UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN RE:	)	
	)	
TRW, INC.	)	Docket No. TSCA-V-C 33-891
	)	
Respondent	)	

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Initial Decision

Dated: April 20, 1995

TSCA: Pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2615(a), the Respondent TRW, Inc., as charged in Count I of the Complaint, is assessed a civil penalty of $11,250 for failure to meet Condition 7 of the August 2, 1985 Amended Approval Conditions for the secure cell landfill at TRW's Minerva, Ohio manufacturing facility, which condition was established under the authority of Section 761.75(c)(3)(ii) of the PCB Regulations, 40 C.F.R. § 761.75(c)(3)(ii). Count II of the Complaint is dismissed with prejudice as barred by Section 3512 of the Paperwork Reduction Act, 44 U.S.C. § 3512.

Appearances:

For Complainant:

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For Respondent:

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I. Procedural History

On April 10, 1989, the United States Environmental Protection Agency's (EPA) Region V (Complainant) filed a Complaint and Notice of Opportunity for Hearing alleging that TRW, Inc. (Respondent or TRW) had committed two violations of Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). Count I of the Complaint alleges that the Respondent failed to collect and analyze groundwater monitoring well samples for June 1987 as required by the "Amended Approval Conditions for the Secure Landfill at The TRW Minerva, Ohio Manufacturing Facility" (Approval), which was issued by EPA's Region V under Section 761.75 of the EPA Regulations governing polychlorinated biphenyls (PCBs) (hereinafter the PCB Regulations), 40 C.F.R. Part 761. Section 761.75 covers chemical waste landfills under Subpart D, the Storage and Disposal Subpart of Part 761. Count II of the Complaint alleges that Respondent failed to report monthly leachate production at the Minerva site for the period of May 1987 to May 1988, in the Annual Report required by the Approval. The Complaint proposes that a penalty of $25,000 be assessed for each violation, making the total civil penalty sought $50,000.

The chemical waste landfill was installed by TRW at Minerva for the one time disposal of PCB contaminated materials (Ex. C-3). The landfill was constructed, all excavated material deposited and the cell closed in 1985-1986. The landfill is a secure cell design including eight suction lysimeters, a three

foot clay layer at the bottom, a plastic liner, a leachate collection system, the cell which contains the excavated materials, a second plastic liner and another clay cap which was then covered with topsoil (Tr.299-300). Nine groundwater monitoring wells are dispersed around the cell to monitor for any migration of contaminated materials.

Respondent filed an Answer to the Complaint on May 2, 1989, in which TRW admitted paragraphs 1-11, 14, 17 and 20 of the Complaint's 22 paragraphs, but denied the alleged violations and contested the amount of the proposed penalty. Respondent also requested an evidentiary hearing.

Pursuant to Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.20(a), the Complainant, on April 24, 1990, filed a Motion for Accelerated Decision on the issue of liability. In an order dated January 18, 1991, the Presiding Judge granted this motion in part and denied it in part. The Presiding Judge found the Respondent liable for the violation set forth in Count I of the Complaint, but held that triable issues did exist with regard to Count II. The matter was held over for hearing with regard to the issue of liability on Count II, and the appropriate amount of the penalty to be imposed.

The proceeding went to evidentiary hearing on November 6,7, and 8, 1991, in Twinsburg, Ohio, during which the following decisional record was established. The Complainant presented two witnesses and introduced into evidence 11 exhibits, which were designated as Complainant's Exhibits 1-11. Respondent presented

5 witnesses and identified 9 exhibits at trial, which were designated Respondent's Exhibits 1-9. These exhibits were introduced into evidence, with the exception of exhibits 5 and 6, which were not offered into evidence by the Respondent. The transcript of the hearing is contained in one volume totalling 521 pages. In February of 1992, the parties submitted Initial Briefs together with Proposed Findings of Fact and Conclusions of Law, and filed Reply Briefs in March of 1992[1]

Following the submission of the Initial Briefs, Respondent filed a motion to strike and/or for sanctions (motion to strike), because the Complainant's Initial Brief had been served one day late even though the certificate of service reflected that it had been sent on time. Because of this, Respondent asks that the Complainant's Initial Brief be stricken. The motion does not set out what sanctions are requested as an alternative to striking the brief. Complainant opposed this motion and explained that the brief was sent to the Region V mailing room on the due date but was apparently not mailed until the next day. Respondent submitted a supplement to its motion to strike which attaches a copy of envelope with the postmark showing the date of mailing.

On analysis, the Respondent's motion to strike is not well taken. The motion does not attempt to show any prejudice to

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[1] The exhibits will be cited as "Ex." with "C" and the number for Complainant's exhibits (e.g., Ex. C-2); "R" and the number for Respondent's exhibits (e.g., Ex. R-1); the transcript will be cited as "Tr." with the page number (e.g., Tr. 403); and the briefs will be cited by abbreviated party designations and page number (e.g., Compl. Initial Br. p.10).

