

8/105/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

8/105/89
P 2: 03

IN THE MATTER OF:)	DOCKET NOS.	
)		
CITY OF DETROIT, PUBLIC LIGHTING DEPARTMENT)	TSCA-V-C-82-87)
))
CITY OF DETROIT, WATER AND SEWERAGE DEPARTMENT)	TSCA-V-C-83-87)
))
CITY OF DETROIT, COMMUNITY AND ECONOMIC DEVELOPMENT DEPARTMENT)	TSCA-V-C-94-87)
))
CITY OF DETROIT AND LYNCH ROAD PROPERTIES, INC.,)	TSCA-V-C-92-87)
))
RESPONDENTS))
))

CONSOLIDATED

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

1. Provisions of 40 C.F.R. §761.180(b) require that each owner or operator of each facility used for the storage or disposal of PCBs and PCB items shall, by July 1, 1979, and each July 1 thereafter, prepare and maintain a document consisting of specified information relating to such materials so handled during the previous calendar year and that such document be available at such facility for inspection by authorized representatives of the Environmental Protection Agency, and Respondent's failures to so prepare such annual documents and maintain same at its facility for such inspection, constituted violations of said regulation.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

2. The presence of inadequate and disorganized data available at Detroit Public Lighting Department at the time of a regulatory inspection did not satisfy the recordkeeping requirement of TSCA (40 C.F.R. §761.180) that such data shall form the basis of an annual document which must reflect the location, number and identification of PCB items, the dates pertaining

to removal from service, storage and disposal along with the quantities of PCB items and PCBs contained in such PCB items on the date of such annual report.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

3. The TSCA recordkeeping requirement contemplates that compliance there-with shall be voluntary and timely.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

4. The City of Detroit is a municipal corporation organized under the laws of the State of Michigan and carries out its municipal responsibilities through its departments, such as Detroit Public Lighting Department, Detroit Water and Sewerage Department or Detroit Community and Economic Development Department and employees thereof.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

5. PCB regulations were promulgated to prevent additional PCBs from entering the environment and all violations of such regulations are by nature chemical control violations under the Act and the TSCA Civil Penalty Policy.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

6. TSCA and PCB disposal regulations provide that, on disposal, the concentrations of PCBs in transformers and other oil-filled electrical equipment must be known so that such disposal can be in accordance with applicable regulations. Such concentration is presumed to be 50 to 500 ppm in mineral oil-filled electrical equipment where the actual concentration is unknown and such presumption can be rebutted only by proper analysis showing that such actual concentration is less than 50 ppm at time of disposal as opposed to time of acquisition.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

7. The Agency's action creating a presumption that certain mineral oil-filled electrical equipment contains concentrations of 50 to 500 ppm PCBs, resulted from data which indicated that, with great frequency, equipment not originally designed to contain PCBs had become contaminated with PCBs. Such presumption benefits the owners and operators subject to the PCB regulations as it permits them to dispense with sampling and testing except in those cases where such contamination is not likely.

TOXIC SUBSTANCES CONTROL ACT ("TSCA")

8. Detroit cannot contract away its legal obligations and responsibilities under the Toxic Substances Control Act and PCB regulations; however, where the record shows that a Consent Agreement was entered into by Chrysler Corporation and Detroit with the U.S. EPA on April 19, 1985, and the obligations for performance and payment under said agreement were not jointly accepted or assumed but based on a consensus that the alleged violations resulted substantially from the failures of Chrysler Corporation, good cause exists for distinguishing said facts from facts usually present where a prior violation is considered as a specific reason for an upward adjustment of a civil penalty otherwise appropriate, and declining to increase said penalty on such account.

APPEARANCES

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INITIAL DECISION

This proceeding concerns four Administrative Complaints, above styled, instituted for the assessment of civil penalties against Respondents under Section 16(a) of the Toxic Substances Control Act (hereinafter "TSCA" or "the Act"), 15 U.S.C. §2615(a). Said Complaints were duly issued by the Director, Enforcement Division, U.S. Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant"), Region V, Chicago, Illinois, and were consolidated for hearing.

Complaint -82, which alleges violations of the polychlorinated biphenyl (hereinafter "PCB") regulations by the City of Detroit's Public Lighting Department (hereinafter "PLD") at PLD's headquarters on Grinnell Street, Detroit, Michigan, was filed March 16, 1987, and consists of four counts charging: (1) failure to develop and maintain annual records on the disposition of PCB capacitors and PCB and PCB-contaminated transformers for calendar years 1978 through 1985, as required by 40 C.F.R. §761.180(a); (2) disposal of 448 untested PCB-contaminated transformers during the period 1978 through 1986, in violation of 40 C.F.R. §761.60(a)(2); (3) failure to dispose of 10 PCB large capacitors within one year from the date they were placed into storage for disposal, failure to check said capacitors for leaks at least once every 30 days and failure to date said capacitors as to when they were placed into storage for disposal, as required by 40 C.F.R. §761.65(a), (c)(5) and (c)(8), and (4) failure to mark 5 of 10 PCB large capacitors, in storage for disposal in its storage area, with the required PCB label as provided by 40 C.F.R. §761.40(a)(5) and in violation of the Act. Said Complaint proposes penalties of \$10,000, \$92,500, \$1,500 and \$500, respectively, on said Counts One through Four, or a total penalty of \$104,500 for said alleged violations.

The other three Complaints, above-styled, allege violations of the PCB regulations at three locations formerly owned and operated by the Chrysler (hereinafter "Chrysler") Corporation, known as Huber (Complaint -83), Lynch (Complaint -92) and Old Mack (Complaint -94).

Complaint -83 (Huber) was filed May 11, 1987, and alleges violations of the PCB regulations by Detroit's Water and Sewerage Department (hereinafter "DWSD"), owner of property located at 6425 Huber Avenue (hereinafter "Huber") in Detroit. Said Complaint's five counts allege: (1) failure to develop and maintain records on the disposition of PCB items for calendar years 1983 through 1985 as required by 40 C.F.R. §761.180(a); (2) failure to perform quarterly inspections and develop and maintain records of such quarterly inspections on PCB transformers for 1983 and 1984, failure to repair or replace four leaking transformers to eliminate the source of PCB leaks, and failure to contain leaked PCBs until appropriate clean-up was completed, as required by 40 C.F.R. §761.30(a)(1); (3) failure to dispose of PCBs in an approved incinerator, as required by 40 C.F.R. §761.60(a); (4) failure to store PCB items in an area with proper roof, walls and impervious flooring, failure to date drained PCB transformers as to when they were removed from service and failure to immediately transfer leaking PCB containers and their contents to properly marked non-leaking containers, as required by 40 C.F.R. §761.65(b) and (c), and (5) failure to mark an outside storage area, and failure to mark drained PCB transformers, 5 of the 1363 PCB items stored therein, with the PCB label, as required by 40 C.F.R. §761.40(a). Civil penalties proposed for said violations are \$12,500, \$25,000, \$31,250, \$18,750 and \$6,250 on the five counts, respectively, or a total penalty of \$93,750 for said violations so alleged.

Complaint -92 (Lynch), filed April 7, 1987, alleges violations of PCB regulations by Respondent City of Detroit in three counts, viz: (1) failure to develop and maintain annual records on the disposition of 14 PCB transformers for calendar years 1983 through 1985, as required by 40 C.F.R. §761.180(a); (2) failure to perform annual inspections and develop and maintain records of same of 14 transformers for 1984 and 1985, and failure to initiate clean-up of spilled PCBs within 48 hours after spill discovery, as required by §761.30(a)(1), and (3) improper disposal of PCB materials found at transformer substations and roof areas of Lynch. Penalties are proposed for said violations, in the three counts alleged, in the respective amounts of \$12,500, \$21,250 and \$21,250, a total of \$55,000.

