



7/24/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, DC 20460

OFFICE OF  
THE ADMINISTRATIVE  
LAW JUDGES

In the Matter of:

PASADENA DEPARTMENT OF WATER  
AND POWER,

Respondent.

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Docket No.: TSCA-09-89-0004

INITIAL DECISION

1. TSCA - Accelerated Decision: Where the Respondent admits in it's Answer the facts that constitute the basis for the violations set forth in the Complaint, a Motion for an Accelerated Decision filed pursuant to 40 CFR Section 22.20 should be granted.

2. TSCA - Use of Penalty Policy: The Agency's TSCA Penalty Policy was considered when arriving at the penalties herein assessed.

APPEARANCES:

For Complainant: David M. Jones, Esq.  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency - Region IX  
215 Fremont Street  
San Francisco, CA 94105

For Respondent: Scott D. Rasmussen, Esq.  
Deputy City Attorney  
City of Pasadena  
105 S. Los Robles Avenue, Suite 200  
Pasadena, CA 91101

AUG 01 1989

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 January 30, 1989, by the United States Environmental Protection Agency ("EPA" or "Complainant" or "Agency"), Region 9, under Section 16(a) of the Act, 15 U.S.C. § 2615(a).<sup>1</sup> 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.<sup>2</sup> 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 record keeping and reporting requirements of polychlorinated biphenyls (PCB or PCBs) contained in 40 C.F.R. Part 761 ("PCB Ban Rule"). The administrative Complaint charged the Respondent, Pasadena Department of Water and Power,

ENVIRONMENTAL PROTECTION AGENCY  
 REGION IX  
 HEARING CLERK

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 . . ."

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1 ("Respondent" or "Pasadena"), with the following violations:

2 Count I alleged that Respondent failed to develop,  
3 maintain and make available records of PCB Transformer inspec-  
4 tions from 1981 through 1988 in violation of 40 C.F.R. §  
5 761.30(a)(1)(xii). Count I also alleged that Respondent failed  
6 to register PCB Transformers with fire response personnel until  
7 June of 1988.<sup>3</sup>

8 Count II alleged that the Respondent failed to mark the  
9 means of access to the eight PCB Transformers with the PCB  
10 Caution Label in violation of 40 C.F.R. § 761.40(j).<sup>4</sup>

11 Count III alleged that the Respondent failed to dispose of  
12 PCBs in an EPA approved incinerator, chemical waste landfill,  
13 or high efficiency boiler in violation of 40 C.F.R. § 761.60

14  
15 <sup>3</sup>. 40 C.F.R. § 761.30(a)(1)(xii) provides, in pertinent  
part:

16 "A reduced visual inspection frequency of at least once  
17 every 12 months applies to PCB Transformers. . . These inspec-  
tions may take place any time during the calendar year as long  
as there is a minimum of 180 days between inspections."

18 40 C.F.R. § 761.30(a)(1)(vi) provides, in pertinent  
19 part:

20 "As of December 1, 1985, all PCB Transformers . . . must be  
21 registered with fire response personnel with primary jurisdic-  
22 tion (that is, the fire department or fire brigade which would  
normally be called upon for the initial response to a fire  
involving the equipment)."

23 It should be noted that paragraph 5, Count I, cites 40  
24 C.F.R. § 761.30(a)(1)(vi) while paragraph 6 of the Count cites  
25 40 C.F.R. § 761.30(a)(1)(iv). The latter citation is obviously  
26 a typo. Nothing in Respondent's Answer to Complaint or any  
other documents on file herein indicate that Respondent was  
prejudiced in any way by the error which is deemed to be  
harmless.

27 <sup>4</sup>. 40 C.F.R. § 761.40(j) provides in pertinent part:

28 "As of December 1, 1985, the . . . means of access .  
. . . to a PCB Transformer must be marked with the mark M<sub>L</sub>. The  
mark must be placed so that it can be easily read by firemen  
fighting a fire involving this equipment."