Respondent from the service of the brief one day late, and the Complainant's explanation of the reason for the error in service is unchallenged. Moreover, striking of the brief is too drastic a penalty for the harmless mistake involved, and Respondent does not suggest any other sanction that might be appropriate. Therefore, the Respondent's motion to strike is hereby denied.

In addition, on May 12, 1993, the Presiding Judge issued an order requiring supplemental briefing by the parties on the effect that the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501 et seq., might have on disposition of this case. In July and August of 1993, the parties duly filed Supplemental Briefs and replies thereto on this issue.

This Initial Decision will consist of descriptions of the positions of the parties with regard to the issues, an analysis and resolution of the issues, and an order disposing of the issues. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed findings or conclusions accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or in fact, or as unnecessary for rendering this decision.

II. The Paperwork Reduction Act

A. The Positions of the Parties

The May 12, 1993 order of the Presiding Judge directed the parties to present supplemental post-hearing briefs analyzing

whether the PRA applies to the violations at issue herein. Specifically, the parties were requested to address whether there is a current U.S. Office of Management and Budget (OMB) control number involved in this cause and whether the provisions of Section 3512 of the PRA, 44 U.S.C. §3512, are applicable to this case. Section 3512 of the PRA provides, that:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter [44 U.S.C. §§ 3501 et seq.].

Complainant takes the position with regard to both Counts that EPA has complied with the PRA and that Section 3512 of the PRA provides no bar to a penalty being imposed for the Respondent's violations. Complainant points out that the Respondent failed to collect and analyze the groundwater samples (Count I) in June 1987 and failed to report the monthly leachate production data in May 1988 (Count II). At these two relevant times, Complainant avers that there was a valid OMB control number for the EPA PCB Regulations since one had been published in the Federal Register on February 27, 1986, 51 Fed. Reg. 6929, showing a control number for Records of PCB Storage and Disposal had been approved by OMB on December 10, 1985, with an expiration date of December 31, 1988 for the control number. As a result, Complainant argues that the PRA presents no bar to a penalty being assessed for either Count in the Complaint, since the PCB Regulations alleged violated are part of the EPA Records of PCB

Storage and Disposal.

Respondent argues that the Complaint attempts to impose civil penalties based on alleged deficiencies in the Respondent's Annual Report submitted in May 1988, since that Annual Report did not provide all of the information and in the form required by the Approval, which was issued by the Complainant on May 31, 1985 and amended on August 2, 1985. Respondent correctly points out that the Approval (Exs. C-1 and C-3) does not contain an OMB control number and does not state that the information requested is not subject to the PRA (hereinafter for simplicity the disclaimer). Therefore, Respondent argues that penalties for alleged deficiencies in the 1988 Annual Report cannot be assessed because the information request, the Approval, did not comply with the PRA. As a result, Respondent requests that the proceeding against it be dismissed.

In reply briefs on the PRA issue, the parties enlarge on their previous contentions, and the arguments need not be reiterated here. It is clear that the Complainant takes the position that the lack of an OMB control number on the Approval is of no import because at the relevant time, 1987-88, the PCB Storage and Disposal Regulations, including Section 761.75 of the PCB Regulations, 40 C.F.R. §761.75, pursuant to which the Approval was issued, had a valid OMB control number. Equally clear is the Respondent's stance that the PRA requires the information request itself, in this case the Approval, to have an OMB control number or a disclaimer for a penalty to be imposed

for deficiencies in the data supplied pursuant to the information request.

B. Analysis and Resolution of the PRA Issues

On analysis, the initial question to be addressed is whether the Complainant's argument that the lack of an OMB control number or a disclaimer is of no import since the underlying regulations contain a valid OMB control number. This argument must be rejected. The PRA is clear that any penalty is barred if the information collection request involved does not have a current control number or the disclaimer. The fact that the regulation under which the request was issued does have such a number does constitute compliance with the PRA since the plain language of Section 3512 of the PRA requires that the information collection request display the current number or the disclaimer. See Tower Central, Inc., Dkt. No. CAA-III-030, Order Disposing of Outstanding Motions, p. 2, issued July 28, 1994.

The conclusion that the information collection request itself should have the OMB control number or disclaimer is also buttressed by the regulatory scheme involved in this case. The underlying Regulation, Section 761.75, 40 C.F.R. § 761.75, provides the general scheme for the approval of chemical waste landfills. While the Regulation does have provisions for groundwater monitoring and leachate collection, it does not have specific requirements for reporting the data collected. Rather, the Agency has the discretion in Section 761.75(c)(3)(ii) to tailor the approval of a specific site by attaching other

conditions, which, as in the present case, can include regular reporting requirements. Since regular reporting is discretionary under the Regulation, the critical item from an information collection request standpoint is the specific approval, not the Regulation itself. In this action, the Approval must have the OMB control number or the disclaimer to meet the PRA requirements, because that approval document is the only place where the particular reporting requirements for the TRW site are set out.

