IN RE NEWELL RECYCLING COMPANY, INC.

TSCA Appeal No. 97–7

FINAL DECISION

Decided September 13, 1999

Syllabus

Newell Recycling Company, Inc. ("Newell") has appealed from orders of Administrative Law Judge Edward J. Kuhlmann ("Presiding Officer") dated April 28, 1997, and October 7, 1997. In his April 28, 1997 order, the Presiding Officer ruled that Newell had violated the PCB disposal requirements applicable to PCB-contaminated soil, 40 C.F.R. § 761.60(a)(4), and had thereby violated TSCA § 15, 15 U.S.C. § 2614, throughout the period from September 10, 1992 through February 21, 1994. In his October 7, 1997 order, the Presiding Officer assessed a penalty against Newell for those violations in the amount of $1.345 million (less the amount of a settlement with EPA entered into by a co-respondent), pursuant to TSCA § 16, 15 U.S.C. § 2615. In its appeal, Newell also challenges a February 7, 1997 ruling denying Newell's request for leave to take discovery beyond that generally contemplated in 40 C.F.R. § 22.19(b).

Newell owned and operated an industrial facility in Houston, Texas during portions of the 1970s and early 1980s. Newell sold the facility to Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company ("HMPC") during 1982, with Newell retaining a contractual responsibility for certain pre-sale environmental problems associated with the facility. Lead contamination was found to be present at the facility in 1984, and Newell thereafter became involved in the planning and execution of a cleanup of lead-contaminated soil. During this cleanup, in February 1985, it was discovered that 41 electrical capacitors had been buried at the facility at some earlier time. PCB fluids had leaked from the buried capacitors into the surrounding soil. The capacitors were excavated and ultimately removed from the facility. The PCB-contaminated soil was excavated, gathered into a pile, and stockpiled at the facility. Over the ensuing months and years, Newell and HMPC failed to agree concerning who should bear the responsibility for removal and proper disposal of the PCB-contaminated soil. The PCB-contaminated soil, excavated in February 1985, remained in a pile at the facility until September 1995, more than ten years later. In March 1995, EPA Region 6 commenced this TSCA enforcement action against Newell and HMPC. (The Region's action against HMPC was ultimately settled.)

On appeal, Newell raises the following challenges associated with the Presiding Officer's liability ruling: (1) The action is barred by the applicable five-year statute of limitations, 28 U.S.C. § 2462; (2) In that connection, the additional discovery requested by Newell would have enabled Newell to show that the Region had notice of the presence of the excavated soil more than five years before it filed this enforcement action; (3) "Disposal" of the PCBs at issue in the case occurred only at the time the capacitors were buried, and therefore Newell cannot have engaged in any "disposal"; (4) Regulated "disposal" occurs under TSCA and its implementing regulations only if preexisting site

conditions are "exacerbated," which (according to Newell) did not occur in this case; (5) It was not Newell Recycling Company that was involved in the events recounted in the complaint, but rather one of its affiliated companies—meaning that the Region named the wrong party in its complaint; and (6) The Region failed to prove that the soil contained regulated concentrations of PCBs, either as of September 1992 (the beginning of the period for which penalties were sought) or as of February 1994 (the end of the penalty period).

Regarding the Presiding Officer's penalty assessment, Newell argues that the Presiding Officer was required to hold an evidentiary hearing before assessing a penalty, and argues as well that the penalty should have been reduced or eliminated in view of a number of mitigating circumstances.

Held: The Presiding Officer correctly adjudged Newell liable for violating the disposal requirements applicable to PCB-contaminated soil, and both his liability and penalty assessment decisions are upheld.

This action is not barred by the five-year statute of limitations. For limitations purposes, the disposal violation at issue in this case continued until the contaminated soil was properly disposed of. Because the soil was still on-site, and was not properly disposed of, as of the date of filing of this action, the action was timely filed. Moreover, the discovery sought by Newell concerning the date or dates on which the Region received notice of conditions at the facility could not have been relevant to the statute of limitations; hence, the Presiding Officer did not err in the discovery ruling challenged by Newell in this appeal.

Newell's contention that "disposal" occurred only when the capacitors were first buried and discharged fluids into the soil is rejected. The events at issue here fall within the regulatory definition of "disposal" at 40 C.F.R. § 761.3. Moreover, nothing in TSCA or the applicable regulations suggests that regulated disposal has occurred only if site conditions can be shown to have been "exacerbated." Finally, the Region presented sufficient evidence to demonstrate both that Newell Recycling Company was a party to this violation and that the soil pile associated with the violation contained regulated levels of PCBs.

In connection with the amount of the penalty, we conclude that Newell failed to raise a genuine issue of material fact with respect to the calculation of an appropriate penalty, and that the Presiding Officer was, therefore, under no obligation to hold an evidentiary hearing on that subject. We further conclude that the Presiding Officer did not err in declining to mitigate the penalty based on Newell's proffered justifications.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

Respondent Newell Recycling Company, Inc. ("Newell") appeals from orders of Administrative Law Judge Edward J. Kuhlmann ("Presiding Officer") dated April 28, 1997, and October 7, 1997. In his April 28, 1997 order, the Presiding Officer ruled that Newell had, throughout a 529-day period from September 10, 1992, through February 21, 1994, continuously violated 40 C.F.R. § 761.60(a)(4), which prescribes disposal requirements for soil contaminated with polychlorinated biphenyls ("PCBs") at concentrations of 50 ppm or greater. Section 761.60(a)(4) is a rule promulgated under section 6 of the Toxic Substances Control Act ("TSCA"), 15

U.S.C. § 2605; violations of section 761.60(a)(4) are therefore unlawful acts pursuant to TSCA § 15, 15 U.S.C. § 2614, for which administrative penalties are assessable pursuant to TSCA § 16, 15 U.S.C. § 2615. In his October 7, 1997 order, the Presiding Officer assessed a penalty against Newell in the amount of $1.345 million, less the amount paid to EPA in settlement by Newell's co-respondent in this action, Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company ("HMPC").

Newell has appealed both the Presiding Officer's liability decision and his penalty assessment decision. In addition, Newell challenges a February 7, 1997 ruling in which the Presiding Officer denied a motion by Newell for leave to conduct discovery beyond that which is described in section 22.19(b) of EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. § 22.19(b).[1] For the reasons set forth herein, we affirm the Presiding Officer's liability decision and penalty assessment.

I. *INTRODUCTION*

A. *Overview of the Case*

A number of years before the actions giving rise to this case, capacitors containing PCB-contaminated liquids were apparently buried at the site located at 5225 Fidelity Road in Houston, Texas, which is currently owned by HMPC (hereinafter the "Fidelity Road site" or the "HMPC site"). During a cleanup of lead contamination at the site in February 1985, the buried capacitors were discovered and then excavated, along with a large volume of PCB-contaminated soil. While the capacitors themselves were disposed of off-site, the PCB-contaminated soil was left behind in a large pile. It is this excavation and stockpiling of PCB-contaminated soil at the Fidelity Road site that is at the heart of this case.

The complaint in this matter alleges that on September 10, 1992, an EPA inspector discovered the soil pile at the site. Complaint ¶ 7. Samples taken from the soil by the inspector revealed PCBs at levels greater than

[1] We note that the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. pt. 22, were amended on July 23, 1999, with the amended version of the rules becoming effective on August 23, 1999. *See* 64 Fed. Reg. 40,138 (July 23, 1999). All citations to the part 22 rules in this decision refer to the rules that were in effect just prior to the issuance of these amendments.

50 parts per million—the action level for PCBs under TSCA. *Id.* ¶¶ 14–15. As stated in the complaint, PCB-contaminated soil of this kind must be disposed of either at a TSCA-compliant incinerator or in a chemical waste landfill approved for disposal of such waste. *Id.* ¶ 25. Failure to so dispose of such waste is a violation of TSCA, giving rise to liability for civil penalties. *Id.* ¶¶ 37–39, Section III (of the Complaint).

The complaint alleges that Newell had been the owner or operator of the Fidelity Road site "from 1974 until approximately 1982," and had then sold it to HMPC. *Id.* ¶ 3. The PCB-contaminated soil, according to the complaint, had been excavated "by Newell, or by a third party at the direction of Newell, and placed in [the] pile at the Houston Facility." *Id.* ¶ 10. In view of the alleged failure to remove and properly dispose of the waste pile, the complaint proposed a civil penalty against Newell and its co-respondent, HMPC, for the 529-day period running from September 10, 1992, through February 21, 1994, totaling $1.345 million. *Id.* Section III.[2]

As discussed more fully below, the Presiding Officer found that the Region had satisfied the essential elements of its complaint and, accordingly, assessed a penalty in this matter of $1.345 million. He found that Newell committed an act of improper disposal by knowingly causing PCB-contaminated soil to be excavated and stockpiled in a corner of the HMPC site, and then "leaving [the PCBs] there and taking no further clean-up action." Partial Accelerated Decision on Issue of Liability at 23. In this appeal, Newell contends that it was not involved in the excavation and stockpiling of the soil and did not otherwise engage in any act constituting PCB "disposal." Newell claims that the soil pile was never shown to contain regulated levels of PCBs. Newell maintains that any regulated PCB disposal activity at the HMPC site ended more than five years before the commencement of this action, and that the action is therefore untimely. Newell also raises several arguments in opposition to the Presiding Officer's civil penalty assessment.

B. *Factual Background*

The facts of this case, while somewhat complex, are not materially in dispute. Given their significance to the legal issues raised by appellant, however, they are set out in some detail below.

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[2] The February 21, 1994 closing date for the Region's penalty calculation apparently derives from the fact that this was the date of HMPC's response to a subpoena issued by the Region, which served to confirm that the PCB-contaminated soil was still on-site. As explained below, the contaminated soil was not actually disposed of until considerably later—between September 20 and 28, 1995. It is unclear from the record why the Region elected not to seek penalties for the period running from February 22, 1994, to September 19, 1995.

On September 10, 1992, an EPA inspector conducted a PCB compliance inspection at the Fidelity Road site, owned and operated at that time by HMPC. At the inspection, HMPC Vice President and General Manager Francis Garrigues related to the inspector that the facility had a "historical connection * * * with PCB contamination." Complainant's Exhibit ("CX") 4 at 4 (PCB Compliance Inspection Report).[3] Specifically, according to the inspection report, Mr. Garrigues advised that the facility had been purchased by HMPC "in 1982 from Newell Recycling (of San Antonio) which recycled lead batteries." *Id.* He went on to state that soil sampling by the Texas Water Commission in 1984 had disclosed the presence of lead contamination, and that during the ensuing excavation of lead-contaminated soil there were found, among other things, a number of buried capacitors. He stated that the capacitors themselves had been removed,[4] but that the contaminated soil in which those capacitors had been buried was still on-site in a pile. The inspector took photographs of the pile of contaminated soil and collected three samples of the soil for laboratory analysis.

The samples were analyzed for PCB content on September 24, 1992, and the resulting report dated October 7, 1992 (CX 5) states that "[t]here was Aroclor 1248 detected in all three samples at levels greater than 50 ppm." Aroclor 1248 is a form of polychlorinated biphenyl subject to regulation under TSCA, and the EPA regulations promulgated thereunder governing the manufacturing, processing, distribution in commerce, and use of PCBs (hereinafter the "PCB Rule"). Significantly, these rules cover, among other things, soil contaminated with specified levels of PCBs. 40 C.F.R. § 761.1(b); *see also* 40 C.F.R. § 761.60(a)(4) (providing that "disposal requirements" apply to "[a]ny non-liquid PCBs at concentrations of 50 ppm or greater in the form of *contaminated soil,* rags, or other debris") (emphasis added). The pile of soil observed during the September 1992 inspection of the HMPC facility, and immediately thereafter shown to contain Aroclor 1248 in concentrations greater than 50 ppm, was therefore governed by the disposal requirements of the PCB Rule.

