

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
)
)
CITY MANAGEMENT CORP.,) DKT. NO. TSCA-V-C-023-94
DETROIT, MICHIGAN)
) Judge Greene
)
Respondent)
)

ORDER
GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY DETERMINATION;
AND GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DETERMINATION;
AND DISMISSING CERTAIN COUNTS OF THE COMPLAINT

This matter arises under Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). The Second Amended Complaint ("complaint")⁽¹⁾ charges Respondent with distribution of polychlorinated biphenyls (PCBs) in commerce, in violation of Section 6(e) of TSCA [15 U.S.C. § 2605(e)] and with commercial storage of PCBs without having applied for final storage approval, in violation of 40 C.F.R. § 761.65(d)(1). Complainant proposes a total civil penalty of \$65,000 for these alleged violations.⁽²⁾

The events which gave rise to the complaint are as follows, and are not in dispute. On June 14, 1991, Respondent's liquid waste transfer facility accepted 7500 gallons of liquid waste, apparently generated by Ford Motor Company, from Environmental Waste Control, Inc. Respondent transferred 5,875 gallons of that waste to a tanker truck, and 1,625 gallons to a storage tank. Subsequently, the waste from the storage tank was loaded into a second tanker truck along with the contents of two other storage

tanks. On June 17, 1991, one tanker arrived at Systech Corporation ("Systech") in Alpena, Michigan; the other tanker arrived at Systech's Paulding, Ohio, facility. Respondent was notified by Systech personnel within two to three hours after the arrival of the tankers that the contents of both tankers had been tested and found to contain PCBs at 50 parts or more per million. The shipments were rejected by Systech. The tankers, still loaded, returned to Respondent's facility.⁽³⁾ On the day the second tanker returned, June 18, 1991, Respondent notified the Michigan Department of Natural Resources and the U. S. Environmental Protection Agency (EPA) by telephone, as well as by "lengthy description of the entire matter" to both agencies in writing on June 21, 1991. EPA inspected the facility on September 18, 1991.⁽⁴⁾

Respondent moved for summary determination ("accelerated decision" under the Rules of Practice which govern this proceeding). Complainant then moved for partial summary determination as to liability.

In a motion for summary judgment, the question is whether the moving party: (1) has met its burden of establishing that there is no genuine issue as to any material fact; and (2) is entitled to judgment as a matter of law. The question as to genuine issues of material fact is generally considered to be "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." **Anderson v. Liberty Lobby**, 477 U.S. 242, 251-252 (1986).⁽⁵⁾

For the reasons set forth below, both motions are granted in part and denied in part.

Distribution in Commerce.

It is alleged in Counts I and II that shipment of the wastes in question constitutes "distribution in commerce" of PCBs, which is prohibited by Section 6(e)(3)(A)(ii) of TSCA, 15 U.S.C. § 2605(e)(3)(A)(ii), in the absence of an exemption granted by the Administrator of the U. S. Environmental Protection Agency (EPA) pursuant to Section 6(e)(3)(B). Respondent asserts, however, that (1) when the wastes left the facility for Systech Corporation they were not "in commerce" as that term is properly understood under TSCA, because, chiefly, there was no sale of PCBs; and (2) shipment for *for disposal* does not constitute "distribution in commerce" because the two terms are not the

same activity -- "disposal" is not included in the term "distribution in commerce."⁽⁶⁾

The argument that shipment for disposal does not constitute "distribution in commerce" was considered at length recently and rejected in *In re Tri-State Motor Transit*, Docket No. TSCA-VII-92-T-382 (April 18, 1996), and must be rejected here for the same reason: transportation of PCBs for disposal is in commerce and does constitute "distribution in commerce" within the meaning of the Act, whether or not a sale of PCBs occurred in connection with receipt or disposal.

The terms "distribution in commerce" and "commerce" are broadly defined by the Act. "Distribution in commerce" means not only the sale of a substance or item, but also:

. . . . to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce. (Emphasis added).⁽⁷⁾

"Commerce" is defined at Section 3(3) to include not only "trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State," but also "trade, traffic, transportation, or other commerce . . . (B) which *affects* trade, traffic, transportation, or commerce described in clause (A)."⁽⁸⁾ Case law provides a similarly broad definition of "commerce." As stated in *Tri-State*,

the definition of "commerce" has long been very broad, and its import in the law cannot . . . be misapprehended: "commerce" includes just about anything and everything. Any notion that a particular activity may not be "in commerce" must be examined very care-fully and with great skepticism. Decisions particularly from the 1930s and 1940s leave no doubt that virtually any business activity is included in the term, and

