than 220 gallons and hence, falls in the minor range.

The "extent" factor for the "use" violation (Count III) is classified as "significant."67/ There would be no adjustment to the 275 gallons of PCB contaminated fluid under the "Concentration Adjustment Calculation." The PCB Penalty Policy specifically provides: "The concentration reduction also does not apply where the violation is the failure to test liquid required to be tested; for example, the contents of a heat transfer system that has contained PCBs, 40 C.F.R. 761.31(d)(1). In such cases, the risk created by the violation is that the fluid will be high concentration PCBs and that this material will continue in use. Thus, the

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65/ Id. at 59779-59780.
66/ Id. at 59779.
67/ Id. at 59779.

Agency feels that these persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration."68/

B. Calculation of the GBP -- "Circumstances:"

As for the "circumstances" or the probability of damages, the TSCA Civil Penalty System establishes three ranges, each with two levels.69/ To assess the probability of damages from a particular type of PCB violation under the PCB Penalty Policy, the possible violations are grouped into eight categories which include "Marking" and "Use." The failure to mark the heat transfer system (Count II) would be classified as a major marking violation which is described as a situation where there is no indication to someone who is unfamiliar with the situation that PCBs are present. A major marking violation falls at Level three of the Medium Range.70/

The improper use of PCBs (Count III) falls at Level two of the High Range: "Improper use of PCBs or using PCBs in violation of any condition of authorization."71/

68/ Id. at 59780.
69/ Id. at 59772.
70/ Id. at 59780.
71/ Id. at 59780.

C. Calculation of the GBP -- "Application of the Matrix:"

The initial GBP for Counts II and III using the GBP Matrix[72/] would be as follows:

Count II	Extent:	Minor
	Circumstances:	Level 3
	GBP:	$ 1,500.00
Count III	Extent:	Significant
	Circumstances:	Level 2
	GBP:	$13,000.00

D. Application of the Remaining Factors:

To complete the penalty calculation after computing the GBP, I must consider the several remaining factors listed in Section 16(a)(2)(B) of TSCA: the degree of culpability; history of prior such violations; ability to pay; ability to continue in business; and such other matters as justice may require.

(1) The Degree of Culpability: Even though TSCA establishes a standard of strict liability for violations of the statute, it still requires me to consider the culpability of the violator as an adjustment factor when calculating the penalty. Where the violation is willful, an upward adjustment is called for in the guidelines.[73/] I cannot conclude that the violation here was willful.

72/ Id. at 59777.
73/ Id. at 59773.

A willful violation of a legal requirement for which civil penalties are imposed has been characterized as a purposeful or obstinate act in intentional disregard or plain indifference to the legal requirement.74/ Nothing in the record would support such a characterization of Respondent's conduct or attitude.

Where the "violator lacked sufficient knowledge of the potential hazard created by his conduct and also lacked control over the situation to prevent occurrence of the violation,"75/ a downward adjustment is appropriate. As for Hodag's knowledge of the potential hazard, Hodag is charged with knowledge of the relevant TSCA requirements and of Part 761 of the regulations. (See note 25, supra.) Moreover, as the guidelines provide: "The lack of knowledge of a particular requirement would not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of TSCA and its requirements."76/

Finally, the Vice President for Manufacturing was aware of the requirements. In not testing the heat transfer fluid for PCBs, in using a heat transfer system containing PCBs in excess of 50 ppm in the manufacture of products for use in foods and cosmetics and in

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74/ United States v. Illinois Cent. R.R. Co., 303 U.S. 239, 242-243 (1938). In contrast, when used in a criminal statute, willful has been characterized as meaning "with a bad purpose" or "with an evil intent without justifiable excuse." See United States v. Murdock, 290 U.S. 389, 394 (1933); Felton v. U.S., 96 U.S. 699, 702 (1878).

75/ 45 Fed. Reg. 59773 (emphasis added).