Complaint -94 (Old Mack), filed April 7, 1987, alleges violations of subject PCB regulations by Detroit's Community and Economic Development Department (hereinafter "CEDD"), the owner of property known as the Old Mack Avenue Stamping Plant (hereinafter "Old Mack") located at 11631 Mack Avenue in Detroit in five counts as follows: (1) failure to develop and maintain annual records on the disposition of 21 PCB transformers and 14 PCB large capacitors for calendar years 1983 and 1984, as required by 40 C.F.R. §761.180(a) (\$12,500 penalty proposed); (2) failure to perform quarterly PCB transformer inspections and failure to develop and maintain records of such inspections on 21 PCB transformers at Old Mack during the last three quarters of 1983, as required by §761.30(a)(1) (\$25,000 penalty proposed), and (3) improper disposal of PCBs with respect to three areas of PCB contamination at Old Mack (one relating to fluid spilled from a damaged PCB large capacitor, one relating to contaminated soil inside a building near transformer "Bank 18", and one area of soil located near the Gladwin

Street gate of Old Mack), as required by 40 C.F.R. §761.60(a) and (d)(1). The Original Complaint sought penalties totaling \$47,500. Complainant filed its First Amended Complaint pursuant to Order Granting Complainant's Motion to File its Amended Complaint, dated March 17, 1989. The amendment increased the penalty proposed for said Count 3 to \$450,000 from \$6,250, thus increasing the total penalty proposed for the alleged violations at Old Mack to \$491,250. Said increase was bottomed on the allegation that CEDD had continued to fail to remove and dispose of the subject three areas of contamination cited in said Complaint.

Count 4: failure to remove and dispose of, within one year from date placed in storage, PCB articles stored for disposal (\$1,875 penalty proposed), and (5) failure to properly mark PCB capacitors and storage areas (\$1,875 penalty proposed).

STIPULATIONS

Prior to and during the course of subject proceeding, the parties entered into four sets of stipulations. The first, entitled "First Set of Joint Stipulations of Law and Fact", contains 157 numbered stipulations 1/ which will be referred to as "SF1", followed by the specific paragraph referred to (e.g., SF1-157). The second set, entitled "Joint Stipulation Clarification" modifies SF1-82 and SF1-96. The third set, entitled "Second Set of Joint Stipulations of Law and Fact" contains four paragraphs, referred to herein as SF2-1, etc. The fourth and final set of stipulations

1/ Stipulations 1 through 41 of said First Set of Joint Stipulations pertained to a fifth Complaint against Respondent City of Detroit (referred to as Pioneer Equipment Company site) which was dismissed by Complainant.

is entitled "Joint Stipulation Regarding December 1, 1982, Agreement Between the City of Detroit and Chrysler Corporation", hereinafter Complainant's Exhibit (hereinafter "EX") 8.

CONSOLIDATED HEARING

The hearing herein on the subject four consolidated Complaints was held on May 2, 3, 4 and 9, 1989, in Chicago, Illinois, wherein Complainant and Respondent each called three witnesses. Upon consideration of the record, including testimony and exhibits received at the hearing and the prehearing and posthearing submissions made by the respective parties, I make the following FINDINGS OF FACT. Because each Complaint consists of differing charges, the FINDINGS OF FACT and CONCLUSIONS OF LAW pertaining to each such Complaint will be set forth separately.

FINDINGS OF FACT

General Findings

1. The Director of the Environmental Sciences Division, Region V, U.S. EPA, through lawful delegation from the Administrator of U.S. EPA, has the authority to issue Complaints under TSCA (SF2-1).
2. Respondent is a person within the meaning of 40 C.F.R. §761.3 (SF1-1).
3. Respondent is a municipality incorporated under the laws of the State of Michigan (SF1-2).
4. The PCB Disposal and Marking regulations (hereinafter "Disposal and Marking Rule") 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 Prohibitions (hereinafter "PCB Rule") were lawfully promulgated on May 31, 1979 (44 Fed. Reg.

31514), and incorporated the Disposal and Marking Rule. The PCB Rule has been subsequently amended and partially recodified at 40 C.F.R. Part 761 (SF1-3).

6. On April 19, 1985, U.S. EPA, Chrysler and Detroit entered into a Consent Agreement and Final Order for Docket Nos. TSCA-V-C-193, TSCA V-C-194, TSCA-V-C-195 (SF2-4).

Detroit Public Lighting Department ("PLD") - Complaint -82

7. Detroit and the PLD own and operate the PLD facility located at 9449 Grinnell Street, Detroit, Michigan, and owned and operated the facility on August 6, 1986 (SF1-42).

8. On August 6, 1986, Timothy McGarry inspected the PLD facility to determine compliance with TSCA and the PCB Rule (SF1-43). Two days earlier he telephoned PLD and talked to James Tripp, who was identified as a person responsible for PLD's PCB management activities (TR 119).

9. At the time of the August 6, 1986, inspection, Mr. McGarry showed proper identification and served the legally required notice on Detroit (SF 1-44).

10. On August 6, 1986, at the PLD facility, there were 100 PCB large capacitors in service and 10 PCB large capacitors in storage for disposal. These capacitors are PCB items within the meaning of 40 C.F.R. §761.3 (SF1-45).

11. Respondents Detroit and PLD failed to develop and maintain records, on the disposition of PCBs and PCB items, which could be utilized to form the basis of an annual document which it was and is required to prepare, for each facility, by July 1 covering the previous calendar year; such failure was in violation of 40 C.F.R. §761.180(a), which requires each owner or operator of a facility using or storing at one time one or more PCB

transformers or 50 or more PCB large high or low voltage capacitors to develop and maintain such records (TR 133-134).

12. Respondents Detroit and PLD admit that annual documents were not prepared for the period 1978 to 1985 and that on August 6, 1986, no annual documents were available for inspection by EPA's representative as required by §761.180(b) (R's Proposed Findings, page 169; TR 131, 133, 136-137).

13. On May 31, 1979, U.S. EPA promulgated a "Classification of Transformers" which stated that all untested mineral oil transformers must be assumed to be PCB-Contaminated Transformers containing between 50 and 500 parts per million (hereinafter "ppm") PCBs and must be disposed of in high efficiency boilers, chemical waste landfills or incinerators (44 Fed. Reg. 31517, May 31, 1979; see 40 C.F.R. §761.3 - "PCB Contaminated Electrical Equipment" definition).

14. On August 25, 1982, U.S. EPA promulgated the definition of "PCB-Contaminated Electrical Equipment" which states that oil filled transformers, capacitors, voltage regulators, electromagnets, cable, circuit breakers, reclosers and switches whose PCB concentration is unknown must be assumed to contain between 50 and 500 ppm PCBs for purposes of servicing and disposal (47 Fed. Reg. 37352, 37353, August 25, 1982; 40 C.F.R. §761.3).

15. Between July 2, 1979, and July 24, 1986, Respondents disposed of 369 mineral oil-filled transformers whose PCB concentrations were unknown by selling same as salvage to a scrap yard (TR 123, 130; Complainant [hereinafter "C"] EX 3, Attachment ([hereinafter "Att"] F; Respondent [hereinafter "R"] Answer, paragraph 13).

16. Between September 24, 1982, and July 24, 1986, Respondents disposed of 37 mineral oil-filled regulators, whose PCB concentration was unknown, by selling same as salvage to a scrap yard (TR 601; C EX 3, Att F).

17. The average gallonage of the 406 mineral oil-filled transformers and regulators so disposed of, as set forth, supra, was 30.5 gallons (TR 606; C EX 3, Att F).

18. On August 6, 1986, Respondents Detroit and PLD had 10 PCB large capacitors in storage for disposal which had been so stored for more than one year and inspection revealed that Respondents did not place thereon a date indicating when they had been placed in storage for disposal (TR 137-141; C EX 3, Att D).

19. Respondent PLD did not check for leaks, every 30 days, said 10 PCB large capacitors in storage for disposal and said PCB items were not marked with an M_L label (TR 141-142; C EX 3).

Huber - Complaint -83

20. Detroit and the DWSD (Huber, Complaint -83) own and operate Huber, located at 6425 Huber Avenue, Detroit, Michigan, and owned and operated same on October 17, 1986 (SF 1-46).

21. Detroit and CEDD acquired ownership and possession of Huber in December, 1982, from Chrysler. On May 28, 1986, CEDD transferred Huber to DWSD (SF1-47).

22. Prior to acquiring Huber, Respondents Detroit and CEDD signed an Agreement with Chrysler which states that PCB transformers and PCB capacitors were located at the site, were not considered hazardous waste, were operational and were considered an integral part of the property. Respondents agreed to accept said PCB items (Joint [hereinafter "JO"] Stipulation re December 1, 1982, Agreement between the City of Detroit and Chrysler Corporation; C EX 8, paragraph 8).