that it takes very little to constitute an "effect" upon interstate commerce.⁽⁹⁾

Respondent's first argument with respect to this issue is that "distribution in commerce" refers exclusively to *sales of PCBs*. In support of this, Respondent refers to a statement in the 1978 preamble to the (proposed) PCB rules that "[t]he term 'distribution in commerce' is used to refer to the sale of a PCB."⁽¹⁰⁾ This statement, however, occurs in a portion of the discussion which relates to exemptions from the restrictions upon sales and uses of PCBs, especially PCBs removed from transformers, imposed by TSCA and the (then) proposed rules. It was clearly not intended as a comprehensive list of all activities encompassed within the term "distribution in commerce," as may be inferred from the recitation immediately thereafter of two additional types of distributions in commerce which do not include sales. In any case, the statutory definitions of "distribution in commerce" and, particularly, the term "commerce" cannot reasonably be mistaken for references to PCB sales and nothing else. In short, when the Act defines "distribution in commerce" as including an activity such as "the holding of the substance, mixture, or article after its introduction into commerce"⁽¹¹⁾, there is no doubt that transportation of a substance is an activity encompassed within the term, and that no sales or transfer of title of PCBs need occur.⁽¹²⁾

Regarding transportation, the decision in ***Environmental Transportation Systems v. ENSCO, Inc.***, 763 F. Supp. 384, 391, D. C. Ill. 1991, stated that

The term "disposal" would seem to include transportation incidental to the actual disposal of PCBs. But even if transportation for disposal were not covered by the term "disposal," that activity comes within the purview of § 2605(e)(1) by virtue of the term "distribution in commerce." In the definition section of TSCA at 2602(4),

distribution in commerce is defined in terms of "commerce," which is in turn defined . . . as trade, traffic, transportation, or other commerce. [\(13\)](#)

It is noted as well that the definition of "disposal" at 40 C.F.R. § 761.3 includes " . . . actions related to containing, transporting, destroying . . . PCBs and PCB Items." Thus, the term "distribution in commerce" includes transportation for disposal, and "disposal" includes transportation in connection with the destruction of, or ending the useful life of, PCBs.

To the same effect is the comment in the 1979 preamble to the final PCB rule, [\(14\)](#) that a particular finding made by the EPA Administrator as to exports of PCBs was "based upon the well-documented human health and environmental hazard of PCB exposure, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing, processing, or distribution activities; the potential hazard of PCB exposure posed by the transportation of PCBs . . . within the United States." Under the circumstances of the danger of exposure to PCBs at any level of parts per million, it is clear that PCB disposal and transportation for disposal were intended to be prohibited except under the circumstances set out at 40 C.F.R. § 761.20 (c) (2), and that this prohibition was mandated by the intent of the Act with respect to PCBs -- the only chemical substance specifically regulated by TSCA. [\(15\)](#)

Respondent's view that "disposal" and "distribution in commerce" are not one and the same thing, but are two distinct terms, [\(16\)](#) and that "disposal" is not included in the term "distribution in commerce" is entirely correct. However that may be, it does not lead to the conclusion that "disposal" can not be accomplished "in commerce," as Respondent suggests. There is no logical reason, even following Respondent's argument, why PCBs being transported to a disposal facility cannot constitute a "distribution in commerce." No clearer indication that transportation for the purpose of disposal is "in commerce" or constitutes "distribution in commerce" can be found than 40 C.F.R. § 761.20(c) (2), which contains a specific exception to the total statutory and regulatory ban against distribution of PCBs in commerce when the ultimate purpose of the distribution is disposal in accordance with 40 C.F.R. § 761.60. Pursuant to this exception, PCBs at concentrations of 50 ppm or greater may

be distributed in commerce for disposal provided that (1) disposal will be in accordance with the regulations at 40 C.F.R. § 761.60; and (2) that the distribution in commerce will be comply with "this Part." If, as Respondent argues, disposal of PCBs was not considered to be in commerce, there would have been no need to make an exception for distribution of PCBs in commerce for disposal.⁽¹⁷⁾

Accordingly, the shipments which are the subject of the first two counts of the complaint were distributions in commerce, and were prohibited by section 6(e) of the Act [15 U.S.C. § 2605(e)] and 40 C.F.R. § 761.20(c).⁽¹⁸⁾

Respondent asserts that Complainant's attempt to include shipment for disposal within the meaning of "distribution in commerce" is an effort to "forge [a] novel theory of liability" without following notice and comment rulemaking procedures, in violation of Respondent's due process rights.⁽¹⁹⁾ This argument is without merit. The prohibition of PCB distribution in commerce for disposal is by no means a novel theory, as the expansive definitions of "commerce"/"distribution in commerce" as well as the provisions of 40 C.F.R. § 761.20 (exception for PCBs at less than 50 parts per million) demonstrate. The language of the Act and regulations is sufficiently clear to charge members of the regulated community with knowledge that distribution of PCBs in commerce for disposal is prohibited unless the PCB content of the distribution is less than 50 parts per million.⁽²⁰⁾ Accordingly, there is no question of unfairness, and it is difficult to understand how the due process clause could have been violated on this account.

