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**POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY**

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## POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY

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# PCB PENALTY POLICY

## INTRODUCTION

### Background

In 1980, the Environmental Protection Agency (EPA) issued interim guidance for the determination of penalties for violations of the Polychlorinated Biphenyls (PCB) rules. That interim policy was published in the Federal Register on September 10, 1980, with a statement that the Agency would review its experience with the policy before issuing a final penalty policy.

Since developing the 1980 interim guidance, numerous PCB regulations have been promulgated, including but not limited to regulations for use in closed and controlled waste manufacturing processes, various use authorizations, incidental generation, regulations to address fires involving PCB electrical equipment, and the notification and manifesting of PCB waste activities. Amendments, interpretations and revisions to the interim guidance have also been developed. This revised penalty policy is intended to incorporate the enforcement-related provisions of all PCB rules and policy revisions to date, including the Notification and Manifesting Rule, and all future applicable rules.

*Purpose*  
*Effective Date*

The purpose of this PCB Penalty Policy is to ensure that penalties for violations of the various PCB regulations are fair, uniform, and consistent, and that persons will be deterred from committing PCB violations. This policy is immediately applicable and will be used to calculate penalties in all administrative actions concerning PCBs issued after the date of this policy, regardless of the date of the violation.

This policy implements a system for determining penalties in administrative civil actions brought pursuant to Section 16 of the Toxic Substances Control Act (TSCA). Penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- o the "nature" of the violation,
- o the "extent" of potential or actual environmental harm from a given violation, and
- o the "circumstances" of the violation.

These factors are incorporated in a matrix which allows determination of the appropriate proposed GBP.

Once the GBP has been determined, upward or downward adjustments to the proposed penalty amount may be made in consideration of these other factors, either before issuance of a civil administrative complaint, or during settlement negotiations:

- o culpability,
- o history of such violations,
- o ability to pay,
- o ability to continue in business, and
- o other matters as justice may require, such as environmentally beneficial expenditures.

TSCA is a strict liability statute, and there is no requirement that a violator's conduct be willful or knowing for it to be found in violation of TSCA or its implementing regulations. The existence of a violation is to be determined without consideration of the particular culpability of a violator; this factor is to be considered only as an adjustment to the GBP. The initial GBP may increase, decrease, or remain the same when considering the violator's culpability as an adjustment to the proposed penalty.

#### **Penalties**

The PCB regulations include a ban on the manufacture, processing, and distribution in commerce of PCBs, as well as requirements for proper use, storage, disposal, recordkeeping, and marking. EPA has several enforcement options available for dealing with PCB Rule violations. For minor violations, EPA's Regional offices will have the discretion to issue a Notice of Noncompliance. In many cases, EPA will issue civil administrative complaints, using this policy to calculate the appropriate civil penalty. In addition, Section 17 (a) of TSCA, 15 U.S.C. Sec. 2616(a), authorizes Federal district courts to issue injunctive relief to restrain violations of TSCA or the PCB rules. Finally, in some instances EPA may seek criminal sanctions, in accordance with Section 16(b) of TSCA, 15 U.S.C. Sec. 2615(b), for knowing or willful violations of TSCA or the PCB rules.

#### **EXPLANATION OF THE POLICY**

##### **Chemical Control Nature of the Regulations**

The PCB regulations reduce the chance that additional PCBs will enter the environment, and limit the harm to health and the environment when entry does occur. Therefore, these regulations are chemical control regulations, as defined by the TSCA Civil Penalty Policy. The definitions of the "extent" and "circumstances" categories below reflect the chemical control nature of these violations.

## Extent

The greater the quantity of PCBs there is in a violation, the greater the degree and likelihood of harm from the conduct or activity violating the PCB rules. Therefore, the amount of PCB involved in a specific violation will determine whether the Major, Significant, or Minor extent category is used in assessing a penalty based on the GBP Matrix. Since the concentration of the PCBs involved in a violation will also affect the potential for harm, this factor must also be considered in determining which extent category is applicable.

### 1. Amount of Material Involved

For the purpose of this policy, violations of the PCB rules fall into two broad categories: non-disposal violations and disposal violations. Non-disposal violations include, but are not limited to, unauthorized use, failure to mark the access to PCB Transformers, failure to keep records, failure to provide adequate curbing at PCB storage areas, manufacturing PCBs without an exemption, and similar actions where the violator possesses PCBs that have not escaped into the environment. Disposal violations occur when PCBs are disposed of in a manner not permitted by the PCB regulations. Examples of such violations include, but are not limited to, the immediate release of PCBs from leaks or spills, or delayed release, such as when non-leaking PCB Equipment is improperly disposed of in a non-TSCA landfill. Because the degree of harm or potential harm is generally different for disposal and non-disposal violations, separate categories of extent are assigned, as described below.

#### a. Extent for Non-Disposal Violations

The regulations pertaining to non-disposal requirements such as use, storage, and manifesting of PCBs and PCB Items, reduce the potential for harm, help the Agency determine compliance, and track the movement of PCBs from use to disposal. For example, a major use of PCBs is in electrical transformers. The conditions for using transformers, such as inspection, keeping records of inspection, marking, and notification of fire response personnel and adjacent building owners, reduce the likelihood of improper disposal, minimize the potential harm from fires, and help the Agency determine a user's compliance. Similarly, the conditions for storing PCB liquids, PCB Articles such as transformers and capacitors, and PCB-contaminated soil, concrete, and debris help the Agency determine compliance and reduce the likelihood that PCB will escape into the environment. Compliance with the notification and manifesting requirements also serves these ends.

The only acceptable alternative to compliance with the non-disposal requirements of the PCB rules is lawful disposal. Accordingly, a fair penalty for violating the non-disposal requirements can be based on the cost of proper disposal of PCBs or PCB Items. This should provide adequate incentive to comply with the non-disposal requirements.

In cases involving non-disposal violations, the Agency will calculate the penalty using weight, or if unavailable, other units of measure that most closely fit the penalty scheme. For example, if PCB liquid is imported or manufactured, the penalty will be based on the weight of liquid. If PCBs unlawfully appear in a product, the penalty will be based on the weight of the

Basis for  
Penalty

A of  
violations

product, as adjusted for concentration. If weight is unavailable, other units may be used, such as the quantity of 55-gallon drums that the total production of the product would fill.

The following table identifies the quantities of PCBs that define the Minor, Significant, and Major extent categories. The Agency has set the upper limit of the Minor extent category at 1,200 kilograms (220 gallons) of PCB liquid, because it is approximately the amount contained in the average transformer. It should be noted that the primary unit of measure is weight adjusted for concentration. Alternate measures include gallons for liquid, and 55-gallon drums for solids.

#### Minor Extent, Non-Disposal Violations

<u>Unit</u>	<u>Amount Less Than</u>
kilograms	1,200
gallons	220
Large Capacitors	50
55-gallon drums (solids)	15
Drained Transformers	5

#### Significant Extent, Non-Disposal Violations

<u>Unit</u>	<u>Amount</u>
kilograms	1,200 to 6,000
gallons	220 to 1,100
Large Capacitors	50 to 250
55-gallon drums (solids)	15 to 75
Drained Transformers	5 to 25

<b>Major Extent, Non-Disposal Violations</b>
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<u>Unit</u>	<u>Amount More Than</u>
kilograms	6,000
gallons	1,100
Large Capacitors	250
55-gallon drums (solids)	75
Drained Transformers	25

**b. Extent for Disposal Violations**

Improper disposal of PCB generally presents a greater risk of harm to human health and the environment than non-disposal violations. Also, it is usually more expensive on a per-gallon basis to clean an area contaminated by PCB, and to dispose of the contaminated materials, than it is to incinerate the liquid alone. Penalties for such disposal violations are based on the approximate cost of cleanup and disposal of the materials contaminated by PCB.

Basis for  
Penalty

2. For example, fresh spills onto non-porous surfaces such as metal or tile can often be decontaminated by rinsing and washing. The cost of such decontamination, including the need to take wipe samples for verification, is the basis of the Minor disposal category for non-porous surfaces. Spills onto porous surfaces, such as concrete, often result in contamination to some depth, depending on many factors such as porosity, the rate of spillage, and the type of PCB liquid. For the purpose of determining extent, the Agency arrived at a disposal cost estimate based on a nominal depth of contamination of one-eighth inch of concrete, concrete being the most common porous surface involved. The cost of removing the concrete, taking wipe samples for verification, disposing of the contaminated material, and encapsulating the area is the basis of the Minor extent category for porous surfaces.