1 (a)(1). Count III further alleged that three of Respondent's  
2 PCB Transformers were found to be leaking and causing spills in  
3 violation of 40 C.F.R. § 761.60(d)(1).<sup>5</sup>

4 Count IV alleged that the Respondent held five drums  
5 containing twelve PCB Capacitors in storage for disposal which  
6 had not been dated so as to show the date that the drums were  
7 placed in storage for disposal in violation of 40 C.F.R. §  
8 761.65(b)(8).<sup>6</sup>

9 II. Background - Penalties Proposed:

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

13	Count I:	Improper Use	\$10,000.00
14	Count II:	Inadequate Marking	5,000.00 <sup>7</sup>
15	Count III:	Improper Disposal	1,500.00
16	Count IV:	Inadequate Storage for Disposal	500.00

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19 <sup>5</sup>. 40 C.F.R. § 761.60(a)(1) provides in pertinent part:  
20 ". . . PCBs at concentrations of 50ppm or greater  
21 must be disposed of in an incinerator which complies with  
22 §761.70." Section 761.70 ". . . applies to facilities used to  
23 incinerate PCBs required to be incinerated . . ." under the  
24 regulations implementing TSCA.

25 <sup>6</sup>. 40 C.F.R. § 761.65(b)(8) reads in pertinent part:  
26 "PCB Articles and PCB Containers shall be dated on  
27 the article or container when they are placed in storage. The  
28 storage shall be managed so that the PCB Articles and PCB  
Containers can be located by the date they entered storage."

<sup>7</sup>. In my May 11, 1989, Order on Motion, recognition was  
given to Respondent's dispute with Complainant's contentions  
respecting the weight of the PCBs to be considered in applying  
the penalty policy. It was there concluded that the applica-  
tion of the proper weight would result in a penalty of \$3,000  
rather than the \$5,000 shown in the Complaint.

1                                    Total Proposed Penalty                                    \$17,000.00<sup>8</sup>

2                    III. Background - Processing of the Case:

3                    Pasadena filed its Answer to the Complaint with the  
4                    Regional Hearing Clerk, Region 9 on February 23, 1989, in which  
5                    it took issue with the facts in the Complaint pertaining to the  
6                    geographic location of the facilities as described in the  
7                    Complaint. In the remainder of the Answer to Complaint  
8                    Respondent contests the appropriateness of the proposed  
9                    penalty, sets forth facts in mitigation thereof and requested a  
10                    hearing.

11                    On April 10, 1989, Complainant filed its Motion for Leave  
12                    to Amend the Complaint and Notice of Opportunity for Hearing  
13                    and for Accelerated Decision. Pasadena did not oppose the  
14                    Agency's efforts to amend the Complaint to show the proper  
15                    geographic location of Respondent's facilities.

16                    On May 11, 1989, I issued an Order on Motion wherein I  
17                    found that Pasadena had admitted all of the facts set forth in  
18                    the Complaint. As a consequence, I found that Respondent  
19                    violated TSCA and the implementing regulations as charged in  
20                    the Complaint. In addition, I found that issues raised by the  
21                    Respondent on the record before me as potentially mitigating  
22                    the amount of the civil penalty were unavailing.

23                    A copy of the Order on Motion is hereby incorporated herein by  
24                    this reference and attached hereto and marked as Attachment No.  
25                    1.

26                    On the basis of the entire record, including the submis-

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28                    <sup>8</sup>. The total proposed penalty should be adjusted to show  
                  \$15,000.00 rather than the \$17,000.00 set out above.

1 sions of the parties pursuant to my pre-hearing exchange order  
2 and giving such weight as may be appropriate to all relevant  
3 and material evidence which is not otherwise unreliable, I make  
4 the findings of fact which follow. All contentions submitted  
5 by the parties have been considered and whether or not specifi-  
6 cally discussed herein, those which are inconsistent with this  
7 decision are rejected.

8 FINDINGS OF FACT

9 1. The Respondent is the Pasadena Department of Water and  
10 Power, which is and was at all times relevant to the Complaint  
11 herein, a municipally owned facility which serves the City of  
12 Pasadena, State of California.