PCB Content of the Waste.

Respondent argues in connection with another charge that Complainant has not shown the liquid wastes sent to Systech to have contained at least 50 parts per million of PCBs. Section 6(e) (3) (A) (ii) of TSCA provides that "no person may process or distribute in commerce *any polychlorinated biphenyl* . . ." 15 U.S.C. § 2605(e) (3) (A) (ii)⁽²¹⁾. To the same effect is 40 C.F.R. § 761.20(c): "No person may process or distribute in commerce any PCB, or any PCB Item regardless of concentration, for use within the United States . . . without an exemption . . ." In other words, in the absence of an exemption or exception, there is no requirement in the Act itself that the presence of PCBs in excess of 50 parts per million must be shown in order to support a violation of this section. However, 40 C.F.R. § 761.20

specifically excludes certain activities from the general prohibition.

Section 6(e)(3)(B) of the Act provides that the Administrator may grant an exemption to the prohibition on distribution in commerce. This relief is available by specific petition, and it is also noted that, in general accordance with that authority, 40 C. F. R. § 761.20(c) states that "the activities described in paragraphs (c) (1) through (c) (5) of this section may also be conducted without an exemption, under the conditions specified therein." A limited exception is thereupon set forth at 40 C.F.R. § 761.20(c)(2) for distribution of PCBs of at least 50 parts per million in commerce "*in compliance with this Part for disposal in accordance with the requirements of 40 C.F.R. § 761.60.*"⁽²²⁾ Therefore, PCBs at levels of 50 ppm or more may be distributed in commerce as long as (1) the distribution is in accordance with the requirements of "this Part", and (2) the destination is disposal in accordance with § 761.60. Here there is no evidence, and Respondent does not contend, that the wastes were distributed for disposal in an incinerator which complies with § 761.70, or a chemical waste landfill which complies with § 761.65, or an approved high efficiency boiler -- any one of which might constitute "disposal in accordance with § 761.60."

Respondent's argument that it is entitled to summary decision because Complainant has not shown that the PCB level of the wastes was 50 ppm or higher, as alleged⁽²³⁾, is easily disposed of. As the moving party Respondent must demonstrate that there is no genuine issue of material fact remaining to be decided. Yet the level of parts per million is the leading issue of fact in dispute at this point, de-spite Respondent's view that while the PCB content of the wastes might be in dispute, "that factor is not controlling or material"⁽²⁴⁾; if the wastes had contained less than 50 parts per million, the shipments would not have violated the distribution in commerce prohibition. However, Respondent's burden with respect to its motion was to show that the nothing remained to be determined as to the PCB content of the wastes sent to Alpena, Michigan, and those sent to Paulding, Ohio, which allegedly contained in excess of 50 and at least 493 parts per million PCBs, respective-ly.⁽²⁵⁾ As Respondent knows, under summary judgment procedures the non-moving party's evidence must be taken as true in order to assess the strength of the moving party's challenge.

In sum, Respondent has not shown that a genuine issue of material fact does not exist with respect to the PCB content of the waste materials distributed, and cannot prevail as a matter

of law with respect to distribution in commerce. Accordingly, its motion, insofar as it relates to Counts I and II, must be denied.

Taking up Complainant's cross-motion on this point, it is clear that the evidence of record does strongly indicate the presence of at least 50 parts per million PCBs in the wastes in both tankers.⁽²⁶⁾ As noted above, Respondent has pointed to no evidence in opposition,⁽²⁷⁾ although Respondent's expert suggests that an issue of material fact may exist as to whether the materials in question contained at least 50 ppm of PCBs.⁽²⁸⁾ Having reviewed the allegations, the underlying facts, and the relevant laboratory analytical reports, the expert formed the opinion that "the very large disparity among the reported PCB concentrations" suggests the presence of "positive inferences."⁽²⁹⁾

Complainant asserts that the affidavit does not raise an issue of material fact, citing *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994)⁽³⁰⁾ to the effect that mere speculation, which is how Complainant characterizes Respondent's expert's affidavit, is inadequate. In *Little* plaintiff's expert discussed in general terms several factors relevant as to when "nasal fatigue" might occur, but did not apply those factors to the matter in question. In affirming the District Court's decision grant to summary judgment to defendants, the Fifth Circuit discounted such testimony as "speculative."⁽³¹⁾

In the instant case, by contrast, Respondent's expert reviewed the relevant data, and, based upon this review, offered his opinion concerning the test results. Such expert opinion may not be clearly speculative, and may not be total "unsupported speculation"⁽³²⁾, but it is by no means adequate to meet Complainant's summary judgment challenge, even drawing from it every reasonable inference in Respondent's favor. Accordingly, the exception provided at 40 C.F.R. § 761.20(c)(4) is not available to Respondent, and Complainant's motion will be granted as to the "distribution in commerce" counts.