23. After December, 1982, Respondents owned and were responsible for 57 PCB transformers and 1200 PCB large capacitors at Huber (TR 777; C EX 8).

24. In January, 1983, through 1984, Respondents Detroit and CEDD had at least 57 PCB transformers in place in electrical substations at Huber; said transformers are PCB items (40 C.F.R. §761.3; SF1-50).

25. In 1983, Chrysler contracted with United Powers, Inc., to repair and clean 57 PCB transformers located at Huber and clean up all leaks and spills from said transformers (TR 104-105; JO EX A, Att D). On April 28, 1983, United Powers, Inc., after repairing and cleaning said transformers in electrical substations, warranted that it had properly cleaned up all leaks and spills (TR 104-105; JO EX A, Att D).

26. From January, 1983, through September, 1984, Respondent stored at Huber 57 PCB transformers for reuse. Said transformers were not damaged until September, 1984 (TR 114, 536, 776-777).

27. The aforesaid 57 transformers, at Huber, were nameplated PCB transformers containing PCBs at a concentration of greater than 100,000 ppm, and containing more than 20,000 gallons of PCB fluid in total (TR 532; C EX 1, Att E, Environmental Specifications Huber Avenue Foundry Transformer, Capacitor Removal and Spill Cleanup Report, Clayton Job 29162-19, Sec. 2.1).

28. The Huber Avenue Foundry site (Huber) was a heavy industrial facility, owned and operated by Chrysler from 1966 to 1983, which utilized high voltage electrical equipment (C EX 1; TR 887).

29. Detroit, through CEDD, purchased the Huber facility for nominal consideration in order to promote its redevelopment and to avoid its complete abandonment after Chrysler's decision, in 1982, to permanently close Huber (TR 767-768). CEDD acquired possession from Chrysler on December 22, 1982; however, Chrysler retained right of access to remove property and perform cleanup work thereon through April, 1983 (TR 105; C EX 1).

30. On February 11, 1983, the Michigan Department of Natural Resources

(hereinafter "MDNR") inspected Huber to determine compliance with PCB rules (SF2-3); EPA subsequently issued an Administrative Complaint charging Chrysler and Detroit with violation of TSCA, which action was resolved by a Consent Agreement and Final Order (hereinafter "CAFO"), dated April 19, 1985, which assessed a civil penalty of \$53,000 and required remedial action. Detroit accepted no responsibility for Chrysler's violations but agreed to comply with PCB rules prospectively (SF2-4).

31. Subsequent to entry of said CAFO, CEDD hired Clayton Environmental (hereinafter "Clayton"), an independent contractor, to advise it on issues relating to PCB management and to insure PCB compliance at Huber. Its contract with Clayton included preparation of a complete inventory of PCB items at Huber and Lynch; establishing an inspection and maintenance program in compliance with TSCA regulations for Huber and Lynch; performing inspections and preparation of reports and records; contacting CEDD immediately on discovery of a leak or spill of PCBs and providing advice to correct the problem; advising Detroit's personnel regarding the proper use, handling, storage and disposal of PCB items at Huber and Lynch (R EX 8). Clayton was paid over \$150,000 for such services (TR 780-781).

32. Between January, 1983, and October, 1984, three PCB transformers were damaged and discharged PCB fluid in three separate areas of Huber (SF1-52). During 1985, the Respondents, under the direction and advice of Clayton, initiated a program to clean up and remove all PCBs from Huber. PCB items were drained, PCB fluids were placed in 55-gallon drums. Contaminated areas were rinsed and the rinsate was placed in 55-gallon drums. Said PCBs were placed in a storage area designed by Clayton. Detroit spent \$332,000 on PCB remedial efforts at Huber and Lynch prior to October 17, 1986 (C EX 1, pages 2-3; TR 782).

33. During the summer of 1986, while cleanup activities were in progress, DWSD decided to acquire and renovate Huber (TR 882-885). CEDD transferred Huber to DWSD on May 28, 1986 (SF1-47).

34. On October 17, 1986, Timothy J. McGarry, while duly authorized, inspected Huber to determine compliance with TSCA and the PCB rules (SF1-48 and 49).

35. McGarry's said inspection at Huber revealed that Respondents Detroit and DWSD had, on October 17, 1986, 597 55-gallon drums containing PCB liquids, 1200 PCB large capacitors inside 373 drums, 336 drums of PCB-contaminated debris and 57 drained nameplated PCB transformers designated for disposal, all PCB items, situated for more than 30 days in an area without a roof, walls or impervious flooring (40 C.F.R. §761.3; SF 1-64 and 65).

36. On October 17, 1986, barrels containing PCB-contaminated fluids in the storage area, at Huber, were leaking PCB-contaminated liquid (SF 1-66).

37. Between January, 1983, and October 17, 1986, Respondents did not transfer leaking barrels containing PCB fluids, designated for disposal, at Huber, into non-leaking properly marked containers (SF 1-67).

38. On October 17, 1986, at Huber, PCB transformers designated for disposal were not dated as to when they were removed from service (SF 1-68).

39. On October 17, 1986, the outdoor fenced, curbed parking lot at Huber containing PCB items designated for disposal was not marked with a proper PCB label and several transformers in said area were not marked with a proper PCB label (SF 1-69).

40. The parties stipulate that Detroit spent approximately \$2,000,000 to clean up the PCB contamination at Huber (SF1-70).

Lynch Road - Complaint -92

41. Detroit and CEDD owned and possessed Lynch Road Assembly Plant site (Lynch Road) from January, 1983, through December 16, 1985, having acquired said site from Chrysler in January, 1983 (SF 1-107 and 110).

42. At the time Detroit acquired Lynch Road in January, 1983, there were 14 PCB transformers (PCB items) on the property located in five substations; prior to said date, Chrysler removed 362 large capacitors from Lynch Road (SF1-111 and 112; 40 C.F.R. §761.3).

43. Pursuant to a contract with Chrysler, United Powers, Inc., in March and April, 1983, repaired and cleaned 15 PCB transformers in five Lynch Road substations and warranted that it had properly cleaned up all leaks, spills and discharges of PCBs (SF 1-113 and 114).

44. In 1984, two 500-gallon PCB transformers, located in Lynch Road's Substation 1, were damaged and discharged PCB-contaminated fluid into said substation area; also, three 500-gallon PCB transformers located in Substation 3 and two 500-gallon PCB transformers located in Substation 4 were damaged and discharged PCB-contaminated fluid into the areas of said Substations 3 and 4; further, in 1984, two PCB transformers in Substation 5 of Lynch Road were damaged and discharged 100 gallons of PCB-contaminated fluid into the Substation 5 area. Said discharges are "disposals" within the meaning of 40 C.F.R. §761.3 and were discovered by Detroit in September and November, 1984 (SF1-115 through 119).

45. On December 16, 1985, Detroit sold Lynch Road to Lynch Road Properties, Inc., at which time all PCB transformers had been removed and Detroit had spent approximately \$172,000 during the preceding year in its attempt to clean up PCB contamination at Lynch Road (SF1-120 through 122).

46. At the time of the EPA inspections of Lynch Road on October 31, 1986, December 3, 1986, and February 12, 1987, Detroit did not have annual records for 1983, 1984 and 1985 on the disposition of 14 PCB transformers located at Lynch Road (SF1-108, 109 and 123).

47. Between January, 1983, and December, 1985, Detroit did not perform annual visual inspections at Lynch Road of 14 PCB transformers and did not maintain records of visual inspections (SF1-124).