13 2. On or about August 17, 1988, Clarence Berman and Ruth  
14 Williams, representatives of EPA, inspected in the presence of  
15 Walter M. White, Susan Nielsen, Don Paz, Leo Johnson and  
16 Rudolfo Jimenez, the Respondent's Broadway Plant Facility  
17 located at 130 Wallis Street, City of Pasadena and the Water &  
18 Power Warehouse Facility located at 311 West Mountain Street,  
19 City of Pasadena, California. Motion for Leave to Amend the  
20 Complaint and Notice of Opportunity for Hearing and for  
21 Accelerated Decision, p. 2.

22 3. At the time of the EPA inspection on August 17, 1988, the  
23 Respondent had failed to register PCB Transformers at the  
24 Broadway Plant Facility with fire response personnel until June  
25 of 1988. Inspection Report p. 4.

26 4. At the time of the EPA inspection on August 17, 1988, the  
27 Respondent failed to maintain records of inspection and  
28 maintenance history of each PCB Transformer at the Broadway

1 Plant Facility. Inspection Report p.4 and p.16.

2 5. At the time of the EPA inspection on August 17, 1988, the  
3 Respondent had failed to mark the PCB Transformer access door  
4 where four PCB Transformers with Serial Numbers 2984-1, 2984-2,  
5 2984-3 and 2984-4 were located. Affidavit of Donald Paz p. 4.

6 6. PCB Transformers with Serial Numbers 2984-1, 2984-2, 2984-3  
7 and 2984-4 each have a fluid capacity of 250 gallons for a  
8 total 1,000 gallons in all weighing 4,520 kilograms. Inspection  
9 Report p. 16 and Affidavit of Donald Paz p. 4.

10 7. At the time of the inspection on August 17, 1988, the  
11 PCB Transformers with Serial Numbers 2984-1, 2984-2 and 2984-4,  
12 Banks A, B, E, and F, were then and there leaking and causing  
13 spills. Inspection Report p.4.

14 8. At the time of the inspection on August 17, 1988, there  
15 were five 55-gallon drums containing twelve PCB Capacitors  
16 which were in storage for disposal none of which had been dated  
17 at the time that the capacitors were placed in storage for  
18 disposal. Inspection Report p.5.

19 CONCLUSIONS

20 The Complainant is the United States Environmental  
21 Protection Agency, Region 9. The Respondent is a "person" as  
22 defined in 40 C.F.R. § 761.3<sup>9</sup> and is subject to the prohibi-  
23 tions set forth in 40 C.F.R. Part 761.<sup>10</sup> The basis for the  
24 finding that Pasadena violated TSCA and the implementing

25 \_\_\_\_\_  
26 <sup>9</sup>. 40 C.F.R. § 761.3 provides, in pertinent part:  
27 "'Person' means any natural or judicial person including any .  
28 . . . state or political subdivision thereof . . ."

<sup>10</sup>. 40 C.F.R. § 761.1(b) provides in pertinent part:  
"This part applies to all persons who . . . use, or dispose of  
. . . PCBs or PCB Items.

1 regulations as charged in the Complaint is set forth in detail  
2 in my Order on Motion which is attached to this Initial  
3 Decision as Attachment No. 1. Further discussion of the matter  
4 in this Initial Decision is unwarranted.

5 CIVIL PENALTY

6 Having found that the Respondent was in violation of TSCA  
7 and the implementing regulations, I must now determine the  
8 amount of the recommended civil penalty to be assessed for each  
9 violation. My Order on Motion contains a brief review and an  
10 adjustment in the civil penalty proposed by Complainant.<sup>11</sup>

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

13 Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B),  
14 provides: "In determining the amount of a civil penalty, the  
15 Administrator shall take into account the nature, circumstan-  
16 ces, extent, and gravity of the violation or violations and,  
17 with respect to the violator, ability to pay, effect on ability  
18 to continue to do business, any history of prior such viola-  
19 tions, the degree of culpability, and such other matters as  
20 justice may require."

21 40 C.F.R. § 22.27(b) provides, in pertinent part:

22 (b) Amount of Civil Penalty. If the Presiding  
23 Officer determines that a violation has occurred, the  
24 Presiding Officer shall determine the dollar amount  
25 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

26 <sup>11</sup>. On page 2 of my Order on Motion I adjusted the  
27 penalty calculation by Complainant for Count II based on the  
28 information set out in the affidavit by Donald Paz, Assistant  
Electrical Engineer for the City of Pasadena. This adjustment  
resulted in a penalty calculation of \$3,000.00 instead of the  
\$5,000.00 proposed by Complainant.