Next, a review must be made of the Approval to determine if they in any way constitute an information collection request within the meaning of the PRA. Section 3502(11) of the PRA defines an information collection request as follows:

> (11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information.

On this point, Count II of the Complaint will be considered first, since it presents a simpler issue for PRA evaluation purposes. The Approval requires in Condition 17 b that TRW report the monthly leachate data in the Annual Report (Ex. C-3, p. 4). This clearly is an information collection request since this provision constitutes a reporting requirement. Count II of the Complaint seeks a penalty for the Respondent's failure, pursuant to Condition 17 b, to report the monthly leachate data in the 1988 Annual Report. Since it has been established on the record that the Approval does not contain an OMB control number

or a disclaimer (see Exs. C-1 and C-3), under Section 3512 of the PRA no penalty can be imposed for the Respondent's alleged failure to report the monthly leachate data in the 1988 Annual Report, even if the evidence presented at hearing is interpreted as establishing that the Respondent did fail to report the monthly data. Therefore, Count II of the Complaint must be, and hereby is, dismissed with prejudice.[2]

Count I, on the other hand, presents a different, more complicated issue. The disposition of a similar PRA issue was recently made in SCA Chemical Services, Inc., et al, Dkt. Nos. II-TSCA-PCB-88-0204 and 0205, Order on Cross Motions for Accelerated Decision, issued September 7, 1994 (hereinafter SCA). There, Respondent was charged with failure to test a representative sample from the contents of each vehicle transporting PCB wastes into a landfill approved under Section 761.75 of the PCB Regulations, where such testing was required as a specific condition in the approval, SCA at 2-3. Because of a lapsed OMB control number, the Respondent contested this violation by asserting that the testing requirement constitutes a collection of information within the meaning of the PRA, and is therefore barred by Section 3512 of the PRA, SCA at 4-5. However, the Presiding Judge ruled that the Respondent was not charged with a paperwork violation, but rather a failure to

[2] In light of the dismissal of Count II because of the PRA, the issue of multiple violations previously raised need not be addressed, nor is it necessary to analyze and resolve the conflicting arguments raised by the parties on the merits of the alleged violation in Count II.

conduct appropriate testing. The Judge rejected the argument that the testing was part of the burden of paperwork and held that the obligation to test was independent of any paperwork request since the function of the testing was to serve as a screening process, a basis for Respondent's decisionmaking regarding disposal and an assurance that the landfill would not be contaminated by unsafe levels of PCBs. SCA at 6-7. The ruling also pointed out that:

> The fact that a paperwork requirement not in compliance with the PRA was involved in a PCB disposal approval does not mean that the person may violate other conditions of the approval and be protected from the assessment of any penalty. SCA at 7.

Like SCA, Count I of the Complaint herein does not charge the Respondent with a failure to report data but with a failure to collect and analyze the June 1987 groundwater monitoring well composite samples as required by Condition 7 of the Approval. Although one purpose of collecting and monitoring the well samples is to comply with the reporting requirements in Condition 17 b of the Approval, this is not the only reason for collecting and analyzing these samples. For example, if the samples did show significant concentrations of PCBs, this could indicate that the PCB cell was breached and leaking, which would require remedial action by the Respondent to protect the environment.

It is correct that, because of the PRA, TRW could not be assessed a penalty for failure to report the June 1987 monitoring well data because the Approval does not have an OMB control number or a disclaimer. However, as in the SCA case, this

reporting penalty bar does not vitiate the other substantive requirements of the Approval nor exculpate TRW for any failure to comply with such requirements.

The gravamen of Count I is the Respondent's noncompliance with the obligation under Condition 7 of the Approval to collect and analyze the June 1987 groundwater monitoring well composite samples, not its failure to report this data. It must be concluded that collecting and analyzing samples from the groundwater monitoring wells had the independent purpose of alerting TRW to difficulties with the PCB cell so remedial action could be taken to ensure the integrity of the cell and thereby protect the environment. Therefore, the alleged violation in Count I for failure to collect and analyze the June 1987 samples is not a paperwork violation but stands as a separate charge involving noncompliance with Condition 7, a substantive provision in the Approval with an independent, nonpaperwork purpose of protecting the integrity of the PCB cell. Accordingly, Section 3512 of the PRA cannot be used as a bar to Count I of the Complaint.

III. Disposition of Count I

In an order issued January 18, 1991, the Presiding Judge granted the Complainant's motion for accelerated decision on the issue of liability with regard to Count I of the Complaint and held that the Respondent is liable for the violation set forth in Count I. As a result, it has been established that TRW violated Condition 7 of the Approval by failing to collect and analyze the

June 1987 groundwater monitoring well composite samples. The Respondent's violation of Condition 7 constitutes a violation of Sections 761.60 and 761.75 of the PCB Regulations, as well as a violation of Section 15 of TSCA, 15 U.S.C. § 2614. See page 4 of the January 18, 1991 order granting the Complainant's motion for accelerated decision in part. Because of the Respondent's violation as described above, the Respondent is liable for a civil penalty under Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

Since Count II has now been dismissed, the only matter remaining for disposition is the appropriate amount of the civil penalty to be assessed for the violation involved in Count I. This disposition will entail a discussion as necessary of the positions of the parties regarding penalty amount and an analysis and determination of the appropriate amount of civil penalty to be imposed.