48. On October 31, 1986, representative samples of tar-like materials were taken at Lynch Road (1) from the "B" side of Substation 4, (2) from the west side of Substation 3, (3) from the "B-C" area of Substation 3, (4) from the metal panel of Substation 3, and (5) a representative sample of stained gravel was taken from the roof under Substation 1 at Lynch Road. Further, on said date, representative samples of tar-like material were taken at Lynch Road (6) from the "A" side of Substation 1, (7) from the "B" side of Substation 1, and (8) from the roof under the "A" said of Substation 5. The Chain of Custody for said samples confirms that each sample was marked bearing, first, a field number and, subsequently, a lab number prior to its chemical analysis. Said samples, when chemically analyzed, contained PCBs in the following amounts:

- | | | |
|-----|-------------|------------------------|
| (1) | 260,000 ppm | (SF1-125 through 127); |
| (2) | 200 ppm | (SF1-129 through 132); |
| (3) | 370,000 ppm | (SF1-133 through 136); |
| (4) | 810,000 ppm | (SF1-137 through 140); |
| (5) | 96,000 ppm | (SF1-141 through 144); |
| (6) | 530,000 ppm | (SF1-145 through 148); |
| (7) | 180,000 ppm | (SF1-149 through 152); |
| (8) | 540,000 ppm | (SF1-153 through 156). |

Old Mack - Complaint -94

49. Detroit and CEDD have at all pertinent times owned and possessed Old Mack which is located at 11621 Mack Avenue, Detroit, Michigan, since owner-

ship was acquired from Chrysler in December, 1982, including the dates of inspection, i.e., on October 30, 1986, December 3 and 9, 1986 (SF1-71-72; TR 764).

50. From December, 1982, to March 20, 1984, Chrysler retained limited access to Old Mack. In March, 1984, Chrysler relinquished all right of access to Old Mack (C EXs 6, 11; R EX 5; TR 329, 431, 791).

51. Prior to acquiring ownership of Old Mack, said Respondents signed an Agreement which states that PCB transformers and PCB capacitors were located at the Old Mack site, were not considered hazardous waste, were operational, and were considered an integral part of the property. Detroit and CEDD agreed to accept said (PCB) transformers and capacitors (Joint Stipulation Regarding December 1, 1982, Agreement Between the City of Detroit and Chrysler Corp; C EX 8, paragraph 8).

52. Detroit and CEDD did not inspect Old Mack for compliance with PCB regulations during the period December 1982, to March 20, 1984, nor during the period March 20, 1984, through 1986 (TR 814, 850).

53. From December, 1982, through December, 1983, there were 21 PCB transformers in place in electrical substations at Old Mack (SF1-78).

54. In February, 1982, United Power Services contracted with Chrysler to clean up all leaks and make needed repairs to said 21 PCB transformers at Old Mack which contained more than 8,000 gallons of PCB fluid in total (TR 641; C EX 6, Att 2C and 2E).

55. Between February, 1983, and December 22, 1983, vandalism occurred at Old Mack and at least three PCB transformers were damaged and spilled PCB-contaminated liquid (SF1-81; C EX 11).

56. Detroit and CEDD stored 21 transformers for reuse from February, 1983, through December, 1983, when Chrysler removed said 21 PCB transformers from

Old Mack (TR 443-444; C EX 6, Att 2-D).

57. On October 30, 1986, at Old Mack, there was a bank of 13 PCB large capacitors, one of which was damaged, causing a leak of PCBs onto the area surrounding the bank. A representative soil sample was taken from said area surrounding the bank and the chemical analysis of said sample shows that said soil sample contained PCBs at a concentration of 880,000 ppm (SF1-82 through 87; SF2-2 and Joint Stipulation Clarification).

58. On October 30, 1986, a representative sample was taken from the floor near Bank 18 at Old Mack and a chemical analysis of said sample shows that it contained PCBs at a concentration of 2800 ppm (SF1-88 through 91; SF2-2).

59. On October 30, 1986, a representative soil sample was taken from the Gladwin Street gate at Old Mack and the chemical analysis shows that it contained PCBs at a concentration of 190 ppm (SF1-92 through 95; SF2-2).

60. At Old Mack, on October 30, 1986, there was a disconnected bank of 13 PCB large capacitors, one of which was damaged, causing a leak of PCBs, and one disconnected PCB large capacitor on the floor of the Power House. On said date, Detroit and CEDD had no plans to reuse said 14 large PCB capacitors which had then been in storage for disposal at Old Mack for more than one year (SF1-96 and 97 and Joint Stipulation Clarification).

61. The aforementioned 14 PCB large capacitors, on October 30, 1986, were not dated as to when they were placed in storage and were not marked with a proper M_L PCB label (SF1-99 and 101).

62. The aforementioned 14 PCB large capacitors were stored at Old Mack in an area without a six-inch curbed impervious floor and said storage area where said 14 large PCB large capacitors were stored for disposal was not marked with a M_L PCB label (SF1-98 and 100).

63. Since October 30, 1986, no cleanup of PCBs has been performed at Old Mack (SF1-106).

64. The parties stipulate that the discharge of PCBs referenced in Finding 57, supra, is a "disposal" within the meaning of 40 C.F.R. §761.3 (SF1-83).

65. The areas of the soil sampled for PCB contamination resulting from discharges of PCB described in Findings 57, 58 and 59, supra, were, respectively, ten square feet, six square feet and one square foot, i.e., the three areas contaminated by said discharges totaled 17 square feet (TR 646-647).

66. EPA estimated that said contaminated soil, referred to hereinabove, persisted at least from the date of subject Complaint until January 11, 1989, or 634 days (TR 648).

67. Chrysler maintained security at Old Mack from and after December, 1983, until March 20, 1984, on which date they gave possession of said property to the City of Detroit; after that date, Chrysler did not consider it had an interest in the property (TR 799; R EX 5).

68. The Old Mack Avenue Stamping Plant (Old Mack) is a facility which consists of over 30 interconnected buildings, up to six floors in height, located on a parcel consisting of 33 acres, with over 2 million square feet under roof (SF1-103 to 105 - Report of Environmental Design Group, Inc. ("EDG"), April, 1988, Executive Summary, page 222; TR 884).

CONCLUSIONS OF LAW

Detroit Public Lighting Department("PLD") -82

1. Respondent PLD failed to develop and maintain annual records on the disposition of its PCB capacitors and PCB and PCB-contaminated transformers for the calendar years 1978 through 1985 and, thus, violated the regulatory

requirements of 40 C.F.R. §761.180(a) and Section 15 of TSCA, 15 U.S.C. §2614 (Finding 11) for which violations a civil penalty should be assessed.

2. Respondent's sale to a scrap yard of 369 mineral oil-filled transformers, during the period July 2, 1979, to July 24, 1986, and 37 mineral oil-filled regulators during the period September 24, 1982, to July 24, 1986, when the PCB concentration of said transformers and regulators was unknown and, therefore, presumed to be 50 to 500 ppm PCBs for purposes of disposal, violated 40 C.F.R. §761.60(a)(2) and Section 15 of TSCA, 15 U.S.C. §2614, and the assessment of a civil penalty is appropriate for said improper disposals (Findings 13 through 17).

3. Respondent failed to remove from storage and dispose of its 10 PCB large capacitors within one year from the date said capacitors were placed into storage for disposal; failed to check said capacitors for leaks at least once every 30 days, and failed to date said capacitors as to when they were placed in storage and, by said failures, violated 40 C.F.R. §761.65(a),(c)(5) and (c)(8) and Section 15 of TSCA, 15 U.S.C. §2614, for which violation an appropriate civil penalty should and will be assessed (Findings 18 and 19).

4. Respondent failed to mark five of subject 10 PCB large capacitors with the prescribed PCB label and, thus, violated 40 C.F.R. §761.40(a)(5) and Section 15 of TSCA, 15 U.S.C. §2614 (Finding 19).

Huber -83

5. Respondent City of Detroit is a municipality and Respondent Detroit Water and Sewerage Department ("DWSD") and Detroit Community and Economic Development Department ("CEDD") are departments of said Respondent City of Detroit (R Answer, paragraph 3).

6. Respondent City of Detroit has, since 1982, when it acquired the Huber facility from Chrysler Corporation, been the owner of said facility located at 6425 Huber Avenue, Detroit, Michigan. Detroit first assigned the responsibility for the operation and oversight of said facility to CEDD until May 28, 1986, when such responsibility was transferred to DWSD. On October 17, 1986, the date of subject EPA inspection, said facility was owned, possessed and managed by the Respondents City of Detroit and DWSD. As owner of Huber, a facility storing at least the threshold amount of PCB items, it was at all such time subject to PCB regulations (Findings 20, 21, 22, 23, 24 and 32).