1 a civil penalty, and must consider any civil penalty  
2 guidelines issued under the Act. If the Presiding  
3 Officer decides to assess a penalty different in  
4 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.

5 Clearly, the degree of discretion which I possess in  
6 determining the recommended civil penalty is defined and  
7 delimited by the statutory criteria described in Section  
8 16(a)(2)(B) and further restricted by the regulatory require-  
9 ments to "consider any civil penalty guidelines issued under  
10 the Act" and to explain my reasons for any deviation from the  
11 amount of penalty recommended in the Complaint. Thus, I do not  
12 possess the discretion simply to set a civil penalty at a  
13 figure which I might personally believe, based purely on my  
14 subjective judgment, to be "fair" or "appropriate" or "equi-  
15 table."

16 Section 22.27(b) requires me to consider the EPA civil  
17 penalty guidelines. While the guidelines are not regulations,  
18 Section 22.27(b) is a regulation. As the Judicial Officer has  
19 said: "the penalty guidelines constitute an interpretation of  
20 the statutory factors set forth in TSCA § 16(A)(2)(B) . . . and  
21 the Administrator, not the Complainant, has specifically  
22 directed the presiding officer in § 22.27(b) of the procedural  
23 rules to give that interpretation consideration. Therefore,  
24 since the presiding officer is obviously bound to apply the  
25 statutory factors, the Administrator's direction to him to give  
26 consideration to a particular interpretation, i.e., the penalty  
27 guidelines, is the same, in terms of its legal effect, as any  
28 other regulation the Administrator might issue construing the

1 statute; and, in that regard, the presiding officer properly  
2 observed that the requirement to give the guidelines considera-  
3 tion is 'entirely in accordance with the settled rule that  
4 agency policy statements interpreting a statute are entitled to  
5 be given such weight as by their nature seems appropriate.  
6 [Citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)]."<sup>12</sup>

7 Therefore, I am bound, pursuant to regulations, to  
8 consider the penalty guidelines. To "consider" means "to fix  
9 the mind on, with a view to careful examination," "to deliber-  
10 ate about and ponder over" and "to entertain or give heed  
11 to."<sup>13</sup> Thus, the obligation to consider the penalty guidelines  
12 means more than giving them a cursory reading or some slight  
13 scrutiny in passing. "Consider suggests a conclusion reached  
14 through reflection."<sup>14</sup>

15 While I must consider the civil penalty guidelines in  
16 determining the amount of the recommended civil penalty  
17 pursuant to Section 16(a)(2)(B) of TSCA and must set forth  
18 specific reasons for assessing a penalty different in amount  
19 from that recommended by the Complainant, I am not bound to  
20 assess the same penalty as that proposed by the Complainant.<sup>15</sup>  
21 I may assess a different penalty if, upon consideration I  
22 conclude, for example, the guidelines have been improperly  
23 interpreted and applied by the Complainant; or circumstances in

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24 12. Bell and Howell Company, (TSCA-V-C-033, 034, 035)  
25 (Final Decision, December 2, 1983) at 10, n.6.

26 13. Black's Law Dictionary (5th ed. 1979).

27 14. Webster's New Dictionary of Synonyms (1968).

28 15. In re: Electric Service Company, TSCA Docket No. V-C-  
024, Final Decision No. 82-2, at 20, n. 23.

1 the case warrant recognition,<sup>16</sup> or, where they may have been  
2 recognized by the Complainant, warrant a weight, not accorded  
3 them by EPA;<sup>17</sup> or the penalty calculated and recommended by the  
4 Complainant under the guidelines is somehow not consistent with  
5 the criteria set forth in the Act.