Commercial Storage of PCB Waste After August 2,

1990, Without Having Submitted to EPA a Complete Application for Final Storage Approval [40 C.F.R. § 761.65(d)(1)].

It is undisputed that when the tankers returned to Respondent's Roseville, Michigan, facility following Systech's determination that the wastes contained PCBs at 50 parts per million, they

were placed in a separate area at the facility and remained there until Respondent had completed PCB disposal arrangements. The complaint charges that Respondent was or became a commercial storer of PCB waste upon the return of the liquid wastes to Respondent's facility on June 18, 1991. Because Respondent failed to obtain, fill out, and submit to EPA "a complete application for final storage approval" by August 2, 1990, as commercial storers were required to do, the re-entry⁽³³⁾ of the wastes into its facility placed it in violation of 40 C.F.R. § 761.65(d).⁽³⁴⁾

40 C.F.R. § 761.65 (d) (1) provides as follows, in pertinent part:

Approval of commercial storers of PCB waste.

(1) All commercial storers of PCB waste shall have interim approval to operate commercial facilities for the storage of PCB waste until August 2, 1990. *Commercial storers of PCB waste are prohibited from storing any PCB waste at their facilities after August 1, 1990, unless they have submitted by August 2, 1990, a complete application for a final storage approval⁽³⁵⁾ under paragraph (d) (2) of this section.*

In order to have successfully completed such an application and so avoid the alleged violation, Respondent would have had to demonstrate ten months before the unexpected arrival of the PCBs that the facility and its key employees met the qualifications required for operation of a commercial PCB storage facility. These requirements, referred to elsewhere by EPA as "the burdens of the approval process,"⁽³⁶⁾ include showings that:

The applicant, its principals, and its key

employees responsible for the establishment of the commercial storage facility are qualified to engage in the business of commercial storage of PCB waste.

The facility possesses the capacity to handle the quantity of PCB wastes which the owner . . . has estimated will be the maximum quantity of PCB waste that will be handled at any one time at the facility;

The owner or operator has included in the application for final approval a demonstration of financial responsibility for closure that meets the financial responsibility standards of paragraph (g)

The owner or operator has developed a written closure plan for the facility that is deemed acceptable by the Regional Administrator . . . under the closure plan standards of paragraph (e)

The owner . . . of the facility has certified compliance with the storage facility standards in paragraphs (b) and (c) (7)⁽³⁷⁾

Moreover, pursuant to 761.65(d) (3), applicants for PCB storage approvals must:

. . . . submit a written application that includes any relevant information bearing upon the qualifications of the facility's principals and key employees to engage in the business of commercial storage of PCB wastes. This information shall include, but is not limited to:

(1) the identification of the owner and operator of the facility, including all general partners of a partnership, any limited partner of a partnership, any stockholder of a corporation or any participant in any other type of business organization or entity who owns or controls, directly or indirectly, more than 5 percent of each partnership, corporation, or other business organization and all officials of the facility who have direct management responsibility for the facility.

(2) The identification of the person responsible for the overall operations of the facility (i.e., a plant manager, superintendent, or a person of similar responsibility) and the supervisory employees who are or will be responsible for the operation of the facility.

(3) Information concerning the technical qualifications and experience of the persons responsible for the overall operation of the

facility and the employees responsible for handling PCB waste or other wastes.

(4) Information concerning any past State or Federal environmental violations involving the same business or another business with which the principals or supervisory employees were affiliated directly that occurred within 5 years preceding the date of submission and which relate directly to violations that resulted in either a civil penalty irrespective of whether the matter was disposed of by an adjudication or by a without prejudice settlement) or judgment of conviction whether entered after trial or a plea, either of guilt or nolo contendere or civil injunctive relief and involved storage, disposal, transport, or other waste handling activities.

(5) A list of all companies currently owned or operated in the past by the principals or key employees identified in paragraphs (d) (3) (i) and (d) (3) (ii) of this section that are or were directly or indirectly involved with waste handling activities.

- (6) The owner's or operator's estimate of maximum PCB waste quantity to be handled at the facility.
- (7) A written statement certifying compliance with paragraph (b) or (c) of this section and containing a certification as defined in §761.3.
- (8) A written closure plan for the facility, as described in paragraph (e) of this section.
- (9) The current closure cost estimate for the facility, as described in paragraph (f) of this section.
- (10) A demonstration of financial responsibility to close the facility, as described in paragraph (g) of this section.[\(38\)](#)

It is noted again that in order to have complied with the regulation allegedly violated, Respondent would have had to obtain an application, provide all of the above information, and submit it to EPA some ten months before the unforeseen arrival of the PCB wastes from Environmental Control, Inc.[\(39\)](#)

As Complainant points out, TSCA envisions strict liability, where lack of fault is no defense to a charge of violation. Given these facts, allowing the tankers to re-enter the facility and *then* applying for final storage approval pursuant to § 761.65(d) -- a process that may have taken weeks or months, not counting time to approval of the application -- would have availed Respondent nothing except a basis for arguing that the \$25,000 civil penalty now sought for this supposed infraction should be reduced. In short, the violation, if there was one, occurred at the precise moment the tankers re-entered Respondent's facility on June 18, 1991.