HMPC's response to a subpoena *duces tecum* issued to it on or about January 13, 1994, by U.S. EPA Region 6, provides a chronology that is (for all purposes material to the present proceeding) essentially undisputed

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[3] The exhibit numbers cited in this opinion, both for the complainant and the respondent, are the numbers that the parties have assigned to them in their appellate briefs. They may or may not correspond to the numbers assigned by the parties to the same exhibits in their pre-hearing exchanges in the proceedings before the Presiding Officer.

[4] In reality, six capacitors were still on-site. *See* CX 8 at 16.

regarding the continued presence of an uncontrolled, PCB-contaminated soil pile at the HMPC facility.

According to the documents, the Fidelity Road property had been sold to HMPC during 1982 by a seller identified (in the text of the purchase and sale agreement) as "Newell Recycling Co., a Texas Corporation." CX 6 at 1. The purchase and sale agreement contains a number of representations and warranties by the seller (Newell Recycling Co.), one of which, in particular, has an important circumstantial bearing on whether Newell caused, or contributed to the cause of, the unlawful disposal of PCB-contaminated soil. The agreement provides that Newell Recycling Co. "specifically assumes any liability resulting from an occurrence prior to the closing date of this sale." CX 6 at 6 (¶ 2.5(a)).[5] The agreement further includes among the seller's representations and warranties the statement that, to the best of the seller's knowledge, "all the property" to be conveyed "conform[ed] in all material respects to applicable * * * environmental (including air, water and solid waste laws and regulations) * * * laws and ordinances." CX 6 at 8 (¶ 2.9).

Soil sampling at the Fidelity Road property for suspected lead contamination (based on "the nature of the previous work" performed there) was apparently first demanded by the Texas Department of Health, within two years after the sale of the property to HMPC. CX 11 (report by Raba-Kistner Consultants, Inc. ["Raba-Kistner"] dated January 15, 1985[6]) at 1. Indeed, a substantial likelihood of finding lead contamination requiring "cleanup" was evidently assumed, both by the current owner and by the former owner of the property, as of the autumn of 1984. On October 16, 1984, Wayne R. Mathis, Executive Vice President of "Newell Enterprises, Inc.,"[7] wrote the following letter to Mr. Garrigues of HMPC:

> Dear Francis:
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> In the process of our negotiations with the State on the proposed cleanup of the site for lead content, the State

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[5] The purchase and sale agreement, which was executed on September 8, 1982, contemplated a closing date "not later than October 5, 1982." CX 6 at 14. The specific date on which the transaction actually closed is of no particular concern for purposes of this case.

[6] To be precise, the first page of this report is dated January 15, 1985, but some subsequent pages are dated December 26, 1984. The document's authenticity has not been questioned, and thus the noted discrepancy is of no significance.

[7] Although Mr. Mathis first appears in the record as an executive officer of a Newell entity, he is identified in subsequent correspondence as "of counsel" to the San Antonio

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> has requested that we provide them with a letter from your company authorizing Newell to begin testing and cleanup. Accordingly, if possible, I would appreciate your providing me with such a letter of authorization for Newell Recycling Co., Inc., Newell Products of Houston, Inc., and Newell Industries, Inc.

Respondent's Exhibit ("RX") 9 at 7.[8] Mr. Garrigues complied with that request by letter dated October 18, 1994 (CX 14):

> As per your request, please find hereby our authorization to begin testing and perform the clean-up operation of our property located at 5225 Fidelity Road, Houston, TX for the following companies:
>
> —Newell Recycling Co., Inc.
>
> —Newell Products of Houston, Inc.
>
> —Newell Industries, Inc.
>
> The testing and the clean-up of the site are for lead content.

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law firm Brock & Kelfer (CX 19, CX 22)—which, by the end of 1989, was evidently renamed Brock & Mathis. *See* CX 18. Notwithstanding his apparent departure for private law practice, however, Mr. Mathis remained closely involved with the situation at the HMPC site.

[8] It is in RX 9 that the Board encounters, for the first time, a reference to several different "Newell" entities. As discussed later in this opinion, Newell Recycling Co. (the appellant in this proceeding) argues that if any violation of the PCB Rule was committed in this case, the violation was committed by one of the other "Newell" entities or by some other non-party. The Board will address that contention in due course. For now we note simply that it is already apparent, from the limited chronology recounted thus far, that appellant Newell Recycling Co. was the seller of the property to HMPC (and hence the party that contractually undertook to "assume[] any liability resulting from an occurrence prior to the closing date" (CX 6 at 6)) and that it was also — logically enough, given its contractual assumption of liability for pre-sale "occurrences" — among the companies that sought (RX 9) and obtained (CX 14) authorization from HMPC to conduct the lead cleanup at the HMPC property.

The documentary chronology resumes with the January 15, 1985 Raba-Kistner report (CX 11) alluded to earlier, which reports the following:

> Mr. Wayne Mathis of Newell collected twelve soil samples and submitted these to [Raba-Kistner] for analysis. * * * Additional samples were collected by [Raba-Kistner] on August 17, 1984 * * *. These samples reveal that lead contamination is present * * *. Results [of additional testing] indicated that the mid and high range samples leached at levels considered hazardous under the provisions of the Resource Conservation and Recovery Act (RCRA).

CX 11 at 1–2. The report concludes with a tentative recommendation that soil in the affected areas be removed and taken to a nearby hazardous waste facility for disposal. CX 11 at 5.

At this point, the documentary record temporarily lapses into silence. A note composed by Mr. Garrigues — on which we would ordinarily hesitate to rely because it is undated, but which is offered for our examination not only by the Region but also by Newell (RX 6) — recounts that:

> Between February and August 1985, clean-up operations start. Scrapping [sic] 10 inches of soil and piling dirt. Subsequently, the soil was to be tested again to see if additional scrapping was necessary. During scrapping, electric transformers containing PCB oil are found buried.
>
> Newell Enterprises inc. (John) passes the file to Newell Manufacturing (Scott).
>
> Everything stops.[9]

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[9] Two points should be noted in connection with this document. First, although the document refers to buried "transformers," HMPC's later response to EPA's subpoena clearly states that only "[b]uried *capacitors* were excavated from the HMPC site during the initial cleanup of lead contaminated soil which was conducted by Newell in February, 1985." CX 8 at 16 (emphasis added). HMPC's account refers to a total of 41 buried capacitors, 35 of which were removed from the site on June 23, 1989, and six of which were still on-site as of February 10, 1994. *Id.* at 16–17; *see also* RX 7 at 1–2 ("waste data profile sheet" dated June 23, 1989, referring to removal of "35 PCB capacitors" from the site). Second, in a descriptive index to the exhibits accompanying its appellate brief, Newell asserts that this note "describes Newell Enterprises involvement in excavation of soil pile in 1985." Exhibits to Brief for Appellant at i (filed Nov. 3, 1997). In reality, the note states that an entity called "Newell Enterprises" passed a "file" to an entity called "Newell Manufacturing" at some

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It appears clear, in any event, that by April 24, 1985, Raba-Kistner had already begun analyzing soil samples from the HMPC site for PCB content. RX 9 at 16.

The next correspondence between buyer and seller is dated August 19, 1985. In that correspondence, Timothy F. Johnson—identified by his stationery as General Counsel to "The Newell Companies"—writes to Mr. Garrigues to "bring you up to date on where we are with the PCB cleanup." CX 27 at 1. Mr. Johnson reports, in substance, that the "PCB cleanup" is going to "take longer * * * than what we had anticipated." This is attributed to a delay in obtaining results of a "chemistry analysis that we needed," and to an impending change in the State regulatory structure that was expected to shift "the authority for this problem" from the Department of Health to the Texas Water Commission. *Id.* Mr. Johnson refers briefly to a proposed cleanup plan involving biological treatment of PCB-contaminated soil, estimates the PCB cleanup cost at "somewhere around $160,000.00," and concludes: "I apologize for the delay in this matter, but I am sure you realize that it is very important to both you and Newell that it be done right the first time through." *Id.* at 1–2.

When the parties next correspond six months later (March 21, 1986), it appears that a dispute is taking shape. Mr. Garrigues writes directly to Mr. Alton Newell of Newell Recycling Co., noting that "we have had a pile of contaminated soil in a corner of our yard for about one year," and threatening to turn the matter over to an attorney if "the cleanup program has not been completed" within the following two months. CX 26.

That letter elicits a response from Mr. Johnson dated April 12, 1986, acknowledging receipt of Mr. Garrigues's letter and "assur[ing] you that we are taking it quite seriously." CX 25 at 1. Mr. Johnson's letter makes no attempt to deflect responsibility for implementation of a cleanup plan away from Newell Recycling Company. It suggests, rather, that because the State regulatory structure is still in flux, "we [i.e., Newell] have not been able to find anyone who will give us final approval on a cleanup plan." *Id.*

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point after PCB contamination was first encountered. Neither of the named entities is described as having any particular role or "involvement" in the "excavation of [the] soil pile in 1985." Indeed, neither "Newell Enterprises" nor "Newell Manufacturing" was among the entities for which authorization was requested (RX 9 at 7) and granted (CX 14) to participate in the lead cleanup in the first instance.

The documentary record then advances to August 27, 1986, when Mr. Johnson writes to the environmental consulting firm Lockwood, Andrews & Newnam, Inc. ("LAN"). Although not yet willing to execute a formal agreement for the services of that firm, he writes that "Newell Recycling Company would like for you to proceed to develop a testing plan and begin to execute it." CX 24. Indeed, Mr. Johnson's August 1986 letter presses the Lockwood firm "to move this project along as quickly as possible." *Id.*

No further correspondence appears in the record until January 22, 1987. On that date, with almost two years having elapsed since the discovery of PCB contamination, Mr. Garrigues again writes directly to Alton Newell of Newell Recycling Co. Referring back to his letter of March 21, 1986, Mr. Garrigues indicates that Mr. Newell had personally visited the site shortly after receiving that letter and that "after your personal visit we were really under the impression that thing[s] would start happening fast." Mr. Newell's site visit notwithstanding, however, "[t]en months have passed since then and the situation remains the same as far as we are concerned." CX 23. Mr. Garrigues concludes by stating that HMPC will now begin charging Newell Recycling Co. a monthly fee "as compensation for not being able to use and enjoy freely the contaminated land. This charge will remain in effect until completion of the clean-up." *Id.*

In May 1987, LAN, having apparently been formally retained by Newell Recycling (*see* CX 24), issues a "Site Clean-Up Interim Report" (CX 9). In the Interim Report, LAN solicits additional guidance from the parties because "the initial sampling results are much higher than anticipated"; moreover, there may well be more bad news still to come, given that "the initial sampling effort did not define the aerial [sic] and vertical extent of the contamination." In other words, LAN (and by extension, the parties) faced a potentially more significant job than expected. But the Interim Report was clear and unequivocal in asserting that the problem, whatever its magnitude, absolutely had to be addressed:

> PCB clean-up will fall under the Toxic Substances Control Act (TSCA) Compliance Program. TSCA policy states that all improperly disposed PCB shall be cleaned up to background levels. This has also been interpreted to be the lowest level below 50 ppm practicably attainable through the use of normal clean-up methods.
>
> *At a minimum, that means the [sic] all soil contaminated with greater than 50 ppm PCB must be removed from the site. Wastes with these concentrations*

> *must be incinerated or disposed of in a chemical waste landfill.*

CX 9 at 4 (emphasis added).

Perhaps predictably, the ensuing correspondence is between attorneys. At first, however, it appears that Newell Recycling Co. still intends to move forward with the cleanup in some fashion. Attorney Wayne R. Mathis (the former Newell Executive Vice-President) writes, on behalf of Newell Recycling Co., to HMPC's counsel Mark A. Huvard on June 8, 1987. Counsel have apparently met during the previous month, and Mr. Mathis writes that after the meeting "I discussed our fact situation with the consultants I have retained, Lockwood, Andrews & Newnam, Inc. ('LAN')." He indicates that "additional reports" from LAN will be forthcoming and will be made available to HMPC, and that "[m]y staff is currently working on the information to be provided to you * * * and I expect to mail this out sometime next week." CX 22 at 1–2. Copies of this letter are also sent to LAN and to a Mr. John Triesch of "Newell Recycling Co." *Id.* at 2.