6 II. The TSCA Penalty Guidelines and PCB Penalty Policy.

7 The EPA has issued Guidelines for the Assessment of Civil  
8 Penalties Under Section 16 of the Toxic Substances Control  
9 Act.<sup>18</sup> The guidelines are in two parts: a general TSCA Civil  
10 Penalty System<sup>19</sup> and a PCB Penalty Policy.<sup>20</sup> The general TSCA

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12 <sup>16.</sup> See n.7 supra.

13 <sup>17.</sup> Thus, for example, the Judicial Officer has held  
14 that: "There is nothing in the guidelines which suggests that  
15 a presiding officer is required to assess a penalty in an  
16 amount which is identical to one of the amounts shown in the  
17 matrix . . . . The guidelines were never intended to es-  
18 tablish an inflexible policy which would force the presiding  
19 officer to elect between one amount or the other . . . .  
20 Instead, it is better to view the amounts shown in the matrix  
21 as points along a continuum, representing convenient benchmarks  
22 for purposes of proposing and, in some instances, assessing  
23 penalties. Accordingly, if warranted by the circumstances,  
24 other points along the continuum may be selected in assessing a  
25 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 evalua-  
te. 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].

26 <sup>18.</sup> 45 Fed. Reg. 59770 (September 10, 1980).

27 <sup>19.</sup> Id. at 59770-59776.

28 <sup>20.</sup> id. at 59776-59783.

1 Civil Penalty System sets forth a general penalty assessment  
2 policy which is designed to establish standardized definitions  
3 and applications of the statutory factors that Section  
4 16(a)(2)(B) of TSCA requires the Administrator to consider in  
5 assessing a penalty.<sup>21</sup> The TSCA Civil Penalty System provides  
6 the general framework within which the specific penalty  
7 guidelines of the PCB Penalty Policy were developed. Under the  
8 system, penalties are determined in two stages.

9 First, a "gravity-based penalty" (GBP) is calculated based  
10 upon the "nature" of the violation; the "extent" of environmen-  
11 tal harm that could result from a given violation; and the  
12 "circumstances" of the violation. These factors are incor-  
13 porated in a matrix from which the amount of the GBP is  
14 calculated.

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

20 The regulation's specific penalty assessment guidance  
21 contained in the PCB Penalty Policy incorporates the approach  
22 used in the general guidelines in the TSCA Civil Penalty  
23 System. In calculating the GBP under the PCB Penalty Policy,  
24 the "nature" factor is the same for all violations because all  
25 violations of Part 761 are chemical control violations. Thus,  
26 to calculate the GBP for PCB violations, one considers the  
27 remaining two factors; (1) the "extent" of environmental harm,

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28 <sup>21</sup>. Id. at 59770.

1 which is determined by the amount and concentration of the PCB  
2 material involved; and (2) the "circumstances" or "probability  
3 for damage" which is determined by eight categories of viola-  
4 tion by type, e.g., "marking" violations or "use" violations.  
5 III. Application of the Guidelines and Policy.

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

7 In this case, the amount and concentration of the PCB  
8 material involved was 8,416 kilograms<sup>22</sup> of dielectric fluid in  
9 8 PCB Transformers which were in use. Under the PCB Penalty  
10 Policy the "extent" factor for the improper use violation  
11 (Count I) is "major."<sup>23</sup> The "concentration" of PCBs was taken  
12 from the nameplate<sup>24</sup> and is assumed to be in excess of 100,000  
13 ppm and the "concentration adjustment" section of the Penalty  
14 Policy found at Table II<sup>25</sup> indicates that no reduction is  
15 required to determine the extent of probable damage.<sup>26</sup>

16 The "extent" factor for the "marking" violation (Count II)  
17 was originally classified as "major," but as indicated above,  
18 the adjustment in the volume of PCB fluid in my Decision on  
19 Motion<sup>27</sup> resulted in a determination that the material involved  
20 here was 4,250 kilograms of dielectric PCB fluid instead of the  
21 8,416 used by Complainant in calculation of the proposed  
22 penalty, resulting in a change in classification from "major"

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24 22. Inspection Report, page 6.

25 23. Id. n.18 at 59777.

26 24. Inspection Report, page 6.

27 25. Id. n.23 supra.

28 26. Id. at 59779-59780.