Initially, however, note should be made of the Penalty Policies involved in this action. First, there is the 1980 PCB Penalty Policy (1980 Policy) published September 10, 1980 in the Federal Register, 45 Fed. Reg. 59770, et seq. (Ex. C-9).[3] There is also the 1990 PCB Penalty Policy (1990 Policy) notice of which was published April 13, 1990 in the Federal Register, 55 Fed. Reg. 13955. The 1990 Policy supersedes the 1980 Policy but the 1990 Policy applies to Complaints filed after April 9, 1990, the

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[3] The 1980 Policy will be cited by it exhibit number, Ex. C-9, but, since the exhibit is a copy of the Federal Register text, the page numbers are those in the Federal Register. However, for simplicity, the entire Federal Register cite including the volume number, 45, will not be set out in the citations hereafter.

issue date of the guideline, id. (Ex. C-10,[4] Tr. 123). Since the Complaint herein was issued April 10, 1989, the 1980 Policy is the basic controlling document. However, the 1990 Policy has been considered as evidence that the Agency overestimated risk in promulgating the 1980 Policy, New Waterbury, Ltd., Dkt. No. TSCA-I-88-1069, Initial Decision issued July 8, 1992, p. 46, and a witness for the Complainant agreed that the 1990 Policy cleared up "gray areas" of the 1980 Policy (Tr. 210-211). Therefore, the 1990 Policy will be taken into account where appropriate.

The 1980 Policy guidelines are based upon the language of Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which requires the following items be considered in determining the amount of a civil penalty: the nature, circumstances, extent, and gravity of the violation; the ability to pay and the effect on the Respondent's ability to continue to do business; the history of prior such violations; the degree of culpability; and such other matters as justice may require. To do this, the 1980 Policy sets out a two stage system. First, it requires determination of a gravity based penalty and then considers adjustments to the gravity based penalty. To determine the gravity based penalty, the 1980 Policy uses a matrix considering the following factors: the nature of the violation, the extent of

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[4] This exhibit consists of two pages of the notice of availability of the 1990 Policy in the Federal Register, 55 Fed. Reg. 13955-56, and a 26 page copy of the 1990 Policy, which includes a cover sheet, an index, and 24 additional numbered pages. The citations hereafter are to the numbered pages of the 1990 Policy unless otherwise specified.

environmental harm, and the circumstance of the violation. After the gravity based penalty has been determined from the matrix, the 1980 policy calls for downward or upward adjustment to the penalty amount in consideration of the following other factors: culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require. (Ex. C-9, p. 59770-71.)

A. The Complainant's Position

Complainant proposes that the Respondent be assessed a penalty of $25,000 for the violation in Count I. Complainant asserts that the violation at issue is of a chemical control nature as defined in the TSCA Civil Penalty Policy (id, at 59778). Complainant contends that, since the Approval was issued under Section 761.75(c)(3)(ii) of the PCB Regulations, 40 C.F.R §761.75(c)(3)(ii), which is contained in Subpart D of the PCB Regulations pertaining to storage and disposal, the violation in Count I must be a disposal violation, as opposed to a recordkeeping matter covered under Subpart K of the PCB Regulations.

The extent of the violation is next addressed by the Complainant as part of the gravity based penalty matrix (Compl. Initial Br. p. 16). Complainant notes that the figure of 23,000 cubic yards is the amount of PCB contaminated solids in the secure cell landfill (Tr. 513). According to Complainant, this amount would fit into the major category in the gravity based penalty matrix in the 1980 Policy (Ex. C-9, p. 59779).

Complainant considers the circumstances of the violation as the next component of the gravity based penalty matrix to determine if there is a high, medium, or low probability that damage will occur. Complainant stresses that this determination is based on the risk inherent in the violation as it was committed, even though no actual harm has occurred. (Id. at 59772.) Complainant argues that, under the 1980 Policy, a disposal facility operating in a condition that does not meet PCB Regulations represents a level one violation, the high range in the matrix (id. at 59780).

As a result of its evaluation, Complainant concludes that the violation in Count I should be assessed as a major, level one violation on the gravity based penalty matrix, which requires a maximum civil penalty of $25,000 (id. at 59771).

Complainant then addresses the adjustments that may apply to the proposed $25,000 penalty. Complainant suggests that an upward adjustment of 25% for a willful violation in the category of culpability is necessary since TRW had a total disregard for its obligations under the Approval (Compl. Initial Br. p. 24). In the alternative, Complainant asserts that no downward adjustment for the culpability factor is warranted because TRW had the requisite knowledge and control over its obligations under the Approval (Exs. C-1, C-3, Tr. 480, 493).