In connection with the regulation at issue, 40 C.F.R. § 761.65 (d) (1), " (C)ommercial storers of PCB waste are prohibited from storing any PCB waste at their facilities after August 2, 1990, unless they have submitted by August 2, 1990, a complete application for final storage approval", Respondent asserts that it is not a "commercial storer of PCB waste," and, consequently, that 40 C.F.R. § 761.65(d) does not apply.⁽⁴⁰⁾

The term "commercial storer of PCB waste" is defined by the regulations as:

. . . .the owner or operator of each facility which is subject to the PCB storage facility standards of § 761.65, and who engages in storage activities involving PCB waste that was removed while servicing the equipment owned by others and brokered for disposal. The receipt of a fee or any other form of compensation for storage services is not necessary to qualify as a commercial storer of PCB waste. It is sufficient under this definition that the facility stores PCB waste generated by others or the facility removed the PCB waste while servicing equipment owned by others.⁽⁴¹⁾

Respondent argues that this definition was intended to apply only to those facilities that "perform PCB waste storage as a business," "receive . . . compensation for the storage," or "regularly and intentionally store PCBs for others,"⁽⁴²⁾ and that the definition "was clearly not meant to be interpreted so broadly as to include any person who owns a facility where PCBs have inadvertently come to be located."⁽⁴³⁾

Citing *In the Matter of: Leonard Strandley*, 3 EAD 718, 722 (November 25, 1991), to the effect that TSCA is a strict liability statute, Complainant posits again that lack of culpability on Respondent's part is not a defense to the charges here. Respondent's principal argument on this issue, however, is less lack of fault than simply that (a) it is not a "commercial storer of PCB waste" and, consequently, (2) the regulations do not apply. This argument is well taken.

The definition of "commercial storer of PCB waste" (§ 761.3) was restricted to "an owner or operator of each facility which is subject to § 761.65(d)," and "who engages in storage activities involving PCB waste that was removed while servicing the equipment owned by others and brokered for disposal." The questions then become (a) whether Respondent's facility is subject to § 761.65(d); and (b) whether Respondent "engages in

storage activities involving PCB waste that was removed while servicing the equipment owned by others and brokered for disposal." The word "engages," set in the present tense, suggests ongoing PCB storage activity, *i. e.* the business of storing PCB waste.

It is noted further that the PCB waste being stored must have been "removed while servicing the equipment owned by others and brokered for disposal." As to the elements of the PCB waste here at issue having been removed while servicing the equipmet owned by others, the record contains insufficient information. Complainant correctly notes that "receipt of a fee or any other form of compensation for the storage" is not a requirement, but then urges, erroneously, that the full definition of "commercial storer of PCB waste" is summarized or restated in the last sentence of the definition as "(I)t is sufficient under this definition that the facility stores PCB waste generated by others or the facility removed the PCB waste while servicing equipment owned by others." In other words, Complainant takes the position that the words

`it is sufficient under this definition
that the facility stores PCB waste gener-
ated by others or the facility removed the
PCB waste while servicing equipment owned
by others'

supplant the section's previous defining language to the effect that the facility must be subject to § 761.65(d), and that the owner or operator ". . . engages in storage activities involving PCB waste that was removed while servicing the equipment owned by others"

In fact, the words "it is sufficient . . . owned by others" merely explain why the receipt of a fee or other compensation is not the test of whether an entity is or is not a commercial storer of PCB waste. Complainant would qualify Respondent as a commercial storer of PCB waste solely on the basis of the last sentence of the section ("it is sufficient under this definition that the facility stores PCB waste generated by others. . . .") If that were the test, Respondent might well qualify.

However, to find as Complainant urges would ignore the critical first sentence of the defining section. For amplification of this sentence it is appropriate to examine EPA's explanatory words which accompanied the proposed PCB rules in 1978. ⁽⁴⁴⁾

Even a cursory reading of the preamble discussion reveals that, far from intending to apply the PCB storage regulations to smaller businesses or to those for which PCB storage was a "*small and incidental part of an entity's business*," ⁽⁴⁵⁾ EPA at that time intended to relieve such entities of the "burdens of the approval process," and of the "significant costs of preparing storage approval applications." EPA sought to "distinguish the *merely incidental storage of PCB waste* from storage that is more characteristic of a larger, commercial activity." ⁽⁴⁶⁾ In addition, EPA believed that

(T)he resources which EPA will commit to the approval process would be more effectively utilized if focused on the larger commercial operations (e. g. brokers) which were identified as the greatest problems in the oversight investigations by GAO. ⁽⁴⁷⁾