3. For soil, the Agency bases its cost estimate on a spill onto relatively level ground with a nominal depth of removal of 10 inches to obtain sufficient decontamination. This should cover spills on a range of soils from clays to sands. The square footage assigned for spills onto soil reflects the approximate cost of removal and disposal.

4. Where the contamination is measured in cubic feet, the extent quantity is based on the cost of incinerating contaminated soil and concrete. The Agency has used available data and experience suggesting that a gallon of PCB liquid could contaminate about 2 drums of soil or concrete, which have a known average cost of disposal. While actual costs may in some cases be less, particularly if the material is less dense than soil or is suitable for landfilling, the costs assumed in this policy are generally applicable and should provide adequate incentive for compliance.

There are, of course, possible disposal violations that do not correlate exactly to the quantities listed below, such as landfilling or surface disposal of PCB Large Capacitors or PCB Transformers. In such cases, it is presumed that improper disposal will ultimately result in leakage and environmental contamination. In the event that equipment containing PCBs is improperly disposed, the violator should be penalized on the basis of the amount of PCB contained in the equipment, regardless of whether the PCB was leaking at the time of discovery. Penalties for improper disposal of drained PCB Transformers can be reasonably assessed using the approximate cubic footage of the transformer. Penalties for improper abandonment of PCB-contaminated pipeline could be assessed by calculating the square footage of the interior surface. This should provide adequate incentive to comply with the disposal requirements for PCB and PCB-containing equipment and materials.

It should be noted that when known, the source kilograms or gallons will be used to determine the extent for disposal violations. Square and cubic footage, which are based on gallons as described in the preceding paragraphs, are to be used when the kilograms or gallons are unknown.

#### Minor Extent, Disposal Violations

<u>Unit</u>	<u>Amount Less Than</u>
kilograms	25
gallons	5
sq. ft.	625 (non-porous surface) 60 (soil) 20 (porous surface)
cu. ft.	60 (all materials)

#### Significant Extent, Disposal Violations

<u>Unit</u>	<u>Amount</u>
kilograms	25 to 125
gallons	5 to 25
sq. ft.	625 to 3,125 (non-porous surface) 60 to 300 (soil) 20 to 100 (porous surface)
cu. ft.	60 to 300 (all materials)



<b>Major Extent, Disposal Violations</b>	
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<u>Unit</u>	<u>Amount More Than</u>
kilograms	125
gallons	25
sq. ft.	3,125 (non-porous surface) 300 (soil) 100 (porous surface)
cu. ft.	300 (all materials)

For both disposal and non-disposal violations, the Agency has structured the extent portion of the penalty policy to approximate the costs of disposal and cleanup and to remove any economic incentives to violate the rules. The violator will not only pay a penalty for violations, the violator will also pay any additional costs necessary to come into compliance.

The Agency notes that the cost-based extent figures for disposal and non-disposal violations exclude some costs such as transporting response personnel and contaminated materials, and do not account for potential variations in spill scenarios that cause greater or lesser actual costs of cleanup. Also, actual costs may increase or decrease during the time this policy is in effect. However, the objective of the policy is not to estimate actual costs for a specific case, but to provide a sufficient and reasonable basis for calculating penalties that will encourage compliance with the PCB rules. The Agency believes that the quantities selected for each extent category accomplish this objective.

## 2. Converting Volume to Weight

For converting volume to weight, the Agency assumes the average density of PCB liquid to be approximately 12 lbs. per gallon. If the actual density of the fluid involved in a violation is known, then the actual density should be used.

## 3. Exceptions to Extent Category

Spills into Water. Spills into water create a substantial risk of human exposure, either directly from the water, or through the food chain. Also, since it is virtually impossible to remove all PCBs from surface or ground water once a spill occurs, environmental harm is assured. Therefore, where any improper disposal results in the contamination of surface or ground water, or any conduits leading to same, such as drains, ditches, and wells, the extent will always be considered Major, regardless of the amount and concentration.

Spills into Food and Feed. Spills into food and feed, if not quickly detected, will result in human exposure. Even if the problem is detected before humans (or animals) eat the contaminated food, it is likely that the cost of finding and destroying the contaminated products will be high. Where any improper disposal results in the contamination of food or feed, such as spills onto vegetable gardens, pastures, or food storage areas, the extent is always Major.

#### 4. Concentration Adjustments

The Agency recognizes that the concentration of PCBs is relevant to the potential or actual harm from violating the PCB regulations. Obviously, a spill of high concentration PCBs puts more contaminants into the environment than a spill of low concentration PCBs. Nonetheless, because PCBs can be toxic at very low concentrations, a spill of a large amount of low concentration PCB material could cause widespread harm. Thus, a system that would reduce the total weight of PCB material involved in a spill in direct proportion to the concentration of that material would severely undermine the regulatory scheme, and result in penalties that may not reflect the harm or deter improper disposal.

To determine the extent of probable damage for a particular violation, the total amount of PCB material involved in an incident should be reduced by the following percentages:

<u>Concentration (ppm)</u>	<u>Reduction of Amount (%)</u> (of total amount of PCB material involved)
1) 0 - 49	50
2) 50 - 499	30
3) 500 or above	None

#### 5. Exceptions to Concentration Adjustment Calculation

The concentration adjustment factors are not used in the following circumstances:

Dispersed Use. The use of waste oil that contains detectable concentrations of PCBs for heat recovery in non-conforming boilers, or as a sealant, coating, or dust control agent, which is prohibited by 40 C.F.R. Section 761.20(d), is one situation where the concentration reduction would not apply. The Agency chose to prohibit these uses whenever any detectable level of PCBs are present because any such use of PCBs is likely to result in widespread environmental and health damage. Thus, allowing any reduction of the amount of PCBs used by virtue of low concentration would be contrary to the regulatory scheme.

Failure to Test. The concentration reduction does not apply where the violation is the failure to test liquid when required, such as the contents of a heat transfer system that has contained PCBs (40 C.F.R. Section 761.30(d)(1)). In such cases, the risk is that the fluid may contain a high concentration of PCB, and that this material will continue to be used. These persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration.

**Alternative Measure for Solids.** The concentration adjustment shall not be used when the PCB material is measured by a measure for solids other than weight. These alternative measures, which include square footage, cubic footage, capacitors, drums, or drained transformers, were chosen to establish economic incentives for proper disposal. The cost of disposal of such materials is not dependent on their concentration of PCBs. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly.

**Dilution.** The concentration adjustment does not apply where the PCBs have been diluted in violation of the PCB rules.

### Circumstances

The other variable for determining a penalty from the GBP Matrix is the circumstance of the violation, which reflects its probability of causing harm to human health or the environment. The circumstances are ranked high, medium, and low. Each of these ranges in turn has two different levels, for a total of six levels of circumstance, as shown on the GBP Matrix below. All violations of the PCB regulations fall into one of the circumstance categories identified in this policy. Bas?

## GRAVITY BASED PENALTY MATRIX

Circumstances (probability of damages)	Extent of Potential Damage		
	A - Major	B-Significant	C - Minor
<b>High Range</b>			
Level 1	\$25,000	\$17,000	\$ 5,000
Level 2	20,000	13,000	3,000
<b>Medium Range</b>			
Level 3	15,000	10,000	1,500
Level 4	10,000	6,000	1,000
<b>Low Range</b>			
Level 5	5,000	3,000	500
Level 6	2,000	1,300	200

The different types of PCB violations within each of the circumstances (or degree of probability of damages) on the GBP Matrix are discussed below. Note that the adjectives "major, significant, and minor" as used in the circumstance levels are not related to those terms in the GBP Matrix.

**High Range****Level one:**

- 1) Major disposal. This includes any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations, including unauthorized export. Failure to comply with the conditions of a TSCA approval for PCB disposal or alternative treatment, other than recordkeeping, also constitutes a level 1 violation.
- 2) Manufacturing PCBs without an exemption or in violation of any condition of an exemption, including unauthorized import.
- 3) Unauthorized incidental generation of PCBs.
- 4) Major manifesting. Failure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors.
- 5) Refusal to permit entry of an EPA inspector, in violation of TSCA Section 15. The proposed penalty will be Major, level 1 when the Agency has reason to believe that PCBs existed at the time of refusal and that PCB violations could have disappeared between the time of refusal and inspection. A level 1, Significant or Minor extent may be appropriate if mitigating information is subsequently provided showing that the amount of PCBs present at the time of refusal warrants the reduction of extent. The penalty for refusal will only be applied when the statutory requirements of Section 11 of TSCA, 15 U.S.C. Section 2610 have been met, which are:
  - a) presentation of proper credentials;
  - b) written notice to owner, operator, or agent in charge showing scope of inspection;
  - c) inspection attempted to be commenced and completed with reasonable promptness;
  - d) inspection attempted to be conducted at reasonable times (daylight business hours), with reasonable limits, and in a reasonable manner.