7. The City of Detroit, a "person" subject to the Act, filed its Answer to subject Huber Complaint by and through counsel for its Detroit Water and Sewerage Department ("DWSD") and is bound by the content of said pleading purporting to be the Answer of DWSD, for the reason that a contrary interpretation of said pleading would leave the City of Detroit in default, and on recognition that said City acts through its departments and the employees thereof (40 C.F.R. §761.1(b) and §761.3).

8. Respondents admit that they did not develop and maintain annual records on the disposition of PCB items for calendar years 1983 through 1985. Failure by Respondents to so develop and maintain such annual records and to document disposition of PCBs during said period violated 40 C.F.R. §761.180 and the Act (R Answer to Huber Complaint, paragraph 13; C EX 1).

9. Respondents are and have been required, since January 1983, to comply with the inspection, transformer repair, cleanup and recordkeeping parts of the PCB rule, including keeping records of maintenance history (46 FR 16090, March 10, 1981).

10. Respondent admits that it did not perform quarterly inspections of its

PCB transformers nor did it develop and maintain quarterly records of said required inspections for the years 1983 and 1984, and such failure is a violation of 40 C.F.R. §761.30 (a)(1)(ix) (Respondent Answer to Huber Complaint, paragraph 18).

11. Respondents' failure, during 1983 and 1984, to repair or replace three damaged transformers which discharged PCB fluid in three separate areas and its further failure to contain leaked PCBs until completion of cleanup violated 40 C.F.R. §761.30(a)(1)(x) (Finding 32).

12. From January, 1983, to October, 1986, leaks from barrels located in Huber's storage area and containing PCB-contaminated fluid were an improper "disposal" and violated 40 C.F.R. §761.60(a) and the Act (Findings 36 and 37).

13. Respondents were required to comply with disposal regulations beginning January, 1983 (43 FR 7150, February 17, 1978).

14. Respondents' failure to store its PCB items in a storage area with proper roof, walls and impervious flooring (after being in storage for disposal for a period exceeding 30 days) and its failure to date drained PCB transformers as to when they were removed from service and its further failure to immediately transfer leaking PCB containers and their contents to properly marked non-leaking containers violated disposal regulations and, particularly, 40 C.F.R. §761.65(b) and (c), and the Act (Findings 37, 38 and 39).

15. Respondents' failure at Huber to mark the outdoor storage area and approximately five drained PCB transformers (being PCB items included among 1363 PCB items stored for disposal in said outdoor storage area) violated the PCB rule and, particularly, 40 C.F.R. §761.40(a) and the Act (Finding 39; 43 FR 7150, February 17, 1978).

develop and maintain records of such quarterly inspections of 21 PCB transformers, for the calendar year 1983, violated 40 C.F.R. §761.30(a)(1), the Interim Measures Program, Appendix B III, and the Act, for which violation the assessment of a civil penalty is appropriate (SF1-80; Findings 52 and 53; R Answer, paragraph 18; Interim Measures Program, 46 FR 16090, March 10, 1981).

21. Leaks evidenced by soil samples taken and the damage to one capacitor in a bank of 13 large capacitors, were "disposals of PCBs", as that term is defined by 40 C.F.R. §761.3 (Disposal definition), and Detroit's failure to dispose of said PCBs in accordance with 40 C.F.R. Part 761, Subpart D, were and are improper disposals which violated 40 C.F.R. §761.30(a) and the Act, for which violations the assessment of a civil penalty is appropriate (Findings 57-59; 40 C.F.R. §761.60(d)(1)).

22. Detroit's failure to remove and dispose of 14 PCB capacitors, which failure persisted more than one year from the date said capacitors were stored for disposal, violated 40 C.F.R. §761.65(a) and the Act (Finding 60).

23. Detroit violated 40 C.F.R. §761.65(b) and the Act for the reason that its facilities at Old Mack, which it used to store 14 PCB large capacitors designated for disposal, did not provide a six-inch curbed impervious floor, as required by said storage regulation (Finding 62).

24. Detroit failed to date the 14 PCB large capacitors so that the date each said PCB article was placed in storage appeared thereon, which failure violated 40 C.F.R. §761.65(c)(8) and the Act (Finding 61).

25. Because of the storage violations found in the foregoing paragraphs 22, 23 and 24, an appropriate civil penalty should and will be assessed against Respondent City of Detroit.

Lynch Road -92

16. Respondents' failure at Lynch to develop and maintain annual records for calendar years 1983, 1984 and 1985, on the disposition of its 14 PCB transformers, violated 40 C.F.R. §761.180(a) and the Act (Finding 46; R Answer, paragraphs 7-8 and 10).

17. Respondents' failure to perform annual visual inspections of each PCB transformer in use or stored for reuse at Lynch, its failure to develop and maintain records of each such inspection and its failure to properly and timely clean up and dispose of spilled PCBs violated 40 C.F.R. §761.30(a) (1)(ix) and (x) and the Act (Findings 47 and 48).

18. Spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs (40 C.F.R. §761.60(d)(1)), and the regulations require that PCB liquids at concentrations of 500 ppm or greater must be disposed of in an incinerator that complies with 40 C.F.R. §761.70. The discharges in 1984 from transformers at Lynch Substations 1, 3, 4 and 5 were improper "disposals" which violated 40 C.F.R. §761.60(a) and (d)(1) and the Act (Findings 44 and 48).

Old Mack -94

19. Detroit's admitted failure to have annual records for the calendar years 1983, 1984 and 1985 for 14 large capacitors at Old Mack on October 30, 1986, and its admitted failure on October 30, 1986, to have annual records on the disposition of 21 PCB transformers, which were in place in electrical substations during calendar year 1983, violated 40 C.F.R. §761.180(a) and the Act, for which violation the assessment of a civil penalty is appropriate (SF1-76, -77, -78 and -79; R Answer, paragraph 14).

20. Detroit's admitted failure to perform quarterly PCB inspections and to

26. Detroit's failure to mark said 14 PCB capacitors and the said storage area, described in paragraph 23, supra, with a proper PCB label as illustrated in 40 C.F.R. §761.45(a), violated 40 C.F.R. §761.40(a) and the Act, for which violations the assessment of a civil penalty is appropriate (Finding 62).

DISCUSSION

I Respondent's Motion to Strike Portion of Reply Memo

Respondent has filed its Motion praying that paragraph 2 at page 41 of Complainant's Reply Memorandum (to Respondent's posthearing Proposed Findings of Fact, Conclusions of Law, Brief and Argument) be stricken. Said paragraph is responsive to Respondent's contention that Complainant's proof, that the spills at Old Mack occurred after February 17, 1978, is deficient if not altogether lacking. Said paragraph 2 responds to the conclusion in Respondent's Principal Brief that Complainant has not " . . . put into evidence that the alleged disposals (at Old Mack) occurred after February 17, 1978", stating as follows (and continuing to include page 42, paragraph 1):

First, the record is clear that there were 21 PCB transformers on site at Old Mack in 1983. First Stip. 78. Second, from 1982 to at least 1986, vandals had free run of the Old Mack site, and just as at Lynch and Huber, the vandals caused extensive PCB spills. First Stip. 81. Third, Complainant's samples, as well as Detroit's contractor's samples, establish extensive and high levels of PCB contamination. First Stip. 84 - 95, 102-105. Fourth, U.S. EPA did not discover any of these spills in its 1983 inspection giving rise to an inference that they occurred thereafter. Fifth, the high level of contamination suggest recent spills in that the PCBs have not migrated into the soils or been diluted by rain fall. See e.g., Electric Service Corp., at 11 - 12, Findings of Fact 4 and 6; First Stip. 102 -105. Finally, Complainant has three pictures taken in 1986 which

show still moist PCB oil leaking from a bank of 13 PCB large capacitors. C. Ex. 7, Photos 8 -10. These photos surely evidence a PCB spill less than 10 years old.

This evidence is a stark contrast to the evidence adduced in Standard Scrap. First, the Court there found no evidence that the Respondent handled any PCB transformers, i.e., those with concentrations greater than 500 ppm PCBs. Standard Scrap at 17 - 18. Here, Detroit admits to the presence of 21 PCB transformers and 14 PCB capacitors at Old Mack after February 17, 1978. Second, the Court in Standard Scrap found that the Respondent handled only drained transformers with residual oil containing between 50 - 500 ppm PCBs. Standard Scrap at 23. Here, the transformers and capacitors were, without dispute, filled with PCB fluid. Finally, in Standard Scrap there was a "paucity of evidence bearing on" whether spills occurred after February 17, 1978. Id. Here, the parties have stipulated that PCBs were spilled in 1983. First Stip. 81.