27. See Attachment No. 1, pages 2 and 3.

1 to "significant."<sup>28</sup> The concentration adjustment would not  
2 apply here since these PCB Transformers are six of the eight  
3 PCB Transformers that were the subject of Count I.

4 The "extent" factor for the "disposal" violation (Count  
5 III) is classified as "minor" because the three PCB Trans-  
6 formers which were found leaking contain less than 1,000  
7 kilograms of PCB dielectric fluid.<sup>29</sup> Application of the  
8 alternative measures gives the same results since the "con-  
9 taminated area" is less than 150 square feet.<sup>30</sup> "Concentration  
10 adjustment would not be applicable in this instance since, as  
11 in Counts I and II the PCB concentration is represented by the  
12 nomenclature of the dielectric fluid shown on the PCB Trans-  
13 former labels.

14 The "extent" factor for the "storage" violation (Count IV)  
15 is classified as "minor" by application of the alternative  
16 methods of determining extent by counting the number of PCB  
17 Capacitors involved, here less than 60 large capacitors.<sup>31</sup>

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

19 As for the "circumstances" or the probability of damages,  
20 the TSCA Civil Penalty System establishes three ranges, each  
21 with two levels.<sup>32</sup> To assess the probability of damages from a  
22 particular type of PCB violation under the PCB Penalty Policy,  
23 the possible violations are grouped into eight categories which

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24 28. Id. n. 10.

25 29. Id. n.18 at 59778.

26 30. Id. at 59779.

27 31. Id. at 59779.

28 32. Id. at 59772.

1 include "Use, Marking, Storage and Disposal."

2 The improper use of PCBs (Count I) falls at Level four of  
3 the Medium Range: "No records or major recordkeeping viola-  
4 tions at facilities that use or store PCBs."<sup>33</sup>

5 The failure to mark the means of access to the four<sup>34</sup> PCB  
6 Transformers (Count II) would be classified as a Level five of  
7 the Low Range: "Minor marking violations . . . situations in  
8 which all the requirements of the rule have not been followed,  
9 but there are sufficient indications to notify someone un-  
10 familiar with the situation that PCBs are present and enable  
11 them to identify PCB items." <sup>35</sup>

12 The improper disposal of PCBs (Count III) is a Level one  
13 of the High Range: "[I]mproper disposal of PCBs . . ." which  
14 "includes any uncontrolled discharge of PCBs . . ." <sup>36</sup>

15 The placement of undated PCB Items in storage for disposal  
16 (Count IV) is a Level five of the Low Range: "Failure to date  
17 PCB items placed in storage." <sup>37</sup>

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

19 The initial GBP for Counts I,II, III and IV using the GBP  
20 Matrix<sup>38</sup> would be as follows:

21	Count I	Extent:	Major
22		Circumstances:	Level 4

23 <sup>33.</sup> Id. at 59780.

24 <sup>34.</sup> Id. n.10.

25 <sup>35.</sup> Id. n.18 at 59780.

26 <sup>36.</sup> Id. at 59780.

27 <sup>37.</sup> Id. at 59780.

28 <sup>38.</sup> Id. at 59777.

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	GBP:	\$10,000.00
Count II	Extent:	Significant
	Circumstances:	Level 5
	GBP:	\$3,000.00 <sup>39</sup>
Count III	Extent:	Minor
	Circumstances:	Level 3 <sup>40</sup>
	GBP:	\$1,500.00

39. Id. n.27 supra.

40. Region 9 has modified the Penalty Policy in the following manner:

Circumstance Level 1:

All PCB leaks and spills, unless they fall within the mitigating circumstances below.

Circumstance Level 3:

Those seeps, leaks, or spills from a PCB Contaminated or PCB Transformer should be assessed as a level 3 circumstance if either of the following is true:

. . . .

(2) a spill in which liquid has run off the Transformer to the floor below the Transformer if both the following circumstances exist:

(a) the spill boundaries are all within 2 feet of the Transformer that is leaking and causing the spill;

(b) the total area of all spills from the Transformer, when combined with each other, is 1 foot square or less ( $\leq$  1 square foot).