During the remainder of June and much of July the attorneys negotiate a three-year tolling agreement (*see* CX 20 [6/16/87 Huvard to Garrigues, enclosing draft]; CX 19 [7/6/87 Mathis to Huvard, enclosing draft]; CX 21 [final agreement with signatures dated as of July 17, 23, and 31, 1987]). A new party has also entered the picture: The parties to the tolling agreement are Newell Recycling Co., Inc., Oklahoma Metal Processing Company, Inc. (d/b/a HMPC), and "J.L.B. Investment Corporation, N.V., a Netherlands-Antilles corporation" (to which "certain rights [have been] assigned" by HMPC with respect to some or all of the Fidelity Road site). CX 21 at 1. In substance, the agreement provides that for the following three years, Newell Recycling Co. will not interpose a statute of limitations defense to any claim or cause of action that HMPC (or J.L.B.) might bring against it based on the contamination of the Fidelity Road property. The agreement is an effort to keep Newell Recycling's potential liability to HMPC alive for an additional three years, but it says nothing about any plan to proceed with site remediation—even though the agreement, while in draft form, did note that the Fidelity Road property "has substantial PCB contamination and lead contamination" and that "the parties acknowledge and agree that the problem presented by the PCB contamination and lead contamination is a serious one." CX 20 at 1.

A lengthy period of apparent inactivity follows the execution of the tolling agreement. The silence is broken only after EPA Region 6 conducts

an October 19, 1989 PCB inspection at the Fidelity Road property. In the report describing that investigation, the EPA inspector notes that the PCB-contaminated area has not been marked in any way and that it is accessible to HMPC employees and to pets that are living on-site. Having been advised by HMPC officials that HMPC itself accepts no PCB-contaminated materials for recycling, the inspector reports making contact with Newell Recycling:

> Mr. Eric Green of Newell Recycling indicated that the clean-up was being handled by the law firm Rock & Mathis [*sic*]. Mr. Wayne Mathis of Rock & Mathis was then contacted * * *. Mr. Mathis explained that the previous owner does not feel responsible for the clean-up cost, but that ENSR consultants had been hired to prepare a remediation plan of the facility. Mr. Mathis also explained that Newell Recycling is currently involved in a law suit with [the Texas Water Commission] and other property owners regarding a similarly contaminated site in Corpus Christi and that Newell Recycling is currently waiting for the lawsuit settlement and TWC approval of the Corpus site remediation plan before proceeding with any clean-up efforts of the Houston Metal Processing site.

RX 11 at 9. The inspector's inquiry leads him to conclude simply that "the clean-up effort at [HMPC] was dropped for unknown reasons." He urges in his report that, once the safety of plant workers and animals has been ensured, removal and disposal of the contaminated soil should commence right away:

> The contaminated area should be made physically inaccessible to plant employees and pets and any soil migration should be minimized as no erosion control measures have yet been taken. If possible however, the contaminated soil should be removed and disposed of as soon as possible.

RX 11 at 9.

Among the interesting features of the 1989 inspection report is the fact that, once again, representatives of Newell Recycling are not reported to have pointed to the involvement of any other "Newell" entity. Rather, Newell Recycling asserts through counsel that it "does not feel responsible" and has therefore decided to do nothing pending the outcome of litigation involving a "similarly contaminated" but otherwise

unrelated site. Other information in the record tends to corroborate the view that Newell Recycling's disclaimer of responsibility was predicated on the company's belief that an expensive cleanup was beyond its contractual accountability, not because some other Newell entity was the responsible party. *See* CX 18 (December 9, 1989 Letter from HMPC Counsel Mark Huvard to Wayne Mathis).

The record reflects one more effort by LAN to focus the parties' attention on their TSCA obligations. In a January 1990 "Technology Assessment and Economic Evaluation," LAN reminds the parties that its original recommendations with respect to the HMPC site were presented in June 1987, and observes that "[r]ecent contact with the U.S. EPA has prompted renewed interest in cleanup requirements at the site." CX 17 at 1. After reiterating the findings of its 1987 investigation, LAN advises as follows:

> After contact with the U.S. EPA, it was established that PCB's had to be reduced to background levels for a clean site closure. The site could be remediated to a PCB concentration of 25 ppm and deed record [*sic*] for in place closure. This is also predicated on a proper in place closure plan, i.e. groundwater protection and cap. The soil with PCB concentration has to be treated or disposed of by methods acceptable to the U.S. EPA under TCSA [*sic*]. *It was determined that for contaminated soil two methods are allowed by TCSA. The soil either had to be incinerated or landfilled, both in at [sic] approved facilities.*

CX 17 at 3 (emphasis added). LAN's advice was apparently disregarded.

As recounted at the outset of this discussion, as of September 1992 the pile or piles of contaminated soil were still on-site. Some additional sampling was conducted by HMPC in late 1993, confirming the presence, in one of the soil piles, of a PCB concentration (based on a composite of six samples) of 314 ppm. CX 13. EPA then filed this TSCA enforcement action in March 1995. On May 24, 1995, HMPC and Newell Recycling Company executed an agreement wherein *Newell Recycling Company*[10] agreed to "remove and arrange for the proper and lawful disposal of the 120 ton soil pile * * * at its own expense." RX 15 at 1. On September 22, 1995, HMPC filed a civil action against Newell Recycling Co. and certain of its affiliates and controlling persons in the U.S. District Court for the

[10] Conspicuously absent from this agreement is any reference to any of the other Newell entities.

Southern District of Texas, alleging breach of the May 1995 agreement, breach of the September 1982 agreement for the sale of the Fidelity Road property, fraud, and causes of action arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). CX 1. Between September 20 and September 28, 1995, 495,000 pounds of contaminated soil were finally removed from the site and transported, by the American Ecology Transportation Company, to a disposal facility in Beatty, Nevada. CX 29. The ultimate cost of removal of the contaminated soil from the HMPC site was, according to Newell, $84,000.[11]

C. *Proceedings Below*

Upon examining the documentary record—which he aptly described as "a ten year argument over who would pay the cost of removing the contaminated soil"—the Presiding Officer resolved the liability issues regarding both respondents on cross-motions by EPA Region 6 and by HMPC[12] for accelerated decision. *See* 22 C.F.R. § 22.20(a).[13] With respect to Newell Recycling in particular, the Presiding Officer ruled that liability for improper disposal attached because Newell Recycling, like HMPC, "controlled the improper disposal of the PCBs at the facility":

> Newell Recycling undertook an analysis of the scope of the problem and had a plan developed for removal of the contaminated soil. A contractor over which Newell Recycling had control removed the contaminated soil into a pile. Newell Recycling knew that the lead-contaminated soil would need to be removed and it knew that the PCB-contaminated soil which it placed in a pile at the facility was disposed of improperly. The original closure plan under which excavation was initiated called for disposal [of lead-contaminated soil] at a hazardous waste

[11] There is some uncertainty in the record about what the $84,000 actually represents. In its appellate brief, Newell cites the $84,000 figure, first, as the cost to "remov[e]" the PCB-contaminated soil, but then (a few sentences later) as the "total disposal cost." Brief for Appellant at 47. In a Declaration executed by Newell's attorney, the attorney states: "The pile was removed in 1995 with OMP performing the work and Newell Recycling paying the bill ($84,000)." Nasuti Decl. ¶ P. In any case, the Region has not contested this number, notwithstanding the fact that far higher estimates of projected costs appear elsewhere in the record.

[12] Newell filed a notice with the Presiding Officer indicating that Newell wished to join in the Motion for Accelerated Decision that had been filed by HMPC.

[13] Section 22.20(a) authorizes the Agency's Presiding Officers to render an accelerated decision "as to all or any part of [an enforcement] proceeding * * * if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

> disposal facility. Subsequent cleanup plans addressing PCBs called for offsite disposal of regulated levels of PCBs. However, rather than completing the requirements of the original closure plan, or following the later recommendations for site cleanup, Newell discarded the PCBs at the Fidelity Road facility by leaving them there and taking no further clean-up action. Newell's actions in creating the pile, confining the contaminated soil in a central stockpile, and abandoning it are actions meeting the definition of "disposal" in 40 C.F.R. § 761.3.

Partial Accelerated Decision on Issue of Liability at 22–23 (April 28, 1997). The Presiding Officer denied Newell's Motion for Reconsideration of the liability ruling in an order dated June 4, 1997, whereupon HMPC entered into a settlement with the Region. The Presiding Officer considered briefs submitted by the Region and by Newell with respect to an appropriate penalty, but did not conduct an evidentiary hearing on the penalty issues. Rather, on October 7, 1997, the Presiding Officer issued a Decision on Complainant's Motion for Assessment of Civil Penalty, assessing a civil penalty against Newell Recycling in the total amount of $1.345 million, which he further ordered to be reduced, dollar-for-dollar, by the amount paid by HMPC pursuant to its settlement agreement with the Region.

Newell Recycling has appealed the Presiding Officer's liability rulings and his penalty assessment decision. In addition, Newell Recycling appeals an earlier order of the Presiding Officer denying Newell's request for leave to take discovery exceeding the parameters of the typical Part 22 exchange of documents. The appeal is timely and the Board has jurisdiction pursuant to 40 C.F.R. § 22.30.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a). Matters in controversy must be established by a preponderance of the evidence. *Id.* § 22.24; *see In re B.J. Carney Indus.,* 7 E.A.D. 171, 217 (EAB 1997). As the orders from which appeal is taken are challenged, in part, because they were summary adjudications rendered without an evidentiary hearing, our review will consider whether there are any genuine issues of material fact relative to the issues raised. *See In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 792–93 (EAB 1997); *see also* 40 C.F.R. § 22.20(a) (Presiding Officer may enter an accelerated decision as to "all or any part" of a proceeding, "if no genuine issue of material fact exists and a party is entitled to

judgment as a matter of law").[14] In the discussion that follows, we address the challenged discovery ruling, the applicable statute of limitations, the issues surrounding Newell's TSCA liability, and finally the calculation of the penalty.

A. *Discovery*

Newell contends that the Presiding Officer committed reversible error by denying Newell an opportunity to conduct discovery concerning the Region's alleged misconduct in commencing this enforcement action. The applicable regulatory provision is 40 C.F.R. § 22.19(f) ("Other Discovery"), which states in part:

> (1) Except as provided by paragraph (b) of this section [concerning prehearing exchanges of exhibits and witness lists], further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
>
> (i) That such discovery will not in any way unreasonably delay the proceeding;
>
> (ii) That the information to be obtained is not otherwise obtainable; and
>
> (iii) That such information has significant probative value.

We need not consider issues of obtainability, because the Presiding Officer was plainly correct in his determination that the information sought by Newell was not significantly probative.

In its motion for leave to conduct discovery pursuant to section 22.19(f), Newell advised the Presiding Officer that the proposed discovery was intended to demonstrate "an apparent effort [by Region 6] to avoid being sanctioned since its Complaint was filed March 30, 1995 in violation of the five (5) year statute of limitations." Motion for Discovery at 1 (Jan. 19, 1997). "Respondents' burden," Newell explained, "is to

[14] We consider the "administrative summary judgment standard, requiring timely presentation [by Newell] of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *Green Thumb,* 6 E.A.D. at 793 (citing *In re Mayaguez Reg'L Sewage Treatment Plant,* 4 E.A.D. 772, 780–82 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA,* 35 F.3d 300 (1st Cir. 1994)).

establish that EPA had notice of the Site and/or its conditions prior to March 30, 1990." *Id.* at 1–2. The proposed discovery would allegedly have enabled Newell to meet that "burden."

As the discussion below makes clear, Newell's proffered grounds for taking the proposed discovery were flawed. Newell apparently assumed that the applicable statute of limitations would have been triggered by EPA's first "notice" concerning the HMPC site or its "conditions." That assumption, as we will show momentarily, was unfounded, and once it is put aside the discovery proposed to be taken by Newell bears no relation to any of the matters at issue in this proceeding. The Presiding Officer, accordingly, did not err by denying Newell's January 19, 1997 request for leave to pursue discovery.