*announced  
inspections  
only?*

**Level two:**

- 1) Processing PCBs without an exemption or in violation of any condition of an exemption.
- 2) Distribution in commerce of PCBs without an exemption or in violation of any condition of an exemption.
- 3) Major use. Unauthorized use of PCBs or using PCBs in violation of any condition of authorization. Examples of such violations include, but are not limited to:
  - a. Failure to register PCB Transformers with the local fire jurisdiction or the building

owners within the required time.

- b. Storage of combustible organic solvents or other combustible liquids in or near the transformer area.
  - c. Failure to report a fire-related incident.
  - d. Failure to inspect PCB Transformers or to keep records of such inspections.
- 4) **Major marking.** A major marking violation is a situation where there is no indication to someone unfamiliar with PCBs that PCBs are present, such as failure to label the access to a PCB Transformer or failure to label the transformer.
- 5) **Major storage.** A major storage violation means a situation where a significant portion of spilled material would not be contained in the event of an accident, or where PCBs could be exposed to precipitation or overland flow of water. Examples of such situations are storage in areas with: no roof; no curbing, curbing that is pervious to PCBs, or curbing that does not meet the volume or height requirements; non-continuous or no flooring, unsealed floor drains, or flooring that is pervious to PCBs.

### **Medium Range**

#### Level three:

- 1) **Major recordkeeping.** No records, or major recordkeeping violations, at disposal facilities, including incinerators, high efficiency or industrial boilers, landfills and other approved alternate disposal facilities. No records, or major recordkeeping violations, by transporters or commercial storers. Major recordkeeping violations would include failure to keep records or substantial discrepancies in records on disposal process operating parameters, landfill disposal locations, or disposal quantities or dates, or incomplete records on the receipt, inventory, or disposition of waste by commercial storers.
- 2) **Minor disposal.** An example of a minor disposal violation is a leak in which a PCB Article has PCBs on any portion of its external surface, but the PCBs did not run off the surface.
- 3) **Significant manifesting.** This includes failure to prepare or submit an annual report or an exception report.

#### Level four:

- 1) **Minor use violations.** These include the following:
  - a. Failure to provide complete transformer registration, but the fire department or adjacent building owners are aware of the transformer locations.

- b. Failure to remove combustible materials other than organic solvents or other combustible liquids.
  - c. Failure to conduct all required visual inspections, but where a significant percentage was conducted.
  - d. Incomplete records of PCB Transformer inspections such as omitting the inspector's name, or omitting the specific location of the leak on the transformer.
- 2) Minor storage. Examples of these violations are small cracks in an otherwise impervious floor or curbing, and failure to conduct all required visual inspections, but where a significant percentage was conducted. Storage of PCBs in excess of 1 year, including failure to date PCB Items placed in storage.
  - 3) Significant recordkeeping. No records, or major recordkeeping violations, by persons who manufacture, process, or use PCBs, except commercial storers, transporters, and disposers. Major recordkeeping violations would include the absence of data on PCB Transformers, or the absence of records on any transfer of PCBs from the site.

#### **Low Range**

##### Level five:

- 1) Minor marking violations. These are situations in which some requirements of the rule have not been followed, but there is sufficient indication that PCBs are present and the PCB Items can be identified.

##### Level six:

- 1) Minor recordkeeping and manifesting. Examples of such violations are the occasional omission of minor data due to clerical error, or partially missing records where the person responsible can substantiate the correct records upon request.
- 2) Failure to label small capacitors, fluorescent light ballasts, or large low voltage capacitors with a "no PCBs" label as required by 40 C.F.R. Section 761.40(g).

### PENALTY ASSESSMENT FOR MULTIPLE VIOLATIONS

#### **When to Assess Multiple Violations**

A penalty shall be assessed for each violation of the regulations, and for each separate location where violations occur. A violation of the regulations is defined as non-compliance with any requirement of 40 C.F.R. Part 761, regardless of category or subpart. A separate location is any area where the violation presents a distinct risk to human health and the environment.

In short, penalties will be assessed as follows:

- o One count for each violation of the regulations, regardless of categories. For example, if a PCB Transformer is not marked, and the means of access is not marked, then there are two violations and two counts.
- o One count for each location that presents a separate and distinct risk. PCBs are in separate locations when they are in separate buildings or separate rooms. In large rooms, or outside, they are separate when they are at least 100 feet from any other PCBs. The EPA inspector shall determine whether a particular location is separate based on the above, and may consider other factors relevant to the risk associated with the violation and location.

#### **Limits on Multiple Violations**

Some acts of compliance are completely dependent on other acts, such as keeping records of transformer inspections. Thus, the lack of inspections will normally result in the lack of records of inspection. In such cases, only one violation should be charged, namely, failure to inspect.

Other acts of compliance affect a number of separate locations within a facility. For example, it takes a single act of compliance to register PCB Transformers with the fire department or adjacent building owners, regardless of the number of transformer locations. Thus, failure to register with the fire department is a single violative act per facility, as is the failure to register with an adjacent building owner.

Further, the Agency has determined that limits are appropriate for assessing penalties for violations of some periodic requirements, as follows:

- o A separate count shall be charged for each quarterly inspection or record of inspection missed, with the limitation of assessing up to 4 missed inspections or \$250,000, whichever is less.

A separate count shall be charged for each annual document or annual inspection missed during the prior 3 years, and one count for all documents or inspections missed from years 4 and beyond.

*Allege separately  
in complaint*

#### **ASSESSING PENALTIES FOR CONTINUING OR REPEAT VIOLATIONS**

Under Section 16 of TSCA, the Agency has the discretion to assess civil penalties up to \$25,000 per violation, with each day that a violation continues constituting a separate violation. Assessment of such per-day penalties is reserved for repeated acts, or acts that present considerable risk or harm, such as where someone improperly disposes of PCBs on more than one occasion, or when someone illegally imports PCBs on separate occasions. Each day of such violations is significant and warrants a separate penalty.

On the other hand, under the per-day principle, someone who stores an intact, 240-gallon PCB Transformer improperly for 30 days could be liable for \$390,000; an excessive penalty in the absence of aggravating factors such as a history of violations or a risky storage environment. In such a case, the Agency would usually not assess penalties for each day of violation.

The Agency calculates penalties for continuing and repeat violations two different ways, either by combining the total quantity of PCBs involved during the period of the violation, or by multiplying the GBP by the number of days the violation occurred. To calculate the penalty using the former method, the Agency has developed the "proportional penalty calculation," whereby the penalty is proportional to the amount of material involved multiplied by the duration of the violation, subject to the limitation of \$25,000 per day per violation. This method is usually reserved for continuing violations, and is explained in detail in appendix B. Using the latter method, the penalties are often larger than when proportional penalties are used. The Agency reserves the discretion to assess penalties using the latter method for repeated acts of violation, or when the circumstances, taking into consideration the seriousness of the violation or the severity of potential or actual environmental harm, warrant such penalties.

When the proportional penalty calculation yields more than \$25,000 per day for any one violation, the penalty should be \$25,000 per day for that violation, the maximum allowed by statute. The proportional penalty should be used in the same way as any other penalty derived from the GBP Matrix, i.e., the per-day penalty should be entered on line 1 of the TSCA Civil Penalty Assessment Worksheet (see appendix C). Regions should use the proportional penalty calculation as opposed to one day assessments for those violations where it can be documented that violations are continuing, such as failure to clean up after improper disposal of PCB. For violations that have not been corrected by the time of reinspection, EPA may either use the proportional penalty calculation or assess penalties on a per-day basis. Note that the proportional penalty method does not always result in smaller penalties than the per-day method. For large amounts of PCBs, it may be higher than a straight per-day multiplication of the GBP.

### ADJUSTING THE GRAVITY BASED PENALTY

The GBP reflects the seriousness of the violation's threat to health and the environment. TSCA also requires the Agency to consider certain other factors in assessing the violator's conduct. These are culpability, history of similar violations, and ability to pay and to continue in business. In addition, the Act authorizes the Agency to use discretion in considering "other factors as justice may require." Under this last authorization, additional factors are considered and balanced: attitude; voluntary disclosure; the cost of the violation to the government; the economic benefits received by the violator due to his non-compliance; and the environmentally beneficial measures that a violator may perform in exchange for a reduction in penalty (see Settlement with Conditions). These factors are considered as follows.



## **Culpability**

The two principal criteria for assessing culpability are (a) the violator's knowledge of the particular requirement and (b) the degree of the violator's control over the violative condition.