I find that the language complained of is a legitimate argument and clearly raises an inference sufficient to shift the burden of persuasion to Respondent, who must show either that the spills detected by Complainant's sampling were those which occurred before February 17, 1978, or that no spills occurred after February 17, 1978. In view of Stipulation 81 (SF1-81), the latter alternative of Respondent appears foreclosed. SF1-81 establishes that "between January, 1983, and December 22, 1983, vandalism occurred at Old Mack and at least 3 PCB transformers were damaged and spilled PCB contaminated liquid."

It appears that the root of Respondent's complaint is that Complainant's evidence referred to is circumstantial - upon reflection, one can readily discern that both parties must rely on circumstantial evidence to carry their respective evidentiary burdens. Circumstantial evidence is " in . . . no lower plane than other forms of evidence " (Robin v. Schonfeld, 326 F.S. 525 (DCNY, 1971). Rutland v. Sikes, 311 F.2d 538, l.c. 540(3) (CA,

4th Cir., 1962) states that "the fact that there are no eye witnesses . . . does not deprive fact finder of right to draw reasonable inferences . . . from circumstantial evidence, and exercise of such power is not made unsupported by speculative assumptions that extraordinary circumstances might have existed which, if established, would make inference untenable."

In the premises, Respondent's said Motion to Strike should be and it is hereby denied.

II Complainant's Motion to Strike Affidavit of Witness

Respondent filed with Posthearing Evidentiary Submissions an affidavit of witness John Davis, seeking to vary the Davis testimony elicited at subject hearing on May 9, 1989. Complainant submits that said affidavit does not meet the requirements of 40 C.F.R. §22.22(c) or (d). I agree. By reason of the foregoing, said affidavit will not be admitted into evidence and will not be considered as part of the record.

III All motions, objections and requests not otherwise expressly ruled herein are hereby denied, overruled and rejected.

Preparation of Annual Documents

Respondent admits PLD did not prepare an annual document for the years 1978 to 1985. Further, it is admitted that no annual documents were prepared at Huber, Lynch and Old Mack.

40 C.F.R. §761.180(a) provides, in pertinent part, that:

. . . each owner or operator of a facility . . . storing [certain PCB items] . . . 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. (Emphasis supplied.)

Respondent contends that the recordkeeping requirement is the most important part because the annual document is merely a compilation of data

in the records; that the recordkeeping element is of a substantive nature and preparation of an annual document is technical; that Respondent PLD maintained records required and has thus substantially complied with said regulation. I reject Respondent's contention because, first, there has been no showing that the required records were, in fact, kept in accordance with 40 C.F.R. §761.180(a)(1), (2) and (3) (TR 134-137). I find that the only records available on August 6, 1986, the date of inspection, were a computer printout listing approximately 100 large PCB capacitors (C EX 1, Att. F), which were replacements for other capacitors which had been disposed of. No records or documentation were available for 500 or more other capacitors which had been disposed of by PLD (TR 133). Secondly, record-keeping control regulations - "Control Associated Data Gathering" - are a means of enabling the Agency to evaluate the effectiveness of the regulation and to monitor compliance (45 FR 59771, September 10, 1980). Inadequate or incomplete records have the same adverse impact on the regulatory structure as no records at all. It is clear and I find that both requirements of said §761.180(a) are essential and Respondent's failure to comply fully with its provisions can only tend to defeat the intent of the Act and regulations. It should also be added that regulatory provisions are liberally interpreted and strictly construed (Tcherepin v. Knight, 389 U.S. 332, 88 S.Ct. 548 (1967)). The regulation must be evenly applied as written and substantial compliance, even where it is present, is rarely, if ever, adequate or sufficient to achieve compliance as contemplated and required by the Act and regulations. I find and here hold that maintaining data that, on its face, is disorganized and incomplete (TR 134), is not the "recordkeeping" contemplated and required by law, and that Respondent's failure to keep adequate records and prepare annual documents therefrom, on

July 1 of each year, clearly violates said Section and the Act, which further requires that said annual document be maintained at Respondent's facility for inspection by EPA. If no sanctions were provided for failure to prepare such document unless and until an inspection, there would exist no incentive to comply with the regulation and the public would not be protected as by the Act intended (Western Compliance Services, TSCA-1087-11-01-2615, Region X, Initial Decision).

Respondent Detroit Did Not Overcome Presumption that 406 Oil-Filled Transformers and Voltage Regulators Disposed of by PLD were PCB-Contaminated Electrical Equipment

On May 31, 1979, the Agency promulgated a major addition to PCB regulations providing that:

1. U.S. EPA regulated the disposal of PCBs with concentrations of 50 to 500 ppm (44 FR 31514, May 31, 1979);
2. It is assumed that all transformers whose PCB contents were unknown contained between 50 and 500 ppm PCBs (emphasis supplied);
3. The "PCB cut-off point" was lowered from 500 ppm to 50 ppm PCBs because it would "result in substantially increased protection to public health and the environment" (44 FR 31516).

The action creating the presumption and the further action in 1982 extending the presumption to other oil-filled electrical equipment (47 FR 22098, May 31, 1982, effective September 24, 1982), including voltage regulators, whose PCB concentration are unknown, resulted from data which indicated that as many as 38 percent of the 35 million mineral oil transformers contained between 50 and 500 ppm PCBs and, though not originally designed to contain PCBs, had become contaminated with PCBs.

Thus, the concern in the "PCB disposal regulations" is the PCB concentration in mineral oil-filled electrical equipment at the time of disposal. ^{2/} The mere labeling of a transformer as "mineral oil filled" does not rebut the regulatory presumption that its PCB concentration is between 50 and 500 ppm PCBs.

The mere knowledge that the transformers are labeled by the manufacturer as oil-filled is not in itself sufficient to rebut the presumption. Indeed, to construe the requirement otherwise [would] destroy the presumption and make that provision meaningless" (Jackson Brewery Development Corp., NOLA Demolishing Corp. and New Orleans Public Service, Inc., Initial Decision at 19, TSCA-VI-83C (Harwood, CALJ, December 16, 1986)).

As Complainant points out in its Reply Brief (l.c. 6), the presumption benefits Respondent by allowing PLD to forego testing and dispose of the mineral oil dielectric fluid as required by 40 C.F.R. §761.60(a)(2).

Detroit cites the fact that testing has been accomplished on some of PLD's transformers; however, on this record, I agree with Complainant that no samples were identified which were taken from the subject transformers disposed of at Carter Industries, a scrap yard; nor is it shown that the transformers' samples were representative of those disposed of at Carter.

I conclude that Detroit has not rebutted the presumption of PCB contamination with respect to subject 406 transformers and voltage regulators so disposed of.

Further, PLD, because of the business in which it is engaged, in which

^{2/} Detroit's claim of "knowledge" that a transformer is not contaminated at time of purchase is rejected. Clearly, such knowledge, based on the manufacturer's label, is not relevant to the determination of whether such transformer was PCB-contaminated at time of disposal - the very reason for the presumption.

great numbers of transformers, capacitors and voltage regulator are utilized, should have been aware of all PCB regulations, including knowledge of the presumption concerning oil-filled equipment and regulations governing disposal. The regulations clearly contemplate that action implementing such requirements shall be voluntary and timely, prior to the performance of an inspection by the Agency.

Notice of Inspection (at PLD)

The record shows (TR 119) that the Michigan Department of Natural Resources ("MDNR") inspector McGarry called Detroit's PLD a few days in advance of the inspection and talked to James Tripp, who was identified as being one of the persons responsible for PLD's PCB management activities. At the time of the inspection, Mr. Tripp identified himself as supervisor of overhead lines for PLD and professed that he was one of the persons responsible for PCB management activities, and furnished the inspector with documentation involved in past disposals of transformers (C EX 3, Att G). The inspector discussed the regulatory requirement pertaining to testing and Tripp advised (TR 124) that "only recently" had PLD initiated a program whereby it prescreens some transformers using a Chlor-N-Oil test kit. 3/

I reject Detroit's claim that the inspector talked to the "wrong person." In view of Detroit's notice of the inspection, the person selected to meet with the inspector could have been present or requested a postponement. Further, in view of Mr. Tripp's qualifications and position with PLD, I do not find credible the suggestion that Mr. Tripp was not the appropriate

3/ Chlor-N-Oil test kits detect chlorine; it does not detect actual PCB concentration; thus, the Chlor-N-Oil test is not accepted by MDNR or EPA to demonstrate whether or not a transformer does or does not contain PCBs (TR 125-128).

contact or that the inspector's finding would have differed materially had someone else in authority been contacted.