B. *Statute of Limitations*

The central issue presented by Newell's appeal concerns the application of the statute of limitations, 28 U.S.C. § 2462, to the essentially undisputed facts of this case. Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years of the date when the claim first accrued * * * .

The question, then, is when the claim for which the Region sought a penalty in this case first "accrued"—specifically, whether the Region's claim in this case is or is not governed by the doctrine of "continuing violations." As the Board has previously explained:

> The limitations period begins to run when a violation first accrues. The doctrine of continuing violations provides a special rule for determining when a violation first accrues. Under the special accrual rule, the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete. Thus, if the doctrine of continuing violations applies * * * , an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased.

In re Lazarus, Inc., 7 E.A.D. 318, 364 (EAB 1997) (citations omitted). The Board has noted that the special accrual rule for continuing

violations is potentially applicable both to violations of "continuing obligations" and to violations of "continuing prohibitions." *See Lazarus,* 7 E.A.D. at 366 n.84; *In re Harmon Indus., Inc.,* 7 E.A.D. 1, 39 n.41 (EAB 1997).[15] The focus, then, is on determining whether a particular regulatory obligation or prohibition is, or is not, "continuing in nature." *Lazarus,* 7 E.A.D. at 366–67.

We begin by examining the statutory enactment underlying the regulation allegedly violated. In the TSCA context, the Board has previously undertaken such an examination in the *Lazarus* proceeding. The Board there examined both the statutory provision (TSCA § 6(e)) directing EPA to promulgate PCB disposal rules and the statutory provision (TSCA § 16(a)(1)) authorizing EPA to impose administrative penalties for violation of the rules.

The relevant portion of section 6(e) states only that "the Administrator shall promulgate rules to * * * prescribe methods for the disposal of polychlorinated biphenyls." It is silent concerning whether violations of those rules should be deemed continuing in nature. *See Lazarus,* 7 E.A.D. at 377–78. The administrative civil penalty provision, section 16(a)(1), is somewhat more illuminating. That provision begins by stating that anyone who violates TSCA section 15—by, for example, failing to comply with any PCB disposal rule promulgated under TSCA section 6—"shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Section 16(a)(1) then proceeds to explain that, for purposes of applying the $25,000-per-violation civil penalty cap, "[e]ach day such a violation continues shall * * * constitute a separate violation of section 15."

In *Lazarus,* the Board recognized that "section 16(a)(1) is evidence that Congress contemplated the *possibility* of continuing violations of TSCA." *Lazarus,* 7 E.A.D. at 368 (emphasis in original). But the Board further concluded that section 16(a)(1) alone "does not transform every violation of TSCA into a continuing violation." *Id.* The Board therefore found it appropriate, in the TSCA context, to examine separately each regulatory requirement or prohibition allegedly violated for indicia of whether that particular requirement or prohibition is "continuing" in nature. In this analysis, "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature

[15] The Board's decision in Harmon was reversed, on grounds unrelated to the statute of limitations, in *Harmon Indus., Inc. v. Browner,* 19 F. Supp. 2d 988 (W.D. Mo. 1998). A challenge to the District Court's decision is currently pending before the Court of Appeals for the Eighth Circuit. *Harmon Indus., Inc. v. Browner,* No. 98–3775.

* * * [whereas] a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." *Id.* at 367 (footnotes omitted). *Lazarus* demonstrates that, within the confines of the TSCA PCB regulations, certain regulatory provisions exhibit indicia of "continuity" whereas others implicate a "particular time frame," leading to divergent applications of the limitations bar. *See id.* at 372 (obligation to register PCB transformer with local fire response personnel held continuing in nature); *id.* at 373 (obligation to mark transformer room access door with a prescribed symbol held continuing in nature); *id.* at 377–79 (obligation to prepare and maintain yearly records "on the disposition of PCBs and PCB Items" held *not* continuing in nature). The Board has not previously undertaken such an analysis with respect to 40 C.F.R. § 761.60(a)(4), which Newell is alleged to have violated. The question whether violations of section 761.60(a)(4) are "continuing" in nature, for statute of limitations purposes, is therefore one of first impression.

We are not without reliable guideposts, however, given the outlines of an analytical framework that emerge from *Lazarus* and, more importantly, the detailed attention that matters involving PCB disposal have already received in the Agency's administrative case law. The provision at issue in this case, 40 C.F.R. § 761.60(a)(4), has been interpreted in several previous Agency decisions concerning matters other than the statute of limitations. The reasoning in those decisions, when combined with a close reading of the regulatory text, illumines the issue at hand.

> Our point of departure is the text of section 761.60(a)(4):
>
> > Any non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, rags, or other debris shall be disposed of:
> >
> > (i) In an incinerator which complies with § 761.60; or
> >
> > (ii) In a chemical waste landfill which complies with § 761.75.

Previous Agency case law has tended to focus on which parties are responsible for compliance (and hence potentially liable for failure to comply). We put that question aside for the moment, although we will revisit the matter at some length in a subsequent section of this opinion. For present purposes, a different feature of the regulation is noteworthy: The regulation contains elements of both obligation and prohibition. It is written in the affirmative—disposal *shall* occur in one of two specified way—but also delivers, clearly and unmistakably, the message that

disposal *shall not* occur in any other way. In addressing whether violations of this regulation are continuing in nature, we consider both the obligation and the prohibition. Both aspects of the regulation direct us toward the same result.

Viewed as an obligation, the regulation on its face carries no temporal limitation. It does not, as we expressed the idea in *Lazarus*, prescribe a "requirement[] that must be fulfilled within a particular time frame." On the contrary, nothing in the regulation remotely suggests that the obligation described is discharged or extinguished simply with the passage of time. Instead, the obligation is discharged only with the occurrence of a specified event—the proper disposal of PCB-contaminated soil at an incinerator or a chemical waste landfill. Until this occurs, compliance with the regulatory mandate has not been achieved, and the responsible party commits, each day, a violation of section 761.60(a)(4). The regulatory text, accordingly, suggests that an administrative enforcement action for violation of section 761.60(a)(4) is timely if commenced within five years after the noncompliance ends with the *lawful* disposal of the contaminated material.

The same result obtains if we regard section 761.60(a)(4) as a prohibition against methods of disposal other than those specifically authorized. It is useful in this regard to examine the broader Subpart D ("Storage and Disposal") regulatory framework, and to identify the circumstances in which the prohibition does *not* apply, i.e., when it is permissible to do something with PCB-contaminated soil *other than* incineration or landfilling. There are only two such circumstances. First, if contaminated soil was placed in a "disposal site" (which need not be an incinerator or a chemical waste landfill) before the PCB disposal rules were enacted, it is sometimes permissible simply to leave the contaminated soil in place; such soil is, in effect, not regulated under Part 761. *See* 40 C.F.R. § 761.60 (Note). Alternatively, if PCBs in the form of contaminated soil are housed in a storage facility meeting stringent regulatory requirements, the soil may be kept in that facility for up to a year; temporary "storage for disposal," in other words, is a permissible method of handling PCB-contaminated soil until the end of the one-year grace period. *See* 40 C.F.R. § 761.65(a). All other PCB-contaminated soil, however generated or encountered, is governed by section 761.60(a)(4), and may not be addressed in any manner other than incineration or landfilling. Thus, in toto, by forbidding all methods of disposal other than incineration and landfilling, section 761.60(a)(4) effectively divides the universe of PCB-contaminated soil among four mutually exclusive categories: (1) pre-rule, conditionally unregulated soil (largely unaffected by section

761.60(a)(4));[16] (2) soil lawfully held in storage for disposal (*temporarily* unaffected by section 761.60(a)(4)); (3) soil lawfully disposed of in compliance with section 761.60(a)(4); and (4) noncompliant PCB-contaminated soil.

In its administrative case law, EPA has treated this fourth category of soil—that which is subject to TSCA regulation, is not lawfully in storage for disposal, and has not been lawfully disposed of in an incinerator or in a chemical waste landfill—as being "in a state of improper disposal." *In re City of Detroit*, 3 E.A.D. 514, 518 (CJO 1991); *In re Standard Scrap Metal Co.,* 3 E.A.D. 267, 270 (CJO 1990). This is the category of material with which we are concerned in this case.

What is it that terminates a "state of improper disposal"? The answer is not, based on anything stated or implied in the regulations, simply the passage of time. A "state of improper disposal" logically persists until proper disposal occurs, and, indeed, Agency case law so states: "If [PCBs] have been taken out of service for disposal, the responsible party must dispose of the PCBs in accordance with the requirements [of section 761.60(a)(4)]. Failure to do so constitutes a violation of the regulation, and the violation continues as long as the PCBs remain out of service and in a state of improper disposal." *Standard Scrap Metal Co.,* 3 E.A.D. at 269–70. While *Standard Scrap* did not specifically address this issue in the context of a statute of limitations dispute,[17] we find its logic equally compelling here.

Thus, in the final analysis, we simply discern no textual or logical basis—nor does Newell suggest one—for regarding unremedied violations of section 761.60(a)(4) as being limited, for accrual purposes, to a single instant, a single day, or any other particular period of time. Indeed, to conclude otherwise would produce an outcome difficult to reconcile with the policy thrust of the statute and the regulations. A party legally

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[16] The record is unclear as to whether the contaminated soil at issue here was, prior to the February 1985 excavation, in this nonregulated category of material. This is, in any case, immaterial, as we find that it was Newell's excavation and stockpiling of the contaminated soil that both subjected the material to regulation and established Newell's responsibility for proper disposal.

[17] *Standard Scrap* addressed the burden of proof with respect to the applicability of the "disposal site" exemption from the PCB disposal regulations. The disposal site exemption appeared in a Prefatory Note preceding 40 C.F.R. § 761.60 and it provided, in part, that "[t]his subpart does not require PCBs or PCB Items landfilled prior to February 17, 1978 to be removed for disposal." The disposal site exemption, which is not at issue in the present case, was deleted from part 761 effective August 28, 1998. *See* 63 Fed. Reg. 35,384 (1998).

responsible for ensuring the proper disposal of PCB-contaminated material, but disinclined to incur the expense, might well have good reason simply to do nothing for five years.

We are mindful of the important purposes served by statutes of limitations generally and by section 2462 in particular—including, notably, the preclusion of enforcement actions based on claims that have become "stale" with the passage of time. As we recognized in *Lazarus,* "[p]assage of time between the date of a violation and the date of prosecution may serve to obscure basic facts through lost evidence and faded memories." *Lazarus,* 7 E.A.D. at 365. But as we further explained, "[c]oncerns about staleness * * * are much less compelling when a violative course of conduct that began in the past continues unabated into the five-year period immediately preceding the filing of the complaint." *Id.* at 366.

The latter observation brings into focus a second central issue presented by this appeal: specifically, Newell's contention that "disposal" is, by definition, a one-time event that occurs *only* at the moment when PCBs are first taken out of service. If Newell's contention in that regard were correct, improper disposal logically could never "continue" over time or be regarded as a "course of conduct," and the Region's enforcement action against Newell would not only be time-barred, but would also fail for lack of any evidence of Newell's direct involvement in the original burying of these capacitors at the Fidelity Road site (the moment at which, according to Newell, the PCBs were first taken out of service). Having disposed of Newell's statute of limitations arguments, we therefore turn our attention now to this question of the meaning of "disposal" under 40 C.F.R. part 761, subpart D, and the other related liability issues that Newell has raised.

C. *"Disposal" and Other Liability Issues*

1. *"Disposal" of PCBs Occurred*

Newell raises an extensive series of objections to the Presiding Officer's liability ruling, none of which raises a genuine issue of material fact. First, and most prominently, Newell contends that the Presiding Officer committed reversible error when he concluded that Newell had engaged in conduct meeting the definition of "disposal" under the PCB Rule. Newell's specific contention in this regard is that "disposal" constitutes a one-time occurrence, and that in this case disposal occurred only when the capacitors containing PCBs were originally buried and their contents released into the surrounding soil. According to Newell's theory, the subsequent excavation and stockpiling of PCB-contaminated soil could

thus not constitute "disposal" within the meaning of the PCB Rule. Because the Region did not produce evidence implicating Newell in the original disposal of the capacitors, Newell argues, the Region failed to establish that Newell committed an act constituting unlawful disposal under 40 C.F.R. § 761.60(a)(4).