(a) The violator's knowledge. The lack of knowledge of a particular requirement does not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of the PCB rules. The test will be whether the violator knew or should have known of the relevant requirement or the possible dangers of his actions. As a general matter, any electric utility, and any company with PCBs, is deemed to have knowledge of all aspects of TSCA and the PCB regulations. Furthermore, a reduction in the penalty based on lack of knowledge can only occur when a reasonably prudent and responsible person would not have known that the conduct was dangerous or in violation of TSCA or the PCB regulations.

(b) Degree of control over the violation. The Agency expects PCBs to be handled prudently and that all reasonable measures will be taken to ensure compliance with the regulations. The Agency also expects that, when violations are discovered, the persons responsible for the facility or location will immediately take all necessary steps to come into compliance. Nevertheless, there may be situations where the violator is less than fully responsible for the violation's occurrence. For example, another person or company may have had some role in creating the violative condition and must therefore share the responsibility. Similarly, a discharge of PCBs into the environment can occur accidentally, even though the violator took prudent measures to avoid it. Such situations might warrant a reduction of penalties.

Three levels of culpability have been assigned for calculating penalties, as follows:

- |            |  |
|------------|--|
| Level I:   | The violation was willful. Adjust the GBP upward by 25 percent.  |
| Level II:  | The violator had (or should have had) knowledge or control. No adjustment to GBP.  |
| Level III: | The violator lacked sufficient knowledge of the potential hazard created by his or another's conduct, and also lacked control over the situation to prevent occurrence of the violation. The violator's conduct was reasonably prudent and responsible. Adjust the GBP downward by 25 percent. |

## 2.

### **History of Prior Violations**

The GBP Matrix is designed to apply to first offenders. Where a violator has demonstrated a history of "prior such" violations as stated in TSCA, the penalty will be adjusted upward to increase his motivation to comply. Also, repeat violators are penalized more severely because additional enforcement resources are spent on the same violator.

The Agency's policy is to consider only prior violations of TSCA or its rules, even though a violator could have a history of violations of other EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). Congress did not expressly state that it wanted the Agency to go beyond TSCA Section 15 prohibited acts in determining violation history.

The following considerations apply when evaluating a history of "prior such" violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in: a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; or the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint.

Violations litigated in the Federal courts, under the Act's imminent hazard (Section 7), specific enforcement and seizure (Section 17), and criminal (Section 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of noncompliance does not constitute a prior violation for the purposes of penalty assessment, since no opportunity has been given to contest the notice.

(b) To be considered a "prior such" violation, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty. From  
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(c) Generally, companies with multiple establishments are considered as one when determining history. If one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation. In most cases of violations by wholly- or partly-owned subsidiaries, the history of the parent corporation shall apply to its subsidiaries, and the subsidiaries to the parent, particularly when the parent has a majority share of ownership. The exception would be where two companies are held by the same parent corporation. The companies may not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors.

(d) If the "prior such" violation is of a non-PCB-related TSCA provision or regulation, then the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the "prior such" violation is of any PCB-related TSCA provision or regulation, the penalty should be upwardly adjusted by 50 percent for the first repetition and 100 percent for the second repetition.

3.

### **Ability to Continue in Business**

Normally, EPA will not seek a civil penalty that exceeds the violator's ability to pay and, therefore, to continue in business. The agency will assume that the respondent has the ability

*Assumption of ability to pay*

to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. The respondent will be notified in the civil complaint of its right under the statute to a consideration of its ability to continue in business. Any alleged violator can raise the issue of its ability to pay and to continue in business in its answer to the civil complaint, or during the course of settlement negotiations.

If an alleged violator raises the inability to pay as a defense in its answer, or in the course of settlement negotiations, it shall present sufficient documentation to permit the Agency to establish such inability. Appropriate documents will include the following, as the Agency may request, and will be presented in the form used by the respondent in its ordinary course of business.

1. Tax returns;
2. Balance sheets;
3. Income statements;
4. Statements of changes in financial position;
5. Statements of operations;
6. Retained earnings statements;
7. Loan applications, financing agreements, security agreements;
8. Annual and quarterly reports to shareholders and the SEC, including 10 K reports;
9. Business services reports, such as Compusat, Dun and Bradstreet, or Value Line.

Such records are to be provided to the Agency at the respondent's expense and must conform to generally recognized accounting procedures. The Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay.

*Presumption!*

#### OTHER FACTORS AS JUSTICE MAY REQUIRE

##### 4. Attitude

In assessing the violator's attitude, the Agency will look at the following factors: whether the violator is making good faith efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any actions taken to minimize harm to the environment caused by the violation. *Factor*

$\pm 15\%$  This adjustment applies equally to companies that voluntarily disclose violations and to those that do not. A company would generally qualify for a downward adjustment of a maximum of 15% if it immediately halts the violative activity and takes steps to rectify the situation. An upward adjustment of a maximum of 15% may be justified where company officials continue the violative activity after being notified to stop, do not act in good faith, hinder EPA's progress, cause increased government expenditures, or are otherwise uncooperative.

### 5. Voluntary Disclosure

The Agency encourages voluntary disclosure of PCB violations. To be eligible for a penalty reduction for voluntary disclosure, a firm must make the disclosure prior to being notified of a pending inspection. The disclosure cannot be one that is required by the PCB regulations or that is made after EPA has received information relating to the alleged violation.

Penalty amounts for violations of PCB regulations will be reduced when the violations are voluntarily disclosed by the company. This penalty reduction is separate from and in addition to the penalty reduction for culpability and attitude. For PCB violations, the penalty reductions for voluntary disclosure are as follows:

Voluntary disclosure:	25%
Immediate disclosure within 30 days of discovery AND takes all required steps:	15%
Total	40%

The penalty reduction of 15 percent may be given to a company which reports the potential violation to EPA within 30 days of having reason to believe that they may be in violation, and if the company takes all steps reasonably expected or requested by EPA to mitigate the violation. This includes timely submission of information necessary for EPA to assess the violation. Timely submission means within 30 days or a time period agreed upon by EPA and the company. This reduction can be in addition to penalty reductions for environmental expenditures above and beyond that required by the law. This reduction is only applicable to companies which have voluntarily disclosed the violation and may be taken in addition to other adjustments.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the civil complaint. The civil complaint should state the original penalty and the reduced penalty and the reason for the reduction.

### 6. Cost of the Violation to the Government

There may be occasions where it is necessary for the Agency to mitigate the effects of a violation, such as the cleanup of a dangerous spill where the violator will not take timely action or the violator is unknown at the time. An adjustment factor not specified in the statute, but which the Agency feels justice requires, is reimbursement to the government for funds expended to investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. Where the government deems it

necessary to undertake clean-up, the government could recover funds which it expended in an administrative proceeding under Section 16 of TSCA.

7.

### **Economic Benefit of Noncompliance**

The GBP is designed for deterrence and is effective where there is no overriding financial incentive to violate the rules. In some cases, the GBP may not be sufficient to deter in the face of strong economic incentives to violate. Where a violation involves significant economic benefit, the Agency will assess penalties that remove any benefit, subject to the statutory limitation of \$25,000 per day. This will be in addition to the GBP and any relevant adjustment factors.

Economic benefits can be gained by avoiding an expenditure. Economic benefits can also be gained by delaying an expenditure, whereby the violator gains an economic benefit because the firm, or nonprofit entity, earns a return on the money that should have been used for compliance. An example of an avoided cost is a spill into water, which may be impossible to clean up. Delayed expenditures that could result in significant gains may include, but are not limited to: failure to replace PCB Transformers or to install enhanced electrical protection; leaving PCBs in storage for disposal longer than 1 year; failure to provide adequate facilities for storage; failure to make necessary improvements to disposal facilities; failure to decontaminate an area after a spill; and failure to decontaminate or replace PCB-contaminated equipment in unauthorized use.

*In applying the economic benefit component, the Agency will use the most likely presumptions and the best information available to the case development team. For example, in a case where a firm has PCB-contaminated equipment that is not authorized for use, the Agency need not estimate the cost of decontaminating the equipment or the economic value of the equipment to the firm. Instead, the Agency may simply determine the cost of replacing the subject equipment by contacting the equipment manufacturer, and calculate the benefit of the delayed replacement cost.*

### **Settlement With Conditions**

The Agency may choose to adjust a civil penalty assessed for a violation of the PCB regulations in exchange for specific environmentally beneficial actions performed by the respondent. The settlement of a case under terms which commit the respondent to perform specified acts in exchange for reducing a portion of the penalty is a "Settlement with Conditions."