76/ Id. at 59773.

not properly marking the system, Hodag knew or should have known of the potential hazard created by its actions. As previously concluded,[77/] Hodag possessed direct information that PCBs, namely chlorinated biphenyls, were introduced into the heat transfer system in 1969 and consequently, the Respondent knew of that fact. Moreover, as previously concluded, Hodag, at the very least, had knowledge of such facts and circumstances as would lead it, by the exercise of due diligence and reasonable inquiry, to knowledge that the PCB concentration in the heat transfer system remained above 50 ppm in 1979.

Hodag possessed sufficient control over the situation to prevent the violation. When the Therminol FR-1 was removed at Monsanto's direction and expense in 1971, Hodag received very specific instructions from Monsanto concerning the care necessary to insure that Hodag removed all of the old fluid before replacing it with Therminol 66. While Monsanto had a role in the initial introduction of PCBs into the heat transfer system through the production and sale to Hodag of Therminol FR-1, it subsequently replaced the Therminol FR-1 with non-PCB fluid at its own expense. That fact, coupled with the specific instructions which Monsanto sent Hodag concerning the proper manner of replacement, relieves

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77/ See supra, pp. 32-33.

Monsanto of any share in the responsibility which Respondent may, by implication, have attempted to attribute to it for the violative conditions found during the inspection in 1986.

I conclude that the violator, Hodag, had sufficient knowledge to recognize the hazard created by its conduct. Further, Hodag possessed significant control over the situation sufficient to avoid committing the violation. Hence, no downward adjustment of the GBP is appropriate.

In assessing Hodag's "attitude," the promptness of its corrective actions and its efforts to comply with the pertinent provisions of Part 761 must be examined. EPA notified Hodag by telephone on July 21, 1986 that the concentration of PCBs in the heat transfer fluid was 590 ppm. After awaiting written confirmation from EPA for some four months, Hodag had a sample of the fluid submitted for analysis on November 24, 1986. Hodag received the results in early December 1986. The results showed the concentration of PCBs to be significantly in excess of 50 ppm. Nevertheless, Hodag continued to use the heat transfer system in manufacturing agents for use in cosmetics and various food products for more than a year before it had the system flushed and refilled. Even though Respondent had actual express knowledge based upon the tests it had initiated that it was in violation of TSCA requirements, it did not take action to reduce the PCB level in the heat transfer fluid until February 1988 and then only after the complaint was issued herein. The requirement that heat transfer systems used in the manufacture

of any food or cosmetics must contain less than 50 ppm PCBs after November 1, 1979 was established because, "in the event of a heat transfer system rupture, PCBs would contaminate a product that would come in direct contact with humans, either through injestion or though application to the skin....[L]eakage of PCBs into a food [or]...cosmetic...provides a direct avenue for PCBs to enter the human body."78/

As the Court of Appeals for the District of Columbia has noted: "The special attention accorded to PCBs in the Toxic Substances Control Act resulted from the recognized seriousness of the threat that PCBs pose to the environment and human health."79/ In this case, one might say that the extra special attention accorded by EPA to PCBs found in heat transfer systems used in the manufacture of food and cosmetic agents resulted from the special and significantly serious threat that such PCBs pose to human health. Or to put it more succinctly, the use of PCBs in such systems poses more than the usual serious threat that PCBs generally pose to human health. Only after the passage of more than a year following the receipt of its own test results, and then only after the receipt of a formal complaint from EPA, did Hodag recognize that the threat to human health was significant enough to

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78/ 44 Fed. Reg. 31534 (May 31, 1979).
79/ Env. Def. Fund v. Env. Prot. Agency, 636 F. 2d 1267, 1271 (D.C. Cir. 1980).

warrant once again draining and flushing its heat transfer system. Such behavior could not conceivably be classified as a "good faith" effort to comply with TSCA and Part 761 or as a prompt corrective action. Therefore, no downward adjustment of the GBP is warranted.

Nor do I consider an upward adjustment warranted because there is no objective evidence, such as statements or actions of the violator, to justify an upward adjustment. Even though the lack of promptness in taking corrective action clearly contravenes a downward adjustment, Respondent did make a good faith effort to correct the problem after the issuance of the complaint.

(2) History of prior such violations: There is no evidence of prior violations of TSCA by the Respondent.