We note at the outset that, if Newell's interpretation of disposal as a one-time occurrence were correct, no TSCA liability would attach even if Newell had taken the pile of contaminated soil from the Fidelity Road site and dumped it into the nearest river, stream, or vacant lot. Such an interpretation would be difficult to reconcile with the environmental protection goals of the TSCA regulatory regime. *See In re Samsonite Corp.,* 3 E.A.D. 196, 199 (CJO 1990) (PCB regulations "should be read in such a way as to further the purposes of the Act, particularly where, as in this case, public health and safety are involved") (citing TSCA § 6(e)(2)(B), 15 U.S.C. § 2615(e)(2)(B)); 15 U.S.C. § 2601(b)(2) (calling for regulation of "chemical substances and mixtures which present an unreasonable risk of injury to health or the environment").

In any case, Newell's interpretation of "disposal" is inconsistent with the regulatory definition of "disposal" at 40 C.F.R. § 761.3, and thus must fail. This section provides:

> *Disposal* means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.

It is true, as Newell emphasizes, that an act of "disposal" occurs when the "useful life" of PCBs is first brought to an end. Newell is correct, therefore, in asserting that PCB "disposal" occurred when the capacitors were buried at the Fidelity Road site and their contents leaked into the surrounding soil. Section 761.60(d)(1) of the PCB Rule expressly confirms that this is so: "Spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs." 40 C.F.R. § 761.60(d)(1). But the regulatory definition of disposal includes far more than spills and other uncontrolled discharges, and it expressly embraces activities undertaken to address known PCB contamination. Thus, 40 C.F.R. § 761.3 states that "[d]isposal includes spills, leaks, and other uncontrolled discharges as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs

or PCB items." The act of excavating and stockpiling PCB-contaminated soil at the Fidelity Road site is clearly in the nature of action to "contain," "transport," and "confine" PCBs. Moreover, leaving the stockpiled waste abandoned there for a period of years is evidence that the PCB-contaminated soil was "discarded" within the meaning of the rule. Accordingly, the Presiding Officer correctly applied the regulatory definition by holding that Newell committed an act of improper disposal by knowingly causing PCB-contaminated soil to be excavated and stockpiled in a corner of the HMPC site, and then "leaving [the PCBs] there and taking no further clean-up action." Partial Accelerated Decision on Issue of Liability at 23.[18]

2. *PCB "Disposal" Need Not Involve "Exacerbation" of Pre-Existing Site Conditions*

Newell next argues that even if stockpiling and abandonment of PCB-contaminated soil does satisfy the regulatory definition of disposal, that definition should be supplemented by an implied requirement of "exacerbation." According to this argument, EPA cannot establish a violation of the disposal rules unless it can show conduct meeting the definition in section 761.3 and, in addition, show that the conduct "exacerbated" the environmental conditions at the site by, for example, causing contamination of previously uncontaminated areas of the affected site. Because we find nothing in section 761.3 that supports augmentation with this additional requirement, we reject Newell's argument that proof of "exacerbation" is required.[19]

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[18] Also supportive of the Presiding Officer's analysis is the Note preceding the disposal regulations in Part 761, Subpart D. (Although it has since been deleted, *see supra* note 17, the interpretive Note prefacing the disposal rules was in effect throughout the period of the violations at issue in this case.) Among other things, the Note indicates that PCBs "landfilled" before February 17, 1978 need not be "removed for disposal." The Note makes clear, however, that those PCBs become subject to the Subpart D disposal requirements if they are excavated: "[I]f such PCBs or PCB Items are removed from the disposal site, they must be disposed of in accordance with this subpart."

[19] In support of its contention that exacerbation should be regarded as an element of a PCB disposal violation, Newell cites four cases, all arising under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*: *Alcan-Toyo Am., Inc. v. Northern Ill. Gas Co.,* 881 F. Supp. 342 (N.D. Ill. 1995); *Ganton Tech., Inc. v. Quadion Corp.,* 834 F. Supp. 108 (N.D. Ill. 1993); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Co.,* 976 F.2d 1338 (9th Cir. 1992); and *Tanglewood East Homeowners v. Charles-Thomas, Inc.,* 849 F.2d 1568 (5th Cir. 1988). Based as they are on a different statutory scheme and text, we find them inapposite to the matter at hand. We also note arguably stands for the proposition for which it is advanced. Even that case, however, that,

Continued

3. *There Was Sufficient Evidence of Newell Recycling Company's Involvement in the Disposal Violation*

An introductory provision of the PCB Rule (40 C.F.R. § 761.1 ["Applicability"]), citing the relevant statutory language, states that civil penalty liability extends to "any person" who fails to comply with the regulatory requirements:

> Section 15 of the Toxic Substances Control Act (TSCA) states that failure to comply with these regulations is unlawful. Section 16 imposes liability for civil penalties upon any person who violates these regulations, and the Administrator can establish appropriate remedies for any violations subject to any limitations included in section 16 of TSCA.

40 C.F.R. § 761.1(d). With respect to cases involving improper disposal of PCBs, administrative case law supports the view that, "violators" in such cases include those who have "caused (or contributed to the cause of) the disposal." *In re City of Detroit,* 3 E.A.D. 514, 526 (CJO 1991). With that in mind, we turn now to Newell's claim that the evidence before the Presiding Officer in this case was not sufficient to establish Newell's responsibility for a disposal violation.

Newell contends that the Presiding Officer committed error by concluding that Newell Recycling Company, rather than one of its affiliates, was a party responsible for any violation of the PCB disposal rules that may have occurred at the Fidelity Road site. That contention is untenable when viewed against the undisputed facts. Newell Recycling Company may not have acted alone, but it was certainly an active party in the events constituting the TSCA violation. Newell Recycling Company was the owner of the Fidelity Road site immediately before its conveyance to HMPC. In conveying the property, Newell Recycling contractually

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of the cases cited, only one, *Alcan-Toyo*, even stands for the narrow proposition that one court, in assessing relative fault for purposes of an equitable allocation of response costs in a CERCLA contribution action between responsible parties, considered excavation and stockpiling of tainted soil that causes exacerbation of site conditions materially more blameworthy than similar activity that does not cause such exacerbation. There is nothing in *Alcan* that persuades us that there is or should be an implied "exacerbation" requirement in all environmental statutes and regulations that employ the term "disposal." Thus, *Alcan* notwithstanding, we conclude that Region 6 was not required to produce evidence of exacerbation in order to establish Newell's liability for violating 40 C.F.R. § 761.60(a)(4).

assumed responsibility for on-site "occurrences." Indeed, the 1985 cleanup of lead contamination, the attendant discovery of PCB contamination and creation of the PCB waste pile, and the subsequent efforts to remediate PCB contamination all flowed proximately from this covenant by Newell Recycling. Newell Recycling's owner, Alton Newell, was shown to have visited the site in response to HMPC's demand for a remedial response. Until this enforcement case, Newell Recycling never so much as suggested that some other Newell entity was actually responsible for the contaminated soil pile, and the record is devoid of any evidence that the work in 1985 was undertaken without Newell Recycling's participation. Newell Recycling executed a tolling agreement with respect to claims arising from the contamination of the HMPC site in July 1987. Newell Recycling, through Wayne Mathis, hired LAN to make recommendations with respect to a PCB cleanup both in 1987 and in 1989–90. Newell Recycling was contacted by the EPA inspector in October 1989 and did not, so far as the record discloses, point the inspector toward one of its affiliates. Finally, it was Newell Recycling that entered into an agreement, in May 1995, to undertake the removal of the PCB-contaminated soil at its own expense. Given Newell's multiple contacts with this matter, including contractual and other undertakings to do removal work, we conclude that it is more likely than not that the actual physical undertaking of the removal work was performed pursuant to Newell's direction and control. Accordingly, we find that Newell Recycling did, indeed, cause, or contribute to the cause of, the unlawful disposal of PCB-contaminated soil. Thus, the Presiding Officer did not err in concluding that Newell Recycling was a liable party for the PCB disposal violation at issue in this case.

4. *There Was Sufficient Evidence of Regulated PCB Concentrations in the Soil Pile*

Newell claims that Region 6 failed to prove a violation of the PCB disposal rules because it did not sufficiently establish the presence of regulated PCB concentrations in the soil at the Fidelity Road site either as of September 1992 or as of February 1994. Significantly, Newell cites neither expert opinion nor probative evidence in support of its contentions. With respect to the September 1992 soil sampling results, Newell speculates that the samples might either have been taken improperly or analyzed improperly. With respect to the PCB concentration as of February 1994, Newell speculates that "natural bioremediation, dilution or other factors may have teamed up to modify any contaminant levels that might have existed in 1992." Brief for Appellant at 23–24. Newell's speculation is inadequate to create a genuine issue of material fact regarding the presence or absence of regulated PCB concentrations in the soil.

As to the September 1992 testing, Newell complains that "it was provided with no hearing at which Region 6 experts could be cross-examined." Brief for Appellant at 23. Newell misconstrues the nature of summary adjudication. As the Board observed in *In re Dos Republicas Res. Co.,* 6 E.A.D. 643 (EAB 1996), it is necessary to oppose a properly supported motion for summary adjudication "by referencing probative evidence in the record, or by producing such evidence." *Id.* at 662 (citations omitted). "Summary judgment may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up." *Id.* (citing *United States v. Potamkin Cadillac Corp.,* 689 F.2d 379, 381 (2d Cir. 1982)). *See also In re Clarksburg Casket Co.,* 8 E.A.D. 496, 504–09 (EAB 1999) (respondent's defense, though "theoretically possible," could not prevent the entry of an accelerated decision against respondent, where respondent failed to produce probative evidence in support of the defense). Here, Region 6 produced evidence in support of its Motion for Accelerated Decision demonstrating the presence of regulated concentrations of PCBs in the soil pile as of September 1992. With the Region having produced such evidence, it was incumbent upon Newell—to avoid summary adjudication of that particular issue—to go beyond mere allegation and speculation by presenting some evidence indicating possible sampling improprieties and/or laboratory errors. The Presiding Officer was not required to conduct an evidentiary hearing based solely on Newell's unsubstantiated concern that it might uncover such evidence in the course of cross-examination.

The same analysis holds true with respect to Newell's conclusory assertion that "natural bioremediation" or other means of dilution "may have" reduced PCB concentrations in the soil pile below regulated levels before February 21, 1994, i.e., the end of the period for which Region 6 sought penalties in this action. Newell could not avoid summary adjudication by offering sheer speculation concerning what "may have" happened to the contaminated soil between September 1992 and February 1994. It was incumbent upon Newell to offer countervailing evidence sufficiently probative to create a genuine issue for resolution at a hearing, but Newell made no attempt to do so.

We note that Newell, having managed the disposal of the PCB-contaminated material in 1995, was in a position to conduct its own tests of the material at that time. Had Newell come forward with evidence that, at that later date, PCBs were no longer present at levels of concern, its contentions might have greater force. But this Newell did not do. Because Newell failed to offer any such evidence, the Presiding Officer did not err when he resolved the issue in the Region's favor by means of summary adjudication.

D. *Penalty Issues*

1. *Evidentiary Hearing*

Newell argues, preliminarily, that it was *per se* impermissible for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing. Newell relies on 40 C.F.R. § 22.15, which states that "[a] hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer." We have held, however, that an oral hearing (as opposed to an opportunity to obtain a ruling from the Presiding Officer on the documentary record) is required only if the party requesting the hearing raises a genuine issue of material fact. *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 792–93 (EAB 1997).[20] As explained fully below, we find that Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing. We similarly find that the Presiding Officer did not err in applying the law to the unrefuted facts before him.