## Appendix A Using the GBP Matrix to Find a PCB Penalty

In order to determine a penalty for a specific PCB violation, the following steps should be followed:

- 1) Determine the violation. If more than one violation is involved, repeat the calculation in steps 2 through 8 for each violation.
- 2) Find which level the violation fits on the circumstance axis of the GBP Matrix.
- 3) Calculate the total amount of PCBs involved in the violation. If there are several materials involved which fall into different concentration ranges, do a separate calculation for each concentration.
- 4) Apply the concentration adjustment. Note the exceptions to use of the concentration adjustment.
- 5) If different concentration ranges are present, add up the figures from step 4.
- 6) Determine which extent category (Major, Significant, or Minor) is applicable to the amount from step 5.
- 7) Use the level from step 2 and the extent from step 6 to locate the penalty on the GBP Matrix (e.g., Level 3, Significant is \$10,000).
- 8) Enter the amount from step 7 on line 1 of the Civil Penalty Assessment worksheet attached to the TSCA Civil Penalty Policy. Use that worksheet to complete the calculation of the penalty accounting for factors such as culpability, history of violations, economic benefit of noncompliance, etc.

**Example:** An inspection of Company X reveals that the following items are all stored for disposal in a room with *discontinuous curbing*:

Two transformers  
 Three capacitors  
 One 800-gallon tank of PCB liquid

All three capacitors are PCB Large Capacitors with a volume of 5 gallons each. One transformer contains 300 gallons, and is tested at 700 ppm. The second transformer contains 500 gallons, and is an askarel unit and therefore contains over 500 ppm PCBs. It is leaking, and 70 square feet of concrete is contaminated. The 800-gallon tank is not leaking and the liquid is tested at 200 ppm. The density of the fluid in the 300-gallon transformer and the 800-gallon tank is found to be 8.5 pounds per gallon, and the density of the 500-gallon askarel unit is 12 pounds per gallon.

- 1) Determine the violations; these are disposal and storage. Because there are two violations, a calculation is needed for each.

Calculation for Disposal Violation

- 2) Find the "circumstances" level. This is level 1, for disposal.
- 3) Find the total amount involved. Since the leakage contaminated 70 square feet of concrete, no calculation is required to find the extent. (Note: where the quantity of PCB is known, the extent will always be based on weight in kilograms.)
- 4) Make concentration adjustment. No adjustment for alternative measure for solids.
- 5) Not applicable because spill was from a single source.
- 6) Determine extent category; 70 square feet of concrete (porous surface) is Significant.
- 7) Find penalty from matrix; Level 1, Significant = \$17,000
- 8) Enter \$17,000 on line 1 of the worksheet.

Calculation for Non-Disposal (Storage) Violation

- 2) Find "circumstances" level. Major storage (discontinuous curbing) is level 2.
- 3) Find total amount involved;

(a) Over 500 ppm:

(i) At 12 lbs/gal: One 500-gallon transformer  
 3 capacitors x 5 gal. ea. = 15 gallons  
 $500 + 15 = 515$  gal.  
 $515 \text{ gal.} \times 12 \text{ lbs./gal.} = 6,180 \text{ lbs.}$

(ii) At 8.5 lbs/gal: One 300-gallon transformer  
 $300 \text{ gal.} \times 8.5 \text{ lbs./gal.} = 2,550 \text{ lbs.}$

Subtotal:  $6,180 \text{ lbs.} + 2,550 \text{ lbs.} = 8,730 \text{ lbs.}$   
 $8,730 \text{ lbs.} \times .45 \text{ lbs./kg} = \underline{3,929 \text{ kg}}$

(b) Under 500 ppm (8.5 lbs./gal. only): One 800-gallon tank

Subtotal:  $800 \text{ gal.} \times 8.5 \text{ lbs./gal.} = 6,800 \text{ lbs.}$   
 $6,800 \text{ lbs.} \times .45 \text{ lbs./kg} = \underline{3,060 \text{ kg}}$

## 4) Make concentration adjustment.

(a) The transformers were both over 500 ppm, therefore there is no adjustment. Total remains at 3,929 kg.

(b) The tankage was 200 ppm, which is under 500 ppm, but more than 49. Therefore, the quantity is reduced 30% as follows:  
 $3,060 \text{ kg} \times (1.0 - .30) = \underline{2,142 \text{ kg}}$

## 5) Add figures from step 4.

$$3,929 \text{ kg} + 2,142 \text{ kg} = 6,071 \text{ kg}$$

6) Determine extent category; 6,071 kg = Major (non-disposal)

7) Find the penalty from the matrix; Level 2, Significant = \$20,000

8) Add \$20,000 to line 1 of the worksheet.

$$\text{\$17,000 (disposal)} + \text{\$20,000 (storage)} = \text{\$37,000.}$$



## Appendix B Calculating Proportional Penalties

The proportional penalty is used for continuing violations. It is calculated by multiplying the quantity of PCBs involved by the number of days of the violation. The sum of the PCBs times the duration is the basis for calculating the GBP. The proportional penalty is calculated in the following manner:

- 1) Multiply the amount of PCBs involved in the violation (reduced by the concentration adjustment) by the number of days the violation continued.
- 2) If the amount from step 1 is less than or equal to two times the Major extent category, use this amount to determine the extent category and obtain a penalty from the GBP Matrix. If the amount from step 1 is greater than two times the Major extent category, proceed to step 3.
- 3) Divide the total amount from step 1 by the Major extent category limit. Multiply the result by the dollar amount in the Major category. This yields the proportional penalty.
- 4) Divide the total penalty by the number of days involved. Enter this amount on line 1 of the TSCA Civil Penalty Assessment Worksheet.

### Examples

(a) 5 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

- 1) 5 kg of askarel, no concentration adjustment.  
 $5 \text{ kg} \times 30 \text{ days} = 150 \text{ kg}$
- 2) 150 kg is less than two times Major extent (Major = 125 kg). Therefore, penalty is for 150 kg (Major, level 1) = \$25,000.
- 3) Not applicable.
- 4)  $\$25,000 \text{ divided by } 30 \text{ days} = \$833.33 \text{ per day.}$

(b) 20 kg spill of askarel onto concrete. Spill was not cleaned up for 30 days.

- 1) 20 kg of askarel, no concentration adjustment.  
 $20 \text{ kg} \times 30 \text{ days} = 600 \text{ kg}$
- 2) 600 kg is more than two times Major extent (125 kg). Therefore, go to step 3.
- 3)  $600 \text{ kg divided by } 125 \text{ kg} = 4.8$   
 $4.8 \times \$25,000 \text{ (Major, level 1)} = \underline{\$120,000}$
- 4)  $\$120,000 \text{ divided by } 30 \text{ days} = \$4,000 \text{ per day.}$

## Appendix C

Civil Penalty Assessment Worksheet

Name of Respondent:  
Address of Respondent:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (1) Complaint LD. Number: \_\_\_\_\_  
 (2) Date Complaint Issued: \_\_\_\_\_  
 (3) Date Answer Received: \_\_\_\_\_  
 (4) Date Default Order Sent: \_\_\_\_\_  
 (5) Date Consent Agreement Signed: \_\_\_\_\_  
 (6) Date Final Order Sent: \_\_\_\_\_  
 (7) Date Remittance Received: \_\_\_\_\_

1. Gravity Based Penalty (GBP) from matrix \$ \_\_\_\_\_  
 2. Percent increase or decrease for culpability: \_\_\_\_\_ %  
 3. Percent increase for violation history: \_\_\_\_\_ %  
 4. Add lines 2 and 3: \_\_\_\_\_ %  
 5. Multiply GBP by percentage total on line 4: \$ \_\_\_\_\_  
 6. Add lines 1 and 5 (subtract line 5 from line 1  
if negative percentage): \$ \_\_\_\_\_  
 7. Enter line 6 amount or \$25,000, whichever is less: \$ \_\_\_\_\_  
 8. Multiply line 7 by the number of days or violations: \$ \_\_\_\_\_  
 9. Government clean-up costs, if any: \$ \_\_\_\_\_  
 10. Economic gains from non-compliance, if appropriate: \$ \_\_\_\_\_  
 11. Add lines 8 through 10: \$ \_\_\_\_\_  
 12. Total of other adjustments as justice may require: \$ \_\_\_\_\_  
 13. Add (or subtract) line 12 to (from) line 11: \$ \_\_\_\_\_

Note: Line 13 should be the proposed penalty for a given violation. The procedure is repeated for each violation.

## **GUIDANCE FOR PROPOSED PENALTIES AND SETTLEMENTS UNDER THE PCB PENALTY POLICY**

### **When to Issue Notices of Noncompliance (NONs)**

At the Agency's discretion, NONs may be issued for cases where the only violations are of circumstance levels 4, 5, and 6. NONs will not be issued in cases involving violations of levels 1, 2, or 3. In determining whether or not to issue a NON, the Agency will take into account the seriousness of the violation, the size of the potential penalty, the violator's history, and other matters relating to the efficacy of the NON in obtaining compliance and deterring future violations.