Complainant also contests the application of the 1990 Policy to consider the Respondent's good faith efforts to comply since this action was filed before the promulgation of the 1990 Policy.

Further, Complainant asserts that no change should be made to the penalty calculation even if it is determined that the 1990 Policy applies. Complainant argues that a downward adjustment for voluntary disclosure provided for in the 1990 Policy should not apply because, to be eligible for such a penalty reduction, the disclosure cannot be one that is required by PCB Regulations (Ex. C-10, p.18). Complainant avers that, since Respondent was required to report groundwater monitoring composite sampling data for June, 1987 in the Annual Report as part of the Approval, the disclosure of the violation does not qualify for a downward voluntary disclosure adjustment under the 1990 Policy.

B. The Respondent's Position

Respondent questions Complainant's interpretation of both the 1980 and 1990 Policies, and suggests that this violation should be placed in the medium-range/level three category of the gravity based penalty matrix (Resp. Initial Br., p. 10). TRW contends that the proper application of the Penalty Policies would take into account the factual circumstances of the violation and would consider the culpability of the Respondent, its attitude, other factors as justice may require, good faith efforts to comply, voluntary disclosure and the promptness and magnitude of corrective efforts (id.).

The Respondent maintains that the violation in Count I was the result of an inadvertent scheduling error by a representative assigned to collect groundwater composite samples (Tr. 220-221). Once aware of the mistake, Respondent claims that it took

voluntary action to report the incident to EPA and implemented corrective steps to prevent the reoccurrence of such an error (Tr. 223-27, 250-56, 311-13 and 418-20). The voluntary notification occurred by telephone (Tr. 421-22) and by a letter to the Agency in July 1987 (Ex. R-9). Respondent contends that corrective measures included meeting with field personnel (Tr. 223), developing written schedules ensuring that samples would be taken early in the month to avoid scheduling difficulties (Tr. 224, 250, 253-54), the establishment of new charts and procedures for sampling data (Tr. 226-27; Exs. R-2 and R-3), and the assurance that TRW's project manager had to approve any sampling schedule changes (Tr. 254-55).

In mitigation, TRW also points out the following factors. The incident could not contribute to cell failure (Tr. 319, 430-31) and comparable well samples taken both before and after June, 1987 contained no evidence of groundwater contamination (Tr. 317-18, Ex. C-8). Respondent adds that none of the nine groundwater monitoring samples included in the 1988 Annual Report indicated evidence of PCB contamination (Tr. 318, Ex. C-8), and that lysimeter data for June 1987 showed no problems (Tr. 328-329).

Despite the absence of PCB contamination in the groundwater monitoring wells, Respondent maintains that TRW is so highly concerned with the possibility of PCB migration that extensive work has been done to model the migration of PCB in groundwater over time (Tr. 323). The calculations made by TRW's consultants show that PCB would migrate a maximum of 1/2 inch in a period of

sixty days (Tr. 322).

Respondent asserts that the failure to collect groundwater data for June, 1987 was of no actual or potential significance. The groundwater monitoring system is but one aspect of an overall multi-faceted system to maintain the integrity of the cell and did not present any risk or probability of damage (Resp. Initial Br. p. 5).

On penalty amount, TRW concludes that: a 25% reduction is appropriate due to lack of culpability; an additional 15% reduction is warranted due to attitude by virtue of the immediate steps taken to rectify the situation; and a further reduction should be made for voluntary disclosure and taking measures to mitigate the violation. Respondent suggests no dollar amount for any civil penalty to be assessed

C. Analysis and Resolution

1. Calculation of the Gravity Based Penalty

Calculation of the gravity based penalty begins with determining the nature of the violation. The 1980 Policy defines the nature of the violation by reference to the set of requirements violated, which in this case is Section 761.75(c)(3)(ii) of the PCB Regulations. The nature of the violation is divided into three categories for better definition: chemical control, control-associated data gathering and hazard assessment. (Ex. C-9, p. 59771.)

The nature of the violation has a direct effect on the criteria used to determine which extent and circumstances

categories are selected to use in the 1980 Policy's gravity based penalty matrix. And, the issue as to whether the violation is of a chemical control or control-associated data gathering nature must be addressed, since the failure to collect and analyze the groundwater samples clearly does not involve hazard assessment as defined in the 1980 Policy. (Id.)

Complainant correctly argues that, since the purpose of PCB regulation is to prevent additional PCBs from entering the environment, any violation of the PCB Regulations is of a Chemical Control nature. The only exception to this designation would be violations of recordkeeping requirements, which would be determined as control-associated data gathering in nature (id. at 59777-78).

As Complainant points out, the Approval, including Condition 7 violated by the Respondent, was issued under Section 761.75(c)(3)(ii) of the PCB Regulations, 40 C.F.R. § 761.75 (c)(3)(ii). Since Section 761.75 is a component of Subpart D, the storage and disposal portion of the PCB Regulations, the violation of Section 761.75(c)(3)(ii) should be considered a storage and disposal violation, as opposed to a recordkeeping violation.