2. *Gravity Based Penalty*

Pursuant to EPA's April 9, 1990 Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"), which the Presiding Officer applied in this case, penalties for PCB Rule violations are calculated in two stages: "(1) determination of a 'gravity based penalty' (GBP), and (2) adjustments to the gravity based penalty." Penalty Policy at 1. The Penalty Policy implements the requirements set forth in TSCA section 16(a)(2)(B), which provides:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

[20] EPA's use of an "administrative summary judgment" procedure was expressly approved by the First Circuit in *Puerto Rico Aqueduct & Sewer Auth. v. EPA,* 35 F.3d 300 (1st Cir. 1994), *aff'g In re Mayaguez Reg' Sewage Treatment Plant,* 4 E.A.D. 772 (EAB 1993). We reject Newell's suggestion that the procedure violates the Administrative Procedure Act or works a denial of due process. *See Green Thumb,* 6 E.A.D. at 792 ("Even the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute.") (citing *Codd v. Velger,* 429 U.S. 624, 627 (1977)).

Under the Penalty Policy framework, the first four statutory factors—nature, circumstances, extent, and gravity—are reflected in the proposed GBP, whereas the remaining statutory factors (the specified characteristics of the violator and "such other matters as justice may require") are reflected in adjustments to the proposed GBP.

Before the Presiding Officer, Newell Recycling made the following arguments in response to the gravity based penalty proposed by Region 6:

(1) Region 6 failed to quantify, or failed to reliably quantify, the amount of material involved in the violation, and should therefore, by default, have characterized the violation as "minor" in extent for purposes of a GBP calculation. Opposition by Respondent Newell Recycling Company, Inc. to Region 6's Proposed Penalty at 2 (Aug. 8, 1997) ("Penalty Opp.");

(2) The Region should not have characterized the "circumstances" of the violation, for purposes of applying the Penalty Policy's GBP matrix, as "High Range, Level One," because that characterization "bears no rationale *[sic]* relationship to any human health concerns." Penalty Opp. at 3. *See also id.* at 12 (arguing that the Region's penalty proposal is "outrageous" in the context of this "piddling little case").

The Presiding Officer concluded that neither of those contentions created a genuine issue of material fact with respect to the appropriateness of the Region's penalty proposal, and that both contentions were erroneous as a matter of law. Newell advances both contentions again in its appellate brief. Brief for Appellant at 41–44. For the following reasons, the Board holds that the Presiding Officer did not err on either point.

a. *Extent*

As a general matter, the Penalty Policy provides for three possible "extent" classifications: Minor, Significant, and Major. According to the Penalty Policy, "extent," as used in the statute, is understood to refer to "the 'extent' of potential or actual harm from a given violation." Penalty Policy at 1. In order to classify disposal violations, in particular, with respect to extent of potential or actual harm, the Penalty Policy looks to the amount of material involved in the violation and adjusts that amount, in certain circumstances, to account for the material's PCB concentration. Where, as here, the volume of PCB fluid involved in a disposal violation is not ascertainable, the amount of material for penalty calculation purposes is measured either in terms of surface area (i.e., square footage of contamination, for fresh spills onto the ground or some other surface) or

volume of material contaminated (i.e., cubic feet). Because this case involved soil contaminated over time as a result of the burial and leakage of PCB articles rather than a spill onto a measurable surface, the Region appropriately looked to the volume of the soil involved in the improper disposal. When soil volume is used, the "extent" classifications are:

- less than 60 cubic feet = Minor
- between 60 and 300 cubic feet = Significant
- more than 300 cubic feet = Major.

Penalty Policy at 6–7. Finally, the Penalty Policy states that *no* concentration adjustment is to be applied "when the PCB material is measured by a measure for solids other than weight. * * * 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." *Id.* at 9.

As noted previously, during an October 1989 inspection of the HMPC site, EPA's inspector observed "two soil piles contain[ing] approximately 20 cubic yards each." *See* RX 11 at 8. With its brief to the Presiding Officer concerning penalty issues, Region 6 submitted the Declaration of EPA environmental scientist Jeffrey Jay Robinson dated July 18, 1997. Robinson states that he determined the "extent" of Newell's disposal violation based on one of the two 20-cubic-yard soil piles shown to have been present at the HMPC site during October 1989. Robinson explains that "the 20 cubic yards exceeded the 300 cubic feet waste quantity for Major Extent Disposal Violations (a cubic yard equals 27 cubic feet; 20 cubic yards x 27 cubic feet per cubic yard equals 540 cubic feet). Therefore, the extent of the disposal is Major under the Penalty Policy." Robinson Declaration at 2.

Newell claims on appeal, as it did before the Presiding Officer, that a penalty could not properly be based on the 540-cubic-foot volume of the soil pile because the record contains "insufficient data for an expert opinion to be formulated regarding the quantity of regulated substances involved." Brief for Appellant at 42. To support that contention, Newell restates an argument that we have previously encountered among Newell's defenses to liability, namely, that EPA's sampling of the soil pile in September 1992 was inadequate to establish contamination of the soil with regulated levels of PCBs.

As we have already held in connection with Newell's defense to liability, Newell cannot avoid summary adjudication simply by speculating that the 1992 sampling and analysis of the soil pile may have produced

an erroneous result. Newell must offer probative evidence indicating that improper sampling and/or faulty laboratory analysis may in fact have occurred. Newell offers no such evidence. Accordingly, the Presiding Officer did not err by ruling that, for purposes of applying the Agency's PCB Penalty Policy, Newell's violation should properly be characterized as "major" in extent.[21]

b. *Circumstances*

The circumstances of the violation must also be classified in order to arrive at a gravity based penalty under the Penalty Policy framework. The Penalty Policy creates six different classifications, labeled, in decreasing order of the violation's "probability of causing harm to human health or the environment," as follows: High Range—Level 1, High Range—Level 2, Medium Range—Level 3, Medium Range—Level 4, Low Range—Level 5, and Low Range—Level 6. Penalty Policy at 9. All disposal violations are classified under the Penalty Policy as either High Range—Level 1 or Medium Range—Level 3. Penalty Policy at 10–11. The Policy refers to the Level 1 disposal violations as "major disposal" violations and to the Level 3 disposal violations as "minor disposal" violations. These "major" and "minor" designations are unrelated to the "major" and "minor" designations used in classifying the *extent* of a violation. *Id.* at 9 (footnote). As discussed previously, the extent of a disposal violation is based on the quantity of material involved in the violation combined, in certain instances, with the PCB concentration present in that material. The "circumstances" of a disposal violation—level 1 or level 3—are determined quite differently.

The Penalty Policy describes level 3 disposal violations only by example: "An example of a [level 3] 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." Penalty Policy at 11. That example certainly does not seem to capture the essence of the violation at issue here, in which PCBs surely did not remain confined to the surface of a particular article without "running off" or otherwise escaping into the surrounding environment. The violation must therefore be assigned to circumstance level 1, which includes:

[21] Because the 1989 inspection report contains sufficient evidence of the volume of soil involved in this violation, we do not consider or address the Presiding Officer's suggestion that, in the alternative, evidence of soil volume could be derived from the September 1995 hazardous waste manifests prepared in connection with the ultimate removal of the soil from the HMPC site.

> 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* * * * .

Penalty Policy at 10 (emphasis added). Because the discarding and abandonment of PCB-contaminated soil in a pile constitutes "disposal * * * in a manner that is not authorized by the PCB regulations," the Presiding Officer did not err by classifying the circumstances of this violation as "High Range—Level 1."

Newell's only contention to the contrary is essentially a legal argument—that the level 1 versus level 3 distinction should depend, at least in part, on the PCB concentration of the material involved in the violation. Brief for Appellant at 44. What Newell's argument overlooks is that the "extent" component of the gravity based penalty is where concentration adjustments, if any, are made. No such adjustment was made in the "extent" component in this case because, as explained in the relevant section of the Penalty Policy, disposal costs for a given volume of PCB-contaminated soil do not vary with the specific concentration of PCBs that are present; concentration adjustments are unwarranted where, as in this case, the "extent" of the violation is measured in cubic feet. *See* Penalty Policy at 9.

For all of the foregoing reasons, the Presiding Officer did not err in determining that there were no genuine issues of material fact in dispute relative to the calculation of a gravity based penalty or when, having consulted the "matrix" at page 9 of the Penalty Policy, he concluded that $25,000 was an appropriate gravity based penalty for each violation at issue in this case.

3. *Separate Penalty for Each Day of Violation*

Section 16(a)(1) of TSCA provides for administrative civil penalties not to exceed $25,000 "per violation," and it provides that for purposes of applying the penalty limit, "[e]ach day such violation continues shall * * * constitute a separate violation." In this action Region 6 alleged that Newell had continuously violated the PCB disposal requirements from September 10, 1992 through February 21, 1994—a period of 529 days. It requested a full $25,000 penalty for the first day of violation, and ten percent of that amount ($2,500) for each of the 528 subsequent days. Although Newell objected to the proposed imposition of per-day

penalties before the Presiding Officer,[22] the Presiding Officer turned aside that objection, Penalty Decision at 7–8, and Newell has not made any similar argument on appeal. Accordingly, the total gravity based penalty assessment stands at $1,345,000 ($25,000 + [528 x $2,500]), less a reduction based on the settlement between EPA and HMPC, as discussed *infra*. We now turn to Newell's claims for downward adjustments to the gravity based penalty.

4. *Adjustments Proposed by Newell*

On appeal, Newell identifies nine factors that, in its view, warrant downward adjustment of the civil penalty. These factors are: (1) the Region's failure to join other "responsible parties" in its enforcement action; (2) disclosure of "the alleged problem" to "the State of Texas (and EPA) in 1985 and again in 1987"; (3) lack of environmental harm resulting from the disposal violation; (4) the eventual removal of the soil pile at an alleged cost of $84,000; (5) the Region's refusal to "credit" Newell with the alleged $84,000 removal cost; (6) the size of the payment required to be made by HMPC under its settlement with the Region; (7) the Region's "refusal to use the BEN model" in calculating a proposed penalty; (8) the Region's "inaction" between 1985 and the date of commencement of the enforcement action; and (9) the fact that lower penalties have been assessed in certain other TSCA penalty actions that have been the subject of administrative appeals.

a. *Estoppel Arguments (Factors 5 and 8)*

We first address a pair of mitigation arguments raised by Newell that are in the nature of estoppel claims, specifically (1) the claim that Region 6 acted inequitably by commencing the enforcement process after a period of inaction, and (2) the claim that Region 6 "reneged" on a commitment to deduct Newell's cleanup costs from whatever civil penalty the Region might seek in an enforcement action. Brief for Appellant at 48. We conclude that there are no genuine issues of material fact in dispute relative to these claims and that, consistent with the Presiding Officer's analysis, the conduct alleged by Newell does not give rise to an estoppel against the government.

[22] Newell's objection was erroneously based on a superseded 1980 penalty policy. *See* Penalty Opp. at 7–8.

This Board examined equitable estoppel principles in *In re B.J. Carney Indus.,* 7 E.A.D. 171 (EAB 1997). There, the Board explained that the circumstances in which the government may be equitably estopped are extremely limited, and "'it is well settled that the Government may not be estopped on the same terms as any other litigant.'" *Id.* at 196 (quoting *Heckler v. Cmty. Health Serv.,* 467 U.S. 51, 60 (1984)).[23] The Board further explained:

> A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government. *United States v. Hemmen,* 51 F.3d 883, 892 (9th Cir. 1995). This means that "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment. *In re Wego Chemical & Mineral Corp.,* 4 E.A.D. 513, 522 (EAB 1993).

Id. see also Linkous v. United States, 142 F.3d 271, 277 (5th Cir. 1998) ("Courts have applied estoppel to the federal government only in the narrowest of circumstances. In order to establish estoppel against the government, a party must prove affirmative misconduct by the government in addition to the four traditional elements of the [equitable estoppel] doctrine.").[24] Against the backdrop of these principles, as discussed below, we think it apparent that Newell's two estoppel arguments are unavailing.

Credit for Cleanup Cost Ultimately Incurred—Newell argues that Region 6 committed misconduct by "refus[ing] to credit [Newell] for the $84,000 expended to remove the soil pile." Brief for Appellant at 48. In its brief, Newell claims that representatives of the Region "presented to [Newell] that such remediation, if accomplished, would be factored into

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[23] There are sound reasons for limiting estoppel claims against the government: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Cmty. Health Serv.,* 467 U.S. at 60, quoted in *B.J. Carney,* 7 E.A.D. at 196.