History of Violations

I find that, in pertinent part, the Consent Agreement and Final Order entered into by Chrysler and Detroit with EPA on April 19, 1985, provides, as stipulated by Respondents, for payment by Chrysler of the \$53,000 penalty there assessed against Chrysler and Detroit and that Respondent City of Detroit agreed that it would comply with the Toxic Substances Control Act, 40 C.F.R. Part 761, and regulations promulgated pursuant thereto.

It is recognized, and I so hold, that Detroit cannot, and did not, by its accords with Chrysler, contract away its legal obligations and that technically it was responsible, as the owner, for the violations then found at Lynch, Huber and Old Mack (TSCA-V-C-193; -194 and -195). See SF2-4 and R EX 2.

I have considered the circumstances surrounding the charges so settled by the said Consent Agreement and find that the facts there can be distinguished from the facts usually considered in finding a "history of violations". Said Consent Agreement indicates that the violations alleged resulted, in great part, from the failures of Chrysler. By reason of said distinction here found, the civil penalties assessed at Lynch, Huber and Old Mack for purposes of these proceedings only, will not be increased by 25%, as urged by Complainant, because of Detroit's "history of violations" evidenced by said R EX 2.

CIVIL PENALTIES

The amount of the civil penalties, the assessment of which I have found to be appropriate, for the violations found under the separate Counts of subject four Complaints (Conclusions of Law, pages 19 through 25, supra),

shall be determined in accordance with the Act and regulations. 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.

I am not bound, by said regulations, to assess the penalties proposed in the Complaints; however, it is there provided that I must consider the guidelines in determining the amount of each civil penalty here recommended and must set forth specific reasons should I conclude that an appropriate penalty is different in amount from that recommended in subject Complaint.

Guidelines for the Assessment of Civil Penalties under the Act 4/ are in two parts: a general TSCA Civil Penalty System 5/ and a PCB Penalty Policy. 6/

4/ 45 FR 59770 (September 10, 1980).

5/ 45 FR 59770-59776.

6/ 45 FR 59776-59783.

The Agency's TSCA Civil Penalty Policy memorandum, issued on March 10, 1980, implements a system for determining TSCA civil penalties, whereby penalties are determined in two stages: (1) determination of a "gravity based penalty" ("GBP") and (2) adjustments to the GBP.

To determine the GBP, the following factors are to be considered:

(a) The "nature", (b) the "extent" of environmental harm that could result, and (c) the "circumstances" of the violation. These factors are incorporated on a matrix ^{7/} which allows determination of the appropriate GBP. Once the GBP has been determined, upward or downward adjustments may be made in consideration, if so, of (1) culpability, (2) history of violations (within the preceding five years), (3) ability to continue in business and (4) such other matters as justice may require.

The matrix, from which the appropriate GBP can be found, provides a vertical axis indicating "Circumstances (Probability of Damage)" and a horizontal axis indicating the "Extent of Potential Damage". The probability of damage on the vertical axis is graduated into three ranges, viz., High Range, Mid Range and Low Range. Each range provides two amounts of civil penalty for each evaluation of "Extent of Potential Damage" on the horizontal axis, viz., Major, Significant and Minor. Thus, at points where the two axes coordinate, two dollar amounts are provided for each range of the vertical axis. The amounts shown in the matrix are viewed as benchmarks along a continuum, a range of penalties (Bell & Howell Co., TSCA-V-C-033, 034, 035 (Final Decision, December 2, 1983)).

^{7/} Said Matrix is set forth in C EX 9 (45 FR 59771, September 10, 1980).

Civil Penalty - PLD (-82)

Count I: Detroit does not dispute EPA's calculation of a GBP of \$10,000 (R Proposed Finding, page 181; Discussion, page 27, supra). The extent of potential damage was "Major"; potential for harm was Level 4. On this record, no reason is shown to support a mitigation of said amount; therefore, a civil penalty of \$10,000 is found appropriate and is here assessed.

Count II: On this record (Conclusion 2, page 20, supra), PLD improperly disposed of 369 mineral oil-filled PCB-contaminated transformers after July 2, 1979, and 37 mineral-oil filled PCB-contaminated voltage regulators after September 24, 1982. The proportional penalty calculation was used by Complainant in arriving at the \$85,000 penalty proposed because of the number of the subject PCB-contaminated electrical equipment found to have contained between 50 and 500 ppm PCBs (PCB Penalty Policy, 45 FR 59783; TR 609). I adopt Complainant's calculations, explaining said computation, which are prima facie appropriate since the penalty was calculated pursuant to said PCB Penalty Policy (see Huth Oil Co. and Nichols, Docket No. TSCA-V-C-196 (1986), l.c. 39).

The proportional penalty of \$85,000 is determined by following steps required in the PCB Penalty Policy (TR 600; C EX 12). First, the amount of PCB material involved in the violation is calculated. Information provided by PLD showed that it disposed of 505 oil-filled transformers and regulators, containing 15,407 gallons of fluid, between 1977 and July, 1986 (C EX 3, Att F). The average gallonage per transformer or regulator is 30.5 gallons (C EX 12). The precise number of improperly disposed of transformers and regulators, 406, is then multiplied by the average gallonage (TR 606; C EX 12). The total amount of gallons is then reduced by 70 percent,

because of the applicable concentration reduction, to reach an amount of 3,715 gallons of PCB material involved in the violation (TR 606, 607).

The amount of PCB material (3,715 gallons) is obviously more than twice the threshold amount for the major extent category of 1,100 gallons; therefore, the calculation continued to step three.

The next step in the proportional penalty calculation is to divide the 3,715 gallons of PCB material involved in the violation by the Major extent category threshold of 1,100 gallons (TR 607, 608; PCB Penalty Policy, at 59783; C EX 12). The result is a factor of 3.4, which then is multiplied by \$25,000 to reach the penalty of \$85,000 (id.) In accordance with proportional penalty calculation, the \$85,000 is divided by 10, which represents the 10 discreet transactions in which Detroit disposed of transformers at Carter (C EX 3, Att F). The per-event penalty of \$8,500 then is entered on a worksheet, and applicable adjustment factors are applied. Since no adjustment factors apply here, the total proportional penalty for improper disposal of 406 transformers and regulators is \$85,000. I find that the assessment of a civil penalty in the amount of \$85,000 on said Count II is proper.

Count III: On this record (Conclusion 3, page 20), PLD violated 40 C.F.R. §761.65(c)(5) and (c)(8) in that it did not dispose of its 10 PCB large capacitors within one year, did not date said capacitors to show when they were placed in storage, and failed to check said capacitors for leaks every 30 days. EPA proposed a GBP of \$1500, finding that the extent was "Minor" and probability of damage was Level 3. I find the assessment of \$1500, for said storage violations, is appropriate and that said amount should be and is hereby assessed.

Count IV: On this record (Conclusion 4, page 20, supra), PLD failed to properly mark subject 10 PCB large capacitors with the proper PCB label and, thus, violated 40 C.F.R. §761.40(a)(5) ("Minor" extent, Level 5). I find that a \$500 civil penalty should be assessed for said violation.

Civil Penalty - Huber (-83)

Count I: Improper recordkeeping (Conclusion 8, page 21, supra). The charge is admitted by Respondent. I find that the \$10,000 GBP calculated by Complainant accords with said PCB Penalty Policy and that no adjustment should be made (see Discussion, page 32, supra); therefore, a civil penalty in the sum of \$10,000 should be and is hereby assessed for said violation.