(3) Such other matters as justice may require:

(a) Government clean-up costs: There were no Government clean-up costs in connection with these violations of TSCA.

(b) Gains from noncompliance: On this record, it cannot be determined whether Hodag profited from its violative acts, that is, whether Hodag would receive any economic gains from its delay in acting to test, flush and refill the system. However, when Hodag ultimately acted, it expended over $9,000.00 to have the system flushed and refilled and over $2,000.00 to dispose of the old heat transfer fluid. Moreover, the penalty assessed appears to be of sufficient size at least to substantively diminish any economic gain which Hodag might have realized by its delay in complying.

(c) Other factors as justice may require: Among the other factors "as justice may require" suggested in the guidelines, only those dealing with Hodag's expenditure to correct the violation come into play. As for the money spent to flush and refill the system and to dispose of the PCB contaminated fluid, there should be no reduction unless together with the GBP calculated penalty, the total cost to Hodag is "excessive for the particular violation." I find no rational basis on which to conclude that the total cost is excessive in the circumstances of this case. The fact that tests conducted following Hodag's corrective action demonstrate a presence of PCBs at 10 ppm or less does not constitute circumstances where expenditures were made for environmentally beneficial purposes above and beyond those required by law. The system was required to be tested, flushed and refilled so that the PCBs which were present were reduced below 50 ppm. The fact that the level is at 10 or less rather than, for example, at 49, simply demonstrates that the job was well done. There is no evidence that the process cost more because of the results achieved.

(4) Ability to pay and ability to continue in business: The guidelines put the burden on the Respondent to raise inability to pay or inability to continue in business.80/ Although the

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80/ 45 Fed. Reg. 59775.

Respondent went through Chapter XI bankruptcy proceedings from June 25, 1982 to January 19, 1984, no evidence was introduced to demonstrate an inability to pay the proposed penalty or to show that the proposed penalty would present so great a burden as to pose the threat of destroying, or even severely impairing, Hodag's business. Further, no evidence was introduced to show that the proposed penalty exceeds four percent of total sales. Therefore, no adjustment is appropriate.

IV. Conclusion.

Accordingly, I find that the appropriate penalty is as follows:

Count II	$ 1,500.00
Count III	13,000.00
Total	$14,500.00

O R D E R 81/

Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), a civil penalty in the amount of $14,500.00 is hereby assessed against the Respondent, Hodag Chemical Corporation, for the violations of the Act found herein.

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

U.S. Environmental Protection Agency
Region V
Attn: Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

Henry B. Frazier III
Henry B. Frazier, III
Administrative Law Judge

DATED: November 16, 1988

81/ Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

CERTIFICATE OF SERVICE

IN THE MATTER OF	>	
	>	
Hodag Chemical Corporation	>	DOCKET # TSCA-V-C-28-88
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	>	
	>	
	>	

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RECEIVED
EPA HEARING CLERK

I HEREBY CERTIFY THAT COPIES OF THIS INITIAL DECISION AND CETIFICATE OF SERVICE WERE SENT CERTIFIED MAIL TO THE FOLLOWING PARTIES ON NOVEMBER 23, 1988.

(CERTIFICATE ONLY)

Honorable Henry Frazier, III
Administrative Law Judge
U.S. Environmental Protection Agency
401 M Street S.W.
(A-110)
Washington, D.C. 20460

(INITIAL DECISION AND CERTIFICATE)

Eugene Propp, Esquire
Tropp & Schmidt
Three First National Plaza
Suite 525
Chicago, Illinois 60602

Scott Dismukes, Esquire
Suzanne Glade, Esquire
U.S. Environmental Protection Agency
Regional Counsel
230 South Dearborn
Chicago, Illinois 60604

INITIAL DECISION, CERTIFICATE AND ORIGINAL FILE
NOVEMBER 28, 1988
Bessie Hamilton (Regional Hearing Clerk)
U. S. Environmental Protection Agency
(A-110)
401 M Street S.W.
Washington D.C. 20460

BEVERELY SHORTY

Beverely Shorty
Regional Hearing Clerk

November 28, 1988