The photographs which accompanied the Inspection Report show that the three PCB Transformers, serial numbers 2984-1, 2984-2 and 2984-4 had leaks which meet the criteria set forth in the Region 9 penalty policy modification. A copy of the Region 9 penalty policy modification is attached hereto and marked as Attachment No. 2. It is to be noted that the text of the Inspection Report at page 4 indicates that the photos are numbered 1 thru 4, the photographs which accompanied the Report are marked as showing Transformers bearing serial numbers 2984-1 and 2984-2.

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Count IV	Extent:	Minor
	Circumstances:	Level 5
	GBP:	\$ 500.00

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.<sup>41</sup> I cannot conclude that the violation here was willful. 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.<sup>42</sup> Nothing in the record would support such a characterization of Respondent's conduct or attitude.

Based on the record before me, I conclude that the

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41. Id. n.18 at 59777.

42. 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).

1 violator, Pasadena, had sufficient knowledge to recognize the  
2 hazard created by its conduct. Further, Pasadena possessed  
3 significant control over the situation sufficient to avoid  
4 committing the violations with which it is charged. Hence, no  
5 downward adjustment of the GBP is appropriate.

6 Nor do I consider an upward adjustment warranted because  
7 there is no objective evidence, such as statements or actions  
8 of the violator to justify an upward adjustment. The record  
9 shows that Respondent did make an effort to correct the  
10 violations found by the EPA inspector after the issuance of the  
11 Complaint.

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

14 (3) Such other matters as justice may require:

15 (a) Government investigatory and clean-up costs:  
16 There were no Government clean-up costs in connection with the  
17 violations of TSCA charged in the Complaint. There is no  
18 allowance for government investigatory costs in the penalty to  
19 be assessed in this matter.

20 (b) Gains from noncompliance: On this record, it  
21 cannot be determined whether Pasadena profited from its  
22 violative acts, that is, whether Respondent would receive any  
23 economic gains from its delays in registering the PCB Trans-  
24 formers with fire response personnel, develop and maintain  
25 records of PCB Transformer inspections, mark the means of  
26 access to the PCB Transformer enclosure with the appropriate  
27 "M<sub>L</sub>," clean-up the spills and leaks of PCBs in and about the  
28 PCB Transformers and date the PCB Capacitors placed in storage

1 for disposal so that the same would show the date that they  
2 were placed in storage for disposal. The penalty assessed  
3 appears to be of sufficient size at least to substantively  
4 diminish any economic gains which Pasadena may have realized by  
5 its delay in complying with TSCA.

6 (C) Other factors as justice may require: Among the  
7 other factors "as justice may require" suggested in the  
8 guidelines, only those dealing with Pasadena's expenditures to  
9 correct the violations come into play. As for the money spent  
10 or to be spent to remove the PCB dielectric fluid from the PCB  
11 Transformers and to retrofill them with non-PCB fluid, there  
12 should be no reduction in the penalty assessed unless together  
13 with the GBP calculated penalty, the total cost is excessive in  
14 the circumstances of this case. There is no evidence on this  
15 record that such is the case and no reduction will be  
16 considered.

17 (4) Ability to pay and ability to continue in business:  
18 The guidelines put the burden on the Respondent to raise  
19 inability to pay or inability to continue in business.<sup>43</sup> No  
20 evidence was introduced to demonstrate that the proposed  
21 penalty or the proposed penalty as adjusted by my Order on  
22 Motion would present so great a burden as to pose a threat of  
23 destroying or severely impairing Pasadena's ability to  
24 function. Therefore, no adjustment in the penalty assessed is  
25 appropriate.

26 IV. Conclusion.

27 Accordingly, I find that the appropriate penalty is as

28  

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43. 45 Fed.Reg. 59775.

1 follows:

2 Count I \$10,000.00  
3 Count II 3,000.00  
4 Count III 1,500.00  
5 Count IV 500.00  
6 Total \$15,000.00

7 ORDER<sup>44</sup>

8 Pursuant to Section 16(a) of TSCA, 15 u.s.c. § 2615(A), A  
9 CIVIL PENALTY IN THE AMOUNT OF \$15,000.00 is hereby assessed  
10 against the Respondent, Pasadena Department of Water and Power,  
11 for the violations of the Act found herein.