[24] "Affirmative misconduct" in this context refers to "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Linkous,* 142 F.3d at 278. The "traditional elements" required to be proved in addition to affirmative government misconduct are: "(1) that the party to be estopped was aware of the facts, and (2) intended his act or omission to be acted upon; [and] (3) that the party asserting estoppel did not have knowledge of the facts, and (4) reasonably relied on the conduct of the other to his substantial injury." *Id.* (citing *United States v. Bloom,* 112 F.3d 200, 205 (5th Cir. 1997)).

the overall civil penalty that Region 6 was seeking." *Id.* Newell concludes that "Region 6 and [Newell] had an agreement, and Region 6 is estopped from reneging on its agreement." *Id.*

Newell made the same argument in the penalty brief that it filed with the Presiding Officer. *See* Penalty Opp. at 5–6. The Presiding Officer addressed the argument and concluded that:

> [Newell's] assertions are not sufficient to establish that it relied to its detriment on complainant's alleged representations where [Newell] was under an obligation to comply with the PCB disposal rule whether or not complainant pursued an action against it.

Penalty Decision at 10.[25]

Remarkably, on appeal Newell completely ignores the issue of detrimental reliance that the Presiding Officer considered dispositive. In the absence of any argument to the contrary, we conclude—as did the Presiding Officer—that compliance with a legal obligation does not constitute a "detriment" and cannot, therefore, support Newell's promissory estoppel claim against Region 6.

Region's Alleged Delay in Filing the Complaint—Newell also contends that Region 6 refrained from taking any action for several years[26] and thereby impermissibly allowed Newell's violations (and the associated penalties) to accumulate. Newell states that "[i]t is a violation of public policy for a regulatory agency to sit back and allow penalties to accrue, instead of taking action." Brief for Appellant at 50. Further, Newell claims that only a "nominal" penalty is warranted here based on the reasoning of a federal district court in a case decided in 1958, *United*

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[25] Following Supreme Court precedent, this Board similarly emphasized, in *B.J. Carney,* that a failure to prove detrimental reliance is "fatal" to an estoppel claim against the government:

> Also fatal to [appellant's] estoppel claim is the fact that it has not suffered any detriment from the Region's conduct in this matter. As explained by the Supreme Court, "the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'"

B.J. Carney, 7 E.A.D. at 202 (quoting *Heckler v. Cmty. Health Serv.,* 467 U.S. at 59).

[26] Before the Presiding Officer, Newell argued that there had been "6 years of inaction" on the part of the Region. Penalty Opp. at 7. On appeal, Newell instead cites "10 years of inaction." Brief for Appellant at 50. Otherwise, Newell's argument to the Presiding Officer is identical to Newell's argument on appeal.

States v. Am. Greetings Corp., 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd,* 272 F.2d 945 (6th Cir. 1959).

In *American Greetings,* a company subject to a Federal Trade Commission cease and desist order filed a required "Report of Compliance," advising the FTC that it was engaged in a practice of "remounting" competitors' greeting cards on mounts that did not identify the original manufacturer. The FTC did not initially question the practice, and an FTC representative actually "suggested means of improving" the remounting procedure. 168 F. Supp. at 50. Subsequently, however, the FTC enforcement staff characterized the remounting process as a violation of the cease and desist order, and sought penalties for the alleged violation in a judicial enforcement action. The court concluded that the agency was not estopped from characterizing the remounting practice as a violation of its order, but the court also concluded that the agency's initial failure to question the practice was relevant in calculating a penalty for the violation. The court fixed the penalty at $200, reasoning that the Government "might [have led] the defendant to believe that the Government was not objecting" to the practice at issue. *Id.*

Newell's reliance on *American Greetings* is decidedly misplaced. Here, Newell was at all times aware of the improper disposal of PCBs at the HMPC site and the need for their removal and lawful disposal. There is no allegation, and no evidence, that anyone from Region 6 said anything at any time that might have confused the issue. *See,* e.g., CX 27 (8/19/85 letter from Timothy Johnson to Francis Garrigues concerning the status of the "PCB cleanup"); CX 25 (3/21/86 letter from Mr. Garrigues to Alton Newell, noting that HMPC has had "a pile of contaminated soil in a corner of [its] yard for about one year"). This case is therefore readily distinguished from *American Greetings.*

Similarly, Newell cites no authority for the companion proposition that agency inaction in responding to a violation, which may have the effect of allowing penalties to "accrue" is contrary to "public policy," and that an enforcement action to collect such penalties is automatically barred. The Board rejected that proposition in *B.J. Carney,* pointing out that it had also emphatically been rejected by the courts:

> The Region did not [by an alleged five-year delay] waive any right to bring this enforcement action. "[G]enerally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *United States v. Amoco Oil Co.,* 580 F. Supp. 1042, 1050 (W.D. Mo. 1984). * * * Likewise, in

> *United States v. Chevron U.S.A., Inc.,* 757 F. Supp. 512 (E.D. Pa. 1990), the court held that "the fact that the EPA did nothing for four years to enforce the regulations against Chevron would not be considered an affirmative misrepresentation and does not satisfy the first requirement of the equitable estoppel defense." *Id.* at 515. "Simply put, the government may not be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement." *Washington Tour Guides Ass'n v. National Park Service,* 808 F. Supp. 877, 882 (D.D.C. 1992).

B.J. Carney, 7 E.A.D. at 202.

Thus, it is clear that Region 6 was not estopped or otherwise barred from instituting this action against Newell based on any alleged delay in doing so. We note in this regard that it seems clear that Region 6 did not affirmatively seek to maximize the accumulation of penalties by either of the respondents. If that had been the Region's intention, the Region would presumably have sought penalties for the entire five-year period preceding the commencement of the action. The Region did not do so; rather, the Region dramatically narrowed the scope of its action, seeking penalties only for a 529-day period starting September 10, 1992 and concluding February 21, 1994. There being no genuine issue of material fact on this point and, finding no legal argument that would justify reversing the Presiding Officer on this issue, we uphold the Presiding Officer's conclusion that Region 6 did not commit misconduct by failing to file this enforcement action earlier than it did.

b. *"Selective Prosecution"*

Newell asserts that the Region improperly engaged in "selective prosecution" by filing an enforcement action against Newell and HMPC without also filing an action against J.L.B. Investment Corporation, which owned the HMPC site at one time but which has not otherwise been implicated in the excavation and wrongful disposal of PCB waste at issue here, and against the contractor who moved the contaminated soil at the site into a pile, apparently at Newell Recycling's direction. Brief for Appellant at 45. In attempting to establish such a defense, Newell confronts a "daunting burden." *In re B&R Oil Co.,* 8 E.A.D. 39, 50–51 (EAB 1998). "[C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *Id.*

To substantiate a claim of selective enforcement or selective prosecution, Newell must therefore establish "(1) [that it has] been singled out while other similarly situated violators were left untouched, and (2) that the government selected [Newell] for prosecution 'invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.'" *United States v. Smithfield Foods, Inc.,* 969 F. Supp. 975, 985 (E.D. Va. 1997) (quoting *United States v. Prod. Plated Plastics, Inc.,* 742 F. Supp. 956, 962 (W.D. Mich. 1990)); *accord, Amato v. Sec. & Exch. Comm'n,* 18 F.3d 1281, 1285 (5th Cir. 1994) (defendant claiming selective prosecution "must establish that he was singled out for prosecution while others similarly situated were not, and that the action against him was motivated by an arbitrary or unjustifiable consideration, such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right, such as freedom of speech").

It is quite apparent that Newell has not met its burden. Newell has not suggested that the enforcement action against it was motivated by any consideration akin to racial or religious bias or a desire to prevent the exercise of a constitutional right. Newell certainly points to no evidence of such an impermissible motive. Moreover, Newell has failed to proffer any facts that would persuade us that either of the other parties to which it points are, indeed, "similarly situated" in terms of culpability for the violations at issue in this case. Therefore, Newell has raised no genuine issue of material fact with respect to its claim of selective prosecution, and the Presiding Officer committed no error by rejecting the claim as a basis for penalty mitigation.

c. *Economic Benefit of Noncompliance*

Newell intimates that Region 6 committed misconduct by "refus[ing] to use the BEN model due to the low penalty it would generate." Brief for Appellant at 49. According to Newell, application of this model for calculating the economic benefit of noncompliance would have required Region 6 to lower its penalty proposal to approximately $4,480.00, allegedly the amount of Newell's savings resulting from noncompliance with the PCB disposal regulation. *Id.*

The Presiding Officer addressed this argument and concluded as follows:

> This argument is flawed in two respects. First, under the Penalty Policy economic benefit is only one element to be considered in calculating a civil penalty. Second, and more significantly, the economic benefit component of

> the penalty calculation is employed to ensure that a penalty assessment will provide adequate deterrence, and is therefore used only to adjust a penalty upward, not downward.

Penalty Decision at 11.

The Presiding Officer's application of the Penalty Policy is indisputably correct. The relevant portion of the Penalty Policy states:

> In some cases, the [gravity based penalty] 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.*

Penalty Policy at 19 (emphasis added). Thus, the role that economic benefit plays in penalty assessment under the Policy is to establish the penalty floor—the penalty assessment must at least capture the economic benefit of noncompliance, even if other penalty adjustment factors would eliminate a gravity based penalty computation. The Presiding Officer therefore did not err by finding the absence of a genuine issue of material fact relative to this argument and declining to reduce Newell's penalty based on Newell's calculation of the economic benefit associated with its violations.

d. *Voluntary Disclosure*

On appeal, Newell argues that it should have received a 25% penalty reduction for voluntary disclosure of its violations. The PCB Penalty Policy addresses penalty reductions for voluntary disclosure under the heading of "other factors as justice may require." The Penalty Policy states that:

> 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 Policy at 18.

We will not consider Newell's eligibility for a penalty reduction for voluntary disclosure, because Newell failed to request such a reduction in its submissions to the Presiding Officer. The issue was directly addressed in the Region's penalty brief, which stated (citing the Declaration of Jeffrey Jay Robinson) that "[n]o downward adjustment was made for 'voluntary disclosure' because neither Newell nor HMPC voluntarily disclosed the violations." Region's Memorandum in Support of Proposed Civil Penalty at 13 (July 23, 1997). In its response, Newell did not point to any evidence suggesting that it had, in fact, voluntarily disclosed its violations, nor did Newell argue that it should receive a penalty reduction for voluntary disclosure pursuant to the Penalty Policy. The argument has, accordingly, been waived. *See,* e.g.*, In re Britton Const. Co.,* 8 E.A.D. 261, 277–78 (EAB 1999) (under 40 C.F.R. § 22.30, appellant "may not appeal issues that were not raised before the presiding officer. As a result, arguments raised for the first time on appeal * * * are deemed waived.") (citations omitted).[27]

e. *Lack of Environmental Harm*

Newell argues that the "lack of any environmental harm is a mitigating factor" that the Presiding Officer erroneously failed to consider in assessing a penalty against it. Brief for Appellant at 46–47 (citing Penalty Decision at 9).[28] In the very portion of the Penalty Decision cited by Newell, however, the Presiding Officer does in fact consider the issue of environmental harm. Specifically, the Presiding Officer states:

> Harm is given consideration under the [PCB] Penalty Policy only in instances where a violator has taken actions to minimize harm caused by its violation. [Newell]

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[27] We note that Newell did make reference to the disclosure question in footnote number 5 of its penalty brief below, albeit not in the context of arguing for penalty mitigation. Rather, Newell raised it as part of its argument that it should have been allowed to conduct discovery because it could not obtain evidence of voluntary disclosure except by cross-examining the Region's own witnesses at an evidentiary hearing or in depositions. This strikes us as a disingenuous proposition. If Newell had indeed made a voluntary disclosure, then, surely, Newell was in the best position to attest to it. Having failed to do so by affidavit in response to the Region's motion for penalty assessment, Newell cannot credibly revive this argument on appeal.