Clearly, then, the application requirements of the regulations were not meant for a facility where PCBs were never intended to be received or stored, where they were delivered one time without notice or warning (one "incident" is even less than "incidental"), where the need for preparing the "burdensome" and costly storage application was unforeseeable before the events here occurred, and essentially useless afterward. ⁽⁴⁸⁾ These facts, the PCB regulations themselves, and the discussion of why EPA either accommodated or rejected comments from the public following publication of the implementing regulations, do not add up to Respondent assuming the identity or function of a commercial storer, not to mention the responsibility for complying with the multitude of regulations (including tracking and recordkeeping) which apply to commercial storers' facilities. To hold otherwise would not only construe the regulations in a "hypertechnical" manner, as Respondent puts it. To do so would misconstrue the regulation, the intent of which clearly was --

both to prevent unnecessary burdens from being placed on members of the regulated community, and to increase EPA efficiency -- to confine the application requirements to entities whose regular business in whole or in part included storage of large amounts of PCB wastes. And, it would be grossly unfair.⁽⁴⁹⁾

Accordingly, Defendant's motion is granted as to Count IV of the complaint, since no material issues of fact remain to be determined⁽⁵⁰⁾ and Respondent is entitled to judgment as a matter of law.

Findings of Fact and Conclusions of Law.

1. Respondent is a "person," as that term is defined at 40 C.F.R. § 761.2.

2. Respondent's business included the operation of a liquid waste transfer station at Roseville, Michigan, for hazardous wastes identified by codes F001, F002, F003, F005, and D001.

3. Respondent's facility received a 7500 gallon shipment of liquid waste from Environmental Waste Control, Inc. The waste was visually inspected and found to be comparable to the visual appearance of wastes which Respondent is permitted to accept. The waste was rejected by the Systech Corporation facilities at Alpena, Michigan, and Paulding, Ohio, to which it was sent in tanker trucks, because Systech's tests revealed the presence of 50 parts per million or more of PCBs. The trucks returned to Respondent's facility (one on the same evening, one the following morning) and were parked in a spill-contained area.

Respondent reported the incident by telephoning EPA and the Michigan authorities on the same day the second truck returned to the Roseville facility, and by writing to both agencies shortly thereafter.

4. The liquid wastes in both tankers contained 50 parts per million or more of PCBs.

5. The transportation of such liquid wastes to Systech Corporation facilities in Michigan and Ohio were "in commerce," as defined at 40 C.F.R. § 761.3 and section 3(3) of the Act; the wastes were distributed in commerce, as the term "distribute in commerce" is defined at 40 C.F.R. § 761.3, and in the Act [section 3(4)] in violation of sections 6(e)(3)(A) and 15(1)(B) of the Act.

6. On June 14-18, 1991, Respondent was not a commercial storer of PCB waste. On the facts of this case, re-admitting the PCB liquid waste into its facility did not cause Respondent to become a "commercial storer of PCB waste" to which the relevant regulations were intended to apply. Respondent's facility was not subject to the provisions of 40 C.F.R. § 761.65. at any relevant time herein. The regulations were not intended to apply to the facts here, where the receipt of PCB wastes was not a part of Respondent's business activity, and Respondent was not a "commercial storer." This finding is limited to the facts of this case.

7. Respondent is liable for a civil penalty for violations of sections 6(e)(3)(A)(ii) and 15(1)(B) of the Act, 15 U.S.C. §§ 2605(e)(3)(A)(ii) and 2614(1)(B), for distribution of PCB wastes in of 50 parts per million or more in commerce without an exemption.

ORDER

Accordingly, it is ORDERED Counts III and V shall be, and they are hereby, dismissed.

Respondent's motion shall be, and it is hereby, denied as to Counts I and II of the complaint. The motion is granted as to Count IV of the complaint.

Complainant's cross motion shall be, and it is hereby, granted as to Counts I and II of the complaint. The motion is denied as to Count IV.

And it is FURTHER ORDERED that the parties shall confer again in an effort to settle the issues remaining in this matter, i. e. the amount of civil penalty to be imposed for the violations found herein. They shall report upon the progress of their effort during the week ending October 17, 1997.

And it is FURTHER ORDERED that, if the matter cannot be settled, the parties shall advise whether the penalty issue can be submitted for decision upon oral argument or briefs.

J. F. Greene

Administrative Law Judge

Washington, D. C.

August 22, 1997

September 22, 1997

Mr. John Petersen
President, Board of Directors
Silver Sands Condominium
4865 South Atlantic Avenue
New Smyrna Beach, Florida 32169

Re: Bylaw Article 10, Sales and Leases

Dear President Petersen:

In a conversation with Board member Meyers earlier this month, I was informed that the Board's intent to enforce the bylaw on sale and leases was in its formative states, and, in any event, was not intended to apply to leases. Nevertheless, in an abundance of caution I would like a specific Board minute or a letter stating that the provision on leases does not apply at this time.