### **Inspector Discretion, Multiple Locations**

The guidelines in the PCB Penalty Policy for determining a "separate location" shall be followed, with the exception that the Agency inspector has the discretion to determine otherwise based on whether a location actually constitutes a separate risk, or a separate location for purposes of compliance. For example, the access to a PCB Transformer location must be marked. If in a large room there are two PCB Transformers more than 100 feet apart, but only one door to the room, the inspector may determine that, even though the guidelines call for two separate locations, the failure to mark the access is a single count.

### **Ability to Pay**

There are three methods that EPA can use to determine a violator's ability to pay, depending on the specifics of the case: a detailed tax, accounting, and financial analysis; a cap of four percent of average gross annual sales; or ABEL (a computer model). The latter two are described below.

**Four percent of gross sales.** The average gross income (from all sources of revenue) for the current year and the prior three years will be calculated. Even where the net income is negative, four percent of gross income will be used as the "ability to continue in business/ability to pay" criteria, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses. For corporations, EPA will consider revenues from the total corporate entity in its determination of ability to pay/ability to continue in business.

There may be some cases where a respondent argues that it cannot afford to pay the proposed civil penalty even though the penalty as adjusted does not exceed four percent of gross sales. In such cases, EPA may consider a delayed payment schedule or a "Settlement with Conditions" agreement. In exceptional circumstances, EPA may also consider further adjustment

below four percent of a company's gross annual revenue.

**ABEL.** ABEL is an Agency computer model that is designed to assess a for-profit entity's ability to pay. The evaluation is based on the estimated strength of internally-generated cash flows. The program uses standard financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses. ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable to pay the full penalty. These include:

- o certificates of deposit, money market funds, or other liquid assets.
- o reduction in business expenses such as advertising, entertainment, or compensation of corporate officers.
- o sale or mortgage of non-liquid assets such as company cars, aircraft, or land.

In assessing penalties, TSCA directs EPA to "take into account" a violator's ability to pay and to continue in business, and the Agency will normally reduce the penalty accordingly. Nevertheless, it is important that the regulated community not see the violation of TSCA or the PCB regulations as a way of aiding financially troubled businesses. The Agency reserves the option, in appropriate circumstances, of seeking a penalty that might cause bankruptcy or put the company out of business.

To ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business, the Regions shall consult with the Office of Compliance Monitoring before the decision is made to proceed to a hearing.

#### **Economic Benefit of Noncompliance**

The economic benefit of a violation is added to the GBP when the penalty would otherwise not exceed the benefit. To calculate the economic benefit of delayed costs, the Agency will first determine the amount of money involved, and then apply BEN, an Agency computer model, to determine the benefit to the violator. The model uses discounting techniques to calculate the net present value of on-time and delayed expenditures, and subtracts the delayed compliance cost from the on-time cost to derive the benefit to the violator. Generally, the benefit is calculated using the time between the actual or estimated date of the violation, and the actual or estimated date the violation is corrected. For avoided costs, such as for disposal into water, the calculation will be based on the estimated cost of lawful disposal, taking into account the benefit of the "avoided cost" between the estimated or actual date of the disposal, and the estimated date of payment of the civil penalty.

Obviously, assessing the benefit component requires a commitment of the Agency's resources. Therefore, the case development team has the discretion not to seek the benefit

component where it appears that the amount is likely to be less than \$10,000, or the benefit component would be small relative to the GBP. Furthermore, the Agency need not delve into complex economic assessments or define the benefit to the nearest dollar; in practice, it may be preferable to exclude some minor cost factors or to use conservative assumptions. However, in no case should the total penalty be less than the economic benefit to the violator.

To determine the base economic benefit involved in the violation, the Agency will contact knowledgeable sources of cost information. For example, if dredging is required to decontaminate a body of water after a spill, the U.S. Army Corps of Engineers may be consulted to estimate the cost of dredging. For on-land disposal violations, cleanup contractors can be consulted to estimate costs. Similarly, standard estimates should be available from manufacturers or contractors for installation of enhanced electrical protection, or for replacing transformers or contaminated equipment in unauthorized use.

### **Settlement with Conditions (SWC)**

The Agency may choose to reduce a civil penalty assessed for a violation of the PCB regulations in exchange for specific environmentally beneficial actions performed by the respondent. The settlement of a case under terms which commit the respondent to perform specified acts in exchange for reducing the penalty is a "Settlement with Conditions" (SWC).

Under a SWC agreement, the violator agrees to take extensive and specific actions, such as pollution prevention projects, risk communication, remedying ground water hazards, clean-up operations, training, etc, in exchange for the a reduction in the amount of the proposed civil penalty. These actions must exceed those normally expected under the circumstances and are only to be considered in the context of settlement negotiations. Actions in excess of those required to correct the violation for which the violator was charged, and actions in excess of those already required by Federal/State/local laws, must be taken within a specific time period, and will be strictly monitored by the Agency (or the Agency's designee). If EPA is not satisfied that the conditions of the agreement have been met at the end of the term, the full amount of the proposed penalty, or the penalty absent the reduction for settlement conditions, is due.

A cash penalty must always be collected from the violator regardless of the value of the SWC activities with the range of penalty offset for environmentally beneficial expenditures of 1:2 to 1:7 or more. Further, EPA must not lower the amount of the civil penalty by more than the after-tax amount the violator spends on the project. Calculation of the net present after tax value of the SWC activities is necessary to ensure that the violator cannot offset the cost of the SWC activities through income tax deductions (the Agency's BEN model may be used to calculate the net present after tax value of an SWC).

#### **1. Criteria for Choosing an SWC**

Settlements with Conditions should be employed with some restraint. SWCs should not be used in a manner which encourages people to violate the PCB regulations until they are discovered and then offer to correct actions in hope of a penalty reduction. All SWCs must describe actions which go beyond correction of violations. The guidelines for implementing a

SWC are as follows.

- o The violations do not evidence wanton, knowing, or willful disregard for regulatory requirements;
- o To remedy harm from a violation, the facility or person may need to plan activities that require a number of steps over time;
- o The violator has exhibited a good-faith attitude toward solving the noncompliance;
- o The settlement conditions provide clear benefits to the environment or human health.

## 2. Penalty Payment

Under the Miscellaneous Receipts Act, 31 U.S.C. Section 3302, once money is due and owing the United States government, it must be paid in full. Therefore, the consent agreement and consent order (CACO) containing SWC's will clearly state that the penalty is due and owing at the time the CACO is signed. The CACO will contain (1) the specific conditions and absolute dates for completion of activities, (2) the entire proposed penalty based on the penalty policy, absent the adjustments, (3) the amount of the reduction for completing the conditions, and (4) a statement that the entire proposed penalty is due and owing if the respondent fails to comply with the terms of the CACO.

If the respondent fails to adhere to the conditions of the SWC, the entire penalty is due and payable within 60 days. If the respondent refuses to pay, the EPA shall refer the action to the Department of Justice for collection.

## 3. Reinspection and Additional Enforcement Action

Once the Region determines that the SWC has been violated and so notifies the respondent, EPA should reinspect the facility to document additional violations. When considering additional enforcement actions in response to violations discovered upon reinspection, the Region may give consideration to pursuing injunctive action. Clearly, in cases of serious violations where administrative enforcement action cannot be expected to achieve compliance, an injunction may be the desirable enforcement response.

## 4. Elements of a SWC

The Agency is examining the procedures for issuing SWC agreements and the necessary contents of those agreements. Regions will be able to refer to these procedures when final Agency guidance is available. In the interim, the SWC, like any TSCA settlement, consists of (1) a complaint and (2) a CACO containing SWCs.

Jacobs



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
PESTICIDES AND TOXIC SUBSTANCES

MAR 30 1990

**MEMORANDUM**

**SUBJECT:** Final PCB Penalty Policy

**FROM:** John J. Neylan III, Director  
Policy and Grants Division  
Office of Compliance Monitoring

**TO:** Addressees

I am pleased to announce the completion of the enclosed PCB Penalty Policy, and its companion, Guidance for Proposed Penalties and Settlements Under the PCB Penalty Policy. The new policy is to go into effect on April 9, 1990, the anticipated publication date of the Federal Register Notice of Availability. Copies of the Policy, but not the Guidance, will be sent to some 300 addressees on the Agency's PCB mailing list beforehand and will also be available to the regulated community through the TSCA Hotline (a communications strategy discussing this and other outreach activities has been sent to the Regional Branch Chiefs).