Count II: For violating 40 C.F.R. §761.30(a)(1)(x) (Conclusions 10 and 11, pages 21-22, supra), in that Huber did not perform quarterly inspections of its PCB transformers; did not develop and maintain quarterly records of said required inspections; failed to repair or replace damaged transformers and failed to properly contain leaked PCBs until completion of cleanup, the assessment of a \$20,000 GBP is appropriate and accords with subject civil penalty matrix (extent "Major"; Level 2). No adjustment is warranted, therefore, a civil penalty in the sum of \$20,000 should be and is hereby assessed.

Count III: Improper Disposal (Conclusions 12 and 13, supra, page 22 and Findings 36 and 37, page 14, supra); extent "Major"; probability of damage, Level 1). For said violation, a civil penalty in the sum of \$25,000 should be and is hereby assessed, as no adjustment to GBP will be made.

Count IV: Improper Storage (Findings 37, 38 and 39, page 14, supra, and Conclusion 14, page 22, supra); extent of potential damage, "Major"; probability of damage, Level 3. For said violation, a civil penalty in the sum

of \$15,000 should be and is hereby assessed, as no adjustment will be made (see page 32, supra).

Count V: Improper marking (see Finding 39, page 14, supra and Conclusion 15, page 22, supra); extent "Major"; probability of damage, Level 5. I find that a proper penalty which should be and is hereby assessed is \$5,000, as no adjustment to GBP is warranted.

Civil Penalty - Lynch (-92)

Count I: On this record (Conclusion 16, page 23, supra), Detroit's admitted failure to develop and maintain annual records, for 1983 through 1985, on the disposition of 14 PCB transformers, is a violation of PCB regulations and the Act, for which a civil penalty of \$10,000 should be and is hereby assessed, as no adjustment to said GBP is warranted (see Discussion, page 32, supra). Extent is "Major", probability Level 4 (TR 622).

Count II: On this record (Conclusion 17, page 23, supra), Detroit's failure to perform subject annual inspections, maintain records thereof and to clean up and dispose of spilled PCBs at Lynch violated PCB regulations and the Act. For such improper use, a GBP of \$17,000 was calculated. I find that said GBP penalty amount is appropriate although EPA's witness stated it did not conform to the amount he intended to take from the matrix (TR 627) and I have further found that no adjustment to the GBP is warranted (page 32, supra).

Count III: On this record (Conclusion 18, page 23, supra), the improper disposal at Lynch violated PCB regulations and the Act; the extent "Significant" and probability of damages, Level 1 (TR 629). I find that the GBP of \$17,000 indicated by said civil penalty matrix is appropriate and that no adjustment is warranted.

Civil Penalty - Old Mack (-94)

Count I: On this record (Conclusion 19, page 23, supra), it is not disputed that Detroit failed to develop and maintain records at Old Mack. I find that an appropriate GBP penalty is \$10,000 (extent of potential damage Major; probability of damage Level 4) and that said civil penalty amount should be and is hereby assessed for said violation as no adjustment to said GBP is warranted (Discussion, page 32, supra).

Count II: On this record (Conclusion 20, pages 23-24, supra) Detroit's failure to perform quarterly inspections, in 1983 and 1984, on its PCB transformers and capacitors and to develop and maintain records of such inspection violated the PCB regulations and the Act and a GBP of \$20,000 (extent "Major", probability Level 2) is appropriate and such penalty should be and is hereby assessed. No adjustment to said GBP is warranted.

Count III: Improper Disposal (see Findings 57, 58, 59, 64, 65 and 66, pages 18-19). I find that three contaminated areas of soil sampled by EPA were, respectively, ten square feet, six square feet and one square foot, or a total of 17 square feet and said contamination resulted from improper disposals. Such "conditions" persisted (were not remedied), on this record, for approximately 634 days; however, this does not represent the length of time the "disposal" persisted or "continued" - it is presumptuous to conclude that the subject disposal continued for more than one day. I find that three areas, each less than 150 square feet, were contaminated; therefore, under the PCB Penalty Policy (45 FR at 59779), the extent of potential damage in each instance is "Minor" and the circumstances (probability of damage) is High Range, Level 1, because the violation category is "Improper Disposal" (45 FR 59780). On subject penalty matrix, an appropriate penalty of \$5,000 is indicated for each such "improper disposal" or a total GBP

of \$15,000, which GBP is hereby assessed. In arriving at this conclusion, I have considered Respondent's submission (R Proposed Findings, etc., page 79) that EPA's computation of the Proportional Penalty is in error. I find that use of the Proportional Penalty here for Improper Disposal is not appropriate. I am guided by the penalty policy where it is stated, 45 FR at 59782, Column 3:

When Multiple Penalties Should be Assessed

* * *

Another example of multiple penalties used properly is where one company has several PCB [violations] in substantially different locations. Different buildings or yards on the same site would be sufficient for a multiple violation; two sites in the same building would not, unless the building is very large (for example, an auto assembly building). In these cases, the separate locations present separate and distinct risks to human health and the environment. Thus separate penalties are justified. (Emphasis supplied).

I have considered the facts outlined in Findings 57, 58 and 59 indicating three distinct sampling areas (TR 646) and Finding 68 describes "Old Mack" as a facility with over two million square feet under roof which consists of over 30 interconnected buildings . . . located on . . . 33 acres. As indicated, page 32, supra, no adjustments to said \$15,000 civil penalty will be made; therefore, the amount of the civil penalty here assessed for the Count III violation remains \$15,000.

Count IV: Improper Storage. On this record (Conclusions 22, 23 and 24, page 24, supra), for storage violations at Old Mack, where 14 PCB capacitors, stored for disposal (SF1-82, 96, 97, 100; TR 323), were not disposed of within one year, not dated indicating the date they were placed in storage and not stored in an approved storage area, a GBP penalty in the amount of \$1,500 is appropriate and is hereby assessed, as no adjustment to

said GBP is warranted; extent "Minor", probability Level 3.

Count V: Improper Marking. On this record (Conclusion 26, page 25), for said violation, which consisted of Detroit's failure to mark subject 14 PCB capacitors and storage area with a proper PCB label, a GBP penalty in the amount of \$1,500 is appropriate and is hereby assessed, as no adjustment to said GBP is warranted; extent "Minor", probability Level 3.

Having determined the appropriate penalties to be assessed against Respondent, I recommend entry of the following:

FINAL ORDER 8/

Pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2615(a), civil penalties in the total sum of \$264,000 are hereby assessed against Respondent City of Detroit for violations of TSCA and the PCB regulations in the following cases:

CITY OF DETROIT PUBLIC LIGHTING DEPARTMENT (PLD), TSCA V-C-82-87

Count I:	\$10,000
Count II:	\$85,000
Count III:	\$ 1,500
Count IV:	\$ 500
<hr/>	
	\$97,000

CITY OF DETROIT WATER AND SEWERAGE DEPARTMENT (HUBER), TSCA-V-C-83-87

Count I:	\$10,000
Count II:	\$20,000
Count III:	\$25,000
Count IV:	\$15,000
Count V:	\$ 5,000
<hr/>	
	\$75,000

8/ 40 C.F.R. §22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. §22.30(a) provides for an appeal herefrom within 20 days.

CITY OF DETROIT LYNCH ROAD (LYNCH), TSCA-V-C-92-87

Count I:	\$10,000
Count II:	\$17,000
Count III:	\$17,000

	\$44,000

CITY OF DETROIT COMMUNITY AND ECONOMIC DEVELOPMENT DEPARTMENT (OLD MACK),
TSCA V-C-94-87

Count I:	\$10,000
Count II:	\$20,000
Count III:	\$15,000
Count IV:	\$ 1,500
Count V:	\$ 1,500


	\$48,000

TOTAL: \$264,000

Payment of the full amount of said civil penalties assessed, shall be made within 60 days of the service of the Final Order by forwarding a certified or cashier's check, payable to Treasurer of the United States of America, to:

EPA - Region 5
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673.

DATED: August 25, 1989



Marvin E. Jones
Administrative Law Judge

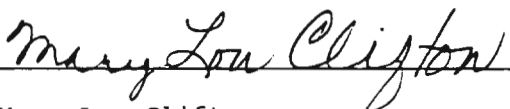
CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR §22.27(a), I have this date forwarded, via Certified Mail, Return Receipt Requested, the Original of the foregoing INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, to Ms. Beverly Shorty, Regional Hearing Clerk (5MF-14), United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the Original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said INITIAL DECISION to the Administrator.

DATED: August 28, 1989



Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