As I believe was discussed at the last Board meeting,

we have chosen International Properties to manage our unit. Although I have no lease, it has been rented through International for four months this coming winter season. If the Board does intend to review rentals in excess of one month, please contact Mrs. Cindy Frost at International Properties for additional information.

Sincerely,

Nahum Litt

Co-owner, 507

The shipment alleged in Count II went from Roseville, Michigan to Ohio, and was unquestionably an "introduction or delivery for introduction into commerce [i.e., "transportation . . . between a place in a State and any place outside of such State"]" of the

wastes. Accordingly, that shipment constituted "distribution in commerce."

The shipment alleged in Count I proceeded from one location to another within the State of Michigan. The materials were transported by way of Interstate Highway Number 75.⁽⁵¹⁾ The use of Interstate Highway 75 in transporting the waste materials as "transportation . . . which affect[ed] trade, traffic, transportation or commerce" "between a place in State and any place outside of such State." Accordingly, the shipment at issue in Count I constituted "distribution in commerce."

Since there is an issue of fact as to whether the materials at issue contained PCB concentrations of 50 ppm or greater, legal issue of whether Respondent is a "commercial storer of PCB waste" must await a determination of whether the materials contained 50 ppm or greater of PCBs. "A court should not make the case hard by deciding a difficult or doubtful question of law that might not survive a factual determination." In re U.S. Coast Guard, RCRA Docket No. 1094-07-05-3008(a) (November 21, 1995). Accordingly, the motion is denied as to Count IV.

As to Complainant's motion, if, as discussed above, Complainant cannot establish at this time that Respondent was a "commercial storer of PCB waste," then Complainant cannot prevail as a matter of law on Count IV. Accordingly, its motion as to Count IV must be denied.

It is noted that Respondent reported the matter to EPA on the date it learned that the wastes apparently contained 50 ppm or more PCBs, and re-reported in writing shortly thereafter.

§§ 136-149

1. Second Amended Complaint and Notice of Opportunity for Hearing, filed March 7, 1995.

2. Respondent was also charged with improper storage of PCBs, in violation of 40 C.F.R. § 761.65(b); and with failure properly to notify EPA of its PCB waste handling activities, in violation of 40 C.F.R. § 761.205(a)(2). Respondent seeks dismissal of these counts (Motion at 9 and 13). Complainant agrees to dismissal. [Complainant's Motion for Partial Accelerated Decision (Complainant's Motion) at 1].

3. One tanker arrived around 9:15 p.m. the same evening; the other arrived early the following morning. Respondent's Motion

for Accelerated Decision, July 21, 1995 [hereafter Respondent's Motion], Exhibit C.

4. Parties' Joint Stipulations, December 23, 1994, at 4-5; Respondent's Motion at 4, and Motion Exhibit C.

5. Whether the shipments were distributed in commerce and whether Complainant has shown that the wastes contained 50 parts or more per million of PCBs are issues more usually raised by motion to dismiss.

6. Respondent's answer to the complaint, ¶ 27 at 9-10; and Respondent's Motion at 5-8.

7. Section 3(4) of the Act.

8. Section 3(3) of the Act, emphasis added.

9. ***In re Tri-State Motor Transit***, Docket No. TSCA-VII-92-T-382 (April 18, 1996) 4-5 (citations omitted). See, e.g., ***United States v. Darby***, 312 U.S. 100, 118 (1940): "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so *affect* interstate commerce or the exercise of power of Congress over it so as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." (Emphasis added).

Congress expressly states in the Act that "the effective regulation of interstate commerce in [chemical substances such as PCBs] and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures." 15 U.S.C. § 2601(a) (3).

10. 43 ***Fed. Reg.*** 24802, 24807, June 7, 1978. *Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Bans; Proposed Rule*.

11. Section 3(4) of the Act.

12. It is undisputed that Respondent's arrangement with Systech Corporation to accept wastes included compensation from Respondent. Complainant's Motion at 17.

13. (Emphasis original). As stated in ***Tri-State*** at n. 11,

While it is true that this statement was made in aid of the court's analysis of the central issue of whether [TSCA] . . . regulations supersede U. S. Department of Transportation regulations promulgated under the Transportation Safety Act of 1974, 49 U.S.C. § 1804, in connection with the transportation of PCBs, it is noteworthy that the District Court had no difficulty in determining that transportation of waste is in "commerce" based upon TSCA definitions of "commerce" and "distribution in commerce."

14. 44 Fed. Reg. 31514, 31549, May 31, 1979, *Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Final Rule*.

15. A lengthy discussion as to the significance of Congress having singled out PCBs for regulation by statute occurs in ***Environmental Defense Fund, Inc. v. Environmental Protection Agency***, 636 F. 2d 1267, 1268-1271 (D. C. Cir. 1980).

16. For instance, Respondent notes that "distribution in commerce" and "disposal" are listed separately in section 6(e) of the Act. Respondent's Motion, at 6.