[28] We decline Newell's invitation to consider correspondence generated by its own attorney, along with the absence of a rebuttal by the Presiding Officer, as proof that the Presiding Officer somehow "admitted" the absence of any environmental harm in this case during a telephone conference. *See* Brief for Appellant at 46 (citing RX 24). The Presiding Officer is not a party to this action and is under no obligation to respond to correspondence from the litigants, even if that correspondence seeks to attribute factual "admissions" to the Presiding Officer for later use in an appeal.

> makes no claim, and the facts show no indication, that respondent took any measures to minimize any harm or risk of harm. The mere fact that no harm may have occurred is not a reason to lower the penalty where chance and not respondent's actions are responsible for such an outcome.

Penalty Decision at 9 (citing Penalty Policy at 17).

In addition, environmental harm was addressed through the Presiding Officer's application of the PCB Penalty Policy, since consideration of environmental harm is inherent in the policy's penalty recommendations. The "degree and likelihood of harm from the conduct or activity violating the PCB rules" is incorporated into a penalty, in the first instance, in the calculation of the "extent" of the violation or violations. *See* Penalty Policy at 3. The Presiding Officer thus considered "environmental harm" in that sense by calculating a gravity based penalty predicated on the volume of contaminated soil involved in Newell's violations. Penalty Decision at 4–6. In sum, the Presiding Officer plainly did not "ignore" the issue, as Newell erroneously argues on appeal. Brief for Appellant at 47. The Board finds no error in the Presiding Officer's treatment of this issue.

f. *Cost of Remediation*

Newell contends that the eventual cost of the soil removal—which Newell claims was $84,000—should be considered as a mitigating factor, and that the Presiding Officer committed a "clear abuse of discretion" by failing to consider it as such. Newell points out that, according to the Penalty Policy, "[p]enalties for * * * disposal violations are based on the approximate cost of cleanup and disposal of the materials contaminated by PCB." Penalty Policy at 5 (quoted in Brief for Appellant, at 47). Newell thus appears to argue that the amount of the penalty assessed in individual cases should be geared to the cost of the cleanup itself.

Newell misapprehends the guidance appearing in the Penalty Policy. The passage quoted by Newell is not an instruction regarding assessments in individual cases; it is rather background information introducing and explaining how the calculations in the Penalty Policy associated with the "extent" factor were developed. As we have seen, the Penalty Policy advocates distinguishing between "major" and "minor" disposal violations quantitatively, classifying the extent of a disposal violation based on the quantity of contaminated material involved in the violation. The passage quoted by Newell simply reflects the correlation which

would ordinarily be expected between the cost of cleanup and proper disposal and the amount of contaminated material involved. The amount of the contamination, and remedial costs associated therewith, have been taken into account in developing the Policy's base penalty assessment framework. Indeed, the policy states clearly that "the objective [of the 'extent' framework] 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." Penalty Policy at 7. Accordingly, we agree with the Presiding Officer that the Penalty Policy should not be read to advocate that, separate and apart from the "extent" calculation, penalties in individual cases correspond to the actual costs of cleanup and proper disposal. Indeed, to conclude otherwise could, by suppressing penalty assessments in cases involving less-expensive cleanups, serve to undermine the role of penalties as an incentive for prompt cleanup. Failure to respond expeditiously to an environmental condition that can be inexpensively addressed is particularly inexcusable and should be subject to penalties sufficient to discourage such behavior. We thus find no error in the Presiding Officer's rejection of Newell's argument for mitigation on this ground. Moreover, we find no genuine issue of material fact with regard to this issue.

g. *Effect of Settlement*

In its penalty brief to the Presiding Officer, Newell argued that it was necessary to deduct the amount received by EPA in its settlement with HMPC from the penalty ultimately assessed against Newell. Penalty Opp. at 6. The Presiding Officer did so. In his Penalty Decision, he directed that Region 6 "should notify respondent Newell immediately of the amount of respondent [HMPC's] settlement and that amount shall be deducted from the penalty assessed against respondent Newell." Penalty Decision at 13. The Presiding Officer further ordered, however, that no other consideration would be given the settlement amount, in recognition of the requirements of 40 C.F.R. § 22.22(a). That provision of the Consolidated Rules states, in relevant part, that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible." Thus, the Presiding Officer explained, "[s]ettlement offers or terms are not indicative of, and should not be used as evidence of, the amount of the appropriate penalty in a proceeding to determine a penalty." Penalty Decision at 12 (citing *McInnis v. A.M.F., Inc.,* 765 F.2d 240, 247–48 (1st Cir. 1985); *McHann v. Firestone Tire & Rubber Co.,* 713 F.2d 161, 165–66 (5th Cir. 1983);

Quad/Graphics Inc. v. Fass, 724 F.2d 1230, 1235 (7th Cir. 1983); *United States v. Contra Costa County Water Dist.,* 678 F.2d 90, 92 (9th Cir. 1982)).[29]

In its appellate brief, Newell does not challenge the Presiding Officer's ruling with respect to the effect of 40 C.F.R. § 22.22(a). Nonetheless, seemingly with complete disregard for that ruling, Newell cites the settlement amount in its appellate brief and argues that the Presiding Officer committed an abuse of discretion by failing to consider the settlement amount "in his assessment of the fairness and propriety of his penalty award" against Newell. Brief for Appellant at 49. In response, Region 6 has filed a motion, based on 40 C.F.R. § 22.22(a), to strike all references to the settlement amount from the record of the proceedings before the Board. Newell opposes the motion to strike, and addresses the Rule 408 issue only in that context.

Both the Region's motion to strike and Newell's claim of error based on the Presiding Officer's failure to consider the settlement amount turn on the admissibility of the settlement evidence; obviously, if the settlement amount was not admissible the Presiding Officer cannot have erred by failing to consider it. We therefore turn to the evidentiary issue and to Rule 408 of the Federal Rules of Evidence, which states in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, *is not admissible to prove liability for or invalidity of the claim or its amount.* Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Fed. R. Evid. 408 (emphasis added).

In its Opposition to the Region's Motion to Strike, Newell makes three assertions: (1) "It is EPA policy to consider other penalties when cal-

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[29] Each of these cases involves the admissibility of a settlement between a plaintiff and a third person—a joint tortfeasor or former defendant—when offered into evidence by the remaining defendant or defendants. The cases are therefore procedurally indistinguishable from the present case, involving a settlement between the complainant and one of two co-respondents being offered into evidence by the second co-respondent. Rule 408 is fully applicable to settlements of this nature. *See,* e.g., *McHann,* 713 F.2d at 166 ("Under Rule 408, 'a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person * * *.'") (quoting 2 D. Louisell & C. Mueller, *Federal Evidence* § 171, at 290 (1978 & Supp. 1983)).

culating what is a fair, uniform and consistent penalty"; (2) "Rule 408 applies to liability issues and *not* to penalty considerations"; and (3) "Rule 408 *does not* apply in civil penalty cases." Opposition to Motion to Strike at 6 (emphasis in original).

Newell's first and third assertions are negated by the very existence of 40 C.F.R. § 22.22(a). Whether or not Rule 408 applies in civil penalty cases generally, section 22.22(a) dictates that it applies in EPA administrative civil penalty actions that are governed by part 22. And the general policy noted by Newell—which does not, in any event, imply any requirement to examine settlements when calculating penalties in litigated cases[30]—is necessarily trumped to the extent that a specific regulation such as section 22.22(a) precludes a presiding officer's receipt of particular evidentiary material in calculating a penalty.

Newell's assertion that Rule 408 applies only to liability rulings is also incorrect. The rule expressly bars the use of settlement evidence to prove the "amount" of a claim. *United States v. Contra Costa County Water District* illustrates the principle. There, the United States filed two separate actions to recover the cost of repairs to a retaining wall. The first action, against an adjoining landowner whose conduct had imperiled the wall, was settled, nominally, for $75,000—but only $30,000 was actually paid to the United States. In the second action, against a user of the wall contractually obligated to pay for maintenance, the United States sought to recover the balance of its repair cost after deducting the $30,000 received in the first action. The defendant believed itself entitled to a credit in the full amount of the prior settlement ($75,000) and urged the district court, for that reason, to take judicial notice of the settlement. Relying on Rule 408, however, the Ninth Circuit upheld the district court's refusal to admit the settlement into evidence. 678 F.2d at 92.

Accordingly, we conclude that the Presiding Officer did not err by declining to consider the settlement involving HMPC as a basis for penalty mitigation in favor of Newell. We further conclude that the Region's motion to strike all references to the amount of the HMPC settlement

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[30] We note that in its Opposition to the Motion to Strike, Newell acknowledges that it "makes sense" to conclude that "negotiated settlements with the agency cannot be compared to penalties imposed by an administrative law judge after hearing." Opposition to Motion to Strike at 4 (citing *In re Briggs & Stratton Corp.,* 1 E.A.D. 653 (JO 1981)). We agree. As the Judicial Officer remarked in *Briggs & Stratton,* it "seems obvious" that comparisons between payments made in settled cases and penalties assessed in litigated cases cannot establish "that the penalties assessed * * * are inconsistent with EPA's policy favoring uniform penalties for like violations." 1 E.A.D. at 666.

from the record of these proceedings is well founded, and the motion is therefore granted.

h. *Penalties in Other Cases*

Finally, Newell offers a comparison of its own case with other TSCA administrative penalty cases that have, for various reasons, come before the Board and/or its predecessors. Newell claims that the penalties ultimately imposed in those other cases were much lower than the penalty being assessed against Newell, but that its own conduct is far less aggravated than the conduct described in those other cases. We note that the outcomes in these other cases are not in dispute—only their significance to the question at hand. Newell concludes that the Presiding Officer abused his discretion by failing to address the other cases cited by Newell when calculating a penalty in this case. Brief for Appellant at 41.

Newell's characterization notwithstanding, the Presiding Officer did not treat the evidentiary significance of other TSCA cases as a matter of discretion. He noted, rather, that existing EPA administrative case law specifically addresses the effect of evidence concerning penalties in other cases:

> As complainant correctly notes, penalties assessed in other cases have no bearing on the penalty assessment in this case. As the [Chief Judicial Officer] has stated, quoting the Supreme Court, "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions in other cases."

Penalty Decision at 11 (quoting *In re Chautauqua Hardware Corp.,* 3 E.A.D. 616, 627 n.14 (CJO 1991); *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 187 (1973)). *See also In re Spang & Co.,* 6 E.A.D. 226, 242 (EAB 1995) (where we held, quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985), that "'generally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings'"). *Cf. In re SchoolCraft Constr., Inc.,* 8 E.A.D. 476, 487 (EAB 1999) (penalty assessed against one respondent held not erroneous despite lower penalty assessed against a second respondent).

We continue to hold to the principle that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another. Accordingly, the Board

upholds the Presiding Officer's decision not to adjust the penalty in this case based on penalties assessed in other cases.

For all of the foregoing reasons, the Board concludes that Newell did not raise any genuine issue of material fact with respect to the appropriateness of the penalty proposed to be assessed against it. The Presiding Officer did not err or abuse his discretion by assessing a penalty against Newell by means of an accelerated decision.

5. *Penalty Amount*

As the preceding discussion indicates, the Presiding Officer did not err in determining that the proposed $1.345 million civil penalty was an appropriate one. The preceding discussion further makes clear that Newell has not established any valid grounds for mitigation of the penalty. The Board finds no other reason to disturb the Presiding Officer's recommended civil penalty assessment; that assessment is, accordingly, upheld.[31]

III. *CONCLUSION*

The Initial Decision is affirmed with respect to Newell's liability, and Newell is assessed a civil penalty of $1,345,000 (less the amount paid by Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company pursuant to its settlement in this matter). Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of receipt of this decision:

EPA-Region VI
Regional Hearing Clerk
P.O. Box 360582
Pittsburgh, PA 15251–6582

So ordered.

[31] We note in this regard that the Region's decision to establish February 21, 1994, as its penalty cut-off date, rather than the date that the waste pile was ultimately removed and properly disposed of (September, 1995), served to reduce dramatically the amount of the penalty to which Newell would have otherwise been subject. Viewed in this light, Newell's penalty has, in effect, been substantially mitigated in the original framing of the case.