Next, it is necessary to determine the extent of the violation under the 1980 Policy. The extent of the violation takes into consideration the degree, range, or scope of the violation. Extent is broken down into three levels for measuring the potential amount of damage to human health or the environment

that the violation may involve: Level A (Major), which indicates a potential for serious damage; Level B (Significant), which indicates a potential for significant damage; and Level C (Minor), which indicates a potential for a lesser amount of damage. (Id. at 59771.)

The calculation of extent is determined by the amount and concentration of the material involved and, if possible, the total weight of the PCB contaminated material should be ascertained and used in this evaluation (id. at 59777). However, no evidence was presented as to the weight of the PCB contaminated soil and material in the Minerva cell. Since weight is not available, the extent factor must be calculated using alternative measures provided in tables in the 1980 Policy (id.). Since the PCBs involved at Minerva are liquid in nature, coming from defusion oil (Tr. 399, 400), it is appropriate to use Table IV in the 1980 Policy. In pertinent part, Table IV provides that the extent of the violation be considered major where a contaminated area of 750 square feet or more is involved (id.).

While no weight figures were given, the was sufficient testimony as to the amount of PCB contaminated soil and material contained in the landfill (Tr. 134, 162-63, 403, 513). Mr. Richard Struthers, the TRW site manager at Minerva, testified that 23,000 cubic yards of PCB contaminated material is present in the secure cell, and estimated that about a couple hundred gallons of PCBs were contained in the contaminated material, although this latter figure was not calculated (Tr. 403). Since

the 200 gallon figure was not calculated, it is not warranted to rely on it in determining the extent factor. As a result, the pertinent amount to consider for extent purposes is 23,000 cubic yards of PCB contaminated soil and material contained in the secure cell.

Since the violation in Count I involves 23,000 cubic yards of PCB contaminated soil and material contained in the landfill, clearly more than 750 square feet of contaminated area is involved. Therefore, the Count I violation must be designated as major in calculating the extent of the violation.

After the extent of the violation has been determined, the next variable in assessing the gravity based penalty is the circumstances of the violation, also called the probability of damages. The probability of damages is divided into three ranges: high, medium and low. Each range has two levels, with high containing levels one and two, medium levels three and four, and low levels five and six. Violations of the PCB Regulations are grouped into eight categories which include: disposal, marking, storage, manufacturing, processing, distributing, use and recordkeeping. These categories are used to determine the levels within the ranges. (Id. at 59780.)

Evidence that no harm occurred as a result of the violation was provided in testimony which indicated that no migration of PCBs occurred during June 1987, since no PCB contamination was found in the groundwater samples for the month before and after June (Tr. 317-19, 412). However, the circumstances of the

violation are based on the risk inherent in the violation as it was committed, even though no actual harm resulted (Ex. C-9, p. 59772).

Level one of the high range of the circumstances component involves the improper disposal of PCBs, which includes operating disposal facilities at conditions which do not meet the requirements of the PCB Regulations (id. at 59780). The violation of Approval Condition 7 requiring groundwater monitoring, constitutes an infraction of Section 761.75 (c)(3)(ii) of the PCB Regulations. Therefore, this violation falls into the disposal category for the purposes of assessing the probability of damages and should be classified in level one of the high range of the circumstances evaluation.

It has been established above that the nature of the Count I is a chemical control violation, that the extent category of the violation is major and that the violation should be classified in level one of the high range in considering the circumstances of the violation. When these conclusions are applied to the gravity based penalty matrix in the 1980 Policy, the gravity based penalty for Count I is determined to be $25,000 (id. at 59771).

2. Adjustments to the Gravity Based Penalty

As mentioned previously, the 1980 Policy provides for modification of the gravity based penalty assessment by consideration of certain adjustment factors. The adjustment factors include: culpability; history of prior violations; cost to the government; benefits from non-compliance; and ability to

pay or to continue doing business. (Id. at 59773.) The only adjustment factor provided for in the 1980 policy that is at issue herein is culpability. However, an adjustment factor of voluntary disclosure will be considered under the 1990 Policy (Ex. C-10, p. 18). The Complainant's argument that the 1990 Policy should not be used because the Complaint was filed before the applicability date set out in the 1990 Policy, has been rejected. See page 13, supra. Moreover, under Section 22.27(b) of the Rules, the 1980 Policy is not binding on the Presiding Judge in assessing a civil penalty and, while it must be taken into account, it can be deviated from as long as the reasons for the change are given. In this case, the statutory edict in Section 16 of TSCA to consider other factors as justice may require, warrants consideration of the voluntary disclosure factor in the 1990 Policy, particularly where the Supplementary Information to the 1990 Policy recognizes the positive compliance effect of reducing penalties for voluntary disclosure, 55 Fed. Reg. 13956.