The 1980 policy applies to all cases issued before April 9. For such existing cases, the Regions should determine if the new policy would result in lower proposed penalties, and if so, the complaint may be amended to assess the lower penalties. The new policy is to apply to all cases issued on or after April 9.

Revising the Policy was a major undertaking. From the New York Division Director's meeting in early 1988 that triggered the revision to the policy, to our "closure" in Seattle this month, you have provided crucial input to the process. In keeping with that process, among the agreements made at the Division Director level were to elevate major, unresolvable issues to the Enforcement Committee, and their decision was reviewed by both Linda Fisher and Vic Kimm; this was done. Finally, at Seattle it was agreed that all would abide by those decisions. I greatly appreciate your input and patience throughout the three iterations we undertook on this document. I especially commend the Regional and HQ workgroup members for their efforts.

Attached are OCM's responses to the more significant or recurrent comments. If you have any questions about these responses, or about OCM's consideration of any that are not addressed here, please contact Mr. Cary Secrest of my staff at 8-475-7006.

Attachments (2)



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## RESPONSE TO COMMENTS

### Multiple Penalties

1. Multiple penalties will make cases more difficult to settle, and more violators will seek a hearing. This will strain Agency resources.

#### Response:

- o The Agency will still consider the violator's ability to pay.
  - o The increased penalties should increase the compliance rate, thereby reducing the number of cases.
  - o Region's have the discretion to issue NONs for Levels 4, 5, and 6, thereby saving enforcement resources for more serious violations.
2. The size of the penalty doesn't make a difference, and networking is sufficient to ensure communication of penalties from a violator to others in the community.

#### Response:

- o The low compliance rate indicates that violators are not deterred by the current penalties.
  - o Higher penalties will likely mean more publicity, thereby increasing the regulated community's interest in compliance.
  - o There will be a significant movement away from use of PCBs to disposal because of the new regulations. Multiple violations of storage and disposal requirements may be found at larger firms that are in the PCB business. Larger penalties will be needed to deter violations.
3. The Policy should not set specific standards or distances for determining what is a "separate location" for purposes of multiple penalty assessments; that should be decided by the inspector.

#### Response:

- o The workgroup and some Regions felt that firm standards should be stated to alleviate ambiguity, ensure separate counts for separate locations at risk, and achieve better uniformity throughout the country. The

Enforcement Committee decided that a separate location/separate risk is a separate building, separate room, or if in a large room or outside, more than 100 feet away.

- o Inspector's discretion is allowed. If in the inspector's judgement the policy doesn't describe a "separate risk" for that location and violation, the inspector may use judgement to determine separate locations. An example is given in the guidance document.

#### Circumstances

4. Import and export violations are similar to manufacturing and disposal, respectively, and should therefore be moved from level 2 to level 1.

Response:

Agreed. The policy was changed to reflect this comment.

5. For storage violations, use Level 3 for non-commercial storers, and Level 1 for commercial storers.

Response:

All violations of storage requirements (curbing, floor, etc.) should be the same regardless of the status of the violator; commercial storers will be assessed higher penalties because there will likely be more locations and greater extent.

6. Because physical storage violations can release PCB into the environment, move major storage from Level 3 to Level 2.

Response:

Agreed. This will also make penalties for physical storage violations one level higher than recordkeeping violations.

7. Include "late registration" in level 4, minor use.

Response:

Failure to register with the fire department or building owners will be kept at level 2. The Agency considers such registration important to human health and safety, and will not reduce penalties for violators whose attention to this matter is lax.

8. Storage of all combustibles near transformers should be level 2.

**Response:**

The Agency recognizes that combustible organic liquids, such as solvents or fuels, are far more hazardous than wood, cardboard, or other such materials likely to be involved in a violation. It is appropriate to distinguish these two very different levels of risk in the policy.

9. Remove "Significant Marking." Two levels of Marking (major and minor) are enough.

**Response:**

Agreed. Failure to mark will be major, minor will be applied where labels don't conform to the requirements, or are obscured, damaged, etc.

10. Recordkeeping penalties for notification and manifesting at storage facilities should be the same as other storage records.

**Response:**

They are (Level 3). However, complete failure to manifest or making major manifesting errors is more serious than failure to keep otherwise legitimate manifests, and is therefore Level 1.

11. While false manifesting indicates willful violation, and should be Level 1, failure to manifest should be Level 2, not level 1.

**Response:**

From the Agency's standpoint, false manifesting and failure to manifest have the same result: no manifest. Level 1 should apply to ensure the highest possible penalty for violating this important rule.

12. A generator failing to notify under the Notification and Manifesting Rule should not be Level 1. That's a high penalty for ignorance of the Rule.

**Response:**

- o The Rule requires that generators with PCB storage areas notify EPA, and that they use the generic Agency ID [40 CFR 761] number, or the generator's RCRA number, until a specific ID is issued. Otherwise, a transporter who complies with the Rule won't accept his waste. Therefore, failure to notify will likely be a deliberate violation.

- o Notification is a vital part of the Agency's tracking system, and should be penalized on par with other major manifest violations.

13. The adjectives "major, significant, and minor" are terms of art and should be reserved for extent and the TSCA civil penalty matrix. Use synonyms for these adjectives when describing circumstances (e.g. major marking, minor storage).

Response:

The adjectives "major, significant, and minor" are always used in the context of either extent or circumstances, so there is no question what they mean. As such, the Agency has become accustomed to using them; using their synonyms would cause at least some temporary confusion. More importantly, the adjectives' location on the TSCA matrix gives them a quantitative relationship which makes them useful for expressing the seriousness of violations under the circumstance levels. For example, what would be the relationship between "substantial, important, and insubstantial" or "chief, important, and small?" One might argue that the Agency shouldn't penalize for "insubstantial" violations, or that "chief" is close in meaning to "important." The adjective "minor," on the other hand, doesn't mean "insubstantial" because it connotes that some penalty is justified; similarly, "significant," although considered a synonym of "major," is clearly not an equal in the context of the Policy.

14. No policy should require penalties for refusing to allow entry of an inspector. Adjust the penalty upward 15% for bad attitude.

Response:

It is a violation of TSCA Section 11 to refuse entry of an inspector. Doing so could allow the violator to remove PCB violations while the Agency seeks a warrant.

The policy provides guidance to ensure the Agency's conduct is within legal requirements (including notification of inspection) for assessing penalties, and discusses how to determine whether the extent is minor, significant, or major. No penalty can be issued for refusing surprise inspections.

15. Why not penalize for refusal to supply documents requested in a subpoena?

**Response:**

Although TSCA Section 11 requires a respondent to supply such documents, the delay caused by refusal does not materially affect the violation. Therefore, once documents are ultimately obtained by the Agency, an upward adjustment can be adequately considered under the adjustment for attitude.

**Extent**

16. The extent for disposal should be based on the amount of debris actually generated by cleanup, not on an estimate made at the time of inspection.

**Response:**

While knowing the actual amount would give the Agency better figures for extent, it may reduce the incentive to clean up completely. Verifying the quantity would also be troublesome. Using estimates derived at the time of inspection should provide an adequate basis for penalties.

17. The extent for disposal should not have different square footages for different surfaces. Use one figure like the old policy. The risk is the same regardless of surface, and it's simpler.

**Response:**

The extent quantities are selected to encourage compliance and to create a fair basis for assessing penalties. Since each surface has different cleanup costs, each surface will require different penalties to encourage compliance. Further, while the risk may be the same, the Agency will still be increasing penalties in general because the lowest extent, which is 625 square feet for non-porous surfaces, is still 125 square feet less than the old policy.

18. For disposal onto soil, increasing gallonage may not necessarily correspond to increasing cubic footage of contamination.

**Response:**

True. In fact, on uneven terrain, especially if the soil is saturated with water, PCBs could remain puddled on the surface for a long time, thereby reducing the quantity of contaminated soil. Nevertheless, these figures are based on the results of a Southern California Edison study suggesting that, when soil is dry and level, 1 gallon of PCBs will contaminate 16 cubic feet of soil. Using this assumption results in a maximum figure; there is no justification for using a lesser figure to benefit violators.

19. The following quantities for minor extent, disposal, were suggested in the comments.

less than:        5 gallons  
                  10 sq. ft. (soil)  
                  30 sq. ft. (porous surface)  
                  100 sq. ft. (non-porous surface)

Response:

Five gallons should contaminate more than 10 square feet of soil, 30 square feet of concrete, and 100 square feet of tile or steel. The policy's figures, which are 60, 20, and 625 sq. ft., respectively, are based on the Southern California Edison study and some unpublished EPA analysis done in preparation for the Spill Cleanup Policy. The figures should reflect at least a rough relationship between gallons spilled and area contaminated.