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

17 EPA - Region 9  
18 Regional Hearing Clerk  
19 P. O. Box 360863M  
20 Pittsburgh, PA 15251

21   
22 Thomas B. Yost  
23 Administrative Law Judge

24 DATED: July 24, 1989

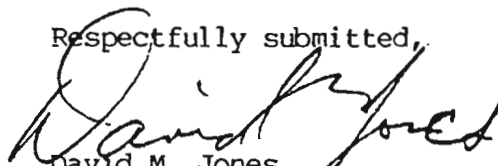
25  
26 <sup>44</sup>. Pursuant to 40 C.F.R. § 22.27(c), this initial  
27 decision shall become the final order of the Administrator  
28 unless an appeal to the Administrator is taken by a party or  
the Administrator elects to review the initial decision upon  
his own motion. 40 C.F.R. § 22.30 sets forth the procedures  
for appeal from this initial decision.

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

In re: ) Docket No. TSCA-09-89-0004  
)  
PASADENA DEPARTMENT OF WATER ) SUBMISSION OF  
AND POWER, ) INITIAL DECISION  
) FOR APPROVAL  
)  
Respondent. )

Transmitted herewith is the Initial Decision drafted by Counsel for Complainant as ordered by the presiding Administrative Law Judge in his Order on Motion dated May 11, 1989, for approval, execution and filing with the Regional Hearing Clerk, Region 9.

Respectfully submitted,

  
David M. Jones  
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Submission of Initial Decision for Approval was filed with the Regional Hearing Clerk, Region 9, United States Environmental Protection Agency, on the date shown below and that a copy was sent by First Class Mail to:

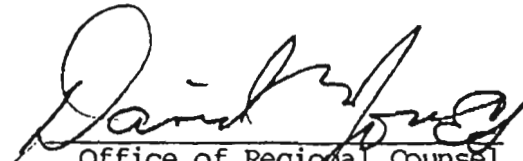
The Honorable Thomas B. Yost  
Administrative Law Judge  
United States Environmental Protection Agency  
Office of Administrative Law Judge  
345 Courtland Street, N. E.  
Atlanta, Georgia 30365

and to:

Scott D. Rasmussen, Esquire  
Deputy City Attorney  
City of Pasadena  
150 S. Los Robles Avenue, Suite 200  
Pasadena, California 91101

Dated

7/21/89

  
Office of Regional Counsel  
U. S. Environmental  
Protection Agency, Region

89 AUG 3

P 1

4 CERTIFICATE OF SERVICE

5 I certify that the foregoing Initial Decision issued by  
6 Thomas B. Yost, Administrative Law Judge was sent on this day  
7 August 1, 1989 to each of the Parties addressees in the following  
8 manner:

9 Original and Copy of the  
10 File Delivered by Mail to:

Bessie Hammiel  
Hearing Clerk  
U.S. Environmental Protection  
Agency  
401 M Street, S.W.  
Room 3706A, Waterside Mall  
Washington, D.C. 20460

11  
12 Copy mailed to:

Scott D, Rasmussen, Esq.  
Deputy City Attorney  
City of Pasadena  
105 S. Los Robles Avenue  
Suite 200  
Pasadena, CA 91101

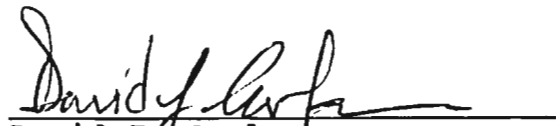
13  
14  
15 Copy hand delivered to:

David M. Jones, Esq.  
Assistant Regional Counsel  
Environmental Protection  
Agency  
215 Fremont St.  
San Francisco, CA 94105

16  
17  
18  
19 Copy Hand Delivered to:

David J. Carlson  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency  
Region 9  
215 Fremont Street  
San Francisco, CA 94105

20  
21  
22  
23  
24 Date: 8/1/89



25 David J. Carlson  
26 Regional Hearing Clerk  
27 Office of Regional Counsel  
28 U.S. EPA  
215 Fremont Street  
San Francisco, CA 94105