Under the 1980 Policy, the penalty may be increased or decreased because of the culpability of the offender. The two principle criteria for assessing culpability are the violator's knowledge of the particular TSCA requirement and the degree of control over the violative condition. The culpability adjustment is divided into three levels: Level I, in which the violation is willful; Level II, in which the violator had sufficient knowledge of the requirements or significant control over the situation;

and Level III, in which the violator lacked both sufficient knowledge and sufficient control. (Ex. C-9, p. 59773).

The infraction related to Condition 7 of the Approval has been established on the record as inadvertent (Tr. 315) and this is sufficient to show that the violation is not willful. Therefore, the violation does not come under Level I in the culpability determination.

The knowledge requirement in Level II involves whether the violator knew or should have known of the relevant TSCA requirements or of the general hazardousness of the action. The degree of control over the violation is the second component of Level II and this recognizes that situations may occur where the violator may be less than fully responsible for the occurrence of the violation. (Ex. C-9, p. 59773.)

TRW certainly knew of Condition 7 of the Approval, as established by the testimony of Mr. Stuthers, the site manager of the project (Tr. 304). Mr. Struthers was involved from the outset of the project, including the development of the Approval, and was aware of the monthly ground well monitoring requirement (Tr. 387-89). TRW was also aware of the hazard presented by a violation of the groundwater monitoring requirement, which is necessary to protect the integrity of the cell (Tr. 499).

TRW had contracted with Wadsworth Laboratories to collect and analyze groundwater samples at the Minerva landfill (Tr. 217), and it was a scheduling error by Wadsworth that caused the infraction in Count I (Tr. 220-21). Wadsworth must be considered

as TRW's agent and TRW is responsible for the laboratory's action or failure to act. The fact that the Respondent elected to fulfill its groundwater monitoring obligations under the Approval by contracting them out, cannot be used to show that TRW did not have sufficient control over the situation to avoid committing the violation.

Since TRW had sufficient knowledge of the requirements involved in the operation of the landfill and also had significant control over the monitoring situation through its contract with its agent Wadsworth, the violation should be considered under Level II in the culpability determination. The classification of the violation in Count I under Level II does not in itself warrant an adjustment to the gravity based penalty calculation but it does open consideration of whether an upward or downward adjustment of up to 15% should be made because of the attitude of the violator, as provided for in the 1980 Policy (Ex. C-9, p. 59773).

In evaluating attitude, it is appropriate in the present case to consider any good faith efforts to comply with the PCB Regulations, and the promptness of TRW's corrective actions. To be taken into account are both the statements and actions of the Respondent (id.).

Regarding TRW's attitude, its concern toward the installation of this facility so near the population of Minerva is apparent from the steps TRW took to protect city wells from contamination, the fact that TRW switched some residents to city

water and the extensive modeling commissioned by the corporation to determine the rate of PCB migration (Tr. 406-09). The attitude of TRW and Mr. Stuthers is also reflected in the action taken after the discovery of the Count I violation. Mr. Stuthers ordered a "complete scrub" of the reporting requirements, called for Wadsworth Laboratories to brief field personnel on the importance of the sampling requirements and directed reduction of the scheduling procedures to a formal written protocol defining the meaning of each monitoring requirement and the frequency with which they should occur (Tr. 418-21). These actions were tailored to avoid what Mr. Stuthers recognized as a serious error (Tr. 429).

In contesting an adjustment for attitude, Complainant avers that these procedures followed months of indifference at TRW over the requirements of the Approval (Tr. 468). Complainant points out that TRW violated the Approval only three months after a reminder to do monthly sampling was sent by the Complainant in March 1987 and argues that the Responbent violated of the monthly leachate data requirement of Condition 17 b even after the "complete scrub" of the reporting requirements (Tr. 312).

However, the Complainant's arguments are not sufficiently persuasive to offset TRW's good faith actions to protect the facility and Minerva and its prompt action to avoid future monitoring failures. Accordingly, the Respondent should not be considered to have an attitude of indifference toward its regulatory obligations. The concern TRW has for the Minerva

groundwater show a good faith attitude toward the risks of their operation. Mr. Stuthers was well aware of the gravity of the situation as evidenced by his reaction to the missed sampling (Tr. 417-18). The corrective procedures established after that incident (Tr. 312, 428-29), indicate that TRW was and is concerned with the requirements of the Approval.

The above analysis of Respondent's attitude toward the violation justifies the application of a 15% downward adjustment to the gravity based penalty for Count I. This reduces the $25,000 penalty by $3750.

Respondent submits that, under the 1990 Policy, an adjustment for voluntary disclosure should be made to any penalty assessed (Resp. Post Trial Br. p.10). While application of the 1990 Policy would not change the gravity penalty calculation made under the 1980 Policy (Tr. 143), the additional adjustment for voluntary disclosure included in the 1990 Policy must be considered (Ex. C-10, p 18). Complainant contends that an adjustment for voluntary disclosure would not apply in the present case because TRW was required to disclose groundwater monitoring data as part of its Annual Report under the Approval (Tr. 188). The 1990 Policy provides that an adjustment for voluntary disclosure is not given if the disclosure of information relating to the violation is required by the PCB Regulations (Ex. C-10, p. 18).

Although disclosure of the June 1987 failure to collect and analyze groundwater samples would have had to be included in the

Annual Report, Mr. Stuthers contacted EPA by phone promptly upon discovery that the June 1987 composite samples were missed. Mr. Struthers first learned of the failure around July 4, 1987 and notified the Agency by phone before the middle of July 1987 (Tr. 421). While Mr. Stuthers was advised by the Agency during that phone call to provide the information in the Annual Report, Mr. Stuthers also decided to send a written disclosure to EPA, which was done by letter dated July 28, 1987 (Tr. 423 and Ex. R-9).

The purpose of this adjustment factor in the 1990 Policy is to encourage the voluntary disclosure of PCB violations (Ex. C-10, p. 22). The disclosure by Mr. Stuthers of the June 1987 violation appears to fit this purpose and the reduction for voluntary disclosure of is appropriate under the 1990 Policy.

The 1990 Policy provides for a 25% reduction for voluntary disclosure and a further 15% reduction if the Respondent discloses the violation within 30 days and the takes all required steps to mitigate the infraction (id.).

In this cause, the facts set out above establish that the voluntary disclosure of the missed sampling occurred within thirty days of the violation, since TRW notified the Agency before the middle of July 1987. The Respondent is, therefore, entitled to a 25% downward reduction to the gravity based penalty for its voluntary disclosure.

Further, TRW took expeditious steps to mitigate the violation by taking responsible action to prevent a reoccurrence in the future. The Respondent ordered a "complete scrub" of the

reporting requirements, called for Wadsworth Laboratories to brief field personnel on the importance of the sampling requirements and directed reduction of the scheduling procedures to a formal written protocol defining the meaning of each monitoring requirement and the frequency with which they should occur (Tr. 418-21). Corrective measures included meeting with field personnel (Tr. 223, 225), developing written schedules ensuring that samples would be taken early in the month to avoid scheduling difficulties (Tr. 224, 250, 253-54), the establishment of new charts and procedures for sampling data (Tr. 226-27, Exs. R-2 and R-3), and the assurance that TRW's project manager had to approve any sampling schedule changes (TR. 254-55). It must be concluded that TRW took all steps reasonably expected to mitigate the violation and, accordingly, should be given an additional 15% reduction in the gravity based penalty.

When the two reductions for voluntary disclosure are taken into account, a reduction of $10,000 to the gravity based penalty of $25,000 is warranted.

C. Final Civil Penalty Assessment

The gravity based penalty for the violation in Count I of the Complaint has been calculated herein under the 1980 Policy as $25,000. An 15% downward adjustment of $3750 to that penalty has been found warranted for attitude in the culpability factor evaluation under the 1980 Policy. A further 40% downward adjustment of $10,000 for voluntary disclosure is appropriate under the 1990 Policy. Therefore, the final civil penalty to be

assessed in this case for the violation in Count I is $11,250.

V. Order

Based on the analysis, rulings, findings and conclusions contained herein, it is ordered:

1. That Count II of the Complaint is barred by Section 3512 of the PRA, 44 U.S.C. § 3512, and is hereby dismissed with prejudice.

2. That the Respondent is liable for a civil penalty in connection with the violation of Condition 7 of the Approval issued pursuant to Section 761.75(c)(3)(ii) of the PCB Regulations, 40 C.F.R. § 761.75 (c)(3)(ii), governing the secure cell landfill at TRW's Minerva, Ohio manufacturing facility.

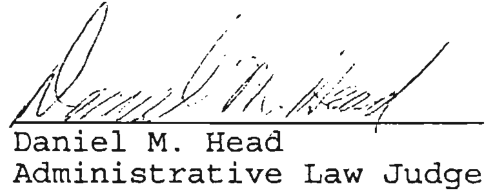
3. That, pursuant to Section 2615(a) of TSCA, 15 U.S.C. §2615(a), a civil penalty of $11,250 be assessed against Respondent for its violation of Condition 7 of the Approval identified in paragraph numbered one above.

4. That payment by the Respondent in the full amount of $11,250 civil penalty assessed shall be made within sixty days (60) of service of the final order of the Environmental Appeals Board,[5] by submitting a certified or cashier's check payable to

[5] Under Section 22.30 of the EPA Rules of Practice (Rules), 40 C.F.R. §22.30, the parties may file with the Environmental Appeals Board a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the Environmental Appeals Board within 45 days after its service, unless an appeal is taken by the parties or unless the Environmental Appeals Board elects, <u>sua sponte</u>, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or <u>sua sponte</u> review, the order of the Environmental Appeals Board shall be the final order in this case.

Treasurer, United States of America. Said check shall be mailed to:

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



Daniel M. Head
Administrative Law Judge

Dated: April 20, 1995
Washington, DC