20. The disposal extents should use Spill Cleanup Policy terminology, i.e., use the term "porous" instead of "concrete." Similar consistency should be made by changing the depth of soil assumption for spills from 12 to 10 inches.

Response:

Agreed. The change has been made.

21. Why not have a piece count for disposed equipment where cubic feet is not available, such as disposal of capacitors in a municipal landfill?

Response:

- o In the event that PCB Articles are known to be improperly disposed, then it should be possible to get a description of those Articles. Assumptions could then be made about the weight of PCB within those Articles, and the extent could be calculated.
  - o If information about the size of the Articles is not available, then the Region has at least two options; (1) assume a size for penalty purposes, and (2) encourage the violator to remove the improperly disposed Articles before settlement.
22. Would the penalty for disposing of a drained transformer equal the penalty for a spill the size of a quarter?



Response: -

Assuming that the drained transformer is less than 60 cubic feet (roughly a 400 gallon transformer) the extent would be the same. However, the penalty may be different, because adjustments are made for culpability and other factors. A quarter-size spill can happen even when one is in compliance with the regulations, while improper disposal of a transformer carcass is a violative act that may be willful, or may have a significant economic benefit component. OCM notes that with only three levels of extent, and a wide range of possible quantities of improper disposal, each extent level must have a fairly wide range.

#### Ability to Pay

23. ABEL involves a great deal of time and resources. Who runs ABEL when we need it done?

Response:

ABEL is a relatively simple program to operate and requires little training or input time. Mr. Jonathan Libber, OECM Office of Compliance Analysis and Program Operations, is scheduling ABEL training sessions for Regional personnel. He can be reached at FTS 475-8777.

24. If the 4% rule is a valid accounting principle, we should keep it as our sole method of calculating ability to pay.

Response:

The 4% rule is a rule of thumb developed in practice by the Agency. It is a rough assessment of ability to pay, not a true indication for every case. Until the Regions are comfortable with ABEL, the 4% rule will provide sufficient guidance.

25. The Policy should specify procedures for dealing with municipalities, universities, cooperatives, charities, and other non-profit entities.

Response:

There is an Agency-wide effort to devise a policy for assessing the ability of non-profit organizations to pay. At this point, however, there is no information that can be incorporated into the policy. The problem is not simple because non-profit organizations vary substantially in their ability to pay and their capacities for penalty mitigation such as environmentally beneficial expenditures. As in the past, the case development team will have to make a judgement on a case by case basis until a uniform Agency

policy is established.

#### Economic Benefit of Noncompliance

26. The whole approach to economic benefit is crippling in its complexity, and will result in preventing the settlement of cases that could otherwise be resolved.

Response:

Assessing the economic benefit of noncompliance should be neither time consuming nor complex. The Agency will, in addition to the Gravity Based Penalty, include in its proposed penalty any benefit the violator gained from noncompliance where the benefit would otherwise exceed the penalty. Not all violations result in such economic benefits, therefore it will not be necessary to calculate the economic benefit for every case. Also, the Agency's consideration will be limited to situations where the benefit is reasonably apparent, and can be calculated using BEN. BEN training will be provided by Mr. Libber in addition to ABEL training (See 23).

#### Voluntary Disclosure

27. Forty percent is not much incentive to disclose. The percentage should be increased.

Response:

- o Add 15% for attitude and you have a 55% reduction. With an additional 25% for Level 3 Culpability, that is an 80% reduction.
- o Some recent voluntary disclosures have been the result of corporate sales of assets where the buyer requires a guarantee of compliance. The Agency wants to encourage disclosure in such cases.

#### Proportional Penalty

28. Proportional penalties should be used for continuing violations, per-day should be used for repeat violations.

Response:

Agreed. For example, disposal is a single violation per act of disposal, and is thus assessed on a per-day basis, but because the PCB is in a continuing state of improper disposal until cleaned up, a proportional calculation is also appropriate. The policy contains a disposal example for proportional penalties.

## Culpability -

29. Level I culpability should be "willful," not "knowledge and control." The latter would apply to virtually every violator, and would not conform to the 1980 TSCA civil penalty guidelines.

### Response:

Agreed. As an adjustment factor, Level I culpability should apply to the violator who willfully violates the regulations, not simply to violators who had knowledge of the regulations and control over the violation. The distinction is that the willful violator is fully aware of the violative condition and chooses not to act in accordance with the regulations. A violator who had knowledge and control may, through inattention, violate the regulations. OCM believes that the GBP, as adjusted by other factors such as attitude and history, adequately penalizes violators who had knowledge and control without upwardly adjusting the penalty.

## History of Violations

30. The Agency should not be limited to the past five years when considering the violator's history.

### Response:

The 1980 TSCA civil penalty guidelines state that the Agency's consideration of the violator's history should be limited to the past five years because beyond that, "the prior violative conduct becomes too distant to require compounding of the penalty for the present violation." While it may be argued that five years is arbitrary, it is generally consistent with other agency determinations. As a general matter, five years is reasonable; however, the rationale that beyond that, the "violative conduct becomes too distant," has been deleted from the policy.

## Attitude

31. The adjustment of 15% for attitude does not go far enough. Increase it to 40%, using a combination of 10% for cooperation, and 30% for completeness/promptness of correcting the violation. The Region should have absolute discretion to apply these adjustments.

### Response:

One goal of this penalty policy is to move the regulated community to greater compliance, and to offer an "incentive"

to self disclose. The Agency believes that a violator who suddenly becomes contrite after being discovered in violation is not deserving of a 40% reduction in penalties. By tightening the reductions allowed for good attitude and building in significant incentives for self disclosure, the Agency expects to move the regulated community to that action. Further, one of the Agency's objectives with the revised policy is to gain greater consistency among the Regions. A 40% adjustment for these factors could cause substantial Regional differences in penalties for similar violations.

## HIGHLIGHTS OF THE PCB PENALTY POLICY

### 1. Multiple Penalties

- o One count for each violative act. For example, it takes a single act to register PCB transformers with the fire department or adjacent building owners, therefore it is one count regardless of the number of transformer locations.
- o A separate count for each violation of the regulations, regardless of categories.
- o A separate count for each quarterly inspection, with the limitation of assessing up to 4 missed inspections, or a cap of \$250,000, whichever is less.
- o A separate count for each annual document missed over the last 3 years, and one count for all documents missed from year 4 and beyond (possible total of 4 counts).
- o Penalties will be assessed for each location that presents a separate and distinct risk. Separate locations are:
  - separate buildings and separate rooms.
  - at least 100 feet away in large rooms or outside.

The EPA inspector shall determine whether a particular location is separate based on the above, and may consider other factors relevant to the risk associated with the site.

### 2. Extent

#### Minor Non-Disposal Violations

Less than:

1,200 kg  
220 gal  
50 lg. capacitors  
15 55 gallon drums (solids)  
5 Drained transformers

#### Minor Disposal Violations

Less than:

25 kg  
5 gal  
50 lg. capacitors  
sq. ft. 625 (non-porous)  
60 (soil)  
20 (porous)  
cu. ft. 60 (all materials)

Note: Extent for Significant and Major non-disposal and disposal violations increases in the same ratio as 1980 policy.

### 3. Circumstances

- Level 1. Major Disposal (includes export)  
Manufacturing (includes import)  
Incidental Generation  
Major Manifesting  
- failure to notify  
- false information in storage application  
- failure to manifest, false manifesting (as opposed to clerical errors)  
- storage without approval  
Refusal to Permit Entry
- Level 2. Processing PCBs  
Distribution in Commerce  
Unauthorized Use or Violation of Use Condition  
Major Marking  
Major Storage
- Level 3. No Records, Major Recordkeeping (disposal and commercial storage facilities)  
Minor Disposal  
Minor Manifesting (failure to submit annual documents/exception reports)
- Level 4. No Records, Major Recordkeeping (use and non-commercial storage facilities)  
Minor Storage  
- storage in excess of 1 year (including failure to date PCBs in storage)  
- small cracks in wall, floor, or curbing  
- failure to prepare visual inspection reports where majority were done  
Minor Use  
- failure to provide complete transformer registration  
- failure to complete all transformer inspections where majority were done  
- failure to remove combustible materials other than organic solvents/fuels
- Level 5. Minor Marking
- Level 6. Minor Recordkeeping  
Minor Manifesting  
Failure to Label "No PCBs"

### 4. Miscellaneous

- o Up to 40% reduction for voluntary disclosure
- o Regional discretion to use NONs for Levels 4, 5, and 6