17. Here, since disposal in accordance with 40 C.F.R. § 761.60 did not result from the activity described in Counts I and II of the complaint, the exception does not apply.

18. If the PCB concentration of the wastes was less than 50 parts per million, the shipment for purposes of disposal is allowed under § 761.20(d)(4). However, Respondent does not make that argument in connection with the "distribution in commerce" charges.

19. Respondent's Reply to Complainant's Opposition, August 29, 1995, at 9.

20. Respondent does not contend, and there is no evidence, that exemptions were obtained for the shipments.

21. Complainant's Motion at 9.

22. Emphasis added.

23. Complaint at 6, ¶ 24; and at 9, ¶ 38.

24. Respondent's Motion at 4, n. 3.

25. Complaint at 9, ¶ 39. It is noted that even if this argument had been raised in a motion to dismiss, Complainant would prevail because its evidence of the PCB levels is adequate

to survive the *prima facie* case test.

26. See Complainant's Motion at 2-6.

27. Indeed, Respondent stated, with respect to the issue of distribution in commerce, that PCB content was not material for purposes of its argument. Respondent's Motion at 4, n. 3.

28. Exhibit A to Respondent's Reply to Complainant's Motion.

29. Id.

30. Complainant's Objection and Response to Respondent's Motion for Leave to File Respondent's Reply to Complainant's Motion for Partial Accelerated Decision, November 21, 1995 [hereinafter Complainant's Objection] at 6.

31. See **Little**, 37 F.3d at 1078.

32. Complainant's Objection at 5.

33. Second Amended Complaint, at 12-14. Remarkably, Respondent was not charged with failure to submit an application in advance of the unexpected arrival of PCB wastes from Environmental Waste Control, Inc., on June 14, 1991.

34. Count IV of the complaint charges that Respondent stored for disposal two tankers of PCB waste (¶ 55), generated by another entity (¶ 56); that the facility was subject to § 761.65 starting on the day the tankers returned (¶ 57), that Respondent was a commercial storer of PCB waste (¶ 58) but did not submit a completed application for storage approval (¶ 59), and that storage of PCB waste after August 2, 1990, without submitting a complete application for final storage approval constitutes a violation of § 761.65 (¶ 60).

35. Emphasis added.

36. 54 **Fed. Reg.** 52718, December 21, 1989; Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities, at III. Discussion of the Rule and Comments Made on the Proposal, Unit C, *Commercial Storers of PCB Waste*.

37. 40 C.F.R. § 761.65(d)(2)(i), (ii), (iii), (iv) (v).

38. 40 C.F.R. § 761.65(d)(3)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), and (x).

39. Complainant's view that Respondent should have applied for a storage permit by the deadline, August 20, 1990 (Complainant's Response to Respondent's Motion, at 14) does not aid the discussion. Respondent was not in the business of accepting or storing PCB waste, and had no reason to suppose, ten months before the events here, that it was or might inadvertently become a "commercial storer of PCB waste," § 761.65(d)(1). See also Respondent's Motion at 10-15.

40. Respondent's Motion at 10.

41. 40 C.F.R. § 761.3.

42. Respondent's Motion at 10-12. It is clear, of course, that lack of compensation does not make a candidate for "commercial storer of PCB waste" ineligible.

43. Id. at 10.

44. It is always appropriate to consider an agency's own words of explanation that accompany the publication of a rule. In any case, the regulations [§§ 761.3, 761.65(d)] are not clear to the extent that Complainant seeks to apply them in these circumstances.

45. Emphasis added.

46. Emphasis added.

47. 54 **Fed. Reg.** 52716, 52719, December 21, 1989; *Final Rule. Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities* at III. Discussion of the Rule and Comments Made on the Proposal; Unit C, *Commercial Storers of PCB Waste*.

The means selected to accomplish the distinguishing of "merely incidental storage" was the creation of an exception for up to 500 gallons of PCB wastes. Nevertheless, it is indisputable that EPA intended to relieve entities for whom storage was "incidental" of the "burden" and "significant costs" of storage applications. Those ultimately exempted (ongoing or regular, but basically minimal, storers) have, overall, a far closer association with PCB wastes than did Respondent. From this it

may be concluded (1) that the term "commercial storer of PCB waste" was never intended to refer to an entity that received PCB wastes once, unknowingly, by accident; and (2) that Respondent's facility is not subject to the PCB storage facility standards set out at 40 C.F.R. § 761.65.

48. Respondent states that the permits it held did not require "admission tests" for incoming wastes. Respondent's Motion at 3.

49. This is particularly true where, as here, Respondent reported the incident orally and in writing to EPA as well as to the Michigan Department of Natural Resources.

50. In view of the holding with respect to Count IV, the PCB content of the wastes is not a material fact.

51. Interstate 75 runs from the Canadian border to the south